

Decisions

Decision 1462-2, 5 May 2009

Public Protector Act
(R.S.Q., c. P-32)

CONCERNING the Regulation respecting contracts of the Public Protector adopted under the Public Protector Act

AS, in Decision 1178-2 dated 27 November 2003, the Office of the National Assembly approved the Regulation respecting contracts of the Public Protector;

AS the Act respecting contracting by public bodies (R.S.Q., chapter C-65.1) has been in force since 1 October 2008 and the Gouvernement du Québec has passed three regulations under the Act;

AS the Public Protector has decided to voluntarily comply with the principles and rules set out in the Act and the three regulations even though they do not apply to the Public Protector;

AS section 35.2 of the Public Protector Act (R.S.Q., chapter P-32) provides that the Public Protector may, by regulation, determine the terms of the contracts the Public Protector is authorized to conclude;

AS the same section of that Act provides that the regulation comes into force on the date of its approval by the Office of the National Assembly and that it is to be published in the *Gazette officielle du Québec*;

AS the Public Protector adopted the Regulation respecting contracts of the Public Protector on May 1, 2009;

AS it is expedient that the Office of the National Assembly approve that regulation;

IT IS THE DECISION OF THE OFFICE

THAT the Regulation respecting contracts of the Public Protector, attached to this decision, is hereby approved;

THAT this Decision replaces Decision 1178-2 dated 27 November 2003;

FRANÇOIS CÔTÉ,
*Secretary of the Office of
the National Assembly*

Regulation respecting Contracts of the Public Protector

Public Protector Act
(R.S.Q., c. P- 32, a. 35.2)

PREAMBLE

WHEREAS the Public Protector is not subject to the Act Respecting Contracting by Public Bodies (R.S.Q., c. C-65.1), under section 5 of this Act;

AND WHEREAS the Public Protector adheres to the principles and rules stipulated in the Act Respecting Contracting by Public Bodies and to the regulations adopted under this Act;

AND WHEREAS the Public Protector may, under subsection 35.2 of the Public Protector Act (R.S.Q., c. P-32), define by regulation the conditions of the contracts it may conclude;

THEREFORE the Public Protector adopts this Regulation Respecting Contracts of the Public Protector.

CHAPTER I

PURPOSE, SCOPE AND GENERAL PROVISIONS

1. The purpose of this Act is to determine the conditions that are to govern the contracts that the Public Protector may enter into with any physical or legal person.

2. The conditions determined by this Act aim to promote:

- (1) transparency in contracting processes;
- (2) the honest and fair treatment of tenderers;
- (3) the opportunity for qualified tenderers to compete in calls for tenders made by the Public Protector;
- (4) the use of effective and efficient contracting procedures, including careful, thorough evaluation of procurement requirements that reflects the Government's sustainable development and environmental policies;
- (5) the implementation of quality assurance systems for the goods, services or construction work required by the Public Protector; and

(6) accountability reporting by the Public Protector to verify the proper use of public funds.

3. This regulation applies to the following contracts concluded by the Public Protector:

(1) service contracts including damage insurance contracts, affreightment contracts, contracts of carriage other than those subject to the Education Act (chapter I-13.3), contracts of enterprise other than construction contracts;

(2) supply contracts, including contracts for the purchase, lease or rental of movable property, which may include the cost of installing, operating and maintaining the property;

(3) construction contracts to which the Building Act (chapter B-1.1) applies and for which the contractor must hold the licence required under Chapter IV of that Act;

(4) mixed contracts for construction work and professional service; and

(5) contracts to lease immovables, other than occupation agreements between the Public Protector and the Société immobilière du Québec, by which the right to occupy an immovable is acquired for a certain time in return for rent.

4. This Regulation does not apply to contracts under a cooperation agreement financed in whole or in part by an international cooperation organization if the agreement contains contract rules.

5. Every contract referred to in this Regulation must be signed by the Public Protector in person or by a person authorized to sign on behalf of the Public Protector, unless expressly stated otherwise.

6. For the purposes of this Regulation, the electronic tendering system is the system approved by the Government under section 11 of the Act Respecting Contracting by Public Bodies.

CHAPTER II CONTRACT AWARD

DIVISION I PUBLIC CALLS FOR TENDERS

§1. *General*

7. The Public Protector must use the public call for tender process described in this division for all contracts involving an expenditure equal to or greater than:

(1) \$100,000 for service or construction contracts; or

(2) \$25,000 for supply contracts.

8. The Public Protector may not split or segment its procurement requirements or amend a contract for the purpose of avoiding the obligation to make a public call for tenders or any other obligation under this Regulation.

9. The Public Protector may be party to a joint call for tenders with a public body referred to in section 4 of the Act Respecting Contracting by Public Bodies or with a legal person established in the public interest whose contracting conditions are different from those determined by this Regulation. In such a case, the conditions for the joint call for tenders are those to which the one that proceeds to it is subject.

§2. *Tender documents*

10. Every public call for tenders is made by publishing a notice on the electronic tendering system identified in section 6.

The notice forms part of the tender documents and must specify and contain:

(1) the identification of the “Public Protector”;

(2) a brief description of the services, needs or construction work required, as well as, where applicable, the date of delivery or execution;

(3) the nature and amount of any required tender security;

(4) the place where the tender documents or information may be obtained;

(5) the place as well as the closing and opening dates and times, the closing date being not less than 15 days after the date on which the notice is published; and

(6) the fact that the Public Protector is not bound to accept any tender.

11. In its tender documents, the Public Protector must provide:

(1) a description of the services, needs or construction work and the conditions under which the contract is to be carried out;

(2) in the case of a joint call for tenders within the meaning of section 9, the identity of every public body and legal person established in the public interest that are parties to the joint call for tenders;

(3) the eligibility requirements for service providers, suppliers or construction contractors and the compliance requirements for tenders;

(4) a list of the documents or other items required from the service providers, suppliers or construction contractors;

(5) the tender opening procedure;

(6) where a quality evaluation of tenders is to be made, the evaluation rules, including the criteria selected and, for the purpose of Schedule 2, their respective weighting;

(7) the contract award rule, including any calculation to be applied before awarding the contract;

(8) the contract to be signed; and

(9) any other particular required under this Regulation or a Public Protector policy under section 87.

