



Recommendation Report on Contract Management Related to Generator Set Calls for Tenders at the Office municipal d'habitation de Montréal

(Section 57.1.23 of the *Charter of Ville de Montréal*)

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SUMMARY

This report deals with the generator set contract award and performance process at the Office municipal d'habitation de Montréal (hereinafter "OMHM").

The OMHM is a municipal body that manages housing for low-income residents on the Island of Montréal. As part of its mandate, it must award contracts resulting from public calls for tenders aimed at replacing or adding generators to be installed in its buildings. The generators are used to provide electrical power to a building in case of a power outage and are required by the Building Code. The investigation conducted by the Office of Inspector General focused on contracts at three (3) stages of the generator set procurement process, namely:

- Professional services contracts awarded by the OMHM to engineering firms for the drafting of documents for calls for tenders exclusively or incidentally aimed at installing or replacing a generator set;*
- Work performance contracts resulting from these calls for tenders awarded to general contractors;*
- Subcontracts between general contractors and generator distributors.*

The OMHM first awards a professional services contract to an engineering firm for the design of electrical specifications for the OMHM's upcoming call for tenders. These electrical specifications feature the technical characteristics of the generator to be installed in the building. A public call for tenders is then issued by the OMHM for replacing or adding a generator set, which may also include other types of construction work, bid on by general contractors. The general contractors are responsible for proposing in their bid a generator that meets the requirements of the specifications prepared by the engineers. To do so, they contract with a generator distributor to acquire a model that complies with the technical specifications.

The Office of Inspector General's investigation has shown the close relationship between the engineers responsible for the design of the specifications and the generator distributors, as well as how this relationship affects the integrity and healthy competition of the future public call for tenders.

The investigation revealed that engineers responsible for designing these specifications for the OMHM were seeking out the assistance of distributors for designing the specifications until the call for tenders was published. Due to this collaboration, the distributor can thus influence the drafting of the specifications by having requirements included that will benefit its product in the future call for tenders. The Inspector General believes that the investigation findings must be reported to the OMHM so that measures can be taken to prevent their recurrence and ensure fair treatment of competitors in these calls for tenders.

First, the Inspector General noted that distributors were taking part in drafting the generator set specifications at the request of engineers that were actually hired by the OMHM to perform this work. The engineers that were interviewed explained that this



practice is necessary, since the distributors are experts on how a generator operates. For the distributors, this work appears to be part of a more comprehensive strategy aimed at maintaining good relations with engineers and increase their sales opportunities. Distributors also did not hesitate to contact engineers during the publication of the call for tenders to mention the aspects of the specifications which they considered the least satisfactory.

The investigation also revealed that portions of the specifications prepared by the distributor were then found in their entirety in the final specifications of the public call for tenders. The distributors involved in drafting the specifications could thus propose requirements that benefited their products during the call for tenders. The specs may pertain to the motor power rating, choice of alternator, or the reference product in the specifications. For three (3) of the tenders that were reviewed, the specifications available on the SEAO electronic tendering site were a copy of those obtained from the distributor, without any changes being made.

The Inspector General has determined that this collaboration between engineers responsible for the design of the specifications and the distributors extends beyond simply gathering information on the generator models available on the market. This is how distributors carry out at least part of the engineers' mandate involving the drafting of the generator set specifications. This practice is unacceptable, because it increases the risk that the resulting specifications will benefit the distributor that was consulted when the call for tenders was published.

There is an apparent conflict of interest when a distributor proposes descriptive characteristics for a call for tenders in which its product could be purchased by bidders. Therefore, there is reason to be concerned that the requirements proposed by the distributors will not be unbiased because of the potential gain that would result from the upcoming call for tenders.

Engineers seeking such assistance distort the very purpose of professional services contracts awarded to them by the OMHM as independent consultants. They are responsible for determining their client's needs and drafting specifications in terms of the performance or functional requirements of the generator set to be installed in the OMHM's buildings.

Prior to the release of this report, the Office of Inspector General met with OMHM officials to present the investigation's findings to them. This led to proposals by the organization to avoid future recurrences. Some of the measures include amendments to the professional services contracts involved by the investigation to reiterate the legislative requirements for drafting specifications. Compliance with these requirements will mitigate the risks identified during the Office of Inspector General's investigation. The Inspector General is also recommending amendments to the contract documents to prohibit any person involved in preparing the tender documents from bidding or being a subcontractor in the resulting contract.



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1. Preliminary remarks

1.1. Mandate

Under section 57.1.8 of the *Charter of Ville de Montréal, metropolis of Québec* (CQLR, c. C-11.4, hereinafter the “Charter of Ville de Montréal”), the Inspector General’s mandate is to oversee the award and execution of contracts by Ville de Montréal or a related legal person.

The Inspector General does not conduct criminal investigations. She conducts investigations of an administrative nature. Throughout this report, wherever the term “investigation” is used, it means an investigation of an administrative nature, