January 1
to June 30, 2021

2021 Mid-Year Report

Submitted to City Council and the Agglomeration Council
For the year ended June 30, 2021
Section 57.1.23 of the Charter of Ville de Montréal, metropolis of Québec

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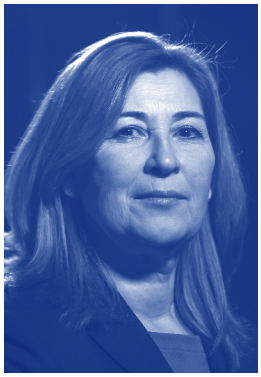
The mandate of the Office of Inspector General of Ville de Montréal is to oversee the contracting process and the performance of the contracts of Ville de Montréal or a legal person related to it in order to prevent breaches of integrity and promote compliance with the legal provisions and requirements related to contract award and performance.

Message from the Inspector General

Madame la mairesse Valérie Plante, membres du conseil municipal et du conseil d'agglomération et citoyennes et citoyens de la Ville de Montréal,



L'inspectrice générale,
Me Brigitte Bishop

Je vous soumets aujourd'hui le rapport de mi-année 2021 du Bureau de l'inspecteur général.

Vous pourrez y lire les diverses interventions effectuées par les membres du Bureau de l'inspecteur général au cours des six derniers mois. Du nombre, force est de constater que plus de trois ans après l'adoption du projet de loi 155, la mise en application des devis de performance demeure une pratique qui n'est pas entièrement intégrée au sein de la Ville de Montréal ou des firmes externes qu'elle mandate.

Les membres de la Commission permanente de l'inspecteur général en arrivent non seulement aux mêmes constats, mais nous apportent une piste de solution en recommandant qu'une formation soit donnée aux personnes responsables de la rédaction de tels devis. En collaboration avec le Bureau du contrôleur général, nous offrirons donc une formation sur la rédaction d'un devis de performance. Entre-temps, nous invitons toute personne impliquée dans le processus d'appel d'offres de la Ville de Montréal à lire attentivement les pages qui sont consacrées à ce sujet dans le présent rapport. Leur contenu contribuera à les aider, lors de la rédaction de leurs futurs appels d'offres, en identifiant certaines balises à respecter.

En parallèle à tout l'important travail préventif réalisé par nos équipes sur le terrain, le Bureau de l'inspecteur général continue de mener des enquêtes en profondeur sur divers manquements dans la gestion contractuelle. Nos interventions ne se limitent pas seulement aux contrats des services centraux et des arrondissements. Elles s'étendent également aux organisations qui sont liées à la Ville de Montréal, comme en témoignent, dans les pages suivantes, les résultats de notre enquête sur le dépassement des coûts dans l'acquisition des biens et services de la Société de transport de Montréal.

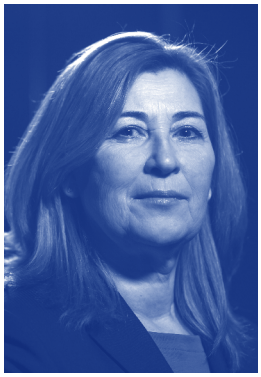
Lorsque les constats effectués en cours d'enquête sont suffisamment graves et font l'objet d'un rapport public, les recommandations qui en découlent visent à participer à l'amélioration continue du service public par l'adoption de pratiques exemplaires au sein de l'appareil municipal. Je me dois de souligner l'ouverture d'esprit des fonctionnaires municipaux lors de discussions préalables à ce sujet et qui illustre leur adhésion partagée à ces idéaux.

En terminant, je souhaite rappeler notre engagement à maintenir une présence constante à toutes les étapes de l'octroi des contrats publics, de la préparation de l'appel d'offres jusqu'à la fin de son exécution. La préservation de l'intégrité contractuelle requiert que cette vigilance soit constamment renouvelée et reçoive l'engagement de tout un chacun. À ce titre, je remercie chaleureusement toutes mes équipes pour le professionnalisme, la rigueur et le dynamisme qu'elles dévouent à la poursuite de cet objectif au bénéfice de la population montréalaise.

L'inspectrice générale,

Me Brigitte Bishop
ORIGINAL SIGNÉ

Mayor Valérie Plante, Members of the City Council and the Agglomeration Council, and citizens of Ville de Montréal,



The Inspector General, Brigitte Bishop

Today, I would like to submit to you the 2021 Mid-Year Report of the Office of Inspector General.

It contains the various actions carried out by members of the Office of Inspector General over the past six months. More than three years after the adoption of Bill 155, the implementation of performance specifications remains a practice that is not fully integrated within Ville de Montréal or the outside firms it mandates.

The members of the Standing Committee on the Inspector General have not only come to the same conclusions, but they are also proposing a solution by recommending that training be given to those responsible for drafting such specifications. Together with the Office of Controller General, we will therefore be providing training on the drafting of performance specifications. In the meantime, we invite anyone involved in Ville de Montréal's tendering process to carefully read the pages on this topic found in this report, which will help them, when drafting their future calls for tenders, by identifying certain guidelines to be observed.

Along with all the important preventive work done by our field teams, the Office of Inspector General continues to conduct in-depth investigations into various breaches related to contract management.

The action we take is not limited to contracts for central services and boroughs, but also extends to organizations related to Ville de Montréal, as evidenced herein by the results of our investigation into cost overruns in the acquisition of goods and services by the Société de transport de Montréal.

When our findings during the course of investigations are sufficiently serious and involve a public report, the resulting recommendations are intended to help continuously improve public service through the adoption of best practices at the municipal level. I would like to mention the openness of municipal officials during previous discussions on this issue, which reflects their shared adherence to these ideals.

In closing, I would like to reiterate our commitment to maintaining our ongoing involvement at all stages of the public contract award process, from preparing calls for tenders to the end of their execution. In order to maintain contractual integrity, such vigilance must be consistently renewed and adopted by everyone. In this respect, I would like to thank all my teams for their professionalism, diligence and enthusiasm in the pursuit of this objective for the benefit of all Montrealers.

The Inspector General,

Brigitte Bishop

ORIGINAL SIGNED

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Performance specifications

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- Required practices

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Performance specifications

01

The Office of Inspector General has noted that there is still a great deal of confusion among those involved in preparing performance specifications under section 573.1.0.14 of the *Cities and Towns Act* more than three years after the legislation came into force. The following is a reminder of the inherent obligations arising from the legislation that should be known and enforced in relation to municipal calls for tenders.

In addition to Ville de Montréal, all organizations subject to the *Cities and Towns Act or the Act Respecting Public Transit Authorities* must draft their technical specifications in terms of performance or functional requirements:

"If, in any of the situations mentioned in the second paragraph, a municipality requires certain technical specifications, it must describe those specifications in terms of performance or functional requirements rather than in terms of descriptive characteristics. If unable to do so, the municipality must provide that any description containing what is equivalent to descriptive characteristics will be considered compliant, and may define how equivalency to such characteristics will be evaluated.