12. In order to submit a tender, a service provider, supplier or contractor must meet the following eligibility requirements:

(1) have all the necessary qualifications, authorizations, permits, licences, registrations, certificates, accreditations and attestations;

(2) have in Québec or in a territory covered by an applicable intergovernmental agreement an establishment where activities are carried out on a permanent basis, clearly identified under the service provider's name and accessible during regular business hours; and

(3) meet any other eligibility requirement specified in the tender documents.

Despite subparagraph 2 of the first paragraph, if competition is insufficient, the Public Protector may make eligible any service provider that has an establishment in a territory not covered by an applicable intergovernmental agreement, provided that the Public Protector so specifies in the tender documents.

A service provider, supplier or contractor who fails to comply with any of these requirements is ineligible.

13. Compliance requirements must specify the cases that will entail automatic rejection of a tender, namely:

(1) the place or the closing date or time has not been complied with;

(2) a required document is missing;

(3) the required signature of an authorized person is missing;

(4) an erasure of or correction to the tendered price is not initialled;

(5) the tender is conditional or restrictive;

(6) the price submitted and the quality demonstration are not presented separately as required by section 19, where applicable; and

(7) any other compliance requirement stated in the tender documents as entailing automatic rejection of a tender has not been complied with.

14. Provided that it is specified in the tender documents, the Public Protector may refuse to consider any service provider, supplier or construction contractor who, in the two years preceding the tender opening date, has been given an unsatisfactory performance report by the public body, failed to follow up on a tender or contract or has had a contract cancelled because of failure to comply with the contract conditions.

15. The Public Protector may amend the tender documents by sending an addendum to the service providers, suppliers or contractors concerned.

If the amendment is likely to affect the prices, the addendum must be sent at least seven days before the tender closing time; if that seven-day period cannot be complied with, the closing time must be extended by the number of days needed to ensure compliance with the minimum period.

16. For construction contracts, the Public Protector must also specify in the tender documents what securities are required and the form and conditions to be complied with.

Tender security is required by the Public Protector if the estimated amount of the contract is equal to or greater than \$500,000, and may be required in all other cases.

Where tender security is required, the contractor must also provide, prior to the signing of the contract, performance security and security for the contractor's obligations with respect to wages, materials and services.

17. For construction contracts, tender security in the form of a bond must be submitted in accordance with the requirements of Schedule 3.

Performance security or security for the contractor's obligations with respect to wages, materials and services in the form of a bond must be submitted in accordance with the requirements of Schedule 4 or Schedule 5, as the case may be.

The bond referred to in the first or second paragraph must be issued by a financial institution that is an insurer holding a licence issued under the Act Respecting Insurance (R.S.Q., c. A-32) authorizing the financial institution to transact guarantee insurance, a trust company having a licence issued under the Act Respecting Trust Companies and Savings Companies (R.S.Q., c. S-29.01), a financial services cooperative to which the Act Respecting Financial Services Cooperatives (R.S.Q., c. C-67.3) applies, or a bank within the meaning of the Bank Act (S.C. 1991, c. 46).

§3. Calling for and opening of tenders

18. The Public Protector solicits solely a price to award a service contract of a technical nature, a supply contract or a contract for construction work.

19. The Public Protector must evaluate the quality of a tender to award a professional service contract; the Public Protector must request a price, if required, and a quality demonstration based on predetermined evaluation criteria.

The price and the quality demonstration must be presented separately so that the first paragraph of section 29 may apply.

20. Tenders are opened by the Public Protector at a public opening in the presence of a witness at the designated place and on the date and time fixed in the tender documents, unless the tenders are in the form of a price list whose scope or layout does not make it possible to specify a total price.

At the public opening, the names of the service providers, suppliers or contractors and their respective total prices are disclosed, subject to subsequent verification.

Despite the previous subparagraph, for a professional service contract, only the names of the service providers are disclosed.

Within 4 business days, the Public Protector must make the results of the public opening of tenders available on the electronic tendering system.

§4. Evaluation of tenders and contract awarding

21. The Public Protector evaluates the tenders received, ensuring that the service providers, suppliers or contractors are eligible and their tenders are compliant.

If the Public Protector rejects a tender because the tenderer is ineligible or the tender is non-compliant, it must so inform the service provider, supplier or contractor and give the reason for the rejection no later than 15 days after awarding the contract.

22. The Public Protector must evaluate the quality of tenders as provided in Schedule 1 or Schedule 2, as the case may be.

23. Where an evaluation is based on a minimum level of quality, the Public Protector must apply the evaluation conditions in Schedule 1 and award the contract to the service provider, supplier or contractor who submitted the lowest price.

24. Where an evaluation is based on measurement of the level of quality followed by calculation of the price-quality ratio, the Public Protector must apply the evaluation conditions in Schedule 2 and award the contract to the service provider who submitted the lowest adjusted price.

25. Where an evaluation is based solely on measurement of the level of quality, the Public Protector must apply the evaluation conditions in sections 1 to 7 of Schedule 2 and award the contract to the service provider whose acceptable tender obtained the highest final score.

26. The Public Protector may solicit only a quality demonstration if a tariff applicable to the contract concerned exists and has been established under an Act or approved by the Government or the Conseil du trésor.

27. Despite section 24, the Public Protector must solicit only a quality demonstration to award an architecture or engineering contract.

If such a contract, excluding a contract for soils and materials engineering, involves an expenditure below \$250,000 and a regionalized public call for tenders is issued, the project manager must be a permanent resource of the service provider. The workplace of the permanent resource must be an establishment of the provider that has been in the region specified in the tender documents for at least two months before the tender closing date.

For the purposes of the second paragraph, permanent resource means a natural person who, on an annual basis, devotes at least 75% of his or her working time to the service provider and at least 1,100 hours.

28. For professional service contracts, the Public Protector may make a public call for tenders in two stages in order to award a contract.

