

[UNOFFICIAL TRANSLATION]

DECISION

QUEBEC

RÉGIE DE L'ÉNERGIE

D-2003-69

R-3513-2003

April 8, 2003

WERE PRESENT:

Mr. Normand Bergeron, M.A.P., Vice President
Ms. Anita Côté-Verhaaf, M.Sc. (Econ.)
Ms. Francine Roy, M.B.A.

Controllers

Hydro-Québec

Plaintiff

Decision approving the addition of certain conditions to the tender selection process and the amendment of the criteria and the selection grids for the assessment of bids related to calls for tenders arising from the *Regulation respecting wind energy and biomass energy* (Order in Council No. 352-2003 dated March 5, 2003)

1. CONTEXT

On March 20, 2003, Hydro-Québec, as part of its distribution activities, (the “**Distributor**”) sent two letters to the Régie de l’énergie (the “**Régie**”) to inform the latter that it had to carry out, no later than May 12, 2003, two calls for tenders regarding the purchase of a wind energy block and a biomass energy block. This requirement is the duty of the Distributor under the *Regulation respecting wind energy and biomass energy* (the “**Regulation**”)¹.

On the other hand, through Order in Council 353-2003² (the “**Order in Council**”), the government informs the Régie of its economic, social and environmental concerns with regard to wind energy and biomass energy. These expectations from the government have an impact on the tender selection process and the criteria as well as on the selection grids for the assessment of bids arising from the calls for tenders that the Distributor must launch prior to May 12, 2003.

2. AMENDMENTS TO THE CRITERIA USED IN THE TENDER SELECTION PROCESS

2.1 POSITION OF THE DISTRIBUTOR

In its letters dated March 20, 2003 and April 1, 2003, the Distributor explains the amendment to be made, both regarding the selection process and the selection grids used for the assessment of the bids, in order to comply with the Regulation and the Order in Council.

2.1.1 CALL FOR TENDERS REGARDING THE WIND ENERGY BLOCK

“Considering the foregoing, the Distributor informs the Régie that it will launch, on or before May 12, 2003 and in compliance with the tender solicitation and contract awarding procedure for electricity purchases, a call for tenders for the wind energy block as described above and, in this regard, the Distributor will apply to phase 1 of the bid assessment process the following minimum requirements in addition to those it usually uses in its calls for tenders:

- *power must be from the wind energy parks set up in the region of Gaspésie-Îles-de-la-Madeleine or in the RCM of Matane and linked to the integrated network;*
- *the wind turbines of these wind energy parks must be assembled in the administrative region of Gaspésie-Îles-de-la-Madeleine or in the RCM of Matane;*

¹ Order in Council 352-2003, March 5, 2003.

² Order in Council 352-2003 regarding the economic, social and environmental concerns indicated to the Régie de l’énergie with regard to wind energy and biomass energy.

For each project, the regional content must be:

- *superior to 40% of the aggregate cost for the first 200 MW;*
- *superior to 50% of the aggregate cost for the 100 MW required no later than December 1, 2007;*
- *superior to 60% of the aggregate cost for the other megawatts required thereafter.*

During phase 2 of the bid assessment process, the Distributor will use the following selection grid and rating:

- *Electricity cost: 35 %*
- *Additional regional content: 30%*
- *Quebec content (except costs incurred in the region of Gaspésie-Îles-de-la-Madeleine and in the RCM of Matane): 15%*
- *Experience: 10%*
- *Financial health: 5%*
- *Feasibility: 5%*

Finally, at the third phase of the bid assessment process, the Distributor will apply the criteria of the lowest aggregate cost for the conditions asked, as contemplated in the tender solicitation procedure.

These varying selection criteria will be more fully described in the call for tender document, which will be filed with the Régie within a reasonable time period prior to the launch of the call for tenders.”

2.1.2 CALL FOR TENDERS REGARDING THE BIOMASS ENERGY BLOCK

In its letter dated April 1, 2003, the Distributor informs the Régie that it will have to make the following adjustments to the selection grid for bid assessment and to the rating approved by Decision D-2002-169:

“Thus, in order to reflect the fact that there is no option to postpone the process as contemplated and that the deliveries no longer contain cyclable products, adjustments were made to the rating of the selection grid to be used in phase 2 of the bid assessment process.

- *The rating of the flexibility criteria is brought down from 10% to 5%;*
- *The rating of the feasibility criteria goes up from 10% to 15%, considering the importance of the “biomass supply” element.*

As it was already announced, these various selection criteria will be more fully described in the call for tender document, which will be filed with the Régie within a reasonable time period prior to the launch of the call for tenders.”

3. OPINION OF THE RÉGIE

Considering that the Régie approved the tender solicitation procedure of the Distributor in its Decision D-2001-191 as well as the selection grid for the assessment of the bids and the rating in Decisions D-2002-17 and D-2002-169, the Régie is of the opinion that the Distributor may not unilaterally amend certain conditions of the Tender Solicitation Procedure and namely those pertaining to the tender selection process. Furthermore, following the letters delivered by the Distributor, the Régie believes that it must consider and approve the proposed amendments to the tender selection process.

