[This is an English version of the decision originally submitted in French to Montréal's City Council on June 20, 2016]

Decision

Rescinding of the contract for the acquisition of 14 pump sets for the Atwater plant

(Call for Tenders 14-12725)

(section 57.1.10, Montréal's City *Charter*)

June 20, 2016

Office of Inspector General
1550 Metcalfe St., Suite1200, 12th Floor
Montréal, QC H3A 1X6
Telephone: 514 280-2800
Facsimile: 514 280-2877
BIG@bigmtl.ca

SUMMARY

The Office of Inspector General conducted an investigation on the contracting process of the contract awarded by Montréal's Agglomeration Council on January 29, 2015 to Solution d'eau Xylem, a division of Société Xylem Canada, for a maximum authorized sum of $24,691,847.89 including taxes. The contract was awarded following the call for tenders 14-12725 which sought the acquisition of fourteen (14) pump sets in order to proceed with the replacement of the pumps at the Atwater potable water production plant.

This decision shows that the City awarded a contract to Xylem even though the firm's bid did not respect several requirements specified in the call for tenders. In addition, Xylem was not the lowest bidder, but it was the only bidder that was declared compliant following two (2) compliance analyses performed by SNC-Lavalin, the engineering firm mandated by the City to prepare the specifications and to supervise the work jointly with Montréal's Directorate of Potable Water. After the first compliance analysis, none of the bids were deemed to be compliant among the five (5) bidders that responded to the call for tenders. A special committee was then formed and a second compliance analysis resulted in only one bidder being declared compliant: Xylem.

The investigation revealed that the Directorate of Potable Water and SNC-Lavalin did not respond in the expected manner to Xylem's failure to respect one of the basic eligibility requirements for submitting a bid in response to the call for tenders. The criteria required the bidders to provide a letter signed by one of their clients and attesting to the reliability of the pumps. The failure to provide such a letter was deemed to be a "minor non-compliance" by the Directorate of Potable Water and SNC-Lavalin, whereas the bid submitted by Xylem should have been rejected. In accordance with the principles established by the courts, the Directorate of Potable Water could not use its discretionary powers because this would have been contrary to the principles of the equality of bidders and would have given an unfair competitive advantage to the winning firm to the detriment of the bidders that respected the requirement but also the firms who procured the tendering documents but did not submit a bid because they believed that they could not fulfill the obligation set out by the requirement in the call for tenders.

Furthermore, the investigation shows that the Directorate of Potable Water and SNC-Lavalin waived a technical requirement, judged to be a major requirement throughout the development of the specifications, by awarding the contract to Xylem who proposed an ambient-air oil-cooling system, whereas the specifications clearly called for a forced-air oil-cooling system. It appears that there was no oil-cooling system on the market that satisfied the requirements set out in the specifications.

In fact, after none of the bidders were declared compliant following the first analysis of the bids, the Directorate of Potable Water and SNC-Lavalin re-evaluated and revised certain requirements of the technical specifications, requirements which were clearly established in the call for tenders. The re-evaluation and revision of the requirements was done once the period set out for submitting a bid was completed and after the bids were opened. The investigation revealed that the Directorate of Potable Water and SNC-Lavalin granted an

equivalence to Xylem and satisfied themselves with an ambient-air cooling system because the Directorate of Potable Water did not want to risk cancelling the call for tenders and having to restart the process because no bidder was found to be compliant.

In the absence of a complete assessment with respect to the availability of the required product and in the absence of a formal, serious and well documented market study before the launching of the call for tenders, the call for tenders process that took place did not allow the Directorate of Potable Water to obtain the best product for the best price. The fact that a forced-air cooling system was required while today the Directorate of Potable Water considers that an ambient-air cooling system is sufficient is susceptible to have unduly limited the market and the competition. In these circumstances, allowing a company that proposed an ambient-air cooling system to obtain the contract and to recognize an equivalence in their favour is susceptible to have breached the equality of the bidders and have given an undue advantage to the winning bidder.

The Inspector General also observed a lack of transparency with respect to the way in which the requirements in the call for tenders were revised during the second compliance analysis of the bids, but also with regards to the way in which the equivalence was granted to Xylem. In fact, there is no document indicating the results of the first bid compliance analysis, nor detailed reports of the meetings which would allow for an understanding of the verifications that were made and the decisions that were taken.

Finally, the Inspector General is of the opinion that the decision-making authorities concerned were not in a position to make an informed decision: the file submitted to them contained inaccurate and incomplete information.

The process that took place violates the fundamental principles as well as the rules governing the contracting process, intended to ensure the equality of the bidders and the integrity of the process.

In addition, what is extremely troubling in this file is the attempt by Xylem to mislead the Inspector General in the course of the investigation by leading him to believe that the firm had included the letter attesting to the reliability of the pumps in the bid submitted to the City, as required in the call for tenders.

In the firm's response to the Inspector General's initial request for information and documents, a request made, by virtue of his authority, Xylem provided a letter dated June 10, 2014, and presented the letter as the one provided to the City in the company's bid in order to be compliant with the eligibility requirements in the call for tenders. However, following steps taken to verify and corroborate this letter, the Inspector General discovered that the letter in question was never provided to the City in Xylem's bid documents. Instead, this letter had been signed and issued on September 11, 2015, that is, after the date that the Inspector General made his request for information.

In fact, the Inspector General had to take additional steps in order to retrace three (3) versions of this letter, all in possession of a Xylem representative. Signed and issued on September 10 and September 11, 2015, these three (3) letters display different header dates: June 10, 2014, September 10, 2015, and September 11, 2015. It appears as

though Xylem obtained these letters in order to respond to the Inspector General's request for information regarding the letter attesting to the reliability of the pumps provided by Xylem in its bid. Even though Xylem had all three (3) letters in its possession, only the letter dated June 10, 2014, that is, the letter dated before the filing of its bid, was given to the Inspector General in its response to the initial request for information. This was done in order to make it appear as though the company was compliant with the requirements set out in the call for tenders.

In conclusion, the Inspector General is of the opinion that the conditions set out in section 57.1.10 of Montréal's City Charter have been established with regards to respecting the basic eligibility requirements specified in the call for tenders. Considering the seriousness of the violations observed with respect to the equality of the bidders, to the integrity of the call for tenders process that took place, as well as the attempt by Xylem to mislead the Inspector General, the Inspector General has no other choice than to rescind the contract awarded following call for tenders 14-12725.

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1. Scope of the work

1.1. Warning

In accordance with section 57.1.8 of Montréal's City Charter (R.L.R.Q., c. C-11.4), the mandate of the Inspector General is to oversee contracting processes and the carrying out of contracts by the City or by a legal person.

The Office of Inspector General does not conduct any criminal or penal investigations. It conducts investigations of an administrative nature. Throughout this report, every time the term "investigation" is used, it means an investigation of an administrative nature and at no time shall it be interpreted as referring to a criminal or penal investigation.

1.2. Applicable Standard of Proof

The Office of Inspector General places upon itself the obligation of delivering quality reports which are timely, objective, accurate and presented in such a way as to ensure that the individuals and organizations under its jurisdiction are able to act on the information transmitted.

Consequently, in support of his opinions, reports and recommendations, the Inspector General imposes upon himself the burden of proof of the civil standard of the balance of probabilities.[1]

While exercising his jurisdictional functions as is the case here,[2] the Inspector General will, *a fortiori*, apply this norm.

2. Contract subject to the investigation of the Office of Inspector General

The Office of Inspector General received a complaint alleging that the contract awarded following the call for tenders 14-12725 was not awarded to the lowest bidder, and without the City providing sufficient explanations for doing so.

The Inspector General began a thorough investigation in order to verify the compliance of the contracting process. During the course of the investigation, the Inspector General used the powers given to him by the law. In total, approximately twenty (20) witnesses were interviewed and several requests for information and documents were served.

[1] If the evidence serves to indicate that a fact is more likely to exist than not to exist, that is a situation of preponderance of evidence (see art. 2804 of the Civil Code of Quebec).
[2] Use of the powers set out in s. 57.1.10 of Montréal's City Charter.

2.1. Call for tenders 14-12725

The call for tenders 14-12725 takes place in the context of a rehabilitation project for potable water production plants, pumping stations, and reservoirs (project REQUP1). The call for tenders sought to acquire fourteen (14) bottom suction, horizontal discharge, double volute, double suction split case pumps and their components for the City, in order to replace the high pressure pumps at the Atwater water plant.

In the decision-making summary regarding this call for tenders (1146603003) and in the presentation made by the Directorate of Potable Water (Direction de l'eau potable) (hereinafter: D.P.W.) to Montréal's Executive Committee on December 10, 2014, a copy of which was obtained by the Office of Inspector General, it is mentioned that the pumps at the Atwater water plant [TRANSLATION] "ensure 45% of the drinkable water for the island of Montréal" and that it is recommended [TRANSLATION] "to replace the pumps considering their obsolescence (on average, the pumps are sixty (60) years old and the oldest pumps are up to eighty (80) years old).

The fourteen (14) pumps targeted by the call for tenders are to be installed at the Atwater plant by a contractor designated by the City, who is not the successful bidder. The successful bidder is responsible for providing, delivering and storing the pumps, ensuring their inspection and maintenance during storage, as well as providing any necessary technical assistance to the designated contractor during the installation and entry into service of the pumps.

The engineering firm SNC-Lavalin (hereinafter: SNC-L) was mandated by the City in June 2011 to prepare the specifications, technical studies, technical specifications, and the monitoring of the work resulting from the call for tenders for the acquisition of the pumps for the Atwater water plant.[3]

SNC-L was also responsible for providing technical support to the City throughout the call for tenders process. As well, once the period for the publication of the call for tenders was completed and the bids opened, SNC-L must perform the compliance analysis of the bids that were received.

Published on Québec's Electronic Tendering System (hereinafter: S.É.A.O.) on May 28, 2014, call for tenders 14-12725 is a world-wide call for tenders that was the subject of eight (8) addenda. The public opening of the bids took place on July 16, 2014.

In total, twenty (20) firms procured the call for tenders documents and five (5) firms submitted a bid:

- Ebara Corporation (hereinafter: Ebara);
- Pompes Flowserve (hereinafter: Flowserve);
- Solutions d'eau Xylem, a division of Société Xylem Canada (hereinafter: Xylem);

[3] CG11 0211.

- Pompes Sulzer (Canada) inc. (hereinafter: Sulzer); and
- KSB Aktiengesellschaft (hereinafter: KSB).

The following table specifies the amount of the bids submitted by the five (5) firms[4]

	EBARA	FLOWSERVE	XYLEM	SULZER	KSB
Part A	**$18,144 059.27**	**$20,599,989.12**	**$24,005,963.25**	**$29,648,193.25**	**$31,967,966.33**
Part B	$48,263,560.49	$48,771,920.15	$48,044,909.87	$49,425,725.49	$49,052,267.15
Total	**$66,407,619.76**	**$69,371,909.27**	**$72,050,873.12**	**$79,073,918.74**	**$81,020,233.48**

The price schedule is comprised of two (2) parts. "Part A" represents the cost for the acquisition of the goods and services whereas "Part B" reflects the electricity costs updated for twenty-five (25) years in relation to the average overall effectiveness of the fourteen (14) pump sets, as guaranteed by the bidder.

The call for tenders documents stipulated that the contract must be awarded to the lowest compliant bidder, that is to say, the firm that proposes the lowest total cost (Part A + Part B). It is important to note, however, that only the amount of the bid in "Part A" is awarded to the successful bidder.

2.2. Results of the bid analysis and the awarding of the contract to Xylem

On January 29, 2015, after a call for tenders process, Montréal's Agglomeration Council awarded the contract to Xylem.[5]

The total expense authorized by Montréal's Agglomeration Council is $24,691,847.89, including taxes.[6]

Xylem was the third lowest bidder, but the only one deemed to be compliant following the bid analyses. The difference in price on Part A between Xylem and the lowest bidder (Ebara) is nearly six (6) million dollars (more precisely: $5,861,903.98). Xylem's bid was therefore 32.3% higher than Ebara's bid.

[4] The amounts include the applicable taxes and come from the price table produced by the Montréal's Procurement Service. They were also repeated by SNC-L in its report on the bid analysis and on the recommendation for awarding the contract, dated November 27, 2014.
[5] CG15 0034.
[6] Decision-making summary 1146603003.

In this file, in total, two (2) bid analyses were conducted.

Following the opening of the bids on July 16, 2014, the first bid analysis of the five (5) bidders was conducted, after which none of the bidders were found to be compliant. The head of division and the engineer responsible for the file at the D.P.W., interviewed by the Office of Inspector General, both confirmed this fact.

A special committee was then formed by the City. Composed of several representatives of the City and one (1) representative from SNC-L, this committee met four (4) times between August 7 and October 17, 2014.

The D.P.W. explains to the Inspector General that the bid analysis was the responsibility of SNC-L and that, in fact, the technical compliance was analyzed by SNC-L and the qualification of the requirements was discussed with the D.P.W. The D.P.W. adds that the special committee's meetings were part of a quality process. SNC-L, for its part, states that the D.P.W. was an active participant in the bid analysis, in particular during the special committee's meetings.

The Office of Inspector General interviewed the individuals who sat on the special committee in relation to the work that was accomplished during these meetings.

A first witness explains that the special committee was created in order to revise the compliance requirements set out in the technical specifications. In the same vein, two (2) other witnesses mention that during the course of the meetings, certain requirements of the call for tenders were scaled down and that certain compliance requirements, initially considered as being major, became minor and therefore less important.

However, a fourth witness gives a different version to the Office of Inspector General. This witness states that none of the requirements were scaled down and that the committee members simply gave a new interpretation to the basic requirements of the call for tenders documents and to the bids that were submitted.

Following the second bid analysis, only the firm Xylem was deemed to be compliant.

The bid filed by Flowserve was held to be [TRANSLATION] "non-compliant on an administrative element" by Montréal's Procurement Service (Service de l'approvisionnement). The firm did not provide a letter of undertaking for a performance bond. The Procurement Service's analysis report, dated July 31, 2014, reveals that this letter should have accompanied the bid-bond pursuant to article 13.1.2.2 of the Instructions to bidders.

As for Ebara, Sulzer, and KSB, their bids were judged to be non-compliant for reasons of technical non-conformity, reasons that will be discussed in the present decision.

The division head of the D.P.W. admits that the new evaluation of the bids by the special committee is very subjective, but mentions that it was teamwork and that it was [TRANSLATION] "necessary to do this work because the contract had to be awarded to one of them [bidders]".

The engineer responsible for the file at the D.P.W. adds that its directorate wanted to avoid cancelling the call for tenders because none of the bidders were found to be compliant and wanted to avoid finding itself in the same situation that it had just encountered in the call for tenders issued for the potable water reservoir in the Rosemont borough.

2.3. Notice to an interested party

Before releasing the results of his investigation, the Inspector General sent to the concerned parties a Notice to an interested party, in accordance with his duty of procedural fairness.

On March 17, 2016, the notice containing the relevant facts gathered during the investigation[7] was sent to the representatives of Xylem, SNC-L, and the D.P.W., so that they could be apprised of these facts and give in writing their comments and representations to the Office of Inspector General, in the interest of allowing the concerned parties to be heard.

The D.P.W., Xylem, and SNC-L provided the Office of Inspector General with their comments and clarifications on the facts mentioned in the Notice to an interested party. Their responses were received respectively on April 12, 13 and 19, 2016.

As soon as April 14, 2016, Xylem was informed, both verbally and in writing, that the Inspector General was considering using the powers given to him pursuant to section 57.1.10 of Montréal's City Charter, allowing him to rescind an awarded contract. SNC-L was informed of this fact by email on April 15, 2016 and made representations on this subject in its response of April 19, 2016.

With this in mind, the Inspector General sent an amended notice[8] on May 4, 2016 in order to allow the D.P.W., Xylem, and SNC-L to be heard on the issue of the Inspector General using the powers in accordance with section 57.1.10 of Montréal's City Charter. The D.P.W., Xylem, and SNC-L were given an additional delay in order to respond to the facts before a decision was rendered. It is at the end of this delay, on May 10, 2016, that Xylem sent its comments on the scope of section 57.1.10 of Montréal's City Charter in response to the amended notice.

[7] The facts contained in the Notice to an interested party were set out in one hundred (100) paragraphs and were accompanied by thirteen (13) appendices containing documentary evidence.
[8] The amended notice integrates the facts and the comments obtained from all the interested parties.

3. Eligibility requirement ignored

3.1. Eligibility requirements contained in the call for tenders

Call for tenders 14-12725 stipulates three (3) eligibility requirements that must be respected for a firm to be able to submit a bid. Article 8 of the Special administrative conditions of the call for tenders reads as follows:

> [TRANSLATION]
>
> **8. Basic eligibility requirements in order to submit a bid**
>
> Only a firm that respects all of the following conditions, without limitation, is eligible to submit a bid.
>
> The tenderer must:
>
> a) be a recognized manufacturer, with experience manufacturing bottom suction, horizontal discharge, double volute, double suction split case horizontal pumps. As such, the tenderer must have successfully completed at least one manufacturing contract for this type of pump during the previous 30 years, for pumps with a power between 1000 and 4000 HP. **Provide a signed letter from the owner of these pumps attesting to their reliability and complete the section entitled "Reference" in section IV "Additional Information";**
>
> b) hold a valid ISO 9001:2008 certification, at the time of submitting the tender, in their field of activity or hold and maintain in force an internal program ensuring the quality, equivalent to the principles of the ISO 9001:2001 norms.
>
> c) procure Montréal's call for tenders documents via the Electronic Tendering System (SÉAO).[9]
>
> [Original text underlined and in bold]

Just by reading article 8 paragraph a), it appears that the tenderers must respect each of the five (5) following elements:

- be a recognized manufacturer of pumps;
- have experience in the manufacturing of the type of horizontal pump referred to in the call for tenders;
- have completed at least one manufacturing contract for this type of pump during the previous 30 years;
- provide a signed letter from the owner of pumps attesting to their reliability of the pumps manufactured by the tenderer; and

[9] Call for tenders 14-12725, Special administrative conditions, article 8.