In the first stage, the Public Protector selects service providers by soliciting only a quality demonstration. The tender documents must indicate whether every selected service provider or only a limited number of them will be invited to take part in the second stage.

The selection committee evaluates the quality of a tender according to the following conditions and procedure:

(1) if all the selected service providers are invited to take part in the second stage, the quality of a tender is evaluated in accordance with the evaluation conditions in Schedule 1 and all the providers who meet at least the minimum quality level are retained;

(2) if only a limited number of service providers are invited to take part in the second stage, the quality of a tender is evaluated in accordance with the evaluation conditions in sections 1 to 7 of Schedule 2 and only those who obtain the highest final scores are retained.

In the second stage, the public body invites the selected service providers to submit a tender that includes only a price or a quality demonstration with or without a price.

If only a price is required, sections 18, 20, 21 and 33 to 35 apply and, where the quality level of a tender is evaluated, sections 19 to 27 and 29 to 31 apply.

29. For professional service contracts, tenders are to be evaluated by a selection committee set up for that purpose by the Public Protector. If a price is submitted, the committee must evaluate quality without knowing the price submitted.

The selection committee must be composed of a secretary in charge of coordinating activities and of at least three members.

30. The provisions of sections 35 and 36 apply to a professional service contract, except that the condition in subparagraph 1 of the second paragraph of section 36 is that only one service provider must have submitted an acceptable tender.

31. For professional service contracts, the Public Protector must inform each tenderer of the results of the tender quality evaluation within 15 days after awarding the contract.

If Schedule 1 applies, the particulars sent to tenderers are:

(1) confirmation that their tender was accepted or not; and

(2) the name of and price submitted by the successful tenderer.

If Schedule 2 applies, the particulars sent to tenderers are:

(1) confirmation that their tender was accepted or not;

(2) their quality score, their adjusted price and their rank according to the adjusted prices, where applicable; and

(3) the name, quality score and, where applicable, price of the successful tenderer, and the resulting adjusted price.

32. Except for contracts for financial or banking services, section 19 and sections 21 to 31 apply where the Public Protector evaluates the quality of a tender following an invitation to tender. However, the composition of the selection committee provided for in the second paragraph of section 29 may differ.

33. With the exception of contracts for professional service, the Public Protector awards the contract to the service provider or contractor who submits the lowest price.

For supply contracts, the Public Protector may, in the determination of the lowest price, include the cost of the impact related to the acquisition and adjust the submitted prices accordingly. This price adjustment must, however, be founded on quantifiable and measurable factors that are clearly identified in the tender documents.

34. Despite section 18, for construction contracts, the Public Protector may decide to evaluate the quality of a tender by making a call for tenders in two stages.

The first stage consists in selecting contractors by soliciting only a quality demonstration in accordance with the evaluation conditions in Schedule 1. The second stage consists in inviting the selected contractors to submit a tender that includes only a price.

The Public Protector must specify in the tender documents the rules to be used to evaluate the quality of tenders, including the evaluation criteria.

35. If several service providers obtain identical results following a call for tenders, the contract is awarded by a drawing of lots.

36. The Public Protector awards the contract on the basis of the procurement requirements described and the rules established in the tender documents and according to the price submitted.

The Public Protector may, however, negotiate the price submitted and the price stipulated in the contract may be less than the price submitted if:

- (1) only one service provider, supplier or contractor submitted a compliant tender;
- (2) the service provider, supplier or contractor agreed to a new price; and
- (3) it is the only change made to the conditions set out in the tender documents or to the tender in the course of the negotiation.

37. For construction contracts, where it is decided after tenders are opened that a contract is not to be awarded following a public call for tenders or, if a quality evaluation is to be made, after a meeting of the selection committee, the tenderer that would have been awarded the contract receives as compensation and final settlement for expenses incurred the amount of:

- (1) \$2,000, if the tender is equal to or greater than \$500,000 but less than \$1,000,000; or
- (2) \$5,000, if the tender is equal to or greater than \$1,000,000.

DIVISION II CONTRACTS NOT SUBJECT TO THE PUBLIC TENDERING PROCESS

38. The Public Protector must award contracts involving an expenditure below the public tender threshold described in section 7 in accordance with the principles set out in this Regulation, particularly those stated in section 2.

To ensure the sound management of such contracts, the Public Protector must, among other means, consider whether they should:

- (1) make a public call for tenders or issue an invitation to tender;
- (2) use a rotation system among the tenderers or contractors they deal with, or seek new tenderers or contractors;
- (3) include provisions to control the amount of such contracts and of any related additional expenditure, especially in the case of contracts by mutual agreement, in compliance with section 39; or
- (4) set up a monitoring mechanism to ascertain the effectiveness and efficiency of the contracting process used for contracts involving an expenditure below the public tender threshold specified in section 7.

39. Every contract referred to in this Regulation involving an expenditure above the public tender threshold specified in section 7 may be entered into by mutual agreement under the following circumstances:

- (1) if there is an emergency that threatens human safety or property;
- (2) if there is only one possible contractor because of the existence of a guarantee, an ownership right or an exclusive right such as a copyright or a right based on an exclusive licence or patent, or because of the artistic, heritage or museological value of the required property or service;
- (3) if the contract involves confidential or protected information whose disclosure in a public call for tenders could compromise its confidential nature or otherwise hinder the public interest;
- (4) if the Public Protector considers that it will be able to prove, in accordance with the principles set out in section 2, that a public call for tenders would not serve the public interest given the object of the contract concerned;
- (5) for legal contracts;
- (6) for financial or banking service contracts;
- (7) for supply contracts related to research and development activities or teaching activities where, due to technical or scientific reasons, only one supplier is able to carry it out and there is no other alternate solution or substitute goods;
- (8) if the Public Protector is of the opinion that, due to the special requirements or time limits involved, the call for tenders procedure prescribed in this Regulation would compromise the carrying out of an intervention in accordance with the Public Protector Act or the Act Respecting the Health and Social Services Ombudsman (R.S.Q., c. P-31.1).

In all cases subject to this section and despite section 5, the contract must be authorized and signed by the Public Protector in person.

DIVISION III SPECIAL RULES FOR AWARDING CONTRACTS

§1. Task order contracts

40. The Public Protector may enter into a task order contract with one or more service providers when the procurement requirements are recurrent and the number of requests, the rate or the frequency at which they are to be performed are uncertain.

41. The Public Protector must indicate in the tender documents the approximate monetary value of the services or construction work that the public body intends to request or have carried out.

42. If the task order contract is entered into with more than one service provider, the performance requests are made to the service provider who submitted the lowest price, unless the provider cannot perform the service, in which case the other providers are solicited according to their respective rank.

43. A task order contract is entered into for a term not exceeding three years, including any renewal.

§2. Delivery order contracts

44. The Public Protector may enter into a delivery order contract with one or more suppliers when the procurement requirements are recurrent and the quantity of goods, the rate or the frequency at which they are acquired are uncertain.

45. The Public Protector must indicate in the tender documents the approximate quantities of goods likely to be acquired or, failing that, the approximate monetary value of the contract and, where applicable, the places of delivery.

46. If the delivery order contract is entered into with more than one supplier, the orders are directed to the supplier who submitted the lowest price, unless the supplier cannot fill the orders, in which case the other suppliers are solicited according to their respective rank.

Such orders may, however, be awarded to any of the selected suppliers whose submitted price does not exceed the lowest price by more than 10%, so long as the awarding rule is authorized by the Québec Ombudsperson before the notice of a call for tenders is published.

§3. Service contracts of a technical nature

47. Despite section 18, the Public Protector may decide to evaluate the quality of a tender in order to award a service contract of a technical nature and must then apply the provisions of sections 19 to 32.

§4. Professional service contract

48. Despite section 19, the Public Protector may, except in the cases provided for in section 27, decide to solicit only a price in order to award a professional service contract; the Public Protector must then apply the provisions of sections 18, 20, 21 and 33 to 37.

§5. Contracts awarded following quality evaluation

49. For supply contracts and despite section 18, the Public Protector may decide to evaluate the quality of a tender; in such a case, it must request a price and a quality demonstration based on predetermined evaluation criteria.

The Public Protector must specify in the tender documents the rules to be used to evaluate the quality of tenders, including the evaluation criteria selected and, for the purposes of Schedule 2, their respective weighting.

The price and the quality demonstration must be presented separately so that the first paragraph of section 56 may apply. In addition to the cases referred to in section 13, the compliance requirements must state that failure to comply with the requirement will entail automatic rejection of a tender.

50. For construction contracts and despite section 18, the Public Protector may decide to evaluate the quality of a tender by making a call for tenders in two stages.

The first stage consists in selecting contractors by soliciting only a quality demonstration in accordance with the evaluation conditions in Schedule 1. The second stage consists in inviting the selected contractors to submit a tender that includes only a price.

The Public Protector must specify in the tender documents the rules to be used to evaluate the quality of tenders, including the evaluation criteria.

The Public Protector awards the contract to the contractor that submits the lowest price.

51. In order to award a mixed contract for construction work and professional service, the Public Protector may consider the quality of a tender. To that end, the Public Protector applies the evaluation conditions in Schedule 2.

In that case, the Public Protector must specify in the tender documents the rules to be used to evaluate the quality of tenders, including the evaluation criteria selected and their respective weighting.

The price and the quality demonstration must be presented separately so that the first paragraph of section 56 may apply. In addition to the cases referred to in section 13, the compliance requirements must state that failure to comply with the requirement will entail automatic rejection of a tender.

The Public Protector awards the contract to the contractor that submits the lowest adjusted price.

52. For mixed contracts for construction work and professional service, the Public Protector may also make a public call for tenders in two stages in order to award a contract.

In the first stage, the public body selects contractors by soliciting only a quality demonstration. The tender documents must indicate whether every selected contractor or only a limited number of them will be invited to take part in the second stage.

The selection committee evaluates the quality of a tender according to the following conditions and procedure:

(1) if all the selected contractors are invited to take part in the second stage, the quality of a tender is evaluated in accordance with the evaluation conditions in Schedule 1 and all the contractors that meet at least the minimum quality level are retained; or

(2) if only a limited number of selected contractors are invited to take part in the second stage, the quality of a tender is evaluated in accordance with the evaluation conditions in sections 1 to 7 of Schedule 2 and only those who obtain the highest final scores are retained.

In the second stage, the Public Protector invites the selected contractors to separately submit a price and a quality demonstration in conformity with the evaluation conditions in Schedule 2.

53. At the public opening of tenders under section 20, for a contract awarded following quality evaluation, only the names of the suppliers or contractors are disclosed and the results of the opening are made available in accordance with the fourth paragraph of that section.

54. For supply contracts, the Public Protector must evaluate the quality of tenders as provided in Schedule 1 or Schedule 2, as the case may be.

55. For supply contracts, where an evaluation is based on a minimum level of quality, the Public Protector must apply the evaluation conditions in Schedule 1 and award the contract to the supplier who submitted the lowest price.

Where an evaluation is based on measurement of the level of quality followed by calculation of the price-quality ratio, the Public Protector must apply the evaluation conditions in Schedule 2 and award the contract to the supplier who submitted the lowest adjusted price.

56. For supply or construction contracts, tenders are to be evaluated by a selection committee set up for that purpose by the Public Protector. The committee evaluates quality without knowing the price submitted.

Where the tender evaluation is to award a contract involving an expenditure equal to or above the public tender threshold, the selection committee must be composed of a secretary in charge of coordinating activities and of at least three members.

57. For the purposes of section 36 with respect to a contract awarded following quality evaluation, the condition in subparagraph 1 of the second paragraph of that section is that only one contractor must have submitted an acceptable tender.

58. The Public Protector must inform each tenderer of the results of the tender quality evaluation within 15 days after awarding the contract.

If Schedule 1 applies, the particulars sent to tenderers are:

(1) confirmation that their tender was accepted or not; and

(2) the name of and price submitted by the successful tenderer.