The situations concerned are those

1. *where, in a call for tenders under section 573 or under a regulation made under section 573.3.0.1 or 573.3.0.2, or in any document referred to in such a call for tenders, a municipality requires technical specifications with regard to goods, services or work;*

2. *where, under section 573.1.0.1 or 573.1.0.1.1, a municipality evaluates tenders submitted after a call for tenders under section 573 or under a regulation made under section 573.3.0.1 or 573.3.0.2 on the basis of the technical specifications of the goods, services or work; and*

3. *where, under sections 573.1.0.2 and 573.1.0.3, a municipality establishes a qualification, certification or registration process that takes into account the technical specifications of the goods, services or work.*

Technical specifications of goods, services or work include, in particular, their physical or, as applicable, professional characteristics and attributes."[1]

The use of descriptive specifications is now an exception to the rule that first requires the use of performance specifications in a call for tenders.

The use of descriptive characteristics is therefore an exception that must be justified by the fact that there is no sufficiently clear, precise or intelligible way of designing performance specifications. This means that the use of descriptive specifications is prohibited without first attempting to draw up performance specifications.

[1] *Cities and Towns Act*, CQLR, c. C-19, sect. 573.1.0.14. See also *Act Respecting Public Transit Authorities*, CQLR, c. S-30.01, sect. 99.2.

ENFORCEMENT CHALLENGES

Since Bill 155 came into force in 2018, the Office of Inspector General has intervened on several occasions in various calls for tenders to correct regulatory breaches, including two investigations that led to a public report being issued.

The most recent report on this subject, published in September 2020[2], revealed breaches by engineering firms responsible for designing the generator set specifications at the Office municipal d'habitation de Montréal. Among the breaches that were observed, the use of descriptive specifications was still a common practice and engineers were contracting a supplier to draft the specifications.

The Office of Inspector General also intervened with other legal entities related to Ville de Montréal as well as with municipal central services for calls for tenders on the acquisition and installation of a generator set. In two cases, the specifications were descriptive and the managers were unable to prove that performance specifications could not be used. They subsequently amended their specifications via an addendum to comply with the legislation.

Furthermore, the Office of Inspector General intervened in a call for tenders on the acquisition of a motorized vehicle at Ville de Montréal. The specifications were so descriptive as to impose a very specific size (1.54 metres by 3.76 metres, for example), rather than requiring a minimum and maximum size to be met for the item. It is still possible to require a very specific size for any type of item in a call for tenders, but this requirement must be justified by the organization's needs and must have been established following a careful and objective assessment.

REQUIRED PRACTICES

There are still few publications and documentation[3] in Québec that specifically explain what performance specifications should contain. To support municipal employees in drafting performance specifications, the Office of Inspector General and the Ville de Montréal Comptroller General intend to provide training in this respect in 2022.

In the meantime, the Inspector General has identified a few practices that need to be implemented to comply with legislation, which resulted from investigations or verifications.

Assess the requestor's needs prior to drafting the specifications

All municipal organizations should conduct a rigorous assessment of their needs in order to be able to then establish the performance criteria for the specifications. Preferably, the assessment should also be documented in order to demonstrate its seriousness and to be able to provide a copy of it as part of an audit, if necessary.

Collect information from multiple suppliers

Assessing the municipal organization's needs for a call for tenders may involve contacting various companies that are active on the market in order to know the range of products and services that are offered and to ensure maximum competition. More importantly, these exchanges with several potential suppliers require active listening with the aim of opening the market to the maximum number of competitors who will offer products according to the identified needs. This process must show a genuine openness to welcoming their comments and must not be done solely for form's sake. Furthermore, the Inspector General cannot tolerate communication with a single supplier to define the specifications.

[2] *Recommendation report on contract management related to generator set calls for tenders at the Office municipal d'habitation de Montréal*, Office of Inspector General of Ville de Montréal, September 21, 2020.

[3] *Outil d'aide à la rédaction des devis en termes de performance ou d'exigence fonctionnelle*, Union des municipalités du Québec, 2020.

Avoid using a single reference product

A reference product is a product listed in the specifications that meets the requirements specified for the tender. Performance specifications should not contain any references to a single specific product, as the specification requirements should be based on the public body's needs, while ensuring the participation of as many bidders as possible in the call for tenders. Bidders are therefore responsible for finding the best way to meet the needs expressed in the municipal organization's specifications. Furthermore, using the specification sheet of a single product to design performance specifications and adding "approved equivalent" is a practice that does not meet legislative requirements.

The Inspector General agrees that the change imposed by Bill 155 may result in a different and heavier workload. However, such a justification cannot be allowed to circumvent the design of performance specifications.

Prohibit the use of very specific criteria

It is preferable to exclude very specific criteria in performance specifications, unless their use can be justified following a preliminary needs assessment for the call for tenders. For example, for criteria related to the dimensions of an item to be acquired, the use of requirements such as "4.64 metres long by 2.16 metres wide" is prohibited.

It is preferable to require maximum and minimum dimensions to be met and thus let the market determine a product that meets the needs.

Procedure involving the description of required technical specifications in a public call for tenders in terms of performance or functional requirements

- Use of descriptive characteristics
- Reference products in descriptive specifications
- Requests for equivalency

02

Procedure involving the description of required technical specifications in a public call for tenders in terms of performance or functional requirements

02

Although there are still few resources available to assist stakeholders in drafting performance specifications, Ville de Montréal has written a procedure that applies to all its business units to help them comply with the law.

Available as of July 5, 2021, this procedure (C-OG- DG-P-21-002) supplements the administrative framework of January 11, 2021 (C-OG-DG-D-21-001) and describes the applicable principles to the drafting of performance specifications, in addition to providing instructions for complying with this obligation. This procedure also establishes the practices to be followed when descriptive specifications must be used on an exceptional basis for a call for tenders. It is therefore important for all Ville de Montréal employees involved in designing specifications to review the procedure.

USE OF DESCRIPTIVE CHARACTERISTICS

In every call for tenders, the use of descriptive specifications "must be preceded by careful and documented research and analysis that makes it possible to justify and explain the use of these types of characteristics" [Free translation]. Since descriptive specifications are the exception, this research will be used to justify its use in the event of an investigation by the Office of Inspector General.

REFERENCE PRODUCTS IN DESCRIPTIVE SPECIFICATIONS

When the use of descriptive specifications is required, a reference product may be included. However, in recent years, the Office of Inspector General has found that the choice of reference product provides an undeniable advantage for the company whose product is indicated as a reference model, particularly for construction projects. This advantage stems from the fact that general contractors can save time and resources by using the reference product rather than submitting an equivalency request.

Ville de Montréal's procedure requires a "comprehensive search of products (e.g. brand or model) that are acceptable, commercially available, and meet the technical specifications that have been identified" [Free translation]. In this way, if more than one product meets the requirements, these products must be listed in the specifications so that bidders can solicit quotes from various competitors or subcompetitors during the posting, while specifying that an equivalency request may be submitted for any other product that is not listed.

REQUESTS FOR EQUIVALENCY

The procedure stipulates that descriptive characteristics can only be used in specifications on an exceptional basis. In such a case, it is imperative that bidders be allowed to submit equivalent products and that there be a fair and objective process for assessing equivalencies.

First, the process for assessing equivalencies must be documented to show that it is objective and fair. This documentation process will also be useful in demonstrating the rigorousness of the process in any future investigation by the Office of Inspector General.

Second, each call for tenders must specify a deadline for submitting equivalency requests that must be set before the bid closing date. In the event an equivalency is accepted, an addendum must be issued prior to the bid closing date in order to publish it.