3.1 ORDER IN COUNCIL AND REGULATION

The Distributor is governed by the terms of and is mostly subject to the very short time periods imposed by the Regulation. The Regulation provides that the Distributor must carry out, no later than on May 12, 2003, the call for tenders regarding each energy block contemplated under Section 1 of the Regulation. The Regulation also provides that the wind energy block of a total capacity of 1000 megawatts once set up must be linked to the establishment of facilities for the assembly of wind turbines in specific regions. Furthermore, the Regulation stipulates that the biomass energy block produced in Quebec must be from facilities allowing a minimum capacity of 100 megawatts, with the biomass constituting at least 75% of the supply source.

The government specifically informed the Régie of its economic, social and environmental concerns with regard to wind energy and biomass energy through the Order in Council:

“1. The maximization of economic benefits in the regional county municipality of Matane and in the administrative region of Gaspésie-Îles-de-la-Madeleine for employment and investment must be carried out by the establishment of facilities for the assembly of wind turbines and wind energy parks and for each project required per block of wind energy determined by the Regulation respecting wind energy and biomass energy made by Order in Council 352-2003 dated March 5, 2003, by incurring expenses and making such investments in such regional county municipality and in such administrative region corresponding to:

- 40% of the aggregate cost for the 200 megawatts required no later than December 1, 2006;*
- 50% of the aggregate cost for the 100 megawatts required no later than December 1, 2007;*
- 60% of the aggregate cost for the other megawatts required thereafter;*

2. To ensure the emergence of wind energy generation and to encourage biomass energy generation as defined in the Regulation respecting wind energy and biomass energy, the purchase cost of electricity from blocks of energy determined by regulation of the government shall be taken into account in the establishment of the cost of service of the electric power distributor.

3.2 ADJUSTMENTS CONTEMPLATED BY THE DISTRIBUTOR

The Order in Council and the Regulation control the task of the Régie in this matter as the governmental policy in connection with the wind energy block and the biomass energy block is provided for in the Order in Council and the Régie must consider it. The acquisition of these energy blocks was not planned when the Régie examined the 2002-2011 procurement plan of the Distributor. The Régie must verify whether the amendments proposed by the Distributor in its letters dated March 20 and April 1, 2003 are in compliance with the Regulation, the Order in Council and the Act.

It is first important to underline the importance of the Tender Selection Procedure and namely the criteria and the selection grid for the assessment of the bids, which are in compliance with the Act pertaining to the case at hand:

“74.1. To ensure that suppliers responding to a tender solicitation are treated with fairness and impartiality, the electric power distributor shall establish and submit for approval to the Régie, which shall make its decision within 90 days, a tender solicitation and contract awarding procedure and a tender solicitation code of ethics applicable to the electric power supply contracts required to meet the needs of Québec markets in excess of the heritage pool, or the needs to be supplied out of an energy block determined by regulation of the Government under subparagraph 2.1 of the first paragraph of section 112.

[...]”

The tender solicitation procedure of the distributor, as approved by the Régie³, involves a three-step selection process and provides namely that the call for tender document must contain the selection grid for bid assessment. This grid must describe the criteria which are taken into account during the assessment of the bids: the criteria with a financial effect and the criteria which affect the risks borne by the Distributor without having a direct financial effect.

Minimum applicable requirements to certain criteria (e.g., minimum requirements regarding the financial capacity of a bidder) are taken into account in step 1 of the selection process. The selection grid regarding bid assessment is applied in step 2 of the selection process.

In examining the risks and the selection criteria in connection with the launch of the first call for tenders, the Régie confirmed⁴ that it namely had to ensure the fair and impartial treatment of

³ Decision D-2001-191, matter R-3462-2001, July 24, 2001, Schedule A, p. 2.

⁴ Decision D-2002-17, matter R-3470-2001, January 21, 2002, page 24.

participating suppliers. The Régie underlined on this occasion that the credibility of the selection process was essential and that it was desirable that a maximum of interested suppliers have the possibility to participate in order to promote fair competition and ensure procurement at a small cost. In this regard, the Régie asked⁵ the Distributor to explain the allocation method for non-monetary points with regard to each selection criterion. This aspect was considered essential in order to have transparency through the process, fairness towards the suppliers and the maintenance of the interest of potential bidders for future calls for tenders.

Note that Decision D-2002-169 approved, with certain clarifications and amendments, the selection grid and its rating⁶. The Distributor namely had to propose, prior to the next call for tenders for long term supply, a non-monetary criterion related to sustainable development with a significant rating within the 40 points allocated to the aggregate of the non-monetary criteria of the selection grid⁷.