If Schedule 2 applies, the particulars sent to tenderers are:

(1) confirmation that their tender was accepted or not;

(2) their quality score, their adjusted price and their rank according to the adjusted prices, where applicable; and

(3) the name, quality score and, where applicable, price of the successful tenderer, and the resulting adjusted price.

CHAPTER III SPECIAL CONTRACTS

DIVISION I ADVERTISING CAMPAIGN CONTRACTS

59. The Public Protector may solicit only a quality demonstration to award an advertising campaign contract.

The amount indicated in the contract may not be greater than the amount predetermined in the tender documents.

DIVISION II TRAVEL SERVICE CONTRACTS

60. The Public Protector may solicit only a quality demonstration to award a travel service contract involving an expenditure equal to or above the public tender threshold.

In that case, the Public Protector negotiates the amount of the contract with the service provider whose acceptable tender obtained the highest score for quality.

CHAPTER IV QUALIFICATION OF SERVICE PROVIDERS

61. The Public Protector may qualify service providers prior to the acquisition process if:

(1) the qualification of service providers is preceded by a public notice to that effect on the electronic tendering system;

(2) a list of the qualified service providers is published on the electronic tendering system and every provider is informed of entry on the list or the reason for refusal if entry is denied; and

(3) a public notice of qualification is published again at least once a year, even though the Public Protector may qualify service providers at intervals varying from one to three years.

62. When the Public Protector evaluates the quality of applications for qualification, it must set up a selection committee within the meaning of section 29 and apply the evaluation conditions in Schedule 1 or in sections 1 to 7 of Schedule 2.

63. Except in the cases described in section 39, every contract subsequent to the qualification of service providers is limited to qualified providers only and, if such a contract involves an expenditure equal to or above the public tender threshold, it must be awarded through a public call for tenders.

CHAPTER V CONDITIONS TO BE MET PRIOR TO ENTERING INTO CONTRACTS

DIVISION I REQUIRED AUTHORIZATION

64. The authorization of the Public Protector in person is required for every contract of a repetitive nature with an expected term, including any renewal, is greater than three years. For construction contracts, this authorization is required before publication of the tender notice when the bid validity period is greater than 45 days.

For a task order or delivery order contract, the Public Protector cannot authorize a contract with a planned duration, including any renewals, greater than five years.

This authorization is also required before entering into a contract involving an expenditure equal to or above the public tender threshold if:

(1) only one service provider submitted a compliant tender; or

(2) only one service provider submitted an acceptable tender following a quality evaluation.

In the case provided for in subparagraph 2 of the third paragraph or for mixed construction and professional service contracts, the selection committee must not know the price and the Public Protector in person shall determine whether or not the awarding process should be continued.

DIVISION II AFFIRMATIVE ACTION PROGRAM

65. Where the amount of a service contract is \$100,000 or more, or where the amount of a service subcontract is \$100,000 or more, the contract or subcontract may not be entered into with a Québec service provider or subcontractor whose business employs more than 100 persons unless the service provider or subcontractor has made a commitment to implement an affirmative action program that complies with the Charter of Human Rights and Freedoms (R.S.Q., c. C-12) and holds an attestation to that effect issued by the Chair of the Conseil du trésor.

If such a contract or subcontract is to be entered into with a service provider or subcontractor outside Québec but within Canada whose business employs more than 100 persons, the service provider or subcontractor must provide an attestation to the effect that the service provider or subcontractor has already made a commitment

to implement an employment equity program of the province or territory concerned, as applicable, or failing that, to implement a federal employment equity program.

66. The Chair of the Conseil du trésor is to cancel the attestation issued to any Québec service provider who does not fulfil a commitment to implement an affirmative action program. Such a service provider may not enter into a supply contract or a service contract or subcontract as long as a new attestation has not been issued.

A service provider located outside Québec but within Canada whose attestation referred to in the second paragraph of section 64, has been revoked may not enter into a service contract or subcontract as long as a new attestation has not been issued.

DIVISION III QUALITY ASSURANCE, SUSTAINABLE DEVELOPMENT AND ENVIRONMENT

67. The Public Protector may require a quality assurance system, including the ISO 9001:2000 standard, or a specification relating to sustainable development and the environment for the carrying out of a contract. The Public Protector must specify the requirement in the tender documents.

If such a requirement unduly reduces competition, the Public Protector must allow any service provider, supplier or contractor to submit a tender and grant to the tenderer that fulfils the requirement referred to in the first paragraph a preferential margin not exceeding 10%. In the latter case, the price submitted by such a service provider, supplier or contractor is, for the sole purpose of determining the successful tenderer, reduced by the preferential margin, without any effect on the price for contract awarding purposes.

The percentage of the preferential margin to be applied must be indicated in the tender documents.

In the case of a contract whose quality evaluation is based solely on the quality measurement, the Public Protector must ascertain that there is enough competition to allow the first paragraph to apply.

CHAPTER VI CONTRACT AMENDMENTS

68. A contract may be amended if the amendment is accessory and does not change the nature of the contract.

However, if the contract involves an expenditure above the public tender threshold, an amendment that entails an additional expenditure must moreover be authorized by the Public Protector in person. The Public Protector in person may delegate, in writing and to the extent specified, the power to authorize such an amendment. Additional expenditures authorized under a given delegation may not total more than 10% of the initial amount of the contract.

Despite the second paragraph, an amendment does not require authorization if it is due to a variation in the amount to which a predetermined percentage is to be applied or, subject to section 8, to a variation in a quantity for which a unit price has been agreed.

CHAPTER VII INFORMATION TO BE PUBLISHED

69. Following a public call for tenders, the Public Protector must publish on the electronic tendering system, within 15 days of the awarding of the contract, the name of the successful tenderer and the amount of the contract or, in the case of a task order contract, the estimated amount of the expenditure.

In addition, if a contract involves renewal options, the public body also publishes the total amount of the expenditure that would be incurred if all options were exercised.

70. In the case of a task order contract involving several service providers or suppliers, the Public Protector must publish the names of the services providers or suppliers retained and their respective total price.

If such a contract involves price lists whose scope or layout prevents the publication of the results, the Public Protector must indicate on the electronic tendering system how information on the results may be obtained.

71. The Public Protector must publish on the electronic tendering system, at least once every six months, a list of the contracts involving an expenditure greater than \$25,000 entered into by mutual agreement or following an invitation to tender, except contracts involving confidential or protected information within the meaning of subparagraph 3 of the first paragraph of section 39.

72. The list to be published pursuant to section 71 must contain at least the following information:

(1) the name of the service provider, supplier or contractor, the date and the amount of the contract or, in the case of a task order or delivery order contract, the estimated amount of the expenditure;

(2) in the case of a contract that involves renewal options, in addition to the information required in paragraph 1, the total amount of the expenditure that would be incurred if all options were exercised;

(3) the nature of the service, goods or construction work to be provided under the contract; and

(4) in the case of a contract by mutual agreement involving an expenditure above the public tender threshold, the provision in this Regulation under which the contract was awarded.

CHAPTER VIII CONTRACT MANAGEMENT CONDITIONS

DIVISION I CHANGE ORDERS FOR CONSTRUCTION WORK

73. For construction contracts, the Public Protector may make changes to the work by issuing a change order.

74. The value of a change is determined as follows:

(1) estimation, negotiation and acceptance of a detailed lump sum that takes into account, for the contractor's overhead, administrative costs and profits, the markup percentage, as the case may be, in subparagraph *a* or *b* of subparagraph 3;

(2) if the nature of the change in the work is such that a lump sum cannot be estimated, application of the unit prices indicated in the contract or subsequently agreed on; or

(3) if the nature of the change is such that a lump sum or unit prices cannot be estimated, addition of the cost of labour, materials and equipment relating to the change and increased:

a) by 15% if the work is performed by the contractor; or

b) by 10% for the contractor and 15% for the subcontractor if the work is performed by a subcontractor.

For the purposes of subparagraph 3 of the first paragraph, the cost of labour, materials and equipment corresponds to the actual costs of the items listed in Schedule 6. The increase includes the contractor's overhead, administrative costs and profits.

75. If the Public Protector and the contractor cannot agree on the value of a change at the first negotiation, the detailed estimate of the change required is then determined by the Public Protector and paid according to the conditions stipulated in the contract.

76. The contractor may file a dispute over the value of a change in writing to the Public Protector within 15 days of the issue of the change order pursuant to section 75. In such a case, the parties must pursue the negotiations in accordance with sections 79 or 80 to 82, as the case may be.

77. If a contract related to a building involves an expenditure equal to or greater than \$3,000,000 and the proposed change order increases the total value of the changes by more than 10 % of the initial value of the contract, the Public Protector may issue the change order or any subsequent change order only if it confirms to the contractor that it has the money necessary to perform the change.

78. No change may be required after the work has been accepted with reservation.

DIVISION II SETTLEMENT OF DISPUTES

§1. *General rules*

79. The Public Protector and the service provider, supplier or contractor must attempt to amicably settle any difficulty that may arise out of a contract by resorting to the dispute resolution clauses in the contract, if any.

If the matter cannot be settled in that manner, it may be referred to a court of justice or an adjudicative body, as the case may be, or to an arbitrator.

§2. *Specific rules relating to a construction contract for a building*

80. The Public Protector and the contractor must attempt to settle amicably any difficulty arising from a contract by following the following steps and procedures:

(1) a manager representing the Public Protector and an officer of the contractor shall attempt to settle the dispute in whole or in part within 60 days after receipt of the notice of dispute from the contractor; the parties may agree to extend that period; and

(2) if the negotiations do not enable the dispute to be settled in full, the Public Protector or the contractor may, by sending a written notice to the other party within 10 days after the end of the preceding step, require mediation of the unsettled issues, which must be carried out within 60 days following receipt of the notice of mediation; the parties may agree to extend that period.

If a notice of mediation is not sent within the time specified in subparagraph 2 of the first paragraph, the negotiation process is then terminated.

81. The mediator is chosen by mutual agreement between the Public Protector and the contractor. The function of the mediator is to assist the parties in clarifying the dispute and defining their positions and interests, and to discuss and explore mutually satisfying solutions to settle the dispute.

The parties, along with the mediator, define the rules applicable to the mediation, set its duration, and specify their commitments, expectations and needs, as well as the role and duties of the mediator. The fees and expenses of the mediator are to be paid in equal parts by the parties, unless a different sharing arrangement has been agreed upon.

The representative of each party must be duly authorized by the Public Protector in person or by the officer of the contractor, as the case may be, to proceed with the mediation.

82. In the absence of an agreement between the Public Protector and the contractor following mediation, the parties retain all their rights and remedies, in particular those under section 79.

DIVISION III **PERFORMANCE EVALUATION**

83. The Public Protector must record in a report the evaluation of any service provider, supplier or contractor whose performance is considered to be unsatisfactory.

84. The Public Protector must complete its evaluation not later than 60 days after the end of the contract and send a copy of the evaluation to the service provider, supplier or contractor.

85. A service provider may forward comments in writing on the report to the Public Protector within 30 days following receipt of a report of unsatisfactory performance.

86. Within 30 days after the expiry of the time in section 85 or following receipt of comments from the service provider, supplier or contractor, as the case may be, the Public Protector in person is to uphold or cancel the evaluation and inform the service provider, supplier or contractor of the decision.

If the Public Protector fails to act within the prescribed time, the performance of the service provider, supplier or contractor is considered to be satisfactory.

CHAPTER IX **POWERS OF THE PUBLIC PROTECTOR**

87. The Public Protector may establish policies for the management of the supply, service and construction contracts it requires. The Public Protector sees to the implementation of the policies and to their application.

88. The Public Protector may prescribe model contract forms or other standard documents to be used by the institution.

CHAPTER XI **TRANSITIONAL AND FINAL PROVISION**

89. Procedures for awarding contracts subject to this Regulation but undertaken before its effective date shall be continued in accordance with the provisions in force on the date on which the procedures were undertaken.