- complete the section entitled “Reference” in section IV “Additional Information”.

The Office of Inspector General had access to the report on the bid analysis and on the recommendation for awarding the contract, dated November 27, 2014 and prepared by SNC-L after the second analysis of the bids. This report shows that only two (2) tenderers out of five (5) provided the letter mentioned in paragraph a) of article 8 of the Special administrative conditions.

The table found at page 15 of SNC-L’s analysis and recommendation report indicates that the letter is included in the bids submitted by Ebara and KSB. On the other hand, for Xylem, Flowserve and Sulzer, the report mentions [TRANSLATION] “no signed letter” and concludes that this is a [TRANSLATION] “minor non-compliance”. The following excerpt illustrates in what way the conclusion is stated in the table for the three last tenderers[10]:

[TRANSLATION]

Item	Description	Analysis	Difference-Details
A	Analysis of the commercial and administrative parts (by Montréal’s Procurement Service)		
B	Special administrative conditions		
B1	Basic eligibility requirements in order to submit a bid (article 8)		
1)	Be a recognized manufacturer of pumps and provide a letter signed by the owners of the same type of pumps	No signed letter	Minor non-compliance

**Table recreated for translation purposes

As specified by SNC-L in its response to the Notice to an interested party, the decision to qualify the absence of providing a letter as a minor non-compliance was taken jointly by SNC-L and the D.P.W.

The Office of Inspector General also reviewed the bids received by the City in the call for tenders 14-12725. An examination of the documentation confirmed that the letter required by article 8a) of the Special administrative conditions was not in the bid of the successful tenderer (Xylem).

Moreover, the Office interviewed the procurement officer from Montréal’s Procurement Service who was in charge of this call for tenders and he stated, in December 2015, after

[10] SNC-L report on the bid analysis and on the recommendation for awarding the contract, dated November 27, 2014, p. 15.

a verification of the file, that he was not able to find such a letter in the tender documents submitted by Xylem.

As well, nothing indicates that the D.P.W. tried to obtain the letter from Xylem or gave Xylem an additional delay so the firm could satisfy the eligibility requirement.

The Inspector General is of the opinion that the bids submitted by Xylem, Flowserve, and Sulzer should have been declared ineligible because they do not fulfill the formalities on an essential element mentioned in the call for tenders. As will be shown, the contract could not be awarded to these firms and never should have been awarded to Xylem.

3.2. Request for production of documents to Xylem

During the course of his investigation, the Inspector General used the powers given to him by section 57.1.9 of Montréal's City Charter in order to request documents and information from the successful bidder (Xylem).

The initial request for documents and information sent July 15, 2015, was aimed at verifying whether the successful bidder, Xylem, had provided in its tender documents, the letter required by article 8 of the Special administrative conditions. The Inspector General requested that Xylem transmit a copy of the letter submitted in its bid, and in the eventuality that the firm did not provide the letter, that the Xylem explain the reasons it omitted doing so.

On September 14, 2015, Xylem, via its lawyers, sent a response to the Inspector General's first request for the production of documents and information:

> [TRANSLATION]
>
> "Xylem does not know the reason why the copy of the quotation in possession of the City does not contain a copy of the letter attached to the present in Appendix 2."[11]

In this same response, Xylem's lawyers attached a letter that Xylem initially states is the letter it provided to the City in order to fulfill the requirements stipulated in article 8 of the Special administrative conditions.

Signed and issued by a design engineer from the Metropolitan Utilities District[12] and dated June 10, 2014, this letter attests to the reliability of the pumps manufactured by Xylem,

[11] Xylem's response, dated September 14, 2015, to the Inspector General's request for the production of documents and information of July 15, 2015, p. 2.

[12] The Metropolitan Utilities District is an entity of the State of Nebraska which provides public services of natural gas and water.

installed only one (1) month earlier (May 2014), in the context of a project relating to a water treatment plant in Omaha (State of Nebraska)[13]:

METROPOLITAN
UTILITIES DISTRICT

TO WHOMSOEVER IT MAY CONCERN

June 10, 2014

This is to confirm that Xylem Water Solution U.S.A., Inc. has designed, engineered, manufactured, tested, supplied & supervised erection & commissioning of the following bottom suction, horizontal discharge, double volute, double suction split case pumps by Flygt A-C:

Project Details / Plant Location	:	Florence Water Treatment Plant / Omaha, Nebraska
Application	:	High Lift Pumps
Flow per Pump	:	19,444 gpm (4,416 m3/hr)
Total Developed Head	:	300 ft (91.4 m)
Model	:	36x24 WSGD
Quantity	:	1
Speed	:	890 rpm
Motor Rating	:	2300 HP (1715 kW)
Date of Installation	:	May 2014

We confirm that the above pumps are in satisfactory operation as of the date of this Certificate / Letter.

Sincerely Yours,

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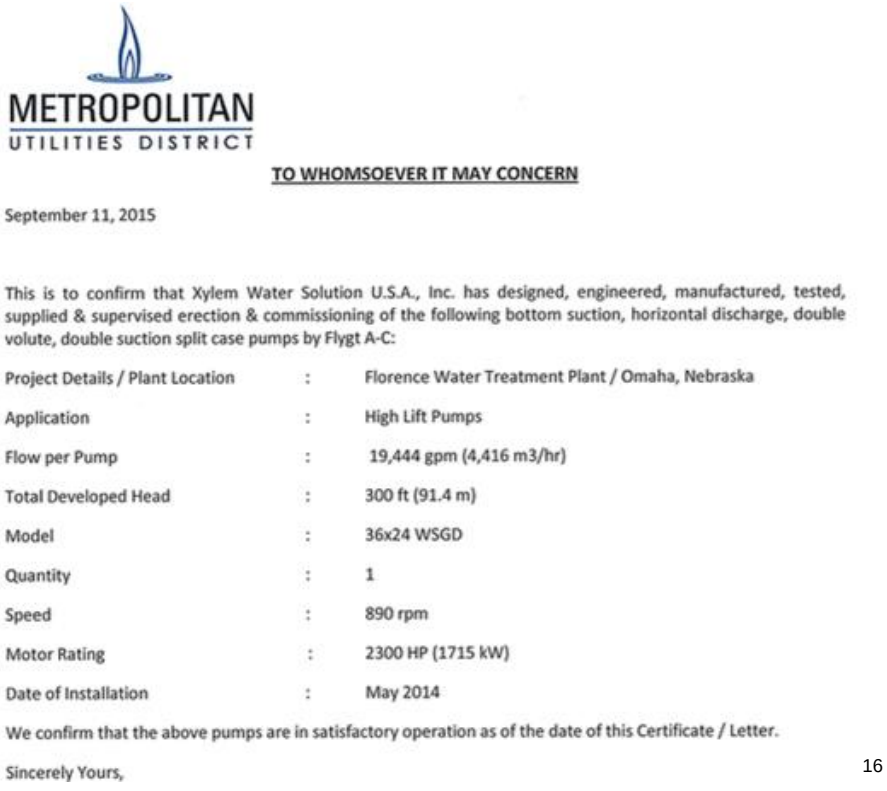
For the sake of understanding why this letter cannot be found in the City's file, the Office contacted, in December 2015, the author and signatory of the letter.

The latter states that he received, in September 2015, through Xylem's American product manager,[15] a request to provide a recommendation letter attesting to the reliability of the pumps. On December 10, 2015, he sent to the Office of Inspector General a letter dated September 11, 2015 as a copy of the letter that he sent to Xylem when the firm asked him for a reference letter for a contract with the City:

[13] The Inspector General questions the probative value of such a letter after only one (1) month of usage of the pumps.

[14] Letter submitted by Xylem to the Inspector General on September 14, 2015 in response to the Inspector General's first request for the production of documents and information dated July 15, 2015.

[15] The Office of Inspector General interviewed the director of Montréal's branch of Xylem who specified that the production of the letter, in the call for tenders 14-12725, was the responsibility of the American product manager because this person was in contact with the American companies who were clients of Xylem.



METROPOLITAN
UTILITIES DISTRICT

TO WHOMSOEVER IT MAY CONCERN

September 11, 2015

This is to confirm that Xylem Water Solution U.S.A., Inc. has designed, engineered, manufactured, tested, supplied & supervised erection & commissioning of the following bottom suction, horizontal discharge, double volute, double suction split case pumps by Flygt A-C:

Project Details / Plant Location	:	Florence Water Treatment Plant / Omaha, Nebraska
Application	:	High Lift Pumps
Flow per Pump	:	19,444 gpm (4,416 m3/hr)
Total Developed Head	:	300 ft (91.4 m)
Model	:	36x24 WSGD
Quantity	:	1
Speed	:	890 rpm
Motor Rating	:	2300 HP (1715 kW)
Date of Installation	:	May 2014

We confirm that the above pumps are in satisfactory operation as of the date of this Certificate / Letter.

Sincerely Yours,

16

Confronted with these facts, Xylem declares that the firm initiated research regarding the issuance of the letter. As such, the firm sent to the Office of Inspector General, a notarized, handwritten statement from the author of the letter. The notarized handwritten statement is dated March 7, 2016.

It is clear that the email exchanges between the design engineer from the Metropolitan Utilities District and the representative of Xylem (American product manager) took place on September 10 and 11, 2015. In total, three (3) letters were signed: the letter dated June 10, 2014 that Xylem gave to the Office following the initial request for the production of documents, the letter dated September 11, 2015 that the author of the letter sent to the Office of Inspector General on December 10, 2015, and a third letter dated September 10, 2015 that the Office of Inspector General obtained following a second request for the production of documents and information dated on April 15, 2016:

[16] Letter provided to the Office of Inspector General by the design engineer at Metropolitan Utilities District by email December 10, 2015.

METROPOLITAN
UTILITIES DISTRICT

TO WHOMSOEVER IT MAY CONCERN

September 10, 2015

This is to confirm that Xylem Water Solution U.S.A., Inc. has designed, engineered, manufactured, tested, supplied & supervised erection & commissioning of the following FLYGT pump sets:

Project Details / Plant Location	:	Florence Water Treatment Plant / Omaha, Nebraska
Application	:	High Lift Pumps
Flow per Pump	:	19,444 gpm (4,416 m^3/hr)
Total Developed Head	:	300 ft (91.4 m)
Pump Type / Mode:		Bottom Suction Split Case / 36x24 WSGD
Quantity	:	1
Speed	:	890 rpm
Motor Rating	:	2300 HP (1715 kW)

We confirm that the above pumps are in satisfactory operation as of the date of this Certificate / Letter.

Sincerely Yours,

17

The date of June 10, 2014 placed in the header of the letter originally sent to the Inspector General leads to the belief that the letter was dated and signed during the tendering period of the call for tenders. As a matter of fact, call for tenders 14-12725 was published between May 28, 2014 and July 16, 2014.

However, Xylem itself admits that the letter dated June 10, 2014 was signed on September 11, 2015 and not on June 10, 2014 as could have been expected. This is fifteen (15) months later! In light of these facts, Xylem now confirms that the letter attesting to the reliability of the pumps was not included in the tender the firm submitted to the City.

The Inspector General notes that it isn't until the reception of his request for the production of documents that Xylem's representative in charge of obtaining the reference letter in call for tenders 14-12275 took steps to obtain the letter that should have been provided at the time of submitting the bid.

This representative had three (3) letters in his possession emanating from the design engineer at the Metropolitan Utilities District. Yet, only the letter of June 10, 2014, a letter pre-dated to before the date for submitting a bid but signed and issued in September 2015, was initially given to the Inspector General in response to the first request for the

[17] Letter given to the Inspector General on April 20, 2016 by Xylem in its response to the Inspector General's second request for the production of documents and information of April 15, 2016.

production of documents and information aimed at obtaining the letter provided to the City in the tender submitted by Xylem in call for tenders 14-12725.

The Inspector General was therefore misled during the course of his investigation. The transmission of the letter dated June 10, 2014 and the response by Xylem to the effect that the firm did not know why the letter could not be found in the City's file led the Inspector General to believe that a reference letter had been signed on June 10, 2014 and provided in the tender submitted by Xylem in order to meet the requirements stipulated in the call for tenders documents. Indeed, nothing in the response to the first request for the production of documents indicated that the letter dated June 10, 2014 was signed, issued and received only in September 2015.

Had it not been for the verifications made by the Inspector General and the steps taken to corroborate the information that had been obtained, the attempt by Xylem to mislead the Inspector General in order to make him believe that the letter was in the City's file would not have been brought to light.

The legislature gave the Inspector General important powers in order for him to be able to effectively fulfill his mandate, notably the power to require the production of information and documents relevant to the performance of his mandate. When the Inspector General uses these powers, the people and enterprises under his jurisdiction must comply, failing which, they will be committing an offense punishable by a fine between $4,000 and $20,000.

Section 57.1.16 of Montréal's City Charter stipulates that whoever hinders or attempts to hinder the performance of the Inspector General's duties, misleads the Inspector General by concealment or misrepresentation, refuses to hand over a document or information the Inspector General may demand or examine, or conceals or destroys such a document or information is guilty of an offence. In addition, pursuant to section 57.1.17, any person who, by an act or omission, helps a person commit such an offense whether it be by encouragement, advice, consent, authorization or order, is guilty of an offence and subject to the same penalty.

3.3. Discretion in the analysis of the tenders and its limits

In its response to the Notice to an interested party, Xylem now claims that, given that it has been confirmed that it never provided a letter that was contemporaneous with the call for tenders, that the omission to provide the letter required in article 8 of the Specific administrative conditions constitutes a minor non-compliance and that the City possesses a certain administrative discretion and latitude in the determination of whether a non-compliance is to be considered as minor or major. Xylem adds that the City can disregard a minor irregularity in a bid in accordance with article 26.1 of the Instructions to the tenderers in the call for tenders.

SNC-L adopts the same position.

As for the D.P.W., it assumes that if SNC-L did not raise an issue on the eligibility of Xylem's bid, it is because the presentation of the firm satisfies the eligibility requirements in the specifications.

This file is an occasion for the Inspector General to clearly explain the difference between the eligibility to bid on a call for tenders and the compliance of a bid.

In the bid analysis filed, SNC-L and the D.P.W. confused these two (2) distinct concepts. They treated an eligibility requirement (the remittance of a letter required by article 8 a) of the Specific administrative conditions) as if it were a compliance requirement.

However, the failure to respect a bid eligibility requirement set out in a call for tenders causes the automatic dismissal of the bid because the firm is no longer considered to be eligible to submit a bid. When conducting the compliance analysis, on the other hand, the dismissal of the bid is not always automatic.

This subject has been examined on several occasions by the courts. A detailed review of the underlying principles is necessary.

- *Corporation de développement Bertone inc.* v. *Société Québécoise des infrastructures*, 2015 QCCS 3139

In this recent decision by the Superior Court, dated July 3, 2015, Justice Gibeau examines the question of the eligibility of a bid. The Court was seized with a request for a temporary injunction to suspend the bid analysis process and the awarding of a construction contract for the period of time that it would take to hear a motion for a declaratory judgment to recognize a bid, determined to be ineligible by the client, as compliant.

In this case, the call for tenders was launched and the firm Corporation de développement Bertone was the lowest bidder. The bid, however, was determined to be ineligible by the client because the company had omitted to include an attestation from Revenue Québec. The call for tenders stipulated that the attestation must be provided by all of the bidders and that this was an eligibility requirement.

At the moment when the bids were opened, the client, having noticed the failure of the lowest bidder to provide the attestation, gave an additional delay so the lowest bidder could provide it. The bidder, however, was unable to provide the required attestation and the client declared the firm ineligible.

According to the bidder, the remittance of the attestation was only a minor irregularity which could not bring about the rejection of the bid.

Justice Gibeau sided with the client. Justice Gibeau states that, in its argumentation, the firm [TRANSLATION] "confuses the eligibility requirements necessary to present a bid and the requirements aimed at ensuring its compliance"[18]. Justice Gibeau adds that they are two (2) different concepts and the failure to provide the attestation required in the call for

[18] *Corporation de développement Berton inc.* v. *Société Québécoise des infrastructures,* 2015 QCCS 3139, para. 26.

tenders documents in the prescribed time [TRANSLATION] "is fatal"[19] regarding the eligibility of the firm to submit a bid. The judge specifies that it is [TRANSLATION] "an essential condition regarding the admissibility of the bid"[20] and concludes that **the client was justified in refusing to accept the bid and was obliged to give full effect to the provisions in the call for tenders** [TRANSLATION] **"in order to respect the equality between the bidders"**[21]. [Original text not in bold]

- *Entreprises de construction Panzini Inc.* v. *Agence métropolitaine de transport*, 2005 CanLII 31531 (QC CS)

This is another decision that captured the attention of the Inspector General in his analysis of this file. The Metropolitan Transportation Authority (L'agence métropolitaine de transport) (hereinafter: AMT) had launched a call for tenders for demolition work in order to allow for the construction of a section of the Laval subway. The call for tenders specified that the tenderers should hold an ISO certification in their field of activity and that only the firms that respect this condition would be permitted to submit a bid. Only one (1) tenderer, Entreprises de construction Panzini inc., respected this requirement. However, the contract was not awarded to this firm.

The AMT believed that it could waive this requirement, all the more so because the requirement to hold an ISO certification was not an essential requirement and was in the call for tenders documents due to an error. In addition, the AMT argued that this requirement unduly limited the pool of potential tenderers.