The Inspector General welcomes this practice, which will stimulate competition by allowing all potential bidders to include the product in their bids. Moreover, she supports Ville de Montréal's recommendation that use of a standard established by an independent body (e.g. BNQ, CSA, ASTM, ISO) should be favoured, wherever possible.

Prevention activities

- Reconcile tender requirements with the quality of the sought-after products
- Innovating to stimulate competition
- Calibrating quality criteria
- Enforcing accountability

Prevention activities

03

The Office of Inspector General's investigations may result in a recommendation to City Council to cancel or suspend a municipal contract. They may also lead to actions to prevent the recurrence of breaches observed during investigations. The following are examples of where the Office of Inspector General has intervened in this second category.

Following an investigation into several contracts for the construction and renovation of various Ville de Montréal arenas, the Office of Inspector General's investigating officers discovered breaches of the contract management process. These breaches were mainly due to a lack of knowledge of the applicable tender rules for performance specifications.

RECONCILE TENDER REQUIREMENTS WITH THE QUALITY OF THE SOUGHT-AFTER PRODUCTS

Investigating officers noted that some engineers employed by the outside firm contracted to write specifications were not aware of these rules. For example, one witness they interviewed explained that he preferred to write descriptive specifications because, in his opinion, this type of specification minimized the risk of errors for complex mechanical equipment.

However, this practice has been prohibited since the adoption of Bill 155, which requires that performance specifications be written before descriptive specifications (for more details, refer to the procedure on the description of target technical specifications in a public call for tenders in terms of performance or technical requirements – *Procedure involving the description of required technical specifications in*

a public call for tenders in terms of performance or functional requirements). Although the contracted engineers are not municipal employees, the Inspector General points out that they are required to comply with the provisions of the *Cities and Towns Act in* preparing specifications for Ville de Montréal.

Moreover, it is also important to mention that past experience with a product does not constitute a criterion to be considered in the needs assessment prior to the drafting of the call for tenders. For example, municipal employees told investigating officers that they defined their criteria based on a product with which they had a good experience in the past. Although these employees were acting in good faith, municipal service requirements for a call for tenders must be defined on the basis of required performance or functional requirements. It should not arise from characteristics specific to a given product. Conversely, if any issues occurred in the past with a product, the source of those issues must be determined in order to establish the functional requirements that will prevent a recurrence.

The Office of Inspector General's investigating officers subsequently met with Ville de Montréal's contract management coordinators to present their findings and prevent a recurrence. One of the solutions considered was to purchase certain equipment under a separate contract from the other arena renovation work so that the supplier's performance could be assessed and, if determined unsatisfactory, excluded from future calls for tenders.

INNOVATING TO STIMULATE COMPETITION

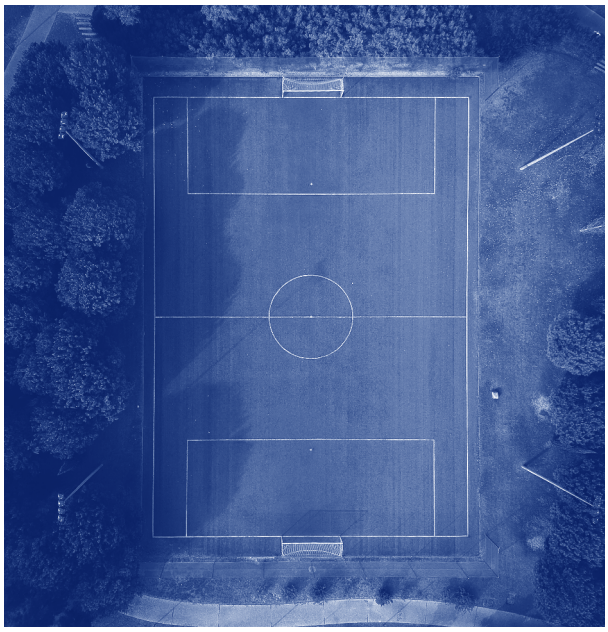
The Office of Inspector General's prevention activities can sometimes be used to inform the various Ville de Montréal stakeholders about key facts about the market targeted by their call for tenders. This information can then be used to adapt new calls for tenders to the market and thus favour competition. This was done following the awarding of a contract for the repair of wheeled bins used to collect household waste, recyclables and organic matter.

The aim of the call for tenders was to obtain repair services for the wheeled bins used in all 19 Montreal boroughs. The future successful bidder was required to always have original parts on hand for various models of bins used in Ville de Montréal that were made by various manufacturers. During their verifications, the investigating officers learned that one of the manufacturers had an exclusive distribution agreement with one Québec company and refused to sell its parts to other distributors. As a result, the Québec company was the only one able to submit a compliant bid since it could meet all the requirements of the call for tenders.

This information was not known by municipal stakeholders prior to the publication of their call for tenders. Once it was brought to their attention, they immediately explored various options to avoid a similar situation in the next call for tenders. One of their suggestions was that two contracts should be awarded: one for the performance of the work and the other for the procurement of parts from bin manufacturers and distributors. The new approach was well received by the Inspector General, who commended the department for its quick response to rectify the situation.

MAKE SURE TO CALIBRATE THE QUALITY CRITERIA

Over the years, the Office of Inspector General has received a number of denunciations regarding calls for tenders for the installation of artificial turf on outdoor soccer fields. 2021 was no exception, with three reports being received. Some of the issues that came up are recurring and should be discussed below.



Awarding the contract to a quality successful bidder is the primary concern of many municipal employees who had been contacted by the Office of Inspector General. To achieve this objective, two common contracting methods consist in using either a two-envelope tender or a tender with qualitative weighting[4], or to include an experience clause.

However, the difficulty lies in the calibration of the quality criteria or experience clauses. Criteria deemed too restrictive by bidders frequently result in complaints, even more so if they account for a significant portion of the qualitative score or if they are an eliminating clause.

Some of the calls for tenders required that the bidder have previous experience installing synthetic coatings with specific characteristics such as the type and colour of granules or the joining assembly method. However, not all suppliers are able to meet such criteria, although they can offer other quality products.

In view of this restrictive effect on the pool of potential bidders, the public body must ensure that it establishes a rational link between its need and the criterion in the call for tenders. For example, there has to be a practical difference between applying a coating made up of granules of a certain type or colour versus another type of granule. If not, the requirement of previous experience in installing a coating with a specific type of granule could be considered excessive and action could be taken to remove it from the tender documents.

In the same vein, recent denunciations criticized project owners for having too many criteria or requirements in their tender documents. Bidders were asked to respond to a lengthy questionnaire on a variety of topics.

On the one hand, there was no explicit indication in the tender documents of the weighting granted to the questionnaire, which created uncertainty about its importance during bid assessment, even though the companies had to be able to fully understand how their bid was going to be evaluated. On the other hand, some of the questions potential bidders were asked to answer may have been redundant with respect to other elements to be provided, or so unclear that it became difficult to understand what the project owner was trying to confirm. For instance, not only did the project owner want bidders to provide a warranty for a certain period of time for the artificial turf, but it was also asking them to describe how they would be providing the warranty. Similarly, they were asked to provide information on what made their company innovative.

[4] For single-envelope tenders, bids that comply with the administrative and technical requirements are scored according to a weighting and evaluation grid that includes the prices. The contract is awarded to the highest-scoring bidder. For the two-envelope weighting and evaluation system, bids that comply with the administrative and technical requirements are evaluated using a weighting grid, and an interim score is attributed. The second envelope containing the price is only opened for bids that score 70% or higher. A final score is then attributed. The contract is awarded to the bidder whose bid received the highest final score. For more information, refer to the document *Faire affaire avec la Ville de Montréal*, produced by Ville de Montréal's Service de l'approvisionnement.

Finding the tender documents unclear and seemingly going in different directions, several suppliers chose not to participate in the tendering process, which resulted in a single bid being submitted. This bid was found to be non-compliant and the call for tenders had to be cancelled. A second call for tenders, almost identical to the first, was quickly issued. However, because the same issues were still present, the project owner again received only one bid, and once again had to cancel the call for tenders, this time for technical reasons.

After meeting with the Office of Inspector General, the borough mentioned that it had not taken any steps following the cancellation of the first call for tenders to determine what corrections could be made to solicit more competition for the second call for tenders.

Sound contract management would have required the documentation to be reviewed. To do so, a good practice would be to identify the calls for tenders published by other boroughs in order to use them as a reference, while adapting them to their organization's specific needs.

Following the assessment of each of the cases presented above on the installation of artificial turf, the Office of Inspector General communicated its findings to the boroughs involved in order to make them aware of measures that could be implemented to clarify their contractual requirements and favour greater openness to the market in future calls for tenders.

APPLY CONTRACTUAL CONTROLS

Some breaches were noted during an investigation on the performance of catch basin and sewer cleaning contracts. These were basically divided into two categories: operational breaches and breaches related to accountability and invoicing to the boroughs.

For the operations category, a number of breaches could be explained, after verification, by an exemption granted by Ville de Montréal with respect to the requirements in the specifications, in particular because of adjustments required by the COVID-19 pandemic.

For the second type of breaches, the successful bidder provided supporting documents that were initially missing, such as weight tickets, at the Office of Inspector General's request. The successful bidder acknowledged that other mandatory documents, such as daily progress reports, were still missing, although the services had actually been delivered. The company agreed to correct the situation.

The investigation also revealed some omissions in the approval of invoices by the boroughs concerned. As mentioned above, some of the documents required for daily reporting were not provided by the successful bidder, while other supporting documents for services rendered were not included with the invoices. Despite these omissions, the boroughs had approved and paid the invoices. Furthermore, while the boroughs could have used GPS data indicating truck movements to supplement the missing documentation, when reconciling the invoices, the investigation revealed that this additional verification was not done.

A meeting was held with each borough involved to present to them the above findings. The borough representatives made a commitment to strengthen the enforcement of the controls available to them.

Best practices: Time between bid opening and the awarding decision for the contract

— Inspector General's recommendations

04

Time between bid opening and the awarding decision for the contract

04

The Office of Inspector General handled denunciations regarding the long period of time between bid opening and communication of the award decision to the successful bidder and the other bidders. These lengthy delays may have an impact on successful bidders and the competition, such as not being able to adequately plan the work schedule or meeting the bid conditions, which have changed since the bid was submitted.

The Office of Inspector General intervened in a case where it took over 12 months to provide a final response to the successful bidder. As a result of the delay, which had namely resulted from technical assessments and the COVID-19 pandemic, the firm selected to carry out the three-year framework agreement could no longer honour the purchasing cost of the equipment that was part of the initial contract, due in part to an increase in transportation costs. After discussions between the firm, the departments involved and the Office of Inspector General, Ville de Montréal finally agreed to terminate the contract.

The second case that was reviewed was that of a company that had been the lowest bidder on a call for tenders for snow removal, issued by a central service for a borough. Six weeks after the call for tenders closing date, the specialized firm wanted a definite answer on the contract award in order to make a decision on whether or not to participate in a new call for tenders issued by another borough. Since the department was unable to confirm the contract award before the closing date of the second call for tenders, the company decided to take part in the latter and was awarded the contract.

In the end, the central service cancelled the first call for tenders since the bids that had been submitted exceeded the cost estimate. However, the service never provided the information to the bidder since the latter had managed to obtain another municipal contract in the meantime. Despite the fact that the company was awarded a contract in its field, the company, like its competitors, would have liked to have been informed quickly of the final decision or the status of the bid assessment process for the municipal tender in which it had taken part.

INSPECTOR GENERAL'S RECOMMENDATIONS

To promote effective communication with companies bidding on Ville de Montréal calls for tenders and to maintain good business relations based on trust, the Inspector General recommends that central services, boroughs and related organizations adopt the following practices after bid opening and the assessment of bid compliance.

1. Wherever possible, promptly inform companies of the selection of the successful bidder. This would allow bidders to know who the successful bidder is as soon as the recommendation is sent to elected officials, while mentioning that the decision will become final at the time of the contract award by resolution. This practice would allow project owners to maintain good relations with suppliers and enable the latter to plan their orders.

2. Similarly, municipal departments should promptly inform bidders of the decision not to proceed with or to cancel a call for tenders. This would allow them to quickly participate in new calls for tenders and show Ville de Montréal's willingness to maintain respectful and transparent relations with its suppliers.

Upstream interventions

- Restrictive clauses on bidders' experience
- Licence, permit and authorization requirements
- Technical defect

05

Upstream interventions

05

The Office of Inspector General regularly receives various types of denunciations about calls for tenders in the process of being issued. These denunciations quickly become part of information gathering and discussions with project owners in order to verify their validity and propose adjustments, if necessary.

Note that any member of the public, a municipal employee, related legal entity, elected representative or co-contracting party of Ville de Montréal may contact the Office of Inspector General to provide information relevant to the performance of the Inspector General's mandate. It is because of the concern for integrity, fairness and courage of these individuals that investigations can be conducted.

The following are examples of calls for tenders that involved denunciations at the time they were issued and which the Office of Inspector General handled together with the project owners to resolve the situation.

Where applicable, the Office of Inspector General proposed possible solutions to enable public bodies to correct the situation so that the call for tenders could proceed on schedule. These upstream interventions also helped increase the pool of potential bidders, respect the integrity of the contracting process, and favour sound management of public funds.

RESTRICTIVE CLAUSES ON BIDDERS' EXPERIENCE

As noted elsewhere in this report, there are instances where services, boroughs or related organizations specify one or more eligibility clauses that may result in firms not bidding on a call for tenders when they have the experience and capacity to do so.

For example, a contractor reported that in its call for tenders, a project owner was requiring bidders to have carried out two urban park development projects, each with a budget of $2M or more, over the past five years. According to the contractor, the value of the completed projects was too high and did not reflect the estimated future work to be carried out in the park totalling over $320,000, before taxes. The contractor wanted the project owner to lower the value of the completed contracts so that its company could comply with this eligibility clause.

Following discussions with the Office of Inspector General on the merits of the complaint, the municipal organization acknowledged that the clause unduly restricted competition. An addendum was subsequently issued that reduced the value of past projects by bidders to the budget that had been assessed for the redevelopment of the park. It also extended the bid opening date by one week to allow more potential suppliers to submit a bid.

LICENCE, PERMIT AND AUTHORIZATION REQUIREMENTS

This section deals with denunciations related to permits, licences and authorizations that bidders must have in order to be awarded a municipal contract.

In Québec, anyone who carries out or subcontracts construction work must have a licence from the Régie du bâtiment du Québec (RBQ), unless exempted by law. Some work such as electrical work requires specific permits from the RBQ, which are specified in the call for tenders eligibility criteria. This requirement may cause confusion on the bidders' part, and may lead to their being excluded from the tendering process if misinterpreted.

