

Contracting/sub-contracting with a public entity in Quebec

Do you have your authorization?

By Jacques Eddé

1. Background

The *Integrity in Public Contracts Act* (the “**Act**”), which was assented to on December 7, 2012, amended the *Act respecting contracting by public bodies* in order to enhance integrity in public contracts.

The Act provides an audit system for ascertaining whether enterprises¹ that wish to enter into a contract² with a public body in Quebec (including a government agency or municipality) meet the high standards of integrity that the public is entitled to expect from a party to a public contract or subcontract.

The Autorité des marchés financiers (the “**AMF**”)³ has been designated to issue authorizations to enterprises covered by the Act that wish to enter into such public contracts and subcontracts (the “**Authorization**”). The AMF may therefore examine the integrity of the applicant enterprise, its shareholders, partners, directors or officers and any person or entity that has direct or indirect legal or *de facto* control.

To ensure that the AMF has all the relevant information it needs to issue an Authorization, the Act mandated the *Associate Commissioner for Audits appointed under the Anti-Corruption Act*, through the *Unité permanente anticorruption* (the “**UPAC**”)⁴ to conduct the necessary audits and specify the factors to be considered.

Except as otherwise provided by Government order in council, if your enterprise responds to a call for tenders for a public contract or subcontract, it must have obtained its Authorization on the date it submits its bid, unless the call for tenders specifies a different date which precedes the date the contract is entered into.

¹ The word “enterprise” means a legal person established for a private interest, a general, limited or undeclared partnership or a natural person who operates a sole proprietorship.

² Please refer to section “2 – Monetary thresholds” of this memorandum.

³ <https://www.lautorite.qc.ca/en/public-contracts.html>.

⁴ For a description of the role and powers of the UPAC, visit: <https://www.upac.gouv.qc.ca/upac/mandat.html>.

If your enterprise enters into a public contract or subcontract, it must have obtained its Authorization on the date the contract or subcontract is entered into. With a consortium, every enterprise comprising the consortium must hold an authorization on that date.

While a foreign company is legally entitled to obtain an Authorization from the AMF, the use of a Canadian entity duly registered with the Registre des entreprises du Québec will facilitate the process and optimize the transmission of documents to the AMF using the Revenu Québec and AMF online services. This approach is widely used by foreign companies.

2. Monetary thresholds

Only contracts and subcontracts with public bodies in excess of certain thresholds are subject to the Act:

Territory	Characteristics	Threshold	
		Value of contract	Value of subcontract ⁵
City of Montréal	<ul style="list-style-type: none"> Contracts for the construction, reconstruction, demolition, repair or renovation of roads, waterworks or sewers; Contracts for the supply of bituminous compounds; or Service contracts for the construction, reconstruction, demolition, repair or renovation of roads, waterworks or sewers. 	\$100,000	\$25,000
Province of Québec (outside the City of Montréal)	<ul style="list-style-type: none"> Construction contracts and subcontracts or service or public-private partnership agreements. 	\$5,000,000	\$5,000,000
Province of Québec (outside the City of Montréal)	<ul style="list-style-type: none"> Service contracts and subcontracts entered into pursuant to a call for tenders made as of November 2, 2015 or with respect to which the award process began as of that date. 	\$1,000,000	\$1,000,000

⁵ Subcontracts directly or indirectly related to contracts subject to the abovementioned \$100,000 threshold.

For the City of Montréal, the requirement to obtain an Authorization also applies to enterprises bidding on a contract covered by an Order in Council with respect to certain contracts of City of Montréal.⁶

3. Steps to follow when applying for an Authorization

3.1. Filing the application

The application must be accompanied by supporting documents so that the AMF can analyze your enterprise's corporate structure and compliance with Federal and Provincial laws. These documents include the following:

- a) An attestation declaring that your enterprise was not found guilty of any of the offences set out in Schedule 1 of the *Act respecting contracting by public bodies*;
- b) As applicable, any documents related to ethics or internal governance of your enterprise (for example: code of ethics);
- c) A resolution or power of attorney from your enterprise appointing the person who will act as respondent for purpose of the application;
- d) An attestation from Revenu Québec that your enterprise has filed its tax returns;
- e) Your enterprise's audited financial statements;⁷ and
- f) An organization chart outlining your enterprise's corporate structure, including the names of its subsidiaries, parent company, and any subsidiaries of the parent company. The AMF also requires that the relationships between these enterprises and the percentage of shares or partnership units held be indicated.