The evidence also revealed that the AMT wanted to award the contract for demolition work at all costs in order to respect the timetable for the construction of the section of the subway. It was therefore not an option for the AMT to proceed by way of an addendum to the call for tenders because delaying the opening of the bids would have inevitably postponed the start of the work to a later date.

Justice Richer of the Superior Court concluded that only the tender submitted by Entreprises de construction Panzini inc. was admissible because none of the other bidders held an ISO certification. Justice Richer states: [TRANSLATION] "the requirement in the call for tenders regarding the ISO certification could not be more imperative"[22]. According to justice Richer, the AMT could not waive this [TRANSLATION] "qualification requirement […] because it is an essential condition.[23]

Justice Richer explains that [TRANSLATION] "**to permit the modification of an essential qualification requirement would bring a competitive advantage to one or some of**

[19] *Id.,* para. 32.
[20] *Id.,* para. 33.
[21] *Id.,* para. 34.
[22] *Entreprises de construction Panzini Inc.* v. *Agence métropolitaine de transport*, 2005 CanLII 31531 (QC CS), para. 33.
[23] *Id.,* para. 35.

the bidders to the detriment of the others, which is totally illegal"[24]. [Original text not in bold]

Justice Richer adds that the fact that the requirement was in the call for tenders documents only due to an error is not a valid reason to allow the client to ignore this requirement. The client was bound by this clause. It is a question of respecting the principle of the equality of the bidders:

> [TRANSLATION]
>
> "The Court is of the opinion that the requirements found in section "B", article 3, entitled "Eligibility to submit a tender", cannot be put aside. Regardless of whether the requirement regarding the ISO certification is present due to an error or not, **as long as this requirement is not removed from the call for tenders documents, it remains a part of the call for tenders and the defendant is bound by it**. Indeed, these are eligibility requirements; this means that the failure of a firm to respect these requirements, a firm cannot submit a bid. One must not confuse eligibility requirements with compliance requirements to a form. **The AMT had no discretion to ignore these fundamental and essential requirements. The only way out for the AMT was an addendum or to withdraw the call for tenders and start over from the beginning**."[25]
>
> [Original text not in bold]

There is no doubt that the failure of a firm to respect eligibility requirements in a call for tenders **MUST** lead to the dismissal of its bid because the firm simply cannot submit a bid to the call for tenders.

3.4. Obligation of the D.P.W. to respect the rules it imposed in the call for tenders 14-12725

The *Regulation respecting certain supply contracts of public bodies* (RLRQ, chapter C-65.1, r. 2) obliges subjected public bodies to foresee and distinguish the eligibility requirements of suppliers and the compliance requirements for tenders.[26]

Municipalities are not subject to this regulation and enjoy a large discretion regarding the contents of call for tenders documents. They can stipulate any eligibility requirement as long as it is not arbitrary, frivolous, or aimed at, or have the effect of, bypassing the law.[27]

The D.P.W., as a client, had the latitude necessary to determine which requirements would be qualified as eligibility requirements and which would be compliance requirements in its

[24] *Id.,* para. 35.
[25] *Id.,* para. 37.
[26] Section 5 of the Regulation.
[27] *Entreprise P.S. Roy inc.* v. *Magog (Ville de)*, 2013 QCCA 617, para. 48 et 49.

call for tenders. Yet, once this choice is made, the D.P.W. must respect the wording of the call for tenders documents. This was confirmed by the Supreme Court of Canada in *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*:

> "The owner — in this case the government — is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner — here the government — sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract."[28]

The D.P.W. had to ensure that the successful bidder respected the eligibility requirements that it itself established in the call for tenders.

According to the doctrine, if the client [TRANSLATION] "specifies that the bid must contain certain precise information or be accompanied by certain documents, it does not have the discretion to waive the requirement".[29]

The Quebec Court of Appeal, in *Demix Construction, division de Holcim (Canada) inc.* v. *Québec (Procureur général)*[30], underlines that the respect of the call for tenders documents is a protection against the arbitrary:

> [TRANSLATION]
>
> It is in establishing formal and substantive requirements and in evaluating those who answer the call in light of these requirements that we are able to avoid the arbitrary and to guarantee a treatment that is uniform and the equality for all the participants. And if it is true that subjectivity can never be completely removed from an evaluation process, at least it is minimized by establishing the rules of play in advance and by having them be respected."[31]

Moreover, it is useful to have recourse to the terms used in the call for tenders documents which reveal several indicators of the importance the D.P.W. attributed to the stipulated requirements.

In the case at hand, article 8 of the Specific administrative conditions is entitled: [TRANSLATION] "Basic eligibility requirements in order to submit a bid". The expression "basic" signifies that these requirements are the minimum requirements that have to be respected for a firm to be eligible to submit a bid.

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[28] Justice Cromwell, speaking for the majority of the Supreme Court of Canada, and adopting the words of the Supreme Court of Newfoundland and Labrador: *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, 2010 SCC 4, para. 68.

[29] Pierre GIROUX and al., *Contrats des organismes publics québécois*, looseleaf, CCH publications, para. 7-750, page 1,189.

[30] 2010 QCCA 1871.

[31] *Demix Construction, division de Holcim (Canada) inc.* v. *Québec (Procureur général)*, 2010 QCCA 1871, para. 22.

As well, the way in which article 8 is written does not leave any room for interpretation. It is written: [TRANSLATION] "**Only** a firm that respects **all the following conditions**, without limitation, is eligible to submit a bid. The tenderer **must** […]." [Original text not in bold]

This clause, as well as the usage of the term "must", show the intention of the D.P.W. to make all the requirements that follow essential requirements that must be fulfilled by the bidders in call for tenders 14-12725. In addition, in its ordinary meaning, the word [TRANSLATION] "eligibility" refers to [TRANSLATION] "the fact of being eligible", which means to be [TRANSLATION] "admissible, valid".[32]

The Inspector General considers this clause to be comparable to the one that the Quebec Court of Appeal deems to be a peremptory clause in the recent judgment of *Maria (Office municipal d'habitation de)* v. *Construction L.F.G Inc.*[33] In this judgment, which focuses on the failure of a contractor to hold a licence at the time of submitting a bid, the Court of Appeal states that when the client requires, by a specific clause, to reject a contractor's bid for failing to respect a specific requirement in the call for tenders documents (peremptory clause), he [TRANSLATION] "limits his own discretion" and he is obliged to reject all bids that do not respect this requirement[34]. It follows that [TRANSLATION] "irregularities regarding obligatory elements specified in the call for tenders and general conditions justify the Administration to not appreciate a bid"[35].

As well as not leaving any place for interpretation regarding its peremptory character, the requirement to provide the letter is written in bold letters and underlined in the call for tenders documents, which is an indicator of the importance that the client has for the requirement and of the clear desire by the D.P.W. to draw the attention of the bidders to this particular clause.

It is also interesting to observe that the clause that follows in the call for tenders, that is, article 9 of the Specific administrative conditions, is the section that provides the compliancy requirements. At the end of this article, it is stated that the failure to attach the required documents [TRANSLATION] "**may** result in the dismissal of the bid" [original text not in bold]. A clarification like this was not brought to article 8, which leaves the impression to firms taking note of the call for tenders documents that article 8 and article 9 are referring to two (2) distinct realities and that the D.P.W. desired to make the requirements stipulated in article 8 essential requirements to be respected.

In the present case, the D.P.W. deliberately chose to raise the requirement to provide a letter, a requirement that could seem trivial at first glance, to an eligibility requirement in order to submit a tender.

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[32] Definition given by the *Multi dictionnaire de la langue française*.
[33] 2014 QCCA 2034.
[34] *Maria (Office municipal d'habitation de)* v. *Construction L.F.G Inc*., 2014 QCCA 2034, para. 45-47.
[35] *Maria (Office municipal d'habitation de)* v. *Construction L.F.G Inc*., 2014 QCCA 2034, para. 45 citing *Mercier* v. *Raby*, 2008 QCCA 1830, para. 20.

For the firms that obtained the specifications, the obligation to provide a letter from the owner of the pumps and attesting to their reliability seemed like an essential requirement in order to submit a bid on the call for tenders.

Having made this choice, the D.P.W., at that moment, lost all the discretionary power regarding this requirement and could not then interpret the failure to provide the letter as a minor non-compliance. The D.P.W. had no other choice but to accept the bids that met the eligibility requirements and to reject the others.

The officer working at the Procurement Service and in charge of call for tenders 14-12725 states that certain criteria listed in the section [TRANSLATION] "Basic eligibility requirements in order to submit a bid" are not eliminatory. He adds that the failure to respect the requirement to provide the letter attesting to the reliability of the bidder's pumps is not a motive to reject the bid. Moreover, he explains that the D.P.W. wished to open the market and avoid a situation in which there were no bidders. Moreover, this is the position taken by the D.P.W. in its response to the Notice to an interested party.

This argument is unfounded. In the Inspector General's opinion, as long as this requirement was found in the call for tenders documents, the D.P.W. was bound by the set requirements. The D.P.W. could not remove the requirement unless they proceeded in an official manner to withdraw the requirement from the call for tenders by publishing an addendum or by restarting the call for tenders process with new documents. It is useful to recall that a similar argument was invoked by the client in *Entreprises de construction Panzini Inc.* v. *Agence métropolitaine de transport*[36] and rejected by Justice Richer.

3.5. Fundamental principle of fair and equal treatment of bidders

As has already been mentioned in the judgments touched upon to date, the importance that the eligibility requirements be respected by a client like the D.P.W., requirements the client itself inserted in the call for tenders documents, is a consequence related to the principle of the fair and equal treatment of bidders.

The equal treatment of bidders is a guiding principle and is an implicit obligation for all clients in matters of public call for tenders processes. The authors Olivier F. Kott and Claudine Roy write the following on this subject:

> [TRANSLATION]
>
> The principle of the equal treatment of bidders is the essence of the call for tenders process. It obliges the project manager to treat all the bidders equally."[37]

[36] 2005 CanLII 31531 (QCCS), para. 37.

[37] Olivier F. KOTT and Claudine ROY, « Les appels d'offres », in Olivier F. SCOTT and Claudine ROY (dir.), *La construction au Québec : Perspectives juridiques*, Montréal, Wilson & Lafleur Editions, 1998, page 205. Referred to with approval by the Court of Appeal in *3051226 Canada inc.* v. *Aéroports de Montréal*, 2008 QCCA 722, para. 42.

The principle of the equal treatment of bidders was established by the Supreme Court of Canada in the judgments *M.J.B. Entreprises*[38], *Martel*[39], and more recently in *Tercon Contractors*[40].

In the first judgment, Justice Iacobucci, speaking for the Supreme Court of Canada, states that the call for tenders process replaces negotiation by competition. The Court insists on the importance for a client to respect the contracting process and to not by-pass the rules it itself established:

> "This competition entails certain risks for the appellant. The appellant must expend effort and incur expense in preparing its tender in accordance with strict specifications and may nonetheless not be awarded Contract B (…). **It appears obvious to me that exposing oneself to such risks makes little sense if the respondent is allowed, in effect, to circumscribe this process and accept a non-compliant bid.** Therefore, I find it reasonable, on the basis of the presumed intentions of the parties, to find an implied term that only a compliant bid would be accepted."[41]
>
> [Original text not in bold]

In *Tercon Contractors Ltd.*[42], the majority of the Supreme Court of Canada restored the trial judge's decision to award damages against a province that had awarded a contract to an ineligible firm following a solicitation of interest process, a process which should have ensured that only the firms that initially expressed an interest were eligible to submit a bid following a request for proposals[43]. Speaking for the majority of the Court, Justice Cromwell underlined the following:

> "To begin, it is worth repeating that there is no doubt that the Province was contractually bound to accept bids only from eligible bidders. This duty may be implied even absent express stipulation."[44]

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[38] *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

[39] *Martel Building Ltd* v. *Canada*, 2000 SCC 60, par. 116: "it is […] imperative that all bidders be treated on an equal footing, […]. Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder."

[40] *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, 2010 SCC 4.

[41] *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619. Stated more recently in *Martel Building Ltd* v. *Canada*, 2000 SCC 60 and *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, 2010 SCC 4.

[42] *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, 2010 SCC 4.

[43] It is important to note that in this case, even though the dissenting judges did not restore the decision to award damages against the province and did not find the province responsible, they shared the opinion of the majority of the Court relating to the irregularity of the process that was followed in awarding the contract to an ineligible firm.

[44] *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, 2010 SCC 4, par. 23.

A fortiori, it would be unreasonable for a firm to have to respect a call for tenders process when the client circumvents it by accepting a bid that is ineligible according to the call for tenders documents.

As stated by the Supreme Court of Canada in these decisions, the requirement that only compliant bids, and even more so, eligible bids, be considered, as well as the obligation that all bidders be treated equally and on equal footing, is compatible with the objectives of contributing to the integrity and business efficacy of the tendering process[45].

When a client does not reject a bid that does not respect a requirement considered as vital in the call for tenders, it is the integrity of the contractual process that is affected.

The Supreme Court of Canada reiterates that the principle of equal treatment of the bidders is weighty "particularly in the context of public procurement" and in this context, "in addition to the interests of the parties, there is the need for transparency for the public at large".[46]

The mandate entrusted to Montréal's Inspector General by the legislator fittingly adheres to this: to oversee contracting processes and the carrying out of contracts by the City or by a legal person and recommend to decision-making bodies any measure aimed at preventing a breach of integrity and to foster compliance with the applicable legal provisions and with the City's requirements regarding contracting or the carrying out of contracts.[47] This mandate is aimed not only at cleaning up the practices in order for the public to have confidence towards public municipal institutions in contractual matters, but also at improving the transparency of municipal activities and decisions.

In fact, as stated by the Supreme Court of Canada, it is important to understand that the implicit obligation to treat all bidders equally "benefits all participants involved"[48] and that "without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process"[49].

Even though some may think that the failure to provide a letter is only a want of form and that it is only a letter, the consequences of accepting an ineligible bidder must be understood. Marc Lalonde, a lawyer as well as an author, wrote the following concerning this subject:

> [TRANSLATION]
>
> "Finally, it needs to be remembered that every eligibility requirement imposed by a municipal body has the effect of reducing the pool of potential bidders. When the municipal body imposes these requirements in its call for tenders documents, but then waives the strict application of these requirements once it is performing

[45] *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, 2010 SCC 4, para. 69 and *Martel Building Ltd* v. *Canada*, 2000 SCC 60, para. 88.
[46] *Tercon Contractors Ltd.* v. *British Columbia (Transportation and Highways)*, 2010 SCC 4, para. 67.
[47] See section 57.1.8 of Montréal's City Charter.
[48] *Martel Building Ltd* v. *Canada* 2000 SCC 60, para. 88.
[49] *Id.*

> the bid analysis, it becomes impossible to know how many additional bidders would have been able to submit a bid with these eligibility requirements they were not able to meet upon the reading of the call for tenders documents.[50]

In the present case, certain firms which took possession of the specifications might have decided not to submit a tender on call for tenders 14-12725 only because, when they read the call for tenders documents, they believed they would not be able to provide the required letter. It is useful to note that twenty (20) firms took possession of the specifications, but only five (5) submitted a bid.

Xylem, in its response to the Notice to an interested party, states that Flowserve and Sulzer were treated in the same way regarding their failure to provide the letter. However, this is not where the problem lies. In the opinion of the Inspector General, accepting one of these bids and awarding them the contract is equal to permitting a firm to not respect an essential requirement, whereas others firms having taken possession of the specifications believed that they could not submit a bid without providing such a letter.

The D.P.W. was obliged to give full effect to the call for tenders clauses [TRANSLATION] "in order to respect the equal treatment of bidders", as was stated by Justice Gibeau in *Corporation de développement Bertone* v. *Société Québécoise des infrastructures*[51].

In addition, the Inspector General adds that the respect of the principle of equality is not only applicable to the bidders, but also to all those interested who are qualified to contract with the Administration:

> [TRANSLATION]
>
> "[The clients] must respect a fundamental principle in administrative law that Patrice Garant describes in these terms: "All the constituents have an equal right to contract with the Administration in accordance with the basic principle which is called equality before the public service". This principle limits the freedom of municipalities to impose requirements that will have the effect of limiting potential bidders."[52]

In the opinion of the Inspector General, the D.P.W., by awarding the contract to Xylem even though they failed to provide the letter required by the eligibility requirements of the call for tenders, infringed its duty to accept only an eligible bid.

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[50] Marc LALONDE, "Honni soit qui mal y pense: réflexions sur l'attribution des contrats des organismes municipaux à l'ère de la vertu » in S.F.C.B.Q., vol. 412, *Développements récents en droit municipal (2016),* Cowansville, Yvon Blais Editions, page 209, at page 269.
[51] 2015 QCCA 3139, para. 34.
[52] *Entreprise P.S. Roy inc.* v. *Magog (Ville de)*, 2013 QCCA 617, para. 48.

3.6. Failure to treat the bidders on the same footing

The question of the equal treatment of bidders takes a place of capital importance in the present file because the bidders were not all treated on equal footing.

Indeed, whereas SNC-L and the D.P.W. judged the failure of Xylem to respect the requirement of providing a letter attesting to the reliability of the pumps as being a minor non-compliance, they decided that the failure by Ebara, Sulzer, and Flowserve to provide a reference letter for the manufacturer of the pumps' motors represented a major non-compliance. This is what can be understood from the analysis and recommendation report of SNC-L, dated November 27, 2014, a report which was followed by the D.P.W.

However, the requirement to provide reference letters for the manufacturer of the motors was specified as a compliance requirement in the call for tenders and not an eligibility requirement, contrary to the letter attesting to the reliability of the pumps. Article 9 of the Special administrative conditions of the call for tenders stipulates that the City has a certain discretion regarding the consequences of failing to respect compliance requirements:

> [TRANSLATION]
>
> **9. Compliance of a bid**
>
> In order to fulfill the needs of the City and to be considered as admissible for evaluation, the bidder who submits a tender must meet the following minimal requirements:
>
> - Provide the required references for the manufacturer of the motors. This manufacturer must have at least ten (10) years' experience in manufacturing synchronous motors and the proposed model in the bid must have been recognized as having given a satisfactory service for a period of at least five (5) years in a similar application;
>
> […]
>
> The failure to attach these documents, relevant to the evaluation and the capacity of the firm to complete all of the requirements specified in the call for tenders, as well as to return the request for additional information duly completed, may result in the dismissal of the bid.[53]
>
> [Original text not underlined]

Consequently, the failure to respect an eligibility requirement is considered to be minor whereas the failure to respect a compliance requirement of the same nature (provide a reference letter) is considered to be major.

According to the doctrine, [TRANSLATION] "the requestor of bids can never reject a bid for an irregularity on a point when he accepts another bid with the same irregularity […], he

[53] Call for tenders 14-12725, Special administrative conditions, article 9.

must evaluate the bids in an equal and uniform manner [and] cannot give one bidder a particular advantage to the detriment of the others"[54]. While examining the bids received, the client [TRANSLATION] "cannot be demanding and pedantic towards some bidders and demonstrate greater flexibility towards others"[55].

3.7. Scope of the reference letter required in article 8 a) of the Specific administrative conditions

In their respective responses to the Notice to an interested party, Xylem, SNC-L, and the D.P.W. claim that the City could disregard the absence of the letter because, in reality, Xylem's bid demonstrated the reputation and the experience of the firm. The D.P.W. assumes that if SNC-L did not raise any issues regarding the eligibility of Xylem's bid, it is because the presentation of the firm respected the eligibility requirements in the specifications.

The D.P.W. submits that the requirement to provide a letter sought confirmation of the status of the bidders as a recognized manufacturer of the pump. The D.P.W. explains that the objective sought by article 8 a) of the Specific administrative conditions is to ensure having firms that possess the necessary experience to be able to provide pumps of such magnitude. The D.P.W. adds that all the bidders filed documents showing their capacity and expertise to manufacture the pumps as required in the technical specifications, and therefore proved that they were recognized manufacturers of the pumps, at the same level as if the letter had been provided.

The Inspector General cannot agree with this suggestion. The letter was supposed to serve as a demonstration that the installations made in the past by the bidder were reliable. As well, the requirement is to the effect that the letter be issued by the owner of the pumps installed by the firm, in other words, a client.

The call for tenders documents contained a section IV [TRANSLATION] "Bid Forms – Additional Information" that the bidders were required to complete. In this section, can be found, in particular, a paragraph requesting the bidder to list all the contracts that are of the same nature that are completed or in the process of being completed in the last five (5) years. It is indicated that this information is requested [TRANSLATION] "in order to prove the competence and ability to execute the contract".

Xylem's submission form refers to attached documents, including a section entitled [TRANSLATION] "Project and personnel references" which is accompanied by a letter in which a Xylem representative confirms that the firm is recognized as a world leader in the field. To this end, a presentation of the firm's list of completed and ongoing projects is attached ("Projects Recently Completed" and Projects Currently in House").

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[54] André LANGLOIS, *Les contrats municipaux par demandes de soumissions*, 3e éd., Yvon Blais Edition, 2005, page 258-259.

[55] Pierre GIROUX and al., *Contrats des organismes publics québécois*, looseleaf, CCH publications, para. 7-750, page 1,192.

The Inspector General is of the opinion that the list of projects and additional information provided does not attest to the reliability of the pumps by the clients. It is a list compiled by Xylem itself and demonstrates the experience of the firm in manufacturing pumps. The letter required in the call for tenders is aimed at obtaining the opinion of a third-party regarding the reliability of the pumps that were manufactured.

Furthermore, it cannot be argued that the question of the reliability of the pumps is secondary. Indeed, the importance that the D.P.W. had for the requirement to show the reliability of the pumps was made known as being an essential element at the very beginning of the tendering process. This can be seen from the various documents and presentations consulted by the Office of Inspector General.

First, in the minutes of the technical committee's meeting held on April 23 and May 1, 2014[56], it is mentioned that one of the goals of the meeting is to [TRANSLATION] "present different intended measures to be taken in the project to ensure the quality, the reliability and the proper functioning of the equipment". In relation to the clause regarding the necessary experience of the manufacturer, it is mentioned that SNC-L [TRANSLATION] "must revise this clause and insist on the reliability of the equipment observed in the references provided".

In the presentation to the project revision committee on April 23, 2014, under [TRANSLATION] "Main Objectives", it can be read [TRANSLATION] "Ensure the optimal reliability of the new equipment". As well, a little farther, in slide 16 entitled [TRANSLATION] "Procedure to ensure the optimal reliability of the equipment", it can be read:

> [TRANSLATION]
>
> **Required experience of the bidder**
>
> - Experience of the manufacturer of the same type of pumps (and motors) and of similar capacity (detailed list to be provided with the bid)
> - Verification of the reputation of each one regarding the reliability of the equipment (good design, minimal maintenance, etc.).[57]

3.8. Conclusion regarding the failure to respect an eligibility requirement

The Inspector General arrives at the conclusion that the D.P.W. and SNC-L committed an error while analyzing the bids by qualifying the failure by Xylem, Flowserve, and Sulzer to provide a letter attesting to the reliability of their pumps as being a minor non-compliance.

In their response to the Notice to an interested party, the D.P.W. concedes that the term [TRANSLATION] "Incomplete" should have been used in the bid analysis table instead of

[56] Minutes no 608307-81AG010-31MC-I-0022_00.
[57] Presentation to the project revision committee, "Projet REQUP 1 Usine Atwater – Préachat des groupes motopompes à la haute pression", April 23, 2014, slide 16.

[TRANSLATION] “minor non-compliance”, but underlines that the failure to provide such a letter was not refusal material.

For their part, Xylem and SNC-L claim that the failure to provide the letter required in article 8 a) of the Specific administrative conditions constitutes a minor non-compliance and that the City enjoys a certain flexibility and administrative discretion in its analysis of whether an irregularity is considered to be minor or major. They add that the City can disregard a minor irregularity of a bid in accordance with article 26.1 of the Instructions to bidders in the call for tenders which states:

> [TRANSLATION]
>
> 26.1 If it is in the interest of the City, the City can disregard any form error and minor defect the bid may contain.[58]

Xylem argues a recent Superior Court of Québec[59] judgment which reasons that the omission to attach a letter attesting to the experience containing information required by the call for tenders constitutes a minor irregularity.

In that case, two (2) firms were asking the Superior Court to declare their bid as the lowest compliant bid on two (2) calls for tenders. For each of these calls for tenders, a clause required the bidders to have completed a minimum of two (2) contracts of the same nature within the five (5) previous years and that had a minimal value of 10 million dollars. According to the same clause, the bidders had to attach a letter of experience containing the information regarding each of these contracts. The failure to attach the letter would result in an automatic rejection of the bid.

At first glance, it would be tempting to draw a parallel and apply this decision to the situation targeted by the investigation of the Inspector General. However, this judgment must be distinguished on several important elements on which the judgment is based:

- The issue before the Superior Court was not the absence of a letter attesting to the experience but on the sufficiency of the information transmitted by the firms and required by the call for tenders. Indeed, contrary to Xylem, the two (2) firms who were addressing the Court had transmitted, in their bid, the letter required by the call for tenders. The bid, however, was rejected because certain work in relation to the contracts, enumerated in the letters of experience, were still being executed at the time of the opening of the bids.
- Contrary to article 8 of the Specific administrative conditions of call for tenders 14-12725, the clause requiring the letter attesting to the firm’s experience was ambiguous with respect to the projects that had to be covered by the letter because the clause did not specify whether the work had to be completed. The Superior Court Justice concluded that the clause must then be interpreted in favour of the

[58] Call for tenders 14-12725, Instructions to bidders, art. 26.1.
[59] *Construction Bau-val inc.* v. *Montréal (Ville de),* 2016 QCCS 1185.

bidders because a call for tenders is a contract of adhesion[60]. According to Justice Gouin the failure of the firms to provide all of the required information resulted from the ambiguity of the clause and therefore constitutes a minor irregularity[61].

- Xylem particularly brings to the attention of the Inspector General the fact that the judge states that [TRANSLATION] "the experience of the bidder is inherent" and that the required letter [TRANSLATION] "simply attests to the [experience] possessed that can be verified by the City"[62]. Contrary to this clause, article 8 of the Specific administrative conditions of call for tenders 14-12725 requires to obtain the opinion of a **third-party (a client of the bidder)** on the reliability of the manufactured pumps, something that cannot be verified any other way.

In the Inspector General's opinion, this judgment is of no help in the case at hand because, in addition, the call for tenders analyzed by the Court did not include, as it does in this case, both "eligibility requirements" and "compliance requirements".[63] The question regarding the distinction between an eligibility requirement and a compliance requirement was not brought before the Court nor was it treated by the Superior Court. The judgments in the cases *Bertone* and *Panzini*, discussed in section 3.3 of this decision, remain key to deciding the consequences of the failure to respect the eligibility requirement in article 8 a) of the Specific administrative conditions in the call for tenders 14-12725.

It is also useful to underline that, in the case before the Superior Court, the ambiguity of the clause had the effect of rejecting the lowest bids received and the formalism adopted by the City was contrary to the interests of taxpayers.[64] However, in the situation under examination by the Inspector General, the financial interests of taxpayers cannot be invoked because Xylem was not the lowest bidder.

The Inspector General reiterates that the D.P.W. could not, in accordance with the principle of the equal treatment of bidders and in order to ensure the integrity of the contractual process, accept a bid that contravened article 8 of the Specific administrative conditions, an article presented as an eligibility requirement to submit a bid on the call for tenders. The D.P.W. could certainly not award the contract to a bidder that did not provide the letter.

Although the City possesses a certain flexibility to evaluate if an irregularity is minor or major when the failure relates to a compliance requirement, when it is a case of failure to respect an eligibility requirement, the City has no discretion. This is the position taken by

[60] *Construction Bau-val inc.* v. *Montréal (Ville de),* 2016 QCCS 1185, para. 75-78.
[61] *Construction Bau-val inc.* v. *Montréal (Ville de),* 2016 QCCS 1185, para. 126.
[62] *Construction Bau-val inc.* v. *Montréal (Ville de),* 2016 QCCS 1185, para. 93.
[63] Respectively articles 8 and 9 of the Specific administrative clauses of call for tenders 14-12725.
[64] The bids of the firms who seized the Court were the lowest bids received and the decision of the Superior Court Justice to declare their bids as compliant allowed Montréal's taxpayers to save close to two (2) million dollars: *Construction Bauval inc.* v. *Montréal (Ville de),* 2016 QCCS 1185, para. 117-119.

the courts who have rendered judgments on the distinction between eligibility requirements and compliance requirements.

In its response to the Notice to an interested party, Xylem argues that the author and signatory of the letter of reference confirms that he would have issued the letter before the bid was submitted if Xylem had made that request, because they were working in a satisfactory manner at that time. In the opinion of the Inspector General, this fact has no impact on his conclusion: Xylem's bid should have been accompanied by the required letter at the time the bid was submitted so that the D.P.W. could analyze the compliance of the bid in a next step.

Furthermore, in its response to the Notice to an interested party, SNC-L explains that the decision to not reject the bids of Xylem, Flowserve and Sulzer was taken in the interests of the City and its taxpayers, because otherwise three (3) out of the five (5) bidders would have been subject to a preliminary rejection, that is, 60% of the bids received.

According to the Inspector General, this reasoning is not justifiable because it invites potential bidders to try their luck and submit ineligible bids in the hope that the eligibility requirements will be removed. This approach of "he who dares wins" is done to the detriment of the other suppliers who respect the rules and submit eligible bids or refrain from submitting an ineligible bid.

Finally, the Inspector General reiterates that he was misled during the course of his investigation. Following a request for the production of documents, Xylem transmitted a letter dated June 10, 2014, and presented it as the letter included in its bid to the City, while a representative of the firm was aware of the fact that this letter had been obtained on September 11, 2015 and was not a part of the documents submitted with the bid. This representative had three (3) letters in his possession, that is, letters dated June 10, 2014, September 10, 2015, and September 11, 2015. These letters were all obtained on September 10 and September 11, 2015, that is after the submission of the bid and following the reception of the Inspector General's request for the production of documents.

Before arguing that the failure to provide the letter was a minor non-compliance, Xylem attached a particular importance to the letter. Indeed, until the moment where the Inspector General discovered that the letter dated June 10, 2014 was only "created" on September 11, 2015 and that the letter had never been provided in support of Xylem's bid, Xylem continued to claim that the letter dated June 10, 2014 was the letter that had been provided to the City and they did not understand why the letter was not in the City's file.

3.9. The Inspector General's power to intervene

This being established, section 57.1.10 of Montréal's City Charter allows the Inspector General to intervene in order to rescind contracts when the following conditions have been met:

57.1.10. The Inspector General may cancel any contracting process involving a contract of the City or of any legal person described in subparagraph 1 of the fifth paragraph of section 57.1.9, or rescind or suspend the carrying out of such a contract if the Inspector General:

(1) finds that any of the requirements specified in a document of the call for tenders or a contract has not been met or that the information provided in the contracting process is false; and

(2) is of the opinion that the seriousness of the breach observed justifies the cancellation, rescinding or suspension.

[…]

The conditions entitling the Inspector General to intervene are cumulative. Firstly, one of the requirements of the call for tenders documents or contract must not have been met or the information provided, by the tenderer in this case, must have been found to be false. Only when one or the other of these is established can the Inspector General rule on the seriousness of the breach.

On May 10, 2016, in its response to the amended notice, Xylem submits that the facts do not justify a decision by the Inspector General to rescind the contract in accordance with section 57.1.10 of Montréal's City Charter. Xylem explains that the failure to provide the reference letter does not constitute a breach where the gravity justifies the rescinding of the contract.

In the opinion of the Inspector General, there is no doubt that Xylem's bid fails to respect one of the requirements in the call for tenders documents and, on this basis alone, the contract never should have been awarded.

The question now is: does the Inspector General believe that the gravity of the observed breach justifies the rescinding of the contract in accordance with the second paragraph of section 57.1.10 of Montréal's City Charter?

The Inspector General believes the observed breach to be objectively "serious". The observed breach undeniably affected **the very integrity of the public tendering process**: the D.P.W., by disregarding the failure to respect the eligibility requirement, **circumvented the rules it itself established** in the call for tenders.

The principles that the Inspector General protects in his decision are those regarding the integrity of the contracting process, the respect of the applicable rules, and the equal treatment of bidders.

What message would the City be sending if the bidders learned that the eligibility requirements were optional and the City had the discretion to disregard them?

The impact this could have on the decision of the firms in possession of the specifications to bid on a call for tenders must be reiterated. If the City was allowed to disregard certain

eligibility requirements specified in the call for tenders, this would not ensure a healthy market competition, would create an insecurity among the bidders who would not know what rules they are subject to, and even create an injustice towards the other bidders who spent resources in order to respect the requirements in the call for tenders.

It is also important to remember that the Inspector General was misled by Xylem during the course of his investigation with the goal to make him believe that the firm had provided the letter attesting to the reliability of the pumps in its bid documents.

The conditions for the application of section 57.1.10 of Montréal's City Charter having been met, the Inspector General rescinds the contract awarded to Xylem following call for tenders 14-12725.

The failure to respect the eligibility requirement is sufficient in itself to rescind the contract, but there is more. The way in which the bid analysis was performed regarding the requirements in the technical specifications for certain elements of the pumps also lends itself to much criticism.

In the opinion of the Inspector General, it is essential to address these other elements because it shows numerous aberrations and is the evidence of the additional glitches in the integrity of the tendering process that the Inspector General has the mandate to protect.

4. Circumvention of the requirements in the technical specifications

As has been already mentioned, during the second compliance analysis of the bids submitted, only Xylem's bid was determined to be compliant.

Of the four (4) firms declared administratively compliant[65], only Xylem's offer was determined to be technically compliant. The bids submitted by the three (3) other firms (Ebara, Sulzer, KSB) were considered non-compliant, particularly due to the cooling system proposed for the oil which is used as a lubricant for the bearings.

During his investigation, the Inspector General therefore paid particular attention to the requirements regarding the oil-cooling system.

The analysis and the investigation performed by the Office of Inspector General shows that none of the bidders respected, in their bid, the requirements established by the D.P.W. and SNC-L in the technical requirements in the section on the oil-cooling system.

[65] Flowserve is the only firm to not pass the stage of administrative compliance because they omitted to provide the commitment letter for a performance bond, contrary to the requirements of article 13.1.2.2 of the Instructions to bidders, as can be seen in the analysis report of the Procurement Service dated July 31, 2014.

Indeed, the technical specification required the oil-cooling system to work on a "proven" method, [TRANSLATION] "by forced-convection by fans" and not in any way be external to the bearings, the fans having to be [TRANSLATION] "installed on the bearings' casings".

Xylem's bid proposed an ambient-air oil-cooling system integrated with the bearings and manufactured by the firm Michell, whereas the bids for Ebara, Sulzer and KSB offered a forced-convection oil-cooling system external to the bearings and manufactured by the firm Kingsbury.

4.1. Bearing requirements in the technical specifications

Call for tenders 14-12725 concerns the acquisition by the City of fourteen (14) pump sets. An essential element to the operation of a pump, that the successful bidder must furnish, is a complete set of bearings. The bearings are what is used in mechanical construction to support and guide the rotation of the drive shafts.