The Office of Inspector General intervened in a call for tenders involving the removal and installation of digital kiosks. This was the second call for tenders for the same project.

In the case of the first call for tenders, the borough required an appropriate, valid, non-restrictive permit in order to be awarded a public contract, and that was issued by the RBQ, failing which the bid would be automatically rejected. A specialized contractor permit was also required with all the sub-categories needed to perform the work involved by the call for tenders. The borough decided to cancel the first call for tenders given that the lowest bidder did not have the RBQ permits and the prices submitted by the other bidders were above the estimate.

For the borough's second call for tenders, the only bidder to have responded had almost all the necessary permits, except for the one required for the electrical work which the bidder subcontracted to a company with the appropriate permit. A denunciation was filed with the Office of Inspector General regarding the bidder's non-compliance with this eligibility criterion. Following discussions with the Office of Inspector General, the borough cancelled the second call for tenders since the bidder did not meet the requirement of a permit for electrical work, as indicated in the specifications.

A similar finding was also made for a mutual agreement contract involving the installation of a door opening and access control system. The successful bidder did not have the permit required under the *Private Security Act* to carry out this type of contract, and therefore had subcontracted the work to another company that had the permit. The situation was reported to the Office of Inspector General, which made inquiries with the project owner. The project owner agreed to terminate the contract due to non-compliance with the requirement to have a permit from the Bureau de la sécurité privée to install such a system.

A company also submitted a complaint to a borough and the Office of Inspector General about the enforcement of the eligibility requirement for having an authorization from the Autorité des marchés publics to carry out a municipal contract valued at $185,000. Under the law, this authorization is only required for professional services contracts of $1 million or more. The borough quickly acknowledged its mistake and removed the criterion that required the authorization of the Autorité des marchés publics from its call for tenders.

TECHNICAL DEFECT

For the following call for tenders, bidders received documents that indicated two closing times at two different locations for the submission of bids. On the return envelope, the closing time was 10:30 a.m. at address A. On the SEAO electronic tendering system, the closing time was 11:00 a.m. on the same day at address B, as is usually the case for this project owner's calls for tenders.

On the closing day, a bidder arrived at 10:30 a.m. at address A and was told instead to go to address B by 11:00 a.m. to submit its bid. The bidder arrived at the location a few minutes late. At bid opening, it was revealed that the bidder who was late was the lowest bidder. However, its bid was rejected because it was delivered after the closing time. The company filed a complaint with the Office of Inspector General. According to the company, it was late because of an error on Ville de Montréal's part. After the Office of Inspector General reviewed the complaint, the project owner decided to cancel the call for tenders due to a technical defect and to ensure fair treatment for all the bidders.

All these cases show the relevance of the Office of Inspector General's interventions at the time calls for tenders are issued, which have often allowed project owners to make corrections without terminating the tendering process, and always in keeping with time limits.

Investigation report

Investigation on contract management by the Société de transport de Montréal regarding amendments made to various contracts

- Summary
- Applicable regulatory framework
- Analysis and findings
- Remedial measures
- Conclusion and recommendations

06

Investigation on contract management by the Société de transport de Montréal regarding amendments made to various contracts

06

SUMMARY

The Société de transport de Montréal (STM) was investigated by the Office of Inspector General for amendments to two procurement contracts and one service contract that resulted in significant cost increases. For instance, increases of 62%, 96% and 336% were granted to successful bidders to carry out the contracts.

The STM mentioned a number of reasons for the increases, including wanting to have a large enough budget envelope to meet new needs determined along the way or to correct errors that were made when the call for tenders was issued. The fact remains that, by making certain contractual amendments, the STM violated the *Act Respecting Public Transit Authorities* and its by-law on contract management.

In response to a prior notice summarizing the breaches observed during the investigation conducted by the Office of Inspector General, the STM implemented new measures, while proposing others. The Inspector General is recommending that the measures be implemented quickly as part of an action plan to ensure sound contract management in accordance with the applicable regulatory framework.

As part of its mandate to oversee public contracting, the Office of Inspector General found that the STM had granted envelope increases to various successful bidders.

As a result, an investigation was conducted into the STM's practices with respect to amendments to three contracts awarded following calls for tenders.

Contracts retained following the Office of Inspector General's investigation					
Title	Type	Initial amount	Increases	Increased amounts	Difference (%)
Procurement of office supplies (STM-6493-02-19-02)	Procurement	$398,795.86	$1,341,549.14	$1,740,345.00	336%
Procurement of office furniture (STM-5361-03-16-02)	Procurement	$7,885,606.37	$281,688.75	$8,167,295.12	3.6%
			$2,299,500.00	$10,466,795.12	28%
			$7,593,047.00	$18,059,842.12	96%
Promotional services (STM-5586-11-16-25)	Services	$459,000[5]	$286,571.16	$745,571.16	62%

Besides the determinations for each contract that will be discussed below, the interviews conducted with STM employees during the investigation provided a comprehensive picture of the transit authority's approach for the assessment of the contract increases at the time of the offence.

Since that time, the STM has taken steps to rectify the situation, while proposing other measures in its response to the Notice to Interested Parties[6] which the Office of Inspector General sent it. These aspects will also be discussed below.

It should be noted that the investigation focused solely on the STM's contract management and, as such, no inferences should be drawn as to the quality of the services rendered by the various successful bidders in the contracts involved.

[5] The original value of the contract was $229,500 for a two-year term, followed by a two-year renewal option for the same amount. Since this is the exercise of a clause in the contract, it does not constitute an amendment.

[6] Before releasing the results of her investigation and, where applicable, submitting a report of recommendations under section 57.1.23 of the *Charter of Ville de Montréal*, in accordance with her duty of procedural fairness, the Inspector General sends a Notice to Interested Parties to the parties involved indicating the relevant facts that were gathered during the course of the investigation. Upon receiving the notice, the persons concerned may submit in writing any comments, representations or observations they believe to be relevant. Such a notice was sent to the STM on August 16, 2021, and the facts and arguments that were invoked in the STM's response were taken into account by the Inspector General prior to drafting this report.

APPLICABLE REGULATORY FRAMEWORK

Before addressing the breaches observed in the management of the three STM contracts, it is important to mention the regulatory framework applicable to contract amendments.

The framework was defined in 1978 by the Supreme Court's *Adricon* decision.[7] In that case, the highest court in the land had ruled that a municipality did not need to go back to tender despite the fact that the dollar value of the proposed amendment to a contract that was under way exceeded the tender threshold.

However, the amendment had to meet certain requirements to avoid being used as a way to circumvent cities' tendering obligations. Therefore, to be valid, an amendment must be accessory to the contract and must not change the latter's nature.

In 2010, this judicial rule was incorporated into the various laws governing municipal bodies, including the Société de transport de Montréal and Ville de Montréal, through section 102.1:

"A transit authority may not amend a contract awarded following a call for tenders unless the amendment is accessory and does not change the nature of the contract."[8]

A few remarks are in order. First, legislators do not provide a definition for accessory or what constitutes a change in the nature of a contract. Therefore, a case-by-case assessment must be done of every change being considered by a municipal project owner.

Second, the interpretation must be done in a restrictive manner.[9] It is important to remember that this is an exception to the general rule of competitive tendering. In other words, not amending a contract is the rule and approving an amendment is the exception.

Another amendment was made, also in 2010, to the section on the objectives of the contract management policy to be adopted by all municipal bodies. From now on, it would have to include "measures aimed at regulating any decisions authorizing the amendment of a contract"[10] [Free translation]. When reviewing a contract amendment, it is also important to refer to the municipality or public body's by-law on contract management to determine whether these measures are being observed.

Lastly, failure to comply with all of the above rules can have serious consequences. The increase in the envelope can then be considered a new contract awarded by mutual agreement to the successful bidder. However, if the value of the new contract exceeds the tender threshold, failure to comply with the applicable formalities results in absolute nullity, that is, it will be deemed to have never existed.[11]

[7] *Adricon Ltée v. East Angus (Town of)*, [1978] 1 SCR 1107.

[8] *Act Respecting Public Transit Authorities*, CQLR, c. S-30.01, sect. 102.1. See also the equivalent provision for cities and towns in the *Cities and Towns Act*, CQLR, c. C-19, sect. 573.3.0.4.

[9] See also *Sotramex* inc. c. *Québec (Procureur général)*, J.E. 96-2258 (C.S.), para. 87-88.

[10] The contract management policy has since been replaced by a by-law on contract management, *Act Respecting Public Transit Authorities*, sect. 103.2, para. 3, subpara. 6. See also the equivalent provision for cities and towns in the *Cities and Towns Act*, sect. 573.3.1.2, para. 3, subpara. 6.

[11] See, for instance, *Montréal (Ville)* c. *Octane Stratégie inc.*, 2019 CSC 57, para. 39 and articles 1416 and 1417 of the *Civil Code of Québec*.

ANALYSIS AND FINDINGS

A review of the three STM contracts led to the following four determinations.

Non-compliance with the requirements of section 102.1 of the *Act Respecting Public Transit Authorities*

A contract amendment must first meet the criteria in the Act, namely the concepts of accessory amendment and no change in the nature of the contract under section 102.1 of the *Act Respecting Public Transit Authorities*, applicable to STM contracts.

Despite the lack of a definition of what constitutes the "nature of the contract" that is the subject of the review, case law provides a clear example. An amendment that would change a lump-sum contract to a unit-price contract would not be acceptable.[12] The same conclusion would apply for a service contract that would be amended, for instance, to become a procurement contract.

The amendments examined during the Office of Inspector General's investigation are consistent from this perspective. Changes to office supply and furniture procurement contracts were made only in terms of quantities of goods to be delivered, without adding types of goods that were not included in the call for tenders.

Regarding the contract for promotional services, the main reason for its increase was an additional mandate to distribute washable masks to STM transit users due to the COVID-19 pandemic and the requirement to wear a mask in public places. However, the successful bidder's duties included the distribution of various promotional items on behalf of the transit authority. It should be noted that the masks were purchased by the STM.

However, the monetary increases of the three contracts targeted by the investigation did not comply with the regulatory framework as they were not accessory amendments. Once again, this is a concept that has not been defined in the Act and that must be reviewed according to the circumstances of each contract.

Admittedly, the percentage that represents an increase in relation to the initial contract is an important element in assessing whether the amendment is accessory or not. However, there is no set threshold that absolutely defines what would constitute a reasonable increase or not. While some decisions mention a range from 15% to 20%, others have refused lower amendments[13], or accepted some that were significantly higher.[14] Therefore, it should not be taken for granted that an increase in the envelope will be consistent simply because it represents a small percentage of the amount initially granted.

In unit-price contracts such as the three contracts reviewed here, the same rule applies, but with some leeway. In fact, a unit-price call for tenders is intrinsically based on a prior estimate of the required quantities, which may be subject to some reasonable variation. In this respect, it is recommended to refer to the clauses of the contract that may specify, for instance, a positive or negative percentage change in the quantities that will be deemed acceptable by the parties.[15]

However, such flexibility has limits:

"This being said, there are times in special circumstances when a weighting measure, based on reasonableness, must be introduced, when it has been noted that the flexibility of the unit-price contract was used to distort the rules for awarding municipal contracts (Section 573 of the Cities and Towns Act). In these circumstances, the total estimated price included with the unit-price contract may become a significant element in assessing the reasonableness of the increase in total cost; in particular, it will enable the amendments or additions to the initial contract to be qualified. In fact, while not specifically refering to it, the trial judge applied the reasonableness criterion when he wrote:

[12] *Adricon Ltée v. East Angus (Town of)*, previously cited, note 7.

[13] *Roxboro Excavation inc.* c. *Montréal (Ville de)*, 2015 QCCQ 1228, para. 91. The work represented 13.7% of the original amount.

[14] For instance, *Pavage LP inc.* c. *Municipalité de Sainte-Béatrix*, 2015, QCCQ 14897. A 42% increase was deemed accessory, but the court placed significant emphasis on the special considerations of the case.

[15] See, for example, *Transport Beaulé inc. c. Québec (Procureur général), 2011 QCCA 999, para. 8 to 16,* where a clause specified that a change should generally be 15% of the quantities indicated in the price schedule. The co-contractor was only paid for the difference that exceeded this predetermined range of 15%.

"The stipulation that the quantities are approximate suggests some leeway in this aspect of the contract, but does not, in my opinion, justify a reduction to zero or a 100-time increase, even if one admits, for the purposes of this argument, that the applicant is correct in their interpretation of the term 'spirit of the specifications'"[16] [Free translation].

The Court of Appeal added in the same decision that *"the extent of the work performed and the substantial change in the type of work required have changed the nature of the contract to the point of altering its circumstances and making the original contract accessory"*.[17] [Free translation]

This determination applies equally to the three STM contracts being reviewed. For the office supplies procurement contract, a one-time increase of 336% is so significant that it makes the original contract ancillary.

The same can be said for the three increases that cumulatively represent a 129% increase in the basic office furniture procurement contract. Even when considered separately, the second and third increases of 28% and 96% are clearly outside the range of reasonableness given the nature of the contract and the circumstances of the case, which will be discussed in the next subsection.

Lastly, the same conclusion applies to the increase in the contract for promotional services, which had an initial value of $229,500 per two-year term, for a total value of $459,000 after the renewal option was lifted in 2019. However, the $286,571.16 increase granted in July 2020 represented 62% of this total amount and approximately 125% of the amount for a two-year term, whereas it was only supposed to cover the remaining 10 months of the contract.

Non-compliance with the STM's by-law on contract management

The second determination resulting from the review of the three contracts relates to the STM's application of the criteria of its by-law on contract management. As mentioned above, a contractual amendment must not only comply with legislation, but also with the provisions of the STM's by-law on contract management, which is an integral part of every STM contract.

The provisions in question are found in section 9.1 on the eligibility of an amendment:

"A contract that has been awarded may not be amended, unless the amendment is accessory and does not change the nature of the contract. A contract may only be amended when the following conditions are met:

- *1 to 4 below in cases where the amendment results in an expenditure;*
- *1 to 3 below in cases where the amendment does not result in any expenditure or results in a credit.*

Conditions to be met:

Condition 1: The amendment does not change the nature of the contract.

Condition 2: The purpose of the amendment is to correct a situation that occurs during the performance of the contract and that was not anticipated or determined at the time of the contract award.