90. Any contract in progress on the effective date of this Regulation shall be continued in accordance with the provisions of this Regulation, unless this Regulation is incompatible with a provision of the contract, in which case the latter provision shall prevail.

91. This Regulation replaces the Regulation Respecting Contracts of the Public Protector adopted on 21 November 2003 and approved by the Office of the National Assembly on 27 November 2003 by Decision 1178-2.

92. This Regulation comes into force on 5 May 2009.

SCHEDULE 1 (ss. 22, 23, 28, 31, 34, 50, 52, 54, 55, 58, 62)

Quality evaluation conditions for a contract award based on the lowest price

1. At least three criteria are required for quality evaluation.

2. The Public Protector must specify in the tender documents, for each criterion, the elements of quality required to reach an “acceptable level of performance,” which corresponds to its minimum expectations for the criterion.

3. An acceptable tender in terms of quality is a tender that, for each criterion, meets the “acceptable level of performance.” A tender that does not reach that level of performance in respect of any criterion is rejected.

SCHEDULE 2

(ss. 22, 24, 25, 28, 31, 49, 51, 52, 54, 55, 58, 62)

Quality evaluation conditions for a contract award based on the lowest adjusted price or based on the final score for the highest quality

1. The evaluation grid must have at least three quality evaluation criteria.

2. The Public Protector must specify in the tender documents, for each criterion, the elements of quality required to reach an “acceptable level of performance,” which corresponds to its minimum expectations for the criterion.

3. Each criterion in the evaluation grid is weighted on the basis of its importance for the carrying out of the contract. The total weight of the criteria is 100%.

4. Each criterion is evaluated on a scale of 0 to 100 points, the “acceptable level of performance” corresponding to 70 points.

5. At least 70 points may be required in respect of any criterion described in the evaluation grid. A tender that does not reach that minimum is rejected.

6. The final score for the quality of a tender is the total of the weighted scores obtained in respect of each criterion; the weighted scores are determined by multiplying the score obtained for a criterion by the weight of that criterion.

7. An acceptable tender in terms of quality is a tender whose final score is at least 70 points.

8. The price of each acceptable tender is adjusted according to the following formula:

$$\text{Adjusted price} = \frac{\text{Price submitted}}{\text{Quality adjustment factor}}$$

The quality adjustment factor is equal to:

$$1 + K \left(\frac{\text{Final score for quality} - 70}{30} \right)$$

where

“K” is the additional percentage that the Public Protector is willing to pay to move from a 70-point tender to a 100-point tender, for all criteria.

9. The Public Protector determines in the tender documents the value of K, which must range from 15% to 30%. For construction contracts, the value of K is set at 15%.

SCHEDULE 3

(s. 17)

Tender bond (construction work)

1. _____
(Name of the SURETY)

having its principal establishment at

(address of the SURETY)

herein represented by _____
(name and title)

duly authorized, hereinafter called the SURETY, having taken cognizance of the tender to be submitted on the _____ day of _____ 20____ to

(The Public Protector)

hereinafter called the Public Protector, by

(name of the CONTRACTOR)

having its principal establishment at

(address of the CONTRACTOR)

herein represented by _____
(name and title)

duly authorized, hereinafter called the CONTRACTOR, in respect of

(description of the work and location)

stands surety for the CONTRACTOR, to the benefit of the Public Protector, on the following conditions:

If the CONTRACTOR fails to sign a contract in conformity with the tender submitted or fails to provide the guarantees or any other document required following the date of acceptance of the tender, the SURETY binds itself to pay to the Public Protector a sum of money corresponding to the difference between the tendered price that had been accepted and the tendered price subsequently accepted by the Public Protector, it being provided that the SURETY is not required to pay more than, as specified in the tender documents:

— _____ percent of the tendered price (_____%),

or

— the lump sum determined by the Public Protector, _____ dollars (\$_____).

2. The CONTRACTOR whose tender is accepted must be notified in writing of such acceptance before the expiry of the tender validity period or any other time period agreed on by the Public Protector and the CONTRACTOR; failing that, this obligation is null and void.

3. This bond is governed by the law applicable in Québec and, should it be contested, the courts of Québec have sole jurisdiction.

4. The SURETY waives the benefit of discussion and division.

5. The CONTRACTOR intervenes in this agreement to consent thereto; should the CONTRACTOR fail to do so, this obligation is null and void.

IN WITNESS WHEREOF, the SURETY and the CONTRACTOR, by their duly authorized representatives, have signed this agreement in

_____, this ___ day of _____, 20_____

The SURETY

(witness)

(signature)

(name of signatory in block letters)

(title of signatory in block letters)

The CONTRACTOR

(witness)

(signature)

(name of signatory in block letters)

(title of signatory in block letters)

SCHEDULE 4
(s. 17)

Performance bond
(construction work)

1. _____
(Name of the SURETY)

having its principal establishment at

(address of the SURETY)

herein represented by _____
(name and title)

duly authorized, hereinafter called the SURETY, having taken cognizance of the tender duly accepted by

(identification of the Public Protector)

hereinafter called the Public Protector, in respect of

(description of the work and location)

and on behalf of

(name of the CONTRACTOR)

having its principal establishment at

(address of the CONTRACTOR)

herein represented by _____
(name and title)

duly authorized, hereinafter called the CONTRACTOR, binds itself jointly and solidarily with the CONTRACTOR, to the benefit of the Public Protector to perform the contract including, without limitation, the obligations covered by the guarantees, for the carrying out of the work described above in conformity with the call for tenders, it being provided that the SURETY in no case may be required to pay more than _____ dollars (\$_____).

2. The SURETY agrees that the Public Protector and the CONTRACTOR may amend the contract at any time, subject to the right of the SURETY to be informed thereof on request, pursuant to article 2345 of the Civil Code of Québec, and consents to the Public Protector granting any time period necessary to complete the work.

3. If the CONTRACTOR fails to perform the contract, including work covered by the guarantees, the SURETY assumes the CONTRACTOR'S obligations and, where applicable, undertakes and continues the work required within 15 days after receiving written notice to that effect from the Public Protector, failing which the Public Protector may have the work completed and the SURETY must pay the Public Protector for any excess amount over the price agreed on with the CONTRACTOR for performance of the contract.

4. This bond covers any fault indicated by the Public Protector to the CONTRACTOR in a written notice before the end of the second year following acceptance of the work within the meaning of article 2110 of the Civil Code of Québec.

5. This bond is governed by the law applicable in Québec and, should it be contested, the courts of Québec have sole jurisdiction.

6. The CONTRACTOR intervenes in this agreement to consent thereto; should the CONTRACTOR fail to do so, this obligation is null and void.

IN WITNESS WHEREOF, the SURETY and the CONTRACTOR, by their duly authorized representatives, have signed this agreement in

_____, this ___ day of _____, 20____

The SURETY

(witness)

(signature)

(name of signatory
in block letters)

(title of signatory
in block letters)

The CONTRACTOR

(witness)

(signature)

(name of signatory
in block letters)

(title of signatory
in block letters)

SCHEDULE 5

(s. 17)

Bond for the contractor's obligations with respect to labour, materials and services (construction work)

1. _____
(Name of the SURETY)

having its principal establishment at

(address of the SURETY)

herein represented by _____
(name and title)

duly authorized, hereinafter called the SURETY, having taken cognizance of the tender duly accepted by

(identification of the Public Protector)

hereinafter called the Public Protector, in respect of

(description of the work and location)

and on behalf of

(name of the CONTRACTOR)

having its principal establishment at

(address of the CONTRACTOR)

herein represented by _____
(name and title)

duly authorized, hereinafter called the CONTRACTOR, binds itself jointly and solidarily with the CONTRACTOR, to the benefit of the Public Protector, to pay directly the creditors hereinafter defined, it being provided that the SURETY in no case may be required to pay more than _____ dollars (\$_____).

2. Creditor means:

- (1) any subcontractor of the CONTRACTOR;

(2) any natural or legal person having sold or leased services, materials or equipment intended exclusively for the work to the CONTRACTOR or to the CONTRACTOR'S subcontractors, equipment leasing prices being determined solely on the basis of current construction industry standards;

(3) any supplier of materials specially prepared for that work and contract;

(4) the Commission de la santé et de la sécurité du travail, with respect to the contributions resulting from the contract; and

(5) the Commission de la construction du Québec, with respect to the contributions resulting from the contract.

3. The SURETY agrees that the Public Protector and the CONTRACTOR may amend the contract at any time, subject to the right of the SURETY to be informed thereof, on request, pursuant to article 2345 of the Civil Code of Québec, and consents to the Public Protector granting any time period necessary to complete the work.

4. Subject to clause 3 above, no creditor has direct recourse against the SURETY unless the creditor has sent an application for payment to the SURETY and to the CONTRACTOR within 120 days of the date on which the CONTRACTOR completed the work or supplied the last services, materials or equipment.

A creditor who has contracted other than directly with the CONTRACTOR has no direct recourse against the SURETY unless the creditor has notified the CONTRACTOR in writing of the contract within 60 days of the commencement of the leasing or delivery of the services, materials or equipment; the notice must indicate the work concerned, the subject of the contract, the name of the subcontractor and the Public Protector.

A subcontractor has no direct recourse against the SURETY in respect of sums held back by the CONTRACTOR unless the subcontractor has sent an application for payment to the SURETY and to the CONTRACTOR within 120 days of the date on which the sums held back became payable.

5. Any creditor may institute proceedings against the SURETY on the expiry of 30 days after the notice required by clause 4 has been sent, provided that the proceedings are not instituted before the expiry of

90 days after the date on which the creditor's work was performed or the date of supply of the last services, materials or equipment.

6. Any payment made in good faith by virtue of this agreement reduces the amount of this bond by a corresponding amount.

7. This bond is governed by the law applicable in Québec and, should it be contested, the courts of Québec have sole jurisdiction.

8. The CONTRACTOR intervenes in this agreement to consent thereto; should the CONTRACTOR fail to do so, this obligation is null and void.

IN WITNESS WHEREOF, the SURETY and the CONTRACTOR, by their duly authorized representatives, have signed this agreement in

_____, this ___ day of _____, 20____

The SURETY

(witness)

(signature)

(name of signatory
in block letters)

(title of signatory
in block letters)

The CONTRACTOR

(witness)

(signature)

(name of signatory
in block letters)

(title of signatory
in block letters)

SCHEDULE 6

(s. 74)

Cost of Labour, Materials and Equipment

The contractor must prove each expense relating to a change. The cost of labour, materials and equipment attributable to making the change to the work corresponds to the actual costs of the contractor and subcontractors, in the following categories:

(1) wages and employment benefits paid to workers under an applicable collective agreement and to the foreman and, where applicable, the superintendent supervising the employees on the construction site;

(2) the travel and accommodation expenses of the additional employees required;

(3) the cost of all materials, products, supplies, including materials incorporated into the work by reason of the change to the work, including transportation, storage and handling expenses, the whole corresponding to the lowest price granted to the contractor and subcontractors;

(4) taxes and other duties imposed by any competent authority on the labour, materials and equipment required and to which the contractor is subject, excluding the goods and services tax (GST) and the Québec sales tax (QST) since the Public Protector is exempt;

(5) the cost for transporting and using additional equipment and tools that are required, other than hand tools used by the employees;

(6) the cost of additional quality control performed by the person responsible for quality assurance or the superintendent on the work relating to the change;

(7) applicable patent royalties and rights;

(8) additional insurance and security premiums that the contractor must pay as a result of the increase in the contract price;

(9) energy and heating expenses directly attributable to the change;

(10) the cost for the removal and disposal of waste and debris attributable to the change;

(11) the necessary additional protections, temporary installations and security devices; and

(12) any other required additional labour, materials or equipment cost not specified in the preceding paragraphs and attributable to performing the change.

This Regulation Respecting contracts of the Public Protector has been adopted in accordance with section 35.2 of the Public Protector Act (R.S.Q., c. P-32), the 1st May 2009 in Quebec City.

RAYMONDE SAINT-GERMAIN,
The Public Protector

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