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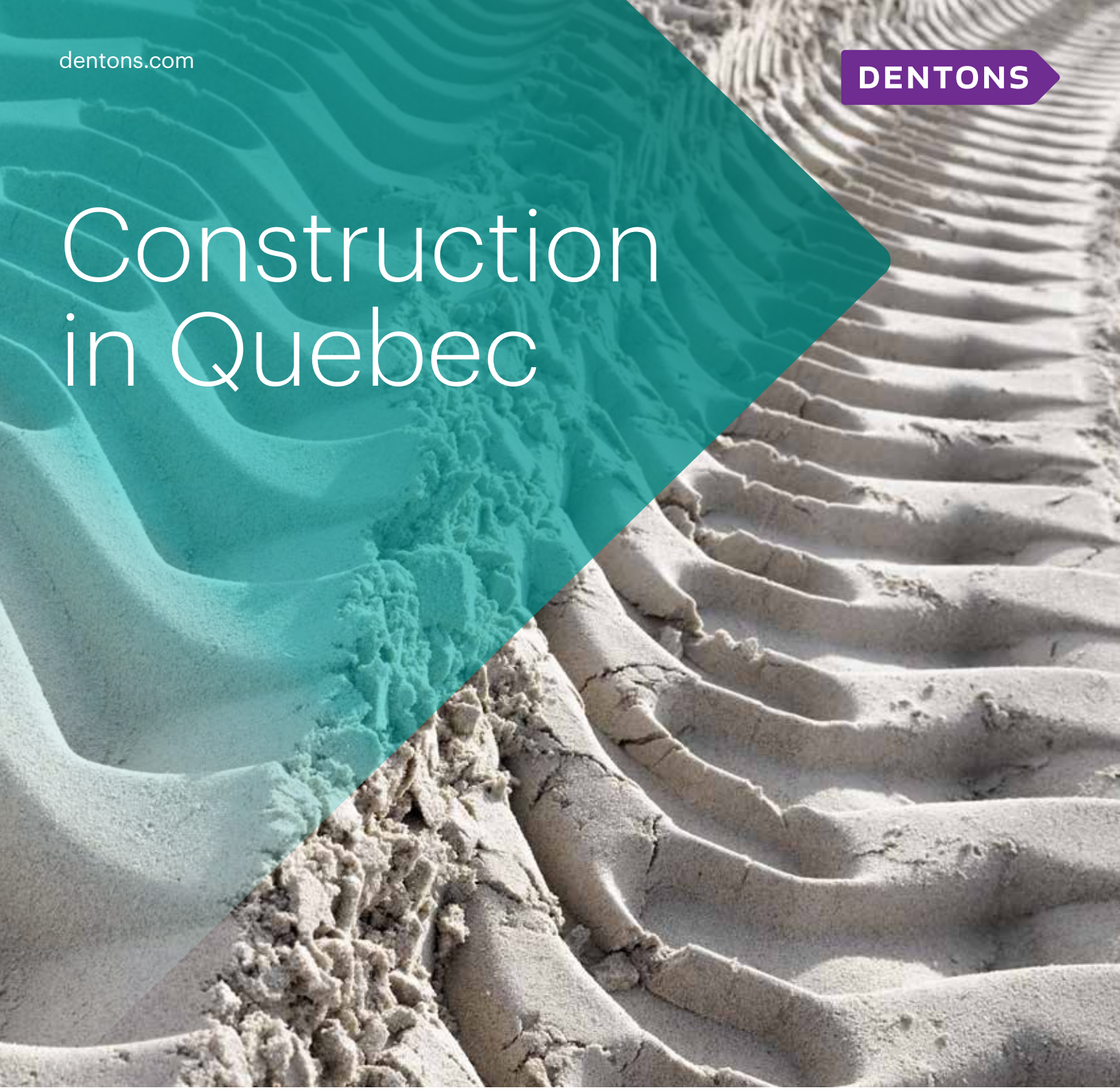

First Issue

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Editors' note

We are pleased to provide you with this newsletter prepared by the Construction, Infrastructure & PPP practice group of Dentons Canada's Montréal office. *Construction in Quebec* will be published quarterly to present certain significant legal developments in the field of construction law in Québec. We invite you to communicate with us if you have any comments or questions in connexion with this newsletter.

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Client's obligation to cooperate in construction contracts

In *Buesco Construction Inc. v Hôpital Maisonneuve-Rosemont*, 2013 QCCS 3832 (currently under appeal), the Superior Court of Québec shed some light on a client's obligation to cooperate with the general contractor in the realization execution of a construction contract.

Context

At the end of fall 2002, pursuant to a call for tenders, Buesco Construction Inc. (Buesco) was awarded a contract to build the Hôpital Maisonneuve-Rosemont's (HMR) ambulatory center. While the work was in progress, HMR terminated the construction contract invoking serious infringements by Buesco, namely a failure to provide a baseline schedule of its activities, to comply with several health and safety standards on the construction site and to adequately set up an abutment system.

Subsequent to the termination of the contract, HMR sued Buesco for the costs necessary to complete the work. Buesco counterclaimed against HMR, arguing that the termination was both illegal and abusive. Buesco claimed an amount equivalent to the remainder of the contract, the lost profits and damages it allegedly suffered.