Condition 3: The amendment is accessory to the contract; to be considered accessory, it must be closely related to the purpose of the contract and required for its performance.

Condition 4: Having the amendment carried out by another supplier would interfere with the efficient and sound administration of the current contract" [Free translation].

The first paragraph essentially reiterates the wording of the section of the *Act Respecting Public Transit Authorities*. However, the next part introduces new conditions, all of which must be met, as they are cumulative. The first condition is self-explanatory since it is identical to the text of the Act and has already been covered above.

The second condition provides a new consideration: the amendment must aim at correcting a contingency at the time of the contract award. While some authors welcome the addition of this criterion[18], its application will depend on the accuracy of the interpretation of what constitutes a contingency.

[16] *Les Entreprises Nord Construction (1962) inc. c. Corporation ville de Saint-Hubert,* 1996 CanLII 5882 (QC CA).

[17] Idem.

[18] LANGLOIS, André, with the collaboration of Pier-Olivier FRADETTE, *Les contrats municipaux par demandes de soumissions*, 4th edition. Éditions Yvon Blais, Montréal, 2018, p. 425.

Based on the notion that a contingency must "constitute a condition that was not anticipated when the bid was being prepared," [Free translation] case law provides a few examples. Such a qualification would thus be suitable for a substitution required by an engineer of excavation material with a type other than that specified in the call for tenders[19], but not for the performance of work outside the work site described in the call for tenders.[20]

Although these are procurement rather than construction contracts, increases in the office furniture and supply contracts are more in line with the second case. In the office furniture contract, the contingencies did not arise from an unforeseen situation that had occurred during the course of the contract (such as the discovery of unexpected functional limitations from a location that would require a change in the layout plans).

Instead, these were new STM requirements entirely unrelated to the contract, such as an unplanned furniture refurbishment project, the provision of furniture for new projects, or the fitup of newly leased space. In this respect, a table included with the decision case for the third increase in 2020 shows that the latter was intended to allow new projects not identified during the second increase in 2019 to be carried out, whereas other projects identified during the initial call for tenders in 2016 were still waiting to be completed.

Given the content of the framework agreement, it was at the STM's discretion to handle the procurement in order to carry out the desired projects in an order of priority that it could establish and then modify. However, the situation was quite different when new projects, in addition to the old ones, led to the envelope being exceeded. In this context, the criterion for correcting a contingency in section 9.1 of the by-law on contract management could not be considered as being met, being more akin to an approach qualified as "might as well" [Free translation] by other authors.[21]

Such a conclusion must also be drawn with respect to the increase in the office supplies contract. As will be explained in the next subsection, an error in the quantities listed in the price schedule led to the submission of bids with a total price for the three years of the contract that was less than the internal estimate of STM's annual consumption of supplies. Although the increase that had been granted just 10 months after the contract award was intended to correct this error, this could not be a contingency that represented "a situation that occurs during the performance of the contract that was not foreseen or determined at the time of the contract award" [Free translation].

With respect to the third condition of section 9.1 of the STM's by-law on contract management, it first reiterates the criterion of section 102.1 of the *Act Respecting Public Transit Authorities* regarding the accessory nature of the amendment, and then defines the term by stating that it must "be closely related to the purpose of the contract and be required for its performance" [Free translation]. While the concept of being closely related to the purpose of the contract remains relevant, the necessity requirement must be cautiously assessed.

For example, construction work on two sections of a bicycle path was awarded to two different contractors. One of the contractors performed work that was outside of its work site, but that was needed to connect the two sections and enable the bike path to be used. While acknowledging the need for such work, the judge noted that "it is not the criterion that should be considered in responding to this issue" of the accessory nature of the contractual amendment[22] [Free translation].

As mentioned in another decision, the work must instead be the normal, logical and necessary continuation of the work which the successful bidder contracted to do, and not conceptually distinct work.[23]

In the present case, the quantities involved in the procurement of office furniture and supplies had to be increased to meet the STM's needs, but could not be considered necessary for the actual contracts to be carried out.

The fourth and final condition of section 9.1 of the STM's by-law on contract management requires a weighing

[19] *Lac Saint-Charles (Ville de) c. Construction Choinière Inc.*, J.E. 2000-1319, para. 36-38.

[20] *Roxboro Excavation inc. c. Montréal (Ville de)*, previously cited, note 13, para. 85.

[21] LAPRISE Sébastien, ÉMOND François, POULIOT Jean-Benoît, ST-LAURENT Gilles, *Contrats des organismes publics – Manuel sur les meilleures stratégies*, Brossard, Wolters Kluwer, 2016, p. 252-253.

[22] *Roxboro Excavation inc. c. Montréal (Ville de)*, previously cited, note 13, para. 87.

[23] *Stantec Experts-conseils ltée c. Brossard (Ville de)*, 2016 QCCS 4941, para. 39.

of whether "the performance of the amendment by another supplier would be detrimental to the effective performance and sound administration of the current contract" *[Translation]*. The condition is not found in section 102.1 of the *Act Respecting Public Transit Authorities* and stems entirely from a characteristic specific to the STM's by-law on contract management.

While this criterion could conceivably be applied to incidental work resulting from a work site contingency, the restrictive interpretation required by the wording of section 102.1 must be maintained. Otherwise, it would be easy to take this criterion for granted, since it is not unreasonable to consider that any transition from one successful bidder to the next could result in some inconvenience for the project owner, including the lead times involved in issuing a new call for tenders and a certain running-in period.

In the present case, one can only wonder how the additional quantities of office supplies and furniture for new STM projects could not have been delivered by the successful bidders of new calls for tenders.

Requirements and contract management planning prior to the amendment

Except in the case of an actual contingency, a request for a contract amendment can often be attributed to a deficiency that occurred earlier in the contracting process. For example, it may result from poor requirements planning prior to the publication of the call for tenders, an incorrect control estimate, an error in the tender documents, poor management in some aspect or other of contract performance, or no timely follow-up of the depletion of the envelope.

The increase granted for the office supplies procurement contract included several of the above situations. As previously mentioned, the 336% increase was based on an error in the estimated quantities entered on the price schedule as a result of a misunderstanding in discussions in this respect with the previous successful bidder.

Indeed, while the specifications elsewhere included a reference to annual consumption of about $550,000, in addition to an experience clause requiring bidders to submit three similar contracts with a minimum annual value of $550,000 and a control estimate of $1,740,340 over three years (approximately $580,000 per year), the three bids that were submitted were all under $525,000 for the full contract term. Therefore, there was a major problem in the tender documents.

The STM acknowledges having noted the discrepancy between the prices submitted and the control estimate at bid opening, stating having been under the impression that the discrepancy was due to the opening of the tender to the presentation of office supply equivalencies. The decision was therefore made to proceed with the contract award. The STM maintains that it was only six months later that the error was discovered on the price schedule, when the envelope that was awarded was starting to be insufficient.

Given a favourable difference of such a magnitude, i.e. 77%, between the control estimate and the lowest bidder, a good practice would have been to conduct an in-depth review of the situation. In fact, either the control estimate had a significant defect of some kind, in which case it had to be identified and corrected for the future, or, as in this case, there was an error elsewhere in the tender documents that would inevitably hinder the proper performance of the contract.

This review would have provided the STM with all the information needed for sound contract management and to ascertain the immediate and future action to be taken on the call for tenders. The STM would have then been able to cancel the call for tenders and issue a new one with the corrected quantities, thereby encouraging bidders to submit better unit prices in light of the higher consumption volume.