3.2. Disclosing business relationships

Once the AMF has determined that your application is complete and complies with the requirements, your enterprise will receive a notice of authorization to disclose *business relationships*. The concept of disclosure of *business relationships* is broadly interpreted by the AMF and includes any natural person or entity with which your enterprise has a business relationship.

The AMF requires three levels of business relationship disclosure:

- a) **Level 1:** the enterprise which submitted the application for Authorization to contract/subcontract with a public body (the "Enterprise");

⁶ You can consult the list of applicable government orders in council at: <https://www.lautorite.qc.ca/en/act-public-contracts-en-autre.html>.

⁷ An opening balance sheet might suffice if your enterprise has recently been incorporated.

⁸ The definition of control will vary according to the level of the applicable business relationship.

- b) **Level 2:** any natural person/entity that has a relationship with and controls⁸ the Enterprise; and
- c) **Level 3:** any natural person/entity that has a relationship with and controls a level 2 entity that has control over the Enterprise.

It is very important to note that any natural person who does not reside in Quebec and who is disclosed to the AMF as being in a business relationship with the Enterprise must provide a good conduct certificate issued by the local authorities (either the government or one of its departments or agencies). The term “good conduct certificate” means, according to the AMF, a police certificate, a criminal background check, a criminal record check or a police check.

As soon as the AMF has completed its analysis of the business relationships and has duly received all the related documents, the application for Authorization is sent to the UPAC which, like the AMF, has broad discretion when reviewing the application. The AMF will only issue a notice of final decision to the Enterprise after the UPAC has made a decision.

3.3. Processing times

Even though the Authorization application process is itself not extremely complicated, the delays related to the initial collection of information about the Enterprise and its processing by the AMF can vary enormously based on (i) the level of sophistication of the Enterprise’s employees, (ii) the effectiveness of communications between the Enterprise’s departments, subsidiaries and parent company, and (iii) the complexity of its corporate structure.

And while we commend the AMF’s effort to simplify the numerous regulatory requirements needed to obtain an Authorization, certain interpretation problems nonetheless still persist leading to a multitude of questions and calls by (often discouraged) Enterprise employees to the AMF Information Centre seeking answers to ambiguous directives.

Based on our experience, the time required to obtain an authorization can vary from three (3) to twelve (12) months according to the above-mentioned variables.

Fasken Martineau DuMoulin, L.L.P. has already successfully assisted several European, Asian and North American companies submit applications for Authorization; we have developed practical know-how based on experience that will reduce processing times for applications for Authorization.

4. Key considerations

We have listed below some important points to remember during the Authorization application process:

4.1. Duration of validity of an Authorization

The Authorization is valid for a period of three (3) years. However, the Authorization may be revoked if your enterprise fails to meet the high standards of integrity that the public is entitled to expect from a party to a public contract or subcontract. In this regard, the AMF has broad discretion to revoke an Authorization.

4.2. Changes to information provided to the AMF

If your enterprise holds an Authorization, it must notify the AMF of any change to information previously provided no later than 15 days following the end of the month during which the change took place. An application must be submitted along with the same documents and information that were required for an application for Authorization.

4.3. Renewing an Authorization

The Application for Renewal must be filed with the AMF at least 90 days before the day on which the Authorization is to expire.

If the Application for Renewal is received within the prescribed period, it remains valid (except if it is revoked during this period) until the AMF rules on the Application for Renewal of the Authorization.

If the Application for Renewal is not received within the prescribed period, your enterprise will be removed from the Register of Authorized Enterprises⁹ and will no longer be able to enter into new contracts during this period. Your enterprise may be able to continue to perform any contracts in progress until the AMF rules on the application for renewal of Authorization.

Please note that the active participation of the person acting as respondent during the application process and his or her ability to effectively access administrative documents are key factors that contribute to reducing application processing times.

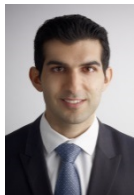
⁹ The public register can be consulted at: <https://www.lautorite.qc.ca/en/register-lcop-conso.html>.

In order to optimize your application with the AMF, we highly recommend that you update your file with the Commission de la construction du Québec (CCQ), the Régie du bâtiment du Québec (RBQ), the Enterprise Registrar (REQ) and Revenu Québec.

4.4. Discretionary power of the AMF

As mentioned, the AMF has broad discretion when examining the application for Authorization. The AMF may therefore ask for additional information if, in its discretion, (i) it determines that some information is inaccurate, incomplete or missing or (ii) it wishes to obtain information on natural persons or entities whose identity has not been disclosed to the AMF.

Any questions?



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