

Budget modification before the awarding of the contract and good faith negotiations in public calls for tenders

By Catherine Dagenais

In *Axor Construction v Bibliothèque et archives nationales du Québec*, 2012 QCCA 1228 (application for leave to appeal before the Supreme Court of Canada dismissed, 2013 CanLII 1175 (SCC)), Quebec's Court of Appeal declared that the tender documents allowed the client, Bibliothèque et Archives nationales du Québec ("BANQ"), to modify the cost estimate of the work prior to awarding the contract. It also reaffirmed that an invitation to negotiate does not create an obligation to pursue further negotiations until an agreement is concluded. In this matter, BANQ was represented by Dentons.

Context

In March 1997, the Quebec government announced its intention to build the Grande Bibliothèque. To this end, the government authorized BANQ to borrow up to \$90,636,310. The construction was divided into three stages. For the last stage ("Lot 3"), which consisted in the construction of the structure, shell, mechanicals, electricity and interior finish of the building, BANQ proceeded with a public call for tenders.

The cost estimate for the construction work of Lot 3 was not identified in the tender documents, but had however been estimated by BANQ to \$54.6 million. It appears this sum was disclosed to one of the bidders, Axor Construction Canada Inc. ("Axor"). In any event, this information was easily accessible.

Upon the opening of bids on September 10, 2002, Axor was the lowest complying bidder, followed by H. Pomerleau Inc. ("Pomerleau"). Axor's bid exceeded the estimated total costs of the work by \$2.8 million.

Some discussions and meetings were subsequently held between representatives of both BANQ and Axor in order to reduce the cost of the work. However, the modifications suggested by Axor were substantial and likely to change the nature of the project.

BANQ then asked the government of Quebec to extend its budget in order to be able to accept Axor's bid as it was, without altering the project. BANQ was ultimately allowed by decree to borrow up to \$97,636,310.

Consequently, BANQ called upon Axor to execute a construction contract consistent with the initial tender documents and its own bid. Axor refused to honor the bid process alleging that clause 11.1.1 of the tender documents allowed it to negotiate a \$2.8 million abatement. Confronted with Axor's refusal, BANQ then awarded the contract to the second lowest bidder, Pomerleau, for its tendering amount of \$59,495,000.

Axor then instituted legal proceedings against the BANQ and claimed for loss of profits or for the reimbursement of expenses incurred for the preparation of its bid and its participation in the negotiations subsequent to the opening of the bids. Conversely, BANQ claimed \$2,095,000 from Axor and its guarantor. This amount represented the difference between the bid awarded to Pomerleau and the bid that should have been awarded to Axor.

The Superior Court dismissed Axor's motion and granted BANQ's claim for the amount of \$2,095,000. This judgement was confirmed by the Court of Appeal.

Important Legal Principles

First, the Court held that clause 11.1.1 of the tender documents did not prevent BANQ from modifying the authorized budget prior to awarding the contract. It considered that such change did not affect the equality of treatment between bidders.

Subsequent to the opening of the bids, BANQ had three options: i) extend its budget and award the contract to the lowest bidder; ii) negotiate a reduction of the costs in order to observe the budget allocated by the government; or, iii) reject all the bids and start over the tendering process.

The Court of Appeal nevertheless held that “[...] to force a public body to re-tender while it could obtain the budget necessary to accept the lowest bid would definitively go against public interest [our translation]”.

Second, it must be remembered that the ability to negotiate is not an obligation to agree. The Court concluded that while clause 11.1.1. of the tender documents allowed BANQ the ability to negotiate with the lowest bidder, it did not however create an obligation to do so, or an obligation to conclude the agreement with Axor. Yet, general principles of good faith still applied at all times during the contractual negotiations process.