However, given other imperatives, such as the impending expiry of the previous contract, the STM could still proceed with the award of the contract despite incorrect quantities. In view of the fact that the envelope was foreseeably insufficient to cover the three-year term of the contract, the STM should have started to prepare a new call for tenders.

But that is not what was done. Although the STM had four months from the time it claimed to have noticed the error on the price schedule to its approval of the increase, it decided instead to "monitor" the use of the envelope "to make sure everything went smoothly" [Free translation]. The STM then increased the value of the contract, which brought the total amount up to the exact amount of the control estimate when the call for tenders was issued.

According to the STM, all of these decisions were justified by the fact that it was applying the rules it was following at the time to assess requests for an envelope increase. Such an explanation is clearly inadequate. Obtaining unit prices through a tender, no matter how favourable they may be, cannot serve as a reason for a 336% increase in the originally planned quantities, as this would distort the rules for awarding municipal contracts.

A similar determination applies even more to the office furniture procurement contract. In fact, having noted that the envelope that was granted would run out well before the end of the contract, the supplementary notes prepared by the STM to authorize the second increase of 28% indicated that it would allow the STM to "meet short-term needs and give us time to issue a new call for tenders" [Free translation].

However, nine months later, not only had the STM not issued the new call for tenders, but it had authorized a third increase, representing an increase of 96% of the initial amount and 73% of the revised amount. In addition to allowing newly identified projects to proceed since the second increase, the purpose of the latter increase was to cover expenses of $438,823 that had been incurred in excess of the authorized budgetary allocations.

The documents at the time show that the STM realized the impact and severity of such an envelope overrun, and in its response to the Notice, added that the error was due to a "series of highly circumstantial factors" [Free translation], including a lack of personnel in the requesting department, restructuring, and a migration of procurement management software. The STM confirms having made the necessary corrections to prevent the situation from recurring.

However, this does not justify the remaining $7,100,000 amount of the third increase. The STM's response is that these expenses became necessary to furnish newly leased suites and that the timelines involved at the end of a sublease made it impossible to wait for a call for tenders to be issued.

Despite the fact that the expenses were required, this is not the criterion to be met for a contractual increase. In addition, such large expenditures can generally be anticipated, and careful planning would have provided sufficient time for a new call for tenders to be issued, especially since the STM knew, nine months earlier, that the envelope would run out well before the end of the initial contract.

Priority given to the term of the contract regarding the early depletion of the envelope

The fourth and final finding resulting from the Office of Inspector General's investigation stems from meetings with STM employees, who reported that envelope increases were common at the time of the award and the increases to the three contracts, i.e. in 2019 and 2020.

Furthermore, if the envelope was nearly or entirely used up, it could be increased to reach the end of the contract as long as the rapid consumption of the envelope and the need to continue the contract were justified. According to STM employees, this practice was approved by STM executives and legal counsel.

These testimonials are entirely consistent with the increases that were reviewed, including in the promotional services contract where the purpose of the increase was to continue handing out washable masks, but also "to have sufficient funds to continue the projects as part of normal operations until the end of the contract" [Free translation].

Such a practice comes down to concealing the overall estimated price of the contract from the review. However, as the Court of Appeal stated in a previously cited decision[24], this element can become a significant factor in assessing the reasonableness of the increase in the total cost in a unit-price contract. In other words, it is important to never lose sight of the magnitude of the percentage which the increase being considered represents.

[24] See note 12.

REMEDIAL MEASURES

During the investigation, the STM implemented a number of measures to review its practices. In addition, in its response to the Notice to Interested Parties, the transit authority proposed other actions that could be implemented in the medium term.

In terms of corrections that were implemented, the STM primarily made changes to its tendering templates by including a clause requiring a notice to be sent by the successful bidder when 75% of the quantities have been consumed, and another notice specifying the expiry of the contract when the term has ended or the envelope has been depleted. The STM also issued new guidelines to its employees.

These can be found in an internal newsletter entitled *Intégrateur 45*. Specifically referring to the envelope increases, the newsletter reiterates that they must be exceptional, comply with the four conditions of the by-law on contract management, and justified. The newsletter also mentions the importance of "no longer undertaking new mandates/ deliverables in a contractual agreement that has exceeded or is about to reach the budget limit" [Free translation]. This document was presented to STM contract administrators and was followed by a question and answer period.

With respect to proposals regarding future remedial measures, the STM is considering the possibility of conducting an annual review of the various amendments and measures implemented during the previous year, which would be an opportunity to review concepts that were not fully understood or applied. The STM is also considering setting up a mandatory internal training program for its procurement staff that would be documented in a log specific to each employee. Lastly, every integration of a new contract administrator would include an information session conducted by an STM lawyer. Currently, new employees are responsible for independently consulting the documentation made available to them.

These steps are well advised and the STM should ideally implement them as soon as possible. However, a few comments related to the investigation need to be made to ensure full compliance with the applicable regulatory framework.

First, *Intégrateur 45* submits five questions to STM employees "to determine whether the legal requirements for an amendment are met" [Free translation]. Some deal with the fourth criterion of the STM's by-law on contract management *(Règlement concernant la gestion contractuelle)*, namely that performance by another supplier would hinder the efficiency and sound administration of the contractual agreement, while the others lead employees to identify certain information necessary to justify an increase to reach the term of the contract, such as determining the remaining term and the amount needed to reach the term.

In addition to being at odds with the new clauses providing that the contract would expire once the envelope was depleted regardless of the remaining term, none of the proposed ideas deals with the first three conditions of the STM's by-law on contract management.

In addition, in order to observe the principle of restrictive interpretation to be applied to a contractual increase, it would be appropriate to remind employees that close monitoring of the depletion of an envelope is to be preferred first so that they have enough time to begin the process of publishing a new call for tenders in a timely manner. The possibility of increasing the amount of an envelope would thus be limited to actual contingencies occurring during the performance of a contract.

Lastly, it appears that some employees have a varying interpretation of what constitutes or does not constitute a contract amendment, or take for granted that an envelope increase of 15% to 20% will be approved. They believe that it is merely an increase above that threshold that should be assessed on a case-by-case basis. Such a perception does not comply with the regulatory framework and should be corrected.

CONCLUSION AND RECOMMENDATION

Upon completing this assessment, the Inspector General believes that the envelope increases granted by the STM for the three contracts involved do not comply with section 102.1 of the *Act Respecting Public Transit Authorities* or all the conditions of section 9.1 of the STM's by-law on contract management. Although all of these contracts have ended or are about to end, the findings listed in this report are still serious.

The STM has already taken steps to correct the situation and the Inspector General welcomes the other proposed measures.

Given the many procurement and service contracts awarded by the STM, as well as the extent of the change in culture that this transition represents, based on the employees' testimony, the Inspector General recommends that an action plan that includes the measures proposed in the STM's response be implemented. The Inspector General requires to be informed of the action that will be taken.

Anyone, whether a citizen, supplier, contractor or employee of Ville de Montréal, can use our denunciation line to inform us of their observations or any irregularities they noticed, or to report a situation concerning the content of a call for tenders, the contract award process, or the performance of a contract. The law guarantees the anonymity of those making denunciations, and the Office of Inspector General fully commits to complying with this obligation.

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