Considering the scope of former decisions in this regard, the Régie must thus be convinced that the tender selection procedure, the criteria and the selection grid as well as the rating of the criteria meet the requirements of the Act in terms of fairness and impartiality to the bidders.

Furthermore, the Régie underlines that it is important to distinguish its role in terms of approval of the tender solicitation procedure and the supervision of the calls for tenders. The supervision is basically an administrative exercise allowing the Régie to ensure that the tender solicitation procedure is followed. At this stage, the Régie does not have to amend the bidding procedure but rather to oversee its application.

“74.2 The Régie shall monitor the implementation of the tender solicitation and contract awarding procedure and code of ethics provided for in section 74.1. and ascertain whether they are complied with.”

The Régie notes that the tender selection procedure may be adjusted based upon the financial conditions. Let's now look at the proposed adjustments by the Distributor to the selection process regarding calls for tenders arising from the Regulation.

3.2.1 TENDER SELECTION PROCEDURE, CRITERIA AND SELECTION GRID FOR THE WIND ENERGY BLOCK

The Régie notes that the minimum requirements that the Distributor plans to apply to phase 1 of the tender selection process, in addition to those it usually applies in its calls for tenders, appropriately correspond to the concerns indicated by the government to the Régie under Order in Council 353-2003.

As for phase 2 of the tender selection procedure, in order to ensure fairness to the suppliers and to maintain the interest of potential bidders regarding future calls for tenders, the Régie is of the

⁵ Decision D-2002-17, matter R-3470-2001, January 21, 2003, page 33.

⁶ Decision D-2002-169, matter R-3470-2001, August 2, 2002, page 73.

⁷ Decision D-2002-169, matter R-3470-2001, August 2, 2002, page 72.

opinion that it would be important to clearly define the allocation method for the points regarding the non-monetary criteria “additional original content” and “Quebec content” in order to make sure that the process is transparent. The Régie thus asks that the Distributor pays particular attention to the description of these selection criteria in the bidding document, which will be filed with the Régie within a reasonable time period prior to the launch of the call for tenders, in compliance with its Decision D-2001-191. The Régie, as part of its supervision of the tender solicitation procedure, will issue its comments, if any.

Furthermore, the Régie notes that the selection grid contemplated in phase 2 with the rating granted to the non-monetary criteria “additional regional content” and “Quebec content” allows to ensure that projects retained at this stage maximize the benefits in the administrative regions concerned, in compliance with Order in Council 353-2003.

Finally, the Régie notes that the application of the criteria in connection with the lowest aggregate cost for the conditions required in phase 3 is in compliance with the tender solicitation procedure approved by its Decision D-2001-191.

3.2.2 TENDER SELECTION PROCEDURE, CRITERIA AND SELECTION GRID FOR THE BIOMASS ENERGY BLOCK

The Régie notes that the distributor amended the rating of the non-monetary criteria “flexibility” and “project feasibility” established in the selection grid of phase 2 regarding tender selection procedure in comparison with those approved by the Régie in previous decisions. According to the Distributor, these amendments reflect the fact that there is no option to report contemplated, that the deliveries do not contain cyclable products and that the element of “biomass supply” is important. The Régie is satisfied with the amendments made to the grid used as part of the selection process for biomass energy offers. Moreover, considering the prescriptions of the Regulation, the Régie notes that the Distributor must ensure in its selection process that the biomass constitutes at least 75% of the source of supply.

3.2.3 SUSTAINABLE DEVELOPMENT CRITERION

Although the calls for tenders contemplated will aim for long-term markets, the Régie considers that its Decision D-2002-169 in connection with the inclusion in the selection grid of a non-monetary criterion related to sustainable development does not have to be applied to the calls for tenders in question. Indeed, according to the Régie, the application of such a criterion is not essential in these cases where each call for tender deals with one matter and that specific requirements for each matter arise from the Order in Council and the Regulation.

IN VIEW of the foregoing;

CONSIDERING the *Act respecting the Régie de l'énergie*⁸, Order in Council 352-2003 regarding the economic, social and environmental concerns indicated to the Régie de l'Énergie with regard to wind energy and biomass energy and the *Regulation respecting wind energy and biomass energy*, Decisions D-2001-191, D-2002-17 and D-2002-169;

The Régie de l'énergie:

For the purposes of the calls for tenders regarding the wind and biomass energy blocks:

APPROVES the amendments made to the selection grid for the assessment of the bids pertaining to calls for tenders arising from the *Regulation respecting wind energy and biomass energy* as well as the rating for the criteria, including the addition of minimum requirements in phase 1 of the selection process for wind energy tenders.

EXEMPTS the Distributor from including in the selection grid a non-monetary criterion related to sustainable development in connection with these calls for tenders.

Normand Bergeron

Vice President

Anita Côté-Verhaaf

Controller

Francine Roy

Controller

Hydro-Québec represented by Nicole Lemieux and Simon Turmel.

⁸ R.S.Q., c. R-6.01.