The technical specifications identify particularly the following specifications regarding the bearings[66]:

- [TRANSLATION] "the supplier will have the responsibility to provide a complete set of journal bearings, to assemble them in bearing casings and to ensure their good working condition";
- [TRANSLATION] "the supplier will have the responsibility to provide a complete set of bearings originating from a single bearing manufacturer, renowned and recognized for its experience in the designing and manufacturing of bearings";
- [TRANSLATION] "the bearings […] must be designed to resist all operational constraints and ensure a long service life, in continuous and intermittent operation";
- [TRANSLATION] "no external recirculation system nor external oil-cooling system will be accepted";
- [TRANSLATION] "the bearings manufacturer must provide for a proven method to cool the oil by forced-convection by fans installed on the bearings' casings";
- [TRANSLATION] "the bearings manufacturer must have a minimum of ten (10) years of experience in the design and manufacturing of air-cooling systems"; and
- [TRANSLATION] "the referenced brands of the bearings, for information purposes, are MICHELL and KINGSBURY, or approved equivalents".

[66] Special technical conditions – Electricity – Electric motor – Section 16803, article 3 and Special technical conditions – Centrifugal pump – Section 11000, article 2.5.5.

Although the mandate to develop and draft the technical specifications of the call for tenders was entrusted to SNC-L, an engineer responsible for the file at the D.P.W. explains that the elaboration of the requirements was done in a collaborative manner between the D.P.W. and SNC-L so that the required specifications would meet with the needs of the D.P.W. Moreover, a technical committee made up of representatives of SNC-L and of the City met regularly during the period of time when the call for tenders was being developed, in order to discuss the needs of the D.P.W. and the technical requirements to be included in the specifications[67].

4.2. Requirement to provide a forced-convection oil-cooling system integrated with the bearings

To begin with, it should be pointed out that the D.P.W. chose an air-cooled oil-cooling system and not a water-cooled system because of a City regulation that forbids since 2013, for reasons of concerns for sustainable development, the installation of cooling equipment which uses potable water.[68]

As already mentioned, the technical specifications of call for tenders 14-12725 require that the manufacturer of the bearings provide for [TRANSLATION] "proven method to cool the oil by forced-convection by fans installed on the bearings' casings" [original text is not underlined]. As well, the specifications specify that [TRANSLATION] "no external recirculation system nor external oil-cooling system will be accepted".

4.2.1. A necessary requirement given the nature of the bearings to be furnished

The requirement to furnish an oil-cooling system is necessary because of the nature of the bearings which the D.P.W. chose to acquire: journal bearings.

The witnesses interviewed by the Office of Inspector General explained that this type of bearing is known for being the easiest to maintain and having an almost infinite life span. As well, a factor that influenced the decision of the D.P.W. was the fact that the employees of the City who take care of the maintenance of the equipment are familiar with the technology because it is already present in several plants in Montréal.

However, journal bearings create a problem regarding the overheating of the oil, a problem with which the City had already been confronted. During the meetings of the technical committee, SNC-L proposed to the D.P.W. that they acquire anti-friction bearings, a

[67] This is what appears in the records of the technical committee's meetings.
[68] Regulation concerning Certain Usage of Potable Water on the Territory of Montréal's Agglomeration (*Règlement relatif à certains usages de l'eau potable sur le territoire de l'agglomération de Montréal*), RCG 13-011, s. 7.

technology less expensive than journal bearings, which do not produce heat but has a shorter life span than journal bearings.

By the end of the discussions which took place between SNC-L and the D.P.W., the D.P.W. still chose to require that the bidders supply journal bearings because of the advantages they present regarding their maintenance and their life span.[69]

In order to eliminate the heat absorbed by the lubricant, the choice of journal bearings implies that it would be preferable to have a secondary circulation system and cooling of the oil. The necessity of the secondary system was first discussed in July 2012 in a technical note by SNC-L which presented the advantages and the inconveniences of journal bearings compared to anti-friction bearings. This necessity was repeated in a technical note by SNC-L dated February 25, 2014.[70]

This is the way in which the requirement to provide journal bearings equipped with an oil-cooling system was integrated in the technical specifications of call for tenders 14-12725.

4.2.2. A requirement that the D.E.P does not want to deviate from during the design period of the call for tenders

In addition to being necessary because of the type of bearings chosen by the D.P.W., the oil-cooling system appears as an important specification in the technical specifications.

The Inspector General's investigation reveals that by the end of the design period of the call for tenders, the D.P.W. had repeated on several occasions its desire to acquire pump sets where the bearings were equipped with a forced-convection (or forced-air) cooling system, and to make this requirement a main characteristic of the equipment targeted by the call for tenders.

First, during a meeting of the technical committee on January 9, 2014, a PowerPoint presentation, which the Office of Inspector General had access to, summarizes the main characteristics of the replacement pumps that were to be acquired for the Atwater plant.[71]

Less than five (5) months before the launching of the tendering process, the D.P.W. and SNC-L considered the forced-convection cooling system to be a main element to the call for tenders, as can be seen in the following slide:

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[69] Minutes of the meeting of August 1, 2013, no. 608307-81AG010-31MC-I-0014_00.

[70] [TRANSLATION] "Presentation of the technical notes for the choice of instrumentation for vibration, speed of rotation, lubrication, and bearing systems for Atwater's high pressure pumps – July 2012" prepared by SNC-L and "Technical Note – Specific recommendations for high pressure pump sets U1-U14 for the Atwater potable water plant – February 25, 2014" prepared by the Engineer Division of the D.P.W., p. 6.

[71] The PowerPoint presentation entitled "Technical Discussion: Replacement of Horizontal Split Case Centrifugal Pumps for Potable Water Distribution – Atwater WTP" is attached to the minutes of the meeting of January 9, 2014, no. 608607-81AG010-31MC-I-0017_00.

Proposed Pumps

- Main Characteristics of the Proposed Replacement Pumps (cont.)

Mechanical Characteristics	Proposed Pumps
Seal Type	Split mechanical seals (Chesterton 442 or John Crane 3740)
Bearings	New Kingsbury or Michell type thurst and sleeve journal bearings
Cooling	Closed loop external cooling system or forced air cooling
Impeller	Stainless Steel (316 L)
Internal Coating	NSF61 approved epoxy coating

[72]

[Original does not contain red frame]

During this same meeting of the technical committee, specialists were consulted in order for them to give their opinions on various technical elements, notably the oil-cooling system. As it appears in the following excerpt from the report of the meeting, their observation is the following: a forced-air (forced-convection) cooling system meets the needs for the Atwater plant:

7.0	**Oil cooling and lubrication**
7.1	While Mechanical Solutions recommended getting an expert opinion from other lubrication and cooling specialist, such as Heinz Bloch (independent consultant), Ken Brown (Eco Fluid Center) or Scan DeCamillo (Kingsbury), they think that a forced air cooling is suitable for the Atwater pump application, and that water cooling should be avoided. Forced air cooling could be a much simpler way to cool the bearings and would avoid the use of external chillers. They are confident that bearing experts such as Kingsbury and Michell will provide the needed calculations and have the capabilities to achieve such a system. If, in case, an external chiller is used with glycol, it has to be a propylene glycol instead of an ethylene glycol (toxicity).

[73]

Finally, on April 23, 2014, date of one of the last technical committee's meetings before launching the call for tenders, a presentation to the project revision committee describes the objectives and the characteristics of call for tenders 14-12725. As it appears in the following slide, it is envisioned that one of the main characteristics of the pump sets is that they be equipped with a forced-air (forced-convection) cooling system:

[72] This PowerPoint presentation entitled "Technical Discussion: Replacement of Horizontal Split Case Centrifugal Pumps for Potable Water Distribution – Atwater WTP" is attached to the minutes of the meeting of January 9, 2014, no. 608607-81AG010-31MC-I-0017_00, slide 8.

[73] Minutes of the meeting of January 9, 2014, no. 608607-81AG010-31MC-I-0017_00, p.6.

[TRANSLATION]

Main characteristics of Pump sets

Parameter	Requirements
Type of pump	bottom suction, horizontal discharge, double volute, double suction split case pumps
Design capacity	1.58m3/s to 73.2 m (30 MGID to 240') This point of operation must be situated in the allowable operating region (AOR)
Efficiency of the average operating pressure of 60.0 m	≤ 88,0%
Rotation speed	600RPM or 720 RPM
Gasket	Split mechanical seals (Chesterton 442 or John Crane 37FSB)
Bearings	Journal bearings for radial bearings and pad type thrust bearings for axial bearings (Kingsbury or Michel)
Cooling	Forced-air cooling
Wheel	Stainless Steel (ASTM A-743, CA6NM)
Internal coating	Epoxy coating NSF61 approved

[74]

**Table recreated for translation purposes
[Original does not contain red frame]

Less than one (1) month before launching the call for tenders, the presentation made to the project revision committee only refers to the forced-air cooling system as it appears in the above mentioned slide. In addition, the technical specifications of call for tenders 14-12725 is not ambiguous on the subject and does not mention anywhere the possibility for the bidders to supply an ambient-air cooling system. On the contrary, in several places in the specifications, it is required that the cooling system function by "forced-convection" thanks to "fans".[75]

In the same manner, the requirement to have an oil-cooling system integrated with the bearings, which are not external, appears as vital for the D.P.W.

According to the engineer of the D.P.W. implicated in the drawing up of the specifications, this requirement of the call for tenders is necessary because of the confined space of the Atwater plant which is situated in a patrimonial building.

The technical specifications of the call for tenders are unequivocal regarding the desire of the D.P.W. not to accept any external oil-cooling system and circulation system. The

[74] Presentation to the project revision committee, "Projet REQUP 1 Usine Atwater – Préachat des groupes motopompes à la haute pression", dated April 23, 2014, slide 7.

[75] Specific administrative conditions – Centrifugal pump – Section 11000, article 2.5.5: [TRANSLATION] "the totality of the pumps include (…) the forced-convection cooling system"; "the manufacturer of the bearings must provide for a proven method to cool the oil by forced-convection by fans"; "the fans of the forced-convection cooling system must be covered by protective guards".

report from the technical committee's meeting of July 23, 2012 is also categorical on this subject:

> [TRANSLATION]
>
> "The City does not wish to have a cooling system that is external from the bearings, which limits the choice to 2 suppliers: Kingsbury and Michell. According to SNCL, Michell suggests to leave the design of the cooling system to the manufacturer of the pump. SNCL will contact Michell again to verify if Michell can furnish an integrated cooling system themselves and preferably by air."[76]

This is repeated on two (2) other occasions during the technical committee's meetings of September 5, 2012 and August 1, 2013:

> [TRANSLATION]
>
> "2.1 As specified during the last presentation, C.R. #608307-81AG010-31MC-I-0007-00, the City does not accept external pumps for recirculating bearings' oil."[77]
>
> "4.2 As specified during the previous meetings, the City does not accept external pumps for recirculating the bearings' oil nor the design of journal bearings from the manufacturers of the pumps. This limits the choice to 2 suppliers: Kingsbury and Michell."[78]

The director of the D.P.W. and an engineer from SNC-L that drafted the technical specifications and participated in the technical evaluation of the bids, both confirm that the D.P.W. did not accept, at the time of the design of the call for tenders, a cooling system that would not be integrated with the bearings.

4.3. Manufacturers referenced in the specifications not producing a cooling system respecting the requirements

4.3.1. Requirement that the bearings and the oil-cooling system come from a bearing manufacturer and not a pump manufacturer

Regardless of the fact that the world's leading pump manufacturers build their own bearings, one of the requirements in the technical specifications for call for tenders 14-12725 is that the bearings come from bearing manufacturers, renowned and recognized for their experience in the designing and manufacturing bearings, as well as the designing and manufacturing of air cooling systems.

[76] Minutes of the meeting of July 23, 2012, no. 608307-81AG010-31MC-I-0007_00.
[77] Minutes of the meeting of September 5, 2012 no. 608307-81AG010-31MC-I-0008_00.
[78] Minutes of the meeting of August 1, 2013, no. 608307-81AG010-31MC-I-0014_00.

During the course of the investigation, the Office of Inspector General interviewed an engineer from the D.P.W. who was involved in preparing the specifications. He explains that this requirement, confirmed during a technical committee's meeting[79], was aimed at ensuring an expertise and the quality of the equipment to be supplied.

This brief response surprises the Inspector General: in what way the expertise and the quality of the equipment to be supplied could not be guaranteed by the pump manufacturers themselves? As it will be addressed later in the decision, during the publication period the call for tenders, faced with the impossibility to obtain the equipment required from the pump manufacturers referenced in the specifications, the pump manufacturers suggested to the D.P.W. that they manufacture the bearings themselves.[80]

4.3.2. Manufacturers referenced in the specifications

In the technical specifications, two (2) bearing manufacturers are referenced: Michell and Kingsbury. The D.P.W. allows that equivalents be proposed as well, as long as they are approved.

When a client puts a product or a manufacturer as a reference in a call for tenders, this is generally an indication that the product corresponds to the needs and the technical requirements in the specifications, or that the manufacturer produces the required equipment.

The four (4) administratively compliant bidders[81] proposed in their offers bearings and oil-cooling systems that came from the manufacturers referenced in the technical specifications. The firm that was awarded the contract, Xylem, chose the manufacturer Michell whereas the other firms (Ebara, Sulzer, and KSB) submitted tenders with products from the manufacturer Kingsbury.

It seems that neither Michell nor Kingsbury offer bearings equipped with a cooling system that respects the requirements of the specifications. Indeed, when the call for tenders was launched, Michell offered an ambient-air (and not forced-air) oil-cooling technology and, as for Kingsbury, it used a cooling system that recirculated the oil but that was external (and not integrated with the bearings).

This is confirmed by Xylem, the firm which was awarded the contract, in its response to the Inspector General's first request for the production of documents:

> [TRANSLATION]
>
> In fact, the two brands referenced in the specifications, Kingsbury and Michell, offer on the one hand technology for the cooling of oil that are standardized and proven in the industry (the technology of Kingsbury and Michell are similar) and on the other

[79] Minutes of the meetings of July 23, 2012, no. 608307-81AG010-31MC-I-0007_00.
[80] See section 4.3.6 of the present decision.
[81] Excludes the firm Flowserve.

hand, technology that are innovative and exclusive to one or the other of these referenced brands.

However, the analysis of these different technologies show that neither of these referenced brands are able to supply a standardized and proven product which uses a cooling method for the oil lubricating the journal bearings of the pump using forced-convection (that is forced-air) attached to the casing of the journal bearings, while using a fan powered by alternating voltage.[82]

The investigation shows that the two (2) manufacturers were referenced in the specifications when neither SNC-L nor the D.P.W. had confirmation that these manufacturers supplied a product that respected on all points the requirements outlined in the specifications.

4.3.3. Incomplete verifications of the availability of the product from the referenced manufacturers

A technical note dated July 23, 2012 attached to a report of the technical committee's meeting[83] attests to certain steps taken by SNC-L with various bearing manufacturers during the period of the preparation of the specifications.

The manufacturers contacted by SNC-L are Michell, Kingsbury, Renk, Orion, and Waukesha. SNC-L indicated in the technical note that only Michell and Kingsbury take care of cooling. For the bearings built by the other manufacturers contacted, it is the manufacturer of the pumps that has to find a system for the recirculation of the oil, possessing an air heat exchanger. But, as already discussed, it is because of the concern to ensure the expertise and the quality of the equipment to be supplied that the D.P.W. chose to require a cooling system from the bearing manufacturers.

As underlined by SNC-L in its response to the Notice to an interested party, by excluding a water-cooling system, by requiring a proven air system, integrated with the bearings and produced by the bearing manufacturers, [TRANSLATION] "the City essentially limited its choice to only two (2) specialized manufacturers: Kingsbury and Michell".

The Inspector General's investigation revealed that when SNC-L contacted Kingsbury and Michell, neither of these bearing manufacturers offered the cooling system chosen by the D.P.W., that is, a forced-air cooling system that was integrated with the bearings. The manufacturers were, however, ready to develop prototypes. The investigation also allowed the Inspector General to learn that before the launching of the call for tenders, the availability and the feasibility of these prototypes had not yet been confirmed.

[82] Xylem's response, dated September 14, 2015, to the Inspector General's request for the production of documents and information of July 15, 2015.
[83] Technical note 608307-8700-49EH-10003-01, dated July 23, 2012 and attached to the minutes of the meeting of the July 23, 2012, no. 608607-81AG010-31MC-I-0017_00.

As early as July 23, 2012, SNC-L is aware that Kingsbury is taking steps to validate the feasibility of its product proposal. The theoretical calculations are completed and the next step is the elaboration of a prototype to validate the practical feasibility. SNC-L also knows as of this moment that the product proposed by Kingsbury is new and does not have an operating history. The following excerpt from a technical note from July 23, 2012 confirms these facts:

> [TRANSLATION]
>
> Kingsbury does not want to develop a water/glycol cooling system. They propose instead to use a forced-convection cooling system with motorized fans installed at the end of the pump shaft. It is a new design by Kingsbury who worked with pump manufacturers in order to validate the feasibility of this system. At the beginning of June 2012, Kingsbury completed its theoretical calculations and will move to a physical model to validate the practical feasibility. As it is a new design, it is not proven and does not have an operating history. As well, for the moment, only Kingsbury proposes this design. [84]

Similar steps were also taken by SNC-L with Michell. At first, Michell proposed an ambient/natural-air cooling system that, in its opinion, would allow to be an equivalent for what was proposed by their competitor Kingsbury.

