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Debarment from Public Contracts: The First Reversal of an AMF Decision

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The Superior Court of Québec recently quashed a refusal of the Autorité des marchés financiers (AMF) to grant the authorization necessary to obtain a public contract. This decision, in *Terra Location inc. v Autorité des marchés financiers*, 2015 QCCS 509, marks a first since the coming into force of the Integrity in Public Contracts Act (IPCA) in December 2012. The decision confirms that the AMF must disclose the precise allegations upon which it has concluded that a business failed to satisfy the IPCA's integrity requirements. The AMF's failure to disclose these allegations constitutes a breach of procedural fairness that vitiates the decision-making process and "must inevitably lead to the reversal of [the AMF's] decision" [our translation].

Context

In May 2013, Terra Location inc. (Terra), a construction company, requested an authorization from the AMF to enter into contracts with certain public bodies. Nine months later, in February 2014, Terra received notice of the AMF's refusal alleging, among other things, that the company had done business with subcontractors that Revenu Québec had identified as suppliers of fraudulent invoices. Terra immediately denied involvement in any collusive practices. In addition, on the basis that the notice was vague, Terra requested that the AMF provide additional clarification concerning the alleged collusive practices and the identity of the fraudulent subcontractors.

Notwithstanding Terra's demands for clarification, the AMF rejected the request for authorization in a decision rendered in June 2014. That decision was based on the AMF's discretionary power to refuse such a request if the business "fails to meet the high standards of integrity that the public is entitled to expect from a party to a public contract or subcontract".

Terra sought judicial review of the AMF's decision before the Superior Court, demanding that the decision be set aside on the ground that, notably, the failure to disclose the identity of the subcontractors in question deprived it of its right to a full and complete defence.

The Requirement of Transparent Decision Making

In granting the application for judicial review, the Superior Court emphasized that to comply with the requirements of procedural fairness, the AMF must disclose the information on which it bases its decisions. The refusal to grant an authorization to enter into public contracts does not escape this requirement, particularly since the allegation of fraudulent invoicing represented a "serious accusation putting into question the integrity of both Terra and its directors" [our translation]. The Court observed as follows:

[60] We can nevertheless take from this that a public body charged with both requiring and monitoring a high standard of integrity as specified by law must always act with the utmost caution and with a constant concern for the respect of the rules of natural justice and procedural fairness, which are inherent to the execution of its mandate. [our translation]

The Court concluded that the AMF, having provided only snippets of information regarding its allegations, had indeed compromised Terra's ability to present a full and complete defence. The failure of the AMF to provide any clarification thus "constituted an obvious and elementary violation of the rules of natural justice" [our translation]. With the AMF's decision-making process having been vitiated by this breach of procedural fairness, the Court set aside the decision and returned the file to the AMF.

Commentary

The *Terra Location* decision sheds some light on the AMF's administration of this fairly new and important regime requiring prior authorizations to obtain public contracts. It is noteworthy that the AMF justified its decision in part by relying on assertions made by the Permanent Anti-Corruption Unit (PACU). These assertions were themselves based on fragmentary information obtained from Revenu Québec. Terra's application for judicial review revealed that both the AMF and PACU were unaware of the identity of the allegedly dishonest subcontractors with whom Terra had dealt with.

In this context, procedural fairness is more important than ever. The decision to hold the AMF to a high standard of transparency in the exercise of its broad discretionary powers to evaluate a business's integrity is greatly welcome.

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