Buesco alleged that HMR was in default of its obligation to cooperate, which consisted of HMR making all necessary efforts to resolve the difficulties encountered in order to successfully complete the project. According to Buesco, this failure from HMR to cooperate has resulted in Buesco's situation with regards to the so-called "serious infringements", thus preventing HMR to invoke them.

Important Legal Principles

The contract studied in this case is a standard construction contract of enterprise where the parties' obligations are set out in the plans and specifications. Accordingly, these obligations and responsibilities are known prior to the execution of the contract. This contract involves an obligation of result on Buesco's part and a commitment from HMR to pay the agreed price on a specific schedule.

As for the obligation of cooperation, the Court declares that the contract does not explicitly create it. The Court further asserts that such an obligation of cooperation is rather to be found in contracts where the execution takes place over a long period of time or sequentially or where the parties stand together in a joint venture or at least share a common purpose.

In this case, the contract at issue had limited duration, was non-recurring and lacked any joint venture or common purpose element. Buesco was still free to choose the means to execute the contract and there has never been any interference from HMR in Buesco's choices. The Court emphasizes the importance not to get confused between the object of the contract and the common purpose of both parties. Here, the parties both wished the work (the object of the contract) entrusted to Buesco to be carried out, but that does not mean there was a joint venture or a shared common purpose.

Furthermore, the Court declares that it is not an easy task to impose any obligation of cooperation in a contract where the debtor is compelled to an obligation of result. It might be hard to reconcile the respective responsibilities of the client, the professionals, the general contractor and the sub-contractors who would all have cooperated together in order to resolve an encountered difficulty, in the event such cooperation failed. The obligation to cooperate does not allow the setting in advance of the scope of respective obligations. It might even create a complex entanglement which would make the obligations resulting from the contract unpredictable, which would be irreconcilable with the obligation of result imposed by the contract currently under discussion.

In light of the foregoing, the Court concludes that the contract did not impose any obligation of cooperation on HMR's part, which would have resulted in an obligation for HMR to make all the necessary efforts to carry out the project defined in the contract.

That being said, while the Court does not ascribe any obligation of cooperation to HMR, it nevertheless holds that HMR breached its duty to inform Buesco by failing to communicate several pieces of information in its possession and thus sides with Buesco in declaring that the termination was indeed abusive.

This decision, if upheld in appeal, might clarify the client's obligations and limit the scope of the general obligation of good faith between the parties to a construction contracts.

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General contractors must follow construction contracts' claims procedure

In *Construction Infrabec inc. v Paul Savard, Entrepreneur électricien inc.*, 2012 QCCA 2304, Quebec's Court of Appeal reasserted the importance for a general contractor to comply with the contractual requirements and delays regarding communication of notices and claims to the client.

Context

Following a call for tenders, the ministère des Transports du Québec ("MTQ") awarded to Construction Infrabec Inc. ("Infrabec") a contract for the construction of various road infrastructures. Infrabec has subsequently subcontracted some of the work to Paul Savard Entrepreneur Électricien Inc. ("Paul Savard").

The contract entered into between the MTQ and Infrabec contained the standard clauses from the *Cahier des charges et devis généraux* ("CCDG"), including clause 9.10. This clause provided that in case of a dispute related to the performance of the work, the general contractor must send a "notice of intent to claim" to the MTQ's territorial division within 15 days from the occurrence of the problem. Should the parties fail to resolve the dispute following the issuance of this notice, the general contractor is then required to submit his claim directly to the MTQ within 120 days from the receipt of the final estimate of the work.

During the performance of the contract, subcontractor Paul Savard presented numerous claims to Infrabec, with copies to the MTQ. These claims eventually led to the institution of legal proceedings against Infrabec, who then called the MTQ in warranty.

In defense, the MTQ denied any responsibility notably because Infrabec neglected to send a proper notice of intent to claim and also failed to submit a formal claim prior to instituting legal proceedings.

The Court of Appeal agreed with the MTQ.

Important Legal Principles

First, the Court of Appeal confirmed that the claims procedure set out in the CCDG, including the short delays of 15 and 120 days for the transmission of notices and claims, was valid and did not contravene the public order rule pursuant to which "no prescriptive period other than that provided by law may be agreed upon" (article 2884 of the *Civil Code of Quebec*).

Justice Nicholas Kasirer, writing for the Court of Appeal, held that the delays related to the claims procedure could not be interpreted as a limitation period since they do not extinguish a right of action, but rather define the conditions of its creation.

Indeed, it is only upon the fulfillment of the claims procedure's formalities that a right of action arises. The civil law limitation period then runs from this date forward and the general contractor thus has three years to institute proceedings before the courts.

Second, the Court of Appeal confirmed that the MTQ was made aware of the claim by the subcontractor instead of the general contractor even before the 120-day delay started running. They were unable to conclude that the claims procedures' formalities were observed.

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

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 Quebec ("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 negociate 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.

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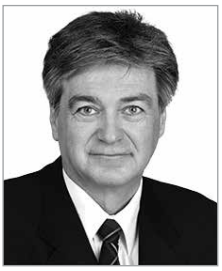

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