The following table summarizes, as of July 23, 2012, the characteristics of the products offered by the bearing manufacturers that were contacted. At the time, SNC-L was still waiting for the system proposed by Michell:

[TRANSLATION]

Brand/Design	Kingsbury/Michell	Renk, Orion, Waukesha
Combination of bearings	Radial and axial flat bearings combined	Radial and axial flat bearings separated
Design and manufacturing of bearings' casings	By Kingsbury or Michell	Casing designed and manufactured by OEM (*) pump (except RENK)
Recirculation system	Recirculation of pressurized oil using rotation of main shaft. No additional pump necessary.	Recirculation of oil by an external kit of oil recirculation. Designed and manufactured by others, under the responsibility of OEM pump.
Cooling System	Motorized fans placed at the end of pump (only Kingsbury, waiting on Michell)	External cooling (to be developed by others)
History of cooling system	New forced-air cooling system by Kingsbury	They do not develop cooling systems

[84] Technical note 608307-8700-49EH-10003-01, dated July 23, 2012 and attached to the minutes of the meeting of July 23, 2012, no. 608607-81AG010-31MC-I-0017_00.

Service life of bearings/rollers antifriction	In theory infinite	
Price received verbally on June 20, 2012	$150 000/pump, including the air cooling system and the casing	Price for journal bearings only around $30-40K per pump without the casing and approximately $10K for a lubrication and cooling system
Example of recirculation system	Internal. Cooling fan not shown (photo not reproduced)	External with cooling. Example of an air cooled system (photo not reproduced)

OEM: Original Equipment manufacturer [85]

**Table recreated for translation purposes

However, following more detailed calculations, Michell conceded that the ambient-air cooling system might not ensure a sufficient cooling of the bearings equivalent to a forced-air cooling system. The following excerpt written by SNC-L and dated August 3, 2012 is clear to this effect:

> [TRANSLATION]
>
> Michell, the closest competitor of Kingsbury, proposes a preliminary solution similar to Kingsbury but using a grooved fixed plate for the axial load instead of pad thrust bearings. According to this design, at the end of July 2012 Michell anticipated that using natural-convection to cool the bearings would be sufficient. However, more thorough calculations could show the need to use pad thrust bearings and a forced-convection cooling system, that is the equivalent of the system proposed by Kingsbury.
>
> Here is Michell's note from August 2 from Jeff Grey, sales engineer, regarding this subject:
>
> > "Grooved fixed plates are devices used for low cyclic loads. However, when the load is constant it produces a loss of heat which is higher than thrust pads. The existing natural-convection cooling design may not be sufficient. The design characteristics should be taken into account in the detailed design. An addition step would be to switch to using thrust pad bearings and/or to the design of a cooling fan. These two options will increase the cost."[86]

The Inspector General would like to point out at this juncture, that the remark by Michell is revealing and allows increased importance to be accorded to the requirement in the

[85] Technical note 608307-8700-49EH-10003-01, dated July 23, 2012 and attached to the minutes of the meeting of July 23, 2012, no. 608607-81AG010-31MC-I-0017_00.
[86] Technical note 608307-8700-49EH-10003-02, dated August 3, 2012.

specifications that the cooling system provided by the bearing manufacturer be a forced-air (or forced-convection) cooling system. Indeed, after having received this clarification from Michell, the D.P.W. required a forced-air cooling system in its technical specifications and made no mention of the possibility to provide an ambient-air cooling system. This is an indication that forced-air was a main characteristic which the D.P.W. did not want to deviate from at that time because of the importance of the efficient cooling of the oil.

An annotation to the report from the technical committee's meeting of September 12, 2012 indicates that [TRANSLATION] "Michell is behind schedule regarding the design when compared to Kingsbury"[87].

During his investigation, the Inspector General observed that both Michell and Kingsbury confirmed to SNC-L that they wanted to start working on a prototype and would need to perform validity testing, but, before the launch of the call for tenders, SNC-L never had confirmation from these firms that the proposed prototype was completed, feasible, and operational.

With regards to this, email exchanges show that before the launch of the call for tenders, SNC-L was still awaiting the verifications that Kingsbury and Michell were supposed to make regarding their prototypes.

First, on January 17, 2014, the engineer in charge of drafting the technical specifications wrote:

> "We are discussing with Kingsbury and Michell about this. Kingsbury will do a test bench to evaluate the air cooling possibility. They should start very soon. I am not sure about Michell yet. Both said that they don't see this as a problem. But yes, fins and fans will be added and the bottom plate will be modified for that purpose. Additionally, if it doesn't work out technically, the City will purchase regular bottom plate and use and external cooling system that (other bid). It would have been much simpler with rolling element bearings…"[88]

Then, only three (3) months before the launch of the call for tenders, email exchanges between a Kingsbury representative and the engineer from SNC-L responsible for drafting the technical specifications show that the bench tests had still not been performed. Indeed, on February 19, 2014, the engineer from SNC-L writes to the Kingsbury representative in order to obtain news regarding the advancement of the bench tests, to which the Kingsbury representative responds that the bench tests had to be delayed for several weeks. On February 27, 2014, the engineer from SNC-L still did not have any news concerning the bench tests, whereas the date for the launching of the call for tenders was approaching.

[87] Minutes of the meeting of September 5, 2012, no. 608307-81AG010-31MC-I-0008_00.
[88] Email dated January 17, 2014, written by the engineer in charge of drafting the technical specifications, sent to a Xylem representative (Product manager in the United States).

The engineer from SNC-L, interviewed by the Office of Inspector General, states that he could not certify that the Kingsbury had performed the bench tests.

4.3.4. Requirement to provide a proven cooling method

Another problem with the fact that Kingsbury and Michell were the referenced manufacturers in the technical specifications is the requirement that the cooling method be "proven"[89].

The examination of the aforementioned documents attests to the fact that the systems proposed by Kingsbury and Michell had no operating history. Therefore, even if Michell and Kingsbury confirmed the practical validity of their prototypes before the launching of the call for tenders, these products could not have met the requirement to provide a "proven" cooling method.

The head of section for the D.P.W. states that the D.P.W. had required a proven system because they did not want to be a test subject. Call for tenders 14-12725 targeted a large scale contract with a low recurrence of acquisition.

According to the different versions of the technical specifications obtained by the Office of Inspector General, it appears that the word "proven" was added in the version dated January 31, 2014. The engineer from SNC-L who drafted the technical specifications states that this term was added at the request of an engineer from the D.P.W. who was implicated in the elaboration of the specifications. Moreover, a technical note written by this same engineer from the D.P.W. confirmed the reasons behind the requirement:

> [TRANSLATION]
>
> "This system must include a proven lubrication and cooling system to ensure equipment quality and a reliability of operation equal or superior to the situation with the existing pumps […]."[90]

This engineer, interviewed by the Office of Inspector General, states that he himself made verifications with Kingsbury and Michell outside the steps taken by SNC-L. According to his version of the facts, Kingsbury had confirmed to him that they were able to provide a forced-air cooling system integrated with the bearings and that the product would be available at that time.

Confronted with the email exchanges between the representatives of Kingsbury and the engineer from SNC-L in charge of drafting the technical specifications, the engineer from the D.P.W. says he is surprised and does not have knowledge of this information. He

[89] Special technical conditions – Electricity – Electric motor – Section 16803, article 3 and Special technical conditions – Centrifugal pump – Section 11000, article 2.5.5.

[90] "Technical Note – Specific recommendations for high pressure pump sets U1-U14 for the Atwater potable water plant – February 25, 2014" prepared by the Engineer Division of the D.P.W., p. 7.

concedes, however, that the requirement of a “proven method” would be difficult to obtain in these circumstances.

Despite this, the requirement to provide a “proven method” was maintained. Why? The Inspector General does not have an answer for this question.

4.3.5. Decision to reference the manufacturers in the absence of a confirmation regarding the feasibility and availability of the prototypes

Having no assurance that the manufacturers, Kingsbury and Michell, were able to supply a product respecting the requirements of the specifications, SNC-L and the D.P.W. decided to reference them anyway.

In its response to the Notice of an interested party, SNC-L explains that Kingsbury had informed them that a new cooling system that met the requirements of the D.P.W. should be available in time for the call for tenders, but finally Kingsbury proposed an external system that did not respect the specifications.

The engineer from SNC-L responsible for drafting the technical specifications was questioned by the Office of Inspector General on this subject. He explained that until the very end of the preparations leading up to the launching of the call for tenders, he sincerely believed that Kingsbury would supply an integrated cooling system.

In the same way, he states that before launching the call for tenders, Michell had not shown him that they possessed an integrated forced-air system, but he believed that the company would be able to produce one.

For his part, the project manager from SNC-L explains that Kingsbury and Michell confirmed their ability to supply the bearings with an integrated forced-air cooling system. Considering the fact that all of the bidders who proposed Kingsbury’s bearing and cooling system were declared non-compliant, the project manager simply presumes that Kingsbury could not perfect its technology in time.

4.3.6. Knowledge by the City of the impossibility for the firms procuring the specifications to obtain a compliant product from the referenced manufacturers

The investigation of the Office of Inspector General also reveals that the City was made aware of the impossibility for the firms procuring the specifications to provide a cooling system meeting the requirements of the specifications during the tendering process.

On July 10, 2014, the Procurement Service issued addendum #8 to the call for tenders. In the section regarding the questions from the firms procuring the documents of the call for tenders, it appears as though the Procurement Service was informed that the

manufacturers referenced in the specifications were not able to meet the conditions set out in the technical specifications:

> **Question 6 :**
> **Subject :** Bearings
>
> Spec calls out for a manufacturer of bearing to design and supply bearing. Mitchell and Kingsbury are mentioned and have been notified via RFP. While working with both manufactures they don't seem to be ready to provide design and or pricing at this time. Would the City be willing to offer an extension to the tender so the bearing manufactures can complete their work? Or would the city accept alternate manufactures such as a pump manufactures own design?
>
> **Réponse 6 :**
> Les paliers doivent être conçus et fournis par un fabricant de paliers. [91]
>
> [TRANSLATION OF THE LAST SENTENCE ORIGINALLY IN FRENCH]
>
> **Answer 6:**
>
> The bearings must be designed and supplied by a manufacturer of bearings.

Despite the fact that the firms procuring the specifications proposed, as an alternative, that the pump manufacturers build the requested product themselves, the D.E.P maintained its requirement that the bearings be provided by a referenced manufacturer or an equivalent.

How can the position of the D.P.W., who maintained the requirement in spite of all opposition, be reconciled when the D.P.W. was informed **six (6) days before the opening of the bids** that the manufacturers of the bearings were incapable of supplying the equipment requested and that the D.P.W. did not have confirmation, before the launching of the call for tenders, of the feasibility and the availability of the prototypes from the bearing manufacturers referenced in the specifications?

Even more so considering the fact that the pump manufacturers offered to supply their own bearing system in order to meet the requirements in the technical specifications.

This stubbornness by the D.P.W. remains to this day incomprehensible.

4.4. Absence on the market of a product meeting the requirements in the specifications

In fact, what the investigation of the Office of Inspector General reveals is that above and beyond the referenced manufacturers, at the moment of the launching of the call for tenders, there did not exist a product on the market that was compliant with the specifications, that is, a "forced-convection" oil-cooling system, integrated with the bearings, manufactured by a bearing manufacturer and which method was "proven".

[91] Call for tenders 14-12725, addendum no. 8, July 10, 2014.

The bidders were therefore faced with an impossibility to provide the D.P.W. the requested equipment, and the contract arising from the call for tenders was, for all intents and purposes, impracticable as long as the requirements remained unchanged.

Moreover, on September 14, 2015, the successful bidder (Xylem), in its response to the Inspector General's first request for the production of documents, states that no product on the market corresponds to the requirements in the call for tenders:

> [TRANSLATION]
>
> No standard product exists on the market – that is, a product that is developed, commercialized, and proven – that uses a forced-convection cooling system for the oil lubricating the journal bearings (that is, forced-air), while using a fan powered by alternating voltage.[92]

This fact is also confirmed to the Office of Inspector General by the representatives of Ebara, Michell, and Kingsbury.

Already in 2012, the engineer from SNC-L, responsible for the drafting of the specifications, brought to the attention of the project manager of the D.P.W. the [TRANSLATION] "lack of competition for the manufacturing of a "package" from a journal bearing manufacturer that does not need any recirculation pump and that uses a natural-convection or forced-convection cooling system"[93].

However, the D.P.W. now states, in its response to the Notice to an interested party, that at the time of launching the call for tenders, no information permitted it to believe that a forced-air cooling system could not be installed on the casing of the journal bearings. This response is difficult to reconcile with all the exposed facts in this case.

What surprises the Inspector General is the lack of market studies and verifications prior to launching the call for tenders in the present case.

Call for tenders 14-12725 concerns a large scale contract, of a value close to twenty-five (25) million dollars. This fact, combined with the low recurrence of acquisition of the equipment targeted by the call for tenders would have necessitated that the D.E.P take the necessary measures to ensure that the required product was available and that the call for tenders generated a healthy competition amongst all the firms who were able to supply the product. This would have ensured that the D.P.W. would be able to obtain the best product for the best price, which is the objective of a tendering process.

Yet the numerous witnesses interviewed by the Office of Inspector General, originating from the Procurement Service, the D.P.W., the City's Legal Affairs Department, and

[92] Xylem's response, dated September 14, 2015, to the Inspector General's first request for the production of documents and information of July 15, 2015.

[93] Except of an email dated August 29, 2012, written by the engineer from SNC-L responsible for the drafting of the specifications, sent to the D.P.W.'s project manager, and attached to the minutes of the meeting of September 5, 2012, no. 608307-84AG010-31MC-I-0008-00.

SNC-L, reveal that no formal, serious, and documented market study was performed in this file.

The director of the D.P.W. confirmed that no market study exists, but states that he assured with his team that the requirements in the specifications did not limit the market. To this effect, he indicates that he received two (2) brochures dating from 2012 that indicate that two (2) different firms manufacture air cooling systems. He states that, to his knowledge, this is the only verification that was made.

Certain steps, which have already been described, were performed by SNC-L. However, the engineer responsible for the project from the D.P.W. explains that no market study aimed at discovering the market players, their products, and their capacity to produce was performed and that the D.P.W. satisfied itself with the aforementioned steps made with the bearing manufacturers.

Even worse, the head of division at the D.P.W. implicated in the file confessed that he does not really know what a market study is. As well, he is skeptical of the added value of a market study because SNC-L had confirmed that more than one player existed who could bid on the call for tenders.

The failure to take sufficient steps, or at the very least, take further steps with Kingsbury and Michell, had the effect that the technical specifications, as they were written, were not adapted to the market and impracticable.

It follows that the bidders were forced to choose the product that they considered to be the “least bad” because none could fully meet the requirements of the call for tenders documents, and this while the specifications were clear regarding the desire of the D.E.P to acquire a forced-air cooling system, as well as its desire to acquire an integrated cooling system.

4.5. Decision-making process

As has already been mentioned, following the opening of the bids on July 16, 2014, no bidder was found to be compliant following the first compliance analysis of the five (5) bidders who submitted a tender.

A special committee was then formed by the City to perform a second evaluation of the bids.

On November 27, 2014, a report on the bid analysis and on the recommendation for awarding the contract was issued by SNC-L. This report was aimed at identifying the bidders determined to be [TRANSLATION] “technically acceptable” and at making a recommendation for awarding the contract arising from the call for tenders. The report contains an analysis table dated September 19, 2014, which compares the bids received with respect to each element specified in the call for tenders.

At the end of the second compliance analysis, only the bid submitted by Xylem was declared compliant.

In its response to the Notice to an interested party, SNC-L indicates that Ebara, Sulzer, and KSB proposed a product offered by Kingsbury despite its [TRANSLATION] "apparent material non-compliance".

However, in the Inspector General's opinion, the product proposed by Michell and offered by the successful bidder, Xylem, presents an [TRANSLATION] "apparent material non-compliance" as well. In fact, the bid analysis shows that no bidder meets the requirements established in the technical specifications in the section on the oil-cooling system. These requirements, however, were considered as important by the D.P.W. at the moment of preparing the specifications and the specifications were clear regarding the desire of the D.P.W., as has been discussed in previous sections of this decision.

Xylem's bid proposed an ambient-air oil-cooling system that was integrated with the bearings and manufactured by Michell, whereas the bids by Ebara, Sulzer, and KSB offered to provide a forced-convection oil-cooling system that was external to the bearings and was manufactured by Kingsbury.

4.5.1. Awarding of the contract to a bidder not respecting the rules established in the call for tenders and in the absence of a sufficient justification

In its response to the Notice to an interested party, SNC-L concludes that Michell's cooling system meets the requirements to provide a proven air cooling system that is integrated with the bearings. However, SNC-L omits to specify that the requirement was not simply to furnish an air cooling system, but a forced-air one.

For its part, the D.P.W. invokes article 2.5.5 of the Special technical clauses – Centrifugal pump – Section 11000 and the fact that [TRANSLATION] "the main obligation of the bidder was to provide for a proven cooling method". However, here again, it must be stated that the article provides that [TRANSLATION] "the bearings manufacturer must provide for a proven method to cool the oil **by forced-convection by fans installed on the bearings' casings**". [Original text not in bold or underlined]

Regarding the bid submitted by Xylem, the report on the bid analysis and on the recommendation for awarding the contract, dated November 27, 2014, mentions the following at the end of the second compliance analysis:

[TRANSLATION]

"The bid by Solution d'eau Xylem is deemed to be "technically acceptable" and is recommended for the awarding of the contract."[94]

"No major non-compliance was identified in this bid. However, certain points were identified during the present analysis and need to be clarified. In order to ensure that these points could not cause a major non-compliance, a request for clarifications was sent to the bidder (see appendix B). Considering the satisfactory answers received from Solutions d'eau Xylem, this bidder is deemed to be technically compliant."[95]

In the analysis table found in the analysis report, under the items relating to the oil-cooling system, a simple "OK", without any other comment, is written next to Xylem's bid[96]:

[TRANSLATION]

		SUPPLIER NAME: Xylem	
4)	Forced-air fan		OK

**Table recreated for translation purposes

Also in the table, under [TRANSLATION] "Non-compliance at pump level", there is no mention of the fact that the oil-cooling system proposed uses ambient-air.

Regarding the conclusion on the totality of Xylem's bid, the box next to technical compliance is checked "YES".[97]

[94] SNC-L report on the bid analysis and on the recommendation for awarding the contract, November 27, 2014, p. 9.
[95] SNC-L report on the bid analysis and on the recommendation for awarding the contract, November 27, 2014, p. 11.
[96] SNC-L report on the bid analysis and on the recommendation for awarding the contract, November 27, 2014, p. 16.
[97] SNC-L report on the bid analysis and on the recommendation for awarding the contract, November 27, 2014, p. 18.

[TRANSLATION]

	SUPPLIER NAME: XYLEM	
Commercially acceptable	☑ YES See Procurement Service analysis	▫ NO
Technically acceptable (if required)	☑ YES	▫ NO

**Table recreated for translation purposes

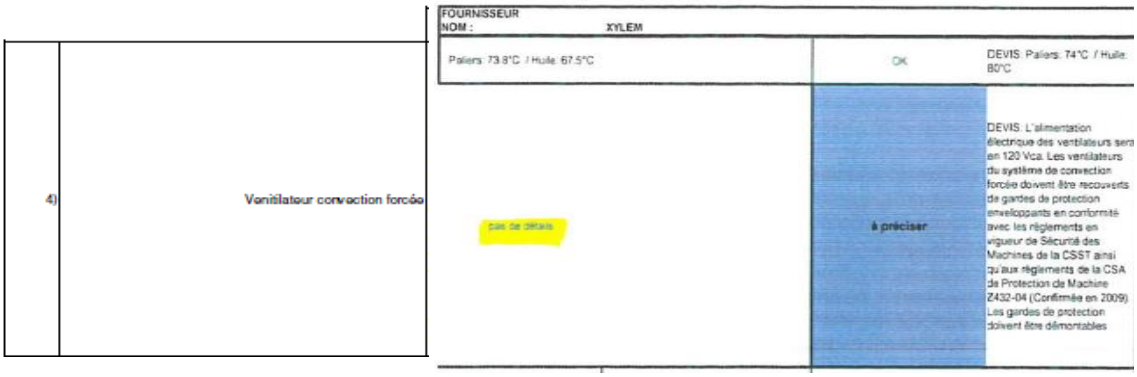
Among the points that needed to be clarified and that SNC-L identified as potentially leading to major non-conformities, it is not mentioned anywhere that the system proposed by Xylem is not a forced-air cooling system.

However, the investigation by the Office of Inspector General permitted the conclusion that the requirement for a forced-air cooling system was always identified as being a main characteristic of the pumps for the D.P.W., and that it was the only system identified in the technical specifications.

It is useful to take into consideration what the first version of the bid analysis table showed regarding the cooling system proposed by Xylem. It is the first version of the table that is available in the second compliance analysis.

The version of August 12, 2014, to which the Inspector General obtained access, indicates in blue, next to the bid submitted by Xylem, [TRANSLATION] “no details” and “to be clarified”[98]:

[98] August 12, 2014 version of SNC-L’s report on the bid analysis and on the recommendation for awarding the contract.



		FOURNISSEUR NOM : XYLEM		
4)	Ventilateur convection forcée	Paliers: 73.8°C / Huile: 67.5°C	OK	DEVIS: Paliers: 74°C / Huile: 80°C
		Cas de détails	à préciser	DEVIS: L'alimentation électrique des ventilateurs sera en 120 Vca. Les ventilateurs du système de convection forcée doivent être recouverts de gardes de protection enveloppants en conformité avec les règlements en vigueur de Sécurité des Machines de la CSST ainsi qu'aux règlements de la CSA de Protection de Machine Z432-04 (Confirmée en 2009) Les gardes de protection doivent être démontables

[Original text not highlighted]

Also in the August 12, 2014 version of the table, under [TRANSLATION] "Non-compliance at pump level", reference is made by SNC-L to a major element to be clarified, underlined in blue, which states the following:

> [TRANSLATION]
>
> "there are no details regarding Michell's bearings. It must be clarified whether Michell's bearings respect the specifications (section 11000, article 2.5.5)"[99]

According to the table's legend, the major elements to be clarified, indicated in blue, can lead to a [TRANSLATION] "possible non-compliance, but cannot be verified because of an ambiguity or a lack of information in the bid. It is recommended that the D.P.W. requests clarifications from the bidder before awarding the contract."

Regarding the conclusion on Xylem's bid, as a whole, in the August 12, 2014 version of the table, the "YES" box next to the technical compliance is checked, but with the following comments are written in red[100]:

[99] August 12, 2014 version of SNC-L report on the bid analysis and on the recommendation for awarding the contract.

[100] August 12, 2014 version of SNC-L report on the bid analysis and on the recommendation for awarding the contract.

[TRANSLATION]

	SUPPLIER NAME: XYLEM	
Commercially acceptable	☑ YES See Procurement Service analysis	▫ NO
Technically acceptable (if required)	☑ YES but Michell's bearings still need to be confirmed	▫ NO

**Table recreated for translation purposes

As will be discussed in more details in the following sub-section of the decision, there are no reports from the meetings of the special committee to indicate the verifications made in order to conclude that the points that needed to be specified and verified in Xylem's bid as of August 12, 2014, were actually clarified with satisfaction on the date of the final report, that is on November 27, 2014, when "OK" appears next to Xylem's proposed equipment.

In its response to the Notice to an interested party, the D.P.W. submits that the technical compliance cannot be based on the August 12, 2014 version of the table because it represents the first analysis and because the November 27, 2014 report is the final, official version, signed and sealed by three (3) engineers. However, the Inspector General is of the opinion that the document dated August 12, 2014 is relevant to his investigation because it represents an indication of the way the bid analysis evolved. Even more so when the D.P.W. states, in its response to the Notice, that the revised versions of the reports and analysis table constitutes the reports of the special committee's meetings.

The D.P.W. claims that the ambient-air cooling system proposed by Xylem was considered to be an equivalent to the forced-air cooling system required by the technical specifications. The D.P.W. adds that the system met the operational needs as well as the criteria regarding reliability, durability, and ease of maintenance. The D.P.W. explains that they chose the best product. It claims that article 26.1 of the Instructions to bidders allows the City to pass over any minor defects and that the bidders had the possibility to submit an equivalent product.

The documents to which the D.P.W. makes reference in order to justify the recognition of an equivalence given to Xylem were included in the initial bid submitted by Xylem. By the end of the first bid analysis, however, none of the bids received were deemed to be compliant and the question of equivalence does not seem to have been raised in order to make one of the bids compliant. Therefore, this means that it wasn't until none of the bids met with the requirements of the technical specifications, that the D.P.W. decided to modify the requirements, otherwise considered important, in order to allow an ambient-air cooling system to be supplied.

4.5.2. Lack of transparency

The Inspector General notes that there does not exist a report of the special committee's meetings which would allow an understanding of what gave rise to the differences between the first compliance analysis and the second, and within the second analysis, to the difference between the August 12, 2014 version of the table and the November 27, 2014 version.

Indeed, in its response to the Notice to an interested party, the D.P.W. transmitted to the Office of Inspector General the following table, which indicates that the first version of the bid analysis document is not available and therefore, no analysis is available before the creation of the special committee:

[TRANSLATION]

Bid analysis by SNC-Lavalin/ Coordination meeting				
# SNC-Lavalin document	Document Version	Date of Bid Analysis	Date of committee meeting	Date of version of table
608307-81AG010_02-51BS-I-002	1st version	NA		ND
Committee meeting			07-August-14	
608307-81AG010_02-51BS-I-002	2nd version	12-August-14		12-August-14
Committee meeting			21-August-14	
Committee meeting			04-Sept-14	
608307-81AG010_02-51BS-I-001_00	00	26-Sept-14		19-Sept-14
Committee meeting			17-oct-14	
608307-81AG010_02-51BS-I-001_01	01	20-oct-14		19-Sept-14
608307-81AG010_02-51BS-I-001_02	02	7-nov-14		19-Sept-14
608307-81AG010_02-51BS-I-001_03	03	27-nov-14		19-Sept-14
NA: Not applicable				
ND: Not available				

[101]

**Table recreated for translation purposes

[101] Table of the bid analysis completed by SNC-L and of the special committee's coordination meetings, transmitted by the D.P.W. in its response of April 12, 2016 to the Notice to an interested party sent by the Inspector General on March 17, 2016.

For the second analysis that took place, it appears that the special committee met on four (4) occasions: August 7, August 21, September 4 and October 17, 2014. In total, five (5) versions of the report and the bid analysis table exist. The D.P.W. claims, in its response to the Notice to an interested party, that these revised versions of the reports and analysis tables are the special committee's work reports.

However, these versions were consulted by the Office of Inspector General and cannot be considered as detailed reports of the meetings. They are indicative of the evolution of the analysis but reading these versions does not permit the reader to obtain knowledge of what was discussed by the special committee at the time when the call for tenders requirements were reviewed.

No detailed reports of the special committee's meetings, comparable to those of the technical committee during the design of the specifications, exist. No document allows the Inspector General to understand how and on what basis points that needed to be "specified" and "clarified" on August 12, 2014 regarding Xylem's bid were, during the second compliance analysis, answered satisfactorily by November 27, 2014, date of the final report, when the mention "OK" was placed next to the equipment proposed by Xylem.

In the Inspector General's opinion, this constitutes an important transparency problem which lends itself to criticism. The absence of detailed reports of the special committee's meetings created by the D.P.W. makes it so that no one is able to question its choices or the decisions it made.

These reports would have been even more useful because the Office of Inspector General is now faced with different versions of the role played by the special committee. Those are versions given several months after the fact, by members who sat on the special committee. According to some, over the course of the meetings, certain requirements of the call for tenders were scaled down and compliance requirements initially considered as major, became minor and therefore of less importance. Another witness states, however, that no requirements were scaled down and that members of the committee gave a new interpretation to the basic requirements in the call for tenders documents and to the bids submitted.

Without more information, the failure of the D.P.W. and of SNC-L to accept a bid that met the specification's requirement to provide a forced-air cooling system, a requirement presented as a main characteristic of the equipment, allows for speculation on the reasons justifying the decision to declare the bid submitted by Xylem as compliant.

In fact, what the Inspector General is able to see firsthand is that the D.P.W. and SNC-L satisfied themselves with an ambient-air cooling system proposed by Xylem because no bidder could be compliant to all the requirements in the call for tenders.

The remarks made by the head of division and the engineer responsible at the D.P.W. are revealing on this subject. Both admit to the Office of Inspector General that the contract had to be awarded to a bidder and that the D.P.W. wanted to avoid placing themselves in the same situation that the City was confronted with regarding the water reservoir in the Rosemont borough, that is, cancelling a call for tenders and starting the process over because none of the bidders was deemed to be compliant.

Is this what the major consideration was in recognizing the cooling system proposed by Xylem as equivalent to the cooling system required in the call for tenders? The Inspector General asks himself the question.

The Inspector General wishes to point out that in his decision, he does not contest the performance of the equipment proposed by Xylem. The firm, in its response to the Notice to an interested party, explains that its bid offers [TRANSLATION] "the best proven and standard product offered by the referenced brand Michell". It adds that the firm gave the Inspector General an email dated July 15, 2016 in which Michell confirmed that the ambient-air system was satisfactory regarding heat losses.

It remains that the product does not meet an important requirement stipulated in the call for tenders documents and that the D.P.W. did not document the discussions that led to the recognition of an equivalence for Xylem, especially in the context where a first bid analysis concluded that none of the analyzed bids were compliant.

The same answer applies to SNC-L who reiterates in its response to the Notice to an interested party, that the D.P.W. opted for the system that best met the requirements of the project and that the D.P.W. can exercise a certain discretion in the evaluation of the compliance of the bids and accept a bid that is not completely compliant with the specifications.

4.5.3. Impact of the decision to award the contract to Xylem on the equality of the bidders

The Inspector General reminds that every client must be conscious of the fact that each criteria of a technical specification in a call for tenders has an impact on the market.

In the absence of complete verifications of the availability of the product required from the referenced suppliers and a formal, serious, and documented market study, the tendering process that took place in this case did not allow the D.P.W. to obtain the best product at the best price.

It is opportune to add that, during the tendering period, Montréal's Procurement Service was informed by the firms who took possession of the specifications, that the manufacturers referenced in the specifications were not able to meet the requirements in these documents. Despite this, the requirements were maintained.

The fact that a forced-air cooling system was required, while nothing on the market met all of the requirements and that today, according to the D.P.W., it seems as though an integrated ambient-air system is sufficient, is susceptible to have unduly limited the market and the competition. Only one (1) firm proposed an ambient-air system whereas five (5) submitted bids and twenty (20) took possession of the specifications. Who knows what price the D.P.W. would have obtained had the specifications not imposed forced-air as the cooling method?

The technical specifications are clear and unambiguous regarding the desire of the D.P.W. to acquire a forced-air cooling system. It is only once the tendering period was completed and the bids opened that the requirements of the call for tenders were reviewed and re-evaluated.

In these circumstances, to allow a firm who proposed an ambient-air system to obtain the contract and to recognize an equivalence in favour of the firm is susceptible to breach the equality between the bidders by unduly advantaging the winner of the contract to the detriment of the other bidders.

The Inspector General reminds that article 14.3 of the Instructions to bidders of the call for tenders stipulates that the [TRANSLATION] "the notion of an equivalence does not have the effect of modifying the general parameters of the needs expressed in the call for tenders and procuring undue advantages for one or another of the bidders to the detriment of the entire market".

4.5.4. Incomplete and incorrect information in the file

One last element attracted the attention of the Inspector General during the course of his investigation and warrants being addressed: information in the D.P.W.'s file and the information presented to the City's decision-making bodies.

First, the report on the bid analysis and on the recommendation for awarding the contract, dated November 27, 2014, reveals the following comments:

> [TRANSLATION]
>
> "Following a review of the bids above (see section 7.0), the requests for clarifications was transmitted by Montréal's Directorate of Potable Water (D.P.W.) to each of the bidders who submitted an offer. […]
>
> (…)
>
> The answers obtained from the bidder Solutions d'eau Xylem to the requests for technical clarifications are satisfactory and this bid is considered as final on the date of the present evaluation."[102]

This excerpt refers to the letters dated September 11 and September 25, 2014 sent by the D.P.W.

The letter dated September 11, 2014, sent only to Xylem, aimed at obtaining certain details and confirmations for the analysis of the bid on certain elements. The letter dated September 25, 2014, was sent to all of the bidders in order to invite them to withdraw from

[102] SNC-L report on the bid analysis and on the recommendation for awarding the contract, November 27, 2014, p. 7.

their bids certain conditions regarding the requirements. This was done to avoid all negotiation and to obtain from the bidders a commitment to respect the requirements of the call for tenders without alterations or modifications of the price.

The report on the bid analysis and on the recommendation for awarding the contract shows the following regarding the bid submitted by Ebara, the lowest priced bid among all the bids received:

> [TRANSLATION]
>
> "In its letter of clarification, the bidder states that it complies with the intentions of the specifications and intends to respect all the requirements in the call for tenders. However, the statement of the bidder does not clearly address the non-compliance of the equipment in its bid at points 1) and 2) above hence it is impossible to lift these (non-compliance). The bid is therefore deemed technically non-compliant."[103]

The D.P.W. explains in its response to the Notice to an interested party that no clarification was needed from Ebara because the bid documents were clear to the effect that the cooling system that was proposed needed an external element.

It is therefore surprising to read that Ebara is blamed for not having clearly addressed the non-compliant items regarding equipment proposed, at points 1) and 2), because this was not at all targeted by the questions asked by the D.P.W. in its letter dated September 25, 2014 and Ebara never had a chance to give a response to these points.

The only letter issued by the D.P.W. to obtain details and clarifications on non-compliant equipment was the letter dated September 11, 2014 which was sent only to Xylem. Only Xylem was given the opportunity to bring certain clarifications and details to its bid. SNC-L, in its response to the Notice to an interested party, specifies that it is the D.P.W. who took the initiative to send the letter dated on September 11, 2014, when the final version of the technical report had not yet been issued.

When interviewed by the Office of Inspector General, the procurement officer responsible for the file from Montréal's Procurement Service and the director of the D.P.W. were surprised to learn that only Xylem had received the letter of September 11. What is surprising here is that the director of the D.P.W. was placed in carbon copy of the letter sent to Xylem on September 11, 2014. Interviewed by the Office of Inspector General regarding this subject, the head of section for the D.P.W. who had signed the letter evokes that the reason why the letter was only sent to Xylem was because, at that time, the four (4) other bidders had been deemed as non-compliant. Yet, according to other witnesses interviewed, the situation was far from being clear at that time.

The Office of Inspector General questioned a witness working at Montréal's Legal Affairs Department who was involved in the file. This person explained that the City had the right

[103] SNC-L report on the bid analysis and on the recommendation for awarding the contract, November 27, 2014, p. 10.

to request details which were necessary in order to properly comprehend the bid. He states, however, that he recommended to the administrators to write to all the bidders, but that they responded that the others were already, at that moment, non-compliant.

In a contrary fashion, two (2) weeks later, the letter of September 25, 2014 was sent to all of the bidders.

Moreover, in its response to the Notice to an interested party, the D.P.W. states that [TRANSLATION] as long as the final recommendation report is not issued, the analysis continues and no disqualification is official".

Beyond the question of knowing whether the September 11, 2014 letter should have been sent to all the bidders, it remains that the report on the bid analysis and on the recommendation for awarding the contract contains incorrect information: it states that all of the bidders had the opportunity to present clarifications of their bids when this is not the case, and it even reproaches Ebara to have not answered in a satisfactory manner to the points raised, when this was not the case either.

The division head of the D.P.W. sent the bid analysis and recommendation report to the head of division at the City's Directorate general on November 13, 2014 and the report was then sent to other members of the Directorate general.

In the Inspector General's opinion, the file in its entirety seems to leave out certain information. Even worse, the information provided to the decision-making bodies is sometimes incomplete or incorrect.

The PowerPoint sent to Montréal's Executive Committee as part of the presentation made on December 10, 2014 by the director of the D.P.W. does not mention anywhere that two (2) compliance analyses were conducted, that no bid was deemed as compliant following the first analysis, that a special committee had to be created in order to take certain steps for the purpose of rendering one of the bids received compliant, and that an equivalence was recognized for Xylem.

Instead, concerning the presentation of the bearings' cooling systems, the following slide presented to Montréal's Executive Committee leads to the belief that the requirements in the specifications were to the effect that the cooling system can be either a natural-convection system or a forced-convection one, whereas this is not the case:

[TRANSLATION]

Type of cooling system	Remarks
Water	The water used is discharged into the sewer which contravenes the Regulation on the usage of water, in force since 2013.
Oil closed circuit -oil-glycol-air -oil-air (photo 1)	These systems require several components, these components generating more maintenance. Requires oil reservoirs in order to function (requires additional space)
Convection -Natural air (photo 2) -Forced air **Requirement of the specifications**	Integrated system. Uses only one controller Minimal maintenance

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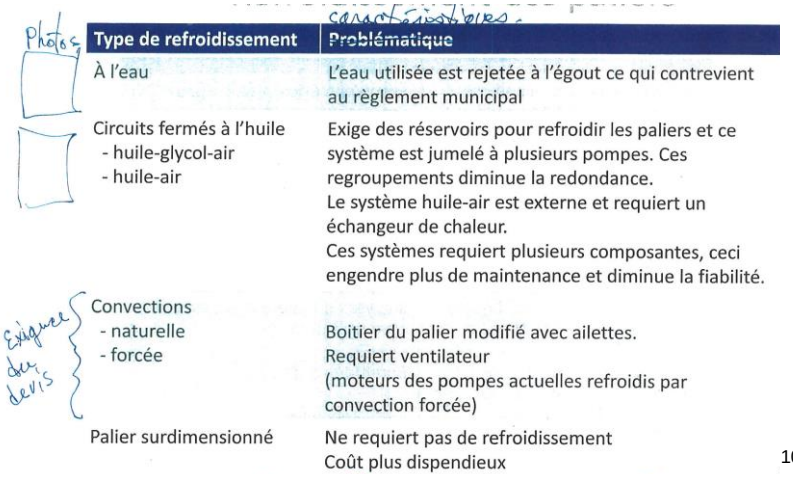
**Table recreated for translation purposes

A working version of this presentation, annotated by a representative of Montréal's engineering division on December 2, 2014, confirms the Inspector General's interpretation of the slide. Indeed, the mention [TRANSLATION] "Requirement of the specifications" is written in French by hand beside the two (2) types of convection, leading to the belief that the two (2) were requirements in the specifications:



105

Moreover, in its response to the Notice to an interested party, the D.P.W. did not deny or contest this interpretation.

[104] D.P.W.'s PowerPoint presentation to Montréal's Executive Committee, [TRANSLATION] "Awarding a contract for the provision of 14 pump sets for Atwater's potable water plant – Project REQUP1", December 10, 2014, slide 9.

[105] Working version of the D.P.W.'s PowerPoint presentation to Montréal's Executive Committee, [TRANSLATION] "Awarding a contract for the provision of 14 pump sets for Atwater's potable water plant – Project REQUP1", December 2, 2014, p. 10.

The whole presentation suggests that the bid submitted by Xylem offers exactly what the specifications demand, without indicating that an equivalence had been granted:

> [TRANSLATION]
>
> The cooling system requested in the specifications was available for all the bidders and only Xylem meets the technical requirements listed in the call for tenders documents.[106]

In the same way, the information that appears in the decision-making summary of the file (no. 1146603003) tends to mislead the decision-making bodies. It is indicated that the technical specifications require an air-convection cooling system without specifying that it is forced-air:

> [TRANSLATION]
>
> The specifications require therefore a bearing cooling system by air-convection, considering that this type of system is integrated and requires less maintenance and less space. Despite the fact that this type of system was available for all the bidders, the firms Ben Pro/Ebara, Pompes Sulzer Canada inc., and KSB Aktiengesellschaft did not respect this requirement.[107]

In these circumstances, the Inspector General is of the opinion that the decision-making bodies were not able to make an informed decision when awarding the contract to Xylem.

5. Recap of the facts in the file and conclusions of the Inspector General

The following facts and elements were revealed during the course of the Inspector General's investigation:

- The call for tenders 14-12725 sought to award a contract which would allow the City to acquire new pumps in order to replace the pumps at the Atwater potable water production plant.
- It is a contract for a substantial amount (close to $25 million) and the equipment targeted have the characteristic of having a low recurrence of acquisition.

[106] D.P.W.'s PowerPoint presentation to Montréal's Executive Committee, [TRANSLATION] "Awarding a contract for the provision of 14 pump sets for Atwater's potable water plant – Project REQUP1", December 10, 2014, slide 12.
[107] Decision-making summary no 1146603003.

- During the publication period of the call for tenders, from May 28 to July 16, 2014, twenty (20) firms took possession of the specifications and five (5) of these firms submitted a bid.
- The contract arising from call for tenders 14-12725 was awarded to Xylem by Montréal's Agglomeration Council in January 2015, when Xylem was not the lowest bidder in terms of price.

Compliance Analyses

- In total, two (2) compliance analyses were conducted by SNC-L, the firm mandated by the City for the drafting of the specifications and the surveillance of the work.
- The first analysis resulted in none of the five (5) bidders being declared as compliant, as is confirmed by the witnesses interviewed by the Office of Inspector General.
- No document exists attesting to the results of the first bid compliance analysis.
- A special committee comprised of representatives from the City and from SNC-L was created.
- There exists no detailed report from the meetings of the special committee allowing to understand what led to the differences between the first bid analysis and the second. As well, there exist no reports attesting to the discussions that took place when the criteria in the call for tenders were reviewed by the special committee.
- The preliminary versions of the bid analysis table reflect the evolution of the second bid analysis, but cannot be considered as being a detailed report of the meeting.
- After the second bid compliance analysis, only Xylem was deemed to be compliant.
- Witnesses interviewed explained that the contract had to be awarded to one of the bidders and that the D.P.W. wanted to avoid cancelling the call for tenders and reliving a recent situation which they encountered at the potable water reservoir in the Rosemont borough.

The absence of a reference letter in Xylem's bid attesting to the reliability of the pumps

- Call for tenders 14-12725 stipulates in article 8 of the Specific administrative conditions, basic eligibility requirements that must be respected in order for a firm to be able to submit a bid.
- Among these requirements, it is required, in a text that is underlined and in bold characters, that the bidders provide a signed letter issued by the owner of the bidder's pumps, attesting to their reliability.

- The question of the reliability of the pumps appeared, throughout the course of the call for tenders, as an important element and even as an essential element for the D.P.W.
- Xylem did not provide this letter in its bid documents
- The report on the bid analysis and on the recommendation for awarding the contract, prepared by SNC-L, and dated November 27, 2014, concludes, on this point, that Xylem's bid contains a minor non-compliance.
- The decision to qualify the absence of the letter as a minor non-compliance was made jointly by the D.P.W. and SNC-L.
- In its response of September 14, 2015 to the Inspector General's first request for the production of documents and information on July 15, 2015, Xylem states that it does not know the reason why the City does not have a copy of the letter. Xylem gives the Inspector General a letter dated June 10, 2014 and presents it as being the letter provided to the City in its bid documents.
- Upon further investigation, it appears that this letter was signed and issued by the owner of Xylem's pumps on September 11, 2015, that is, a few days before the expiration of the delay given by the Inspector General to respond to his request for documents and information.

<u>The attempt by Xylem to mislead the Inspector General</u>

- The steps made by the Inspector General in order to corroborate information revealed that the representative from Xylem who was in charge of obtaining the letter attesting to the reliability of the pumps in call for tenders 14-12725, did not contact the signatory and issuer of the letter until September 2015, that is, after the reception of the production request made by the Inspector General.
- This same Xylem representative obtained, during his exchanges, three (3) versions of the letter: a letter dated June 10, 2014, a letter dated September 11, 2015, and a third letter dated September 10, 2015.
- All of these letters were signed and issued on September 10 and September 11, 2015, and therefore none of them was provided to the City in Xylem's bid documents.
- Yet in its response to the Inspector General's first request for the production of documents, Xylem transmitted a letter predated to June 10, 2014 as being a copy of the letter the firm provided the City in its bid.
- The date of June 10, 2014 in the header of the letter leads to the belief that the letter was signed and issued during the tendering period of the call for tenders.
- The Inspector General was misled during the course of his investigation.

- It is thanks to the thorough verifications he made that the Inspector General obtained copies of the other versions of the letter and that the attempt by Xylem to mislead the Inspector General was brought to light.
- In its response on April 13, 2016 to the Notice to an interested party sent by the Inspector General on March 17, 2016, Xylem finally admits that no letter attesting to the reliability of the pumps was given with its bid documents.

The requirements of the technical specifications regarding the oil-cooling system

- The technical specifications of call for tenders 14-12725 require that the cooling system for the oil that lubricates the bearings be designed by a bearing manufacturer.
- It also requires a proven method of forced-convection cooling by fans installed on the bearings' casings.
- The specifications stipulated that no external cooling system will be accepted.
- The establishment of the requirements in the call for tenders was a collaborative effort between SNC-L and the D.P.W.
- The requirements to provide a forced-air cooling system integrated with the bearings appears, throughout the elaboration of the specifications, as being important and a main characteristic of the equipment that the D.P.W. desired to acquire and to which it did not want to derogate.
- Two (2) bearing manufacturers were referenced in the specifications: Michell and Kingsbury.
- Neither of these manufacturers offered bearings equipped with a cooling system corresponding to the requirements in the specifications. In fact, no product on the market met these requirements.
- At the time when call for tenders 14-12725 was launched, SNC-L had not completed its efforts aimed at verifying that the cooling system required in the specifications was available from the referenced manufacturers.
- In fact, during the period for the elaboration of the specifications, SNC-L was in discussions with Kingsbury and Michell in order for prototypes that met the requirements be developed. When the call for tenders was launched, SNC-L still had not received confirmation of the feasibility, the operability, and of the availability of the prototypes.
- During the tendering publication period, Montréal's Procurement Service was informed of the impossibility for the firms procuring the specifications to obtain a cooling system from Michell and Kingsbury that met the requirements in the call for tenders.

- Despite this fact, this impracticable requirement was maintained.
- No formal, serious, and documented market study was conducted prior to the launching of the call for tenders, despite the magnitude of the contract and the low recurrence of acquisition of the equipment targeted.
- No bidder was able to respect the requirements established in the technical specifications in the chapter on cooling systems, considered important for the D.P.W.
- The contract was awarded to Xylem, when in its bid, the firm proposed an ambient-air convection cooling system from Michell and not a forced-air convection cooling system.
- At the start of second analysis, the ambient-air cooling system proposed by Xylem was indicated as needing to be clarified and confirmed with regards to the respect of the requirements in the technical specifications. At the end of the analysis, the mention “OK” was placed beside Xylem’s proposed cooling system.
- The ambient-air cooling system was deemed to be equivalent to the forced-air cooling system required in the call for tenders.
- Incomplete and incorrect information was found in the file and was presented to the decision-making bodies, in particular regarding the opportunity that the bidders had to provide clarifications regarding their bid, but also in the chapter of what was required by the technical specifications regarding cooling system of the oil.

Following these observations, the Inspector General concludes the following:

1. The process for the awarding of the contract to Xylem was done in contravention of the fundamental principles and rules regulating the awarding of contracts and ensuring the equality of bidders as well as the integrity of the tender process.
2. The Inspector General has the mandate to oversee contracting processes and the carrying out of contracts by the City or by a legal person, to recommend to decision-making bodies any measure aimed at preventing a breach of integrity and to foster compliance with the applicable legal provisions in the making of contracts by the City or the carrying out of such contracts.
3. Xylem’s bid should have been declared ineligible and the contract could not have been awarded to them because the bid submitted did not meet the formalities on an essential element indicated in the call for tenders.

   3.1. The failure to respect an eligibility requirement stipulated in a call for tenders must lead to the rejection of the bid and cannot be treated as a non-compliance.

   3.2. The client cannot exercise its discretion in this regard because this would go against the principle of the equality of bidders. This would also procure a

competitive advantage to one bidder to the detriment of bidders who responded in a satisfactory manner to the criteria, but also to the detriment of the firms who took possession of the specifications but did not bid because they believed that they were unable to meet the criteria.

3.3. It would be unreasonable to allow a client to disregard eligibility requirements they themselves established and accept a bid that did not meet the requirements.

3.4. The objective is to protect the integrity and the commercial efficiency of the tendering mechanism and the contractual process.

4. The file was not transparent in the way that the requirements of the call for tenders were reviewed by the special committee and the way in which the equivalence was recognized in favour of Xylem for the ambient-air cooling system which they proposed.

5. In the absence of detailed reports from the special committee's meetings attesting to the verifications that were made and the decisions which were taken, it is impossible to question and to verify the final choice to award the contract to Xylem.

6. The D.P.W. and SNC-L satisfied themselves with the ambient-air cooling system proposed by Xylem because none of the bidders were compliant to all the requirements in the specifications regarding the cooling and the D.P.W. did not want to risk cancelling the call for tenders and restarting the process.

7. In the absence of complete verifications regarding the availability of the required product from the referenced manufacturers and the absence of a formal, serious and documented market study, the technical specifications were ill-adapted to the market and impracticable. The tendering process that took place did not allow for the D.P.W. to obtain the best product at the best price.

8. The technical specifications were clear and unambiguous regarding the desire of the D.P.W. to acquire a forced-air cooling system for the oil. It is only when the period for submitting bids is completed and all the bids opened that the requirements of the call for tenders were reviewed and re-evaluated.

9. To have required a forced-air cooling system, while an ambient-air system was sufficient, is susceptible to have unduly limited the market and the competition.

10. To allow a firm, in the present circumstances, who proposed an ambient-air system, to obtain the contract and to recognize an equivalence in its favour is susceptible to have breached the equality of the bidders and to have created an unfair advantage for the successful bidder.

The thorough investigation conducted by the Office of Inspector General reveals that the City awarded a contract to the firm Xylem while its bid did not respect several requirements specified in the call for tenders.

The D.P.W. did not respond in the expected manner to Xylem's failure to respect one of the basic eligibility requirements for submitting a bid in response to the call for tenders. This requirement asked the bidders to provide a signed letter issued by one of their clients attesting to the reliability of the pumps.

The failure to provide such a letter, qualified as a [TRANSLATION] "minor non-compliance" by the D.P.W. and SNC-L, goes against the principle of the equality of bidders and procured an unfair competitive advantage to the successful bidder to the detriment of bidders who responded satisfactorily to the requirement and the firms who took possession of the specifications who did not bid believing that were not able to meet the requirement.

In addition, the Inspector General was misled by Xylem during the course of his investigation with the goal of having him believe that the firm provided the letter attesting to the reliability of the pumps in its bid documents submitted to the City.

Thanks to thorough verifications by the Inspector General, Xylem's attempt to mislead was brought to light.

The Inspector General is of the opinion that the conditions set out in section 57.1.10 of Montréal's City Charter are established regarding the failure to respect basic eligibility requirements in order to bid, requirements stipulated in the call for tenders. Because of the gravity of the failures, the Inspector General has no choice but to rescind the contract awarded following call for tenders 14-12725.

Furthermore, the investigation shows that the D.P.W. waived a technical requirement deemed to be major throughout the elaboration of the specifications process by awarding the contract to Xylem who proposed an ambient-air cooling system for the oil whereas the specifications clearly required a forced-air cooling system for the oil. In fact, after no bidder was deemed to be compliant following the first compliance analysis, the D.P.W. and SNC-L reviewed and re-evaluated certain requirements of the technical specifications, requirements clearly established in the call for tenders, and this once the period for submitting bids was closed and once the bids had been opened. The D.P.W. and SNC-L granted an equivalence to Xylem and satisfied themselves with the ambient-air system because the D.P.W. did not want to risk cancelling a call for tenders and restarting the process by having no compliant bidder.

The process that took place breaches the fundamental principles and rules regulating the contract awarding process and ensuring the equality of bidders and the integrity of the process.

FOR THESE REASONS,

The Inspector General

> **RESCINDS** the contract for the acquisition of fourteen (14) pumps sets awarded to Solutions d'eau Xylem, a division of Société Xylem

Canada, by Montréal's Agglomeration Council on January 29, 2015, following call for tenders 14-12725, in accordance with the resolution CG15 0034;

TRANSMITS, in accordance with section 57.1.10 of Montréal's City Charter, a copy of this decision to the mayor of the City, and to the clerk to be sent by the latter to the city council involved, in this instance Montréal's Agglomeration Council.

The Inspector General,

Denis Gallant, Ad. E.

ORIGINAL COPY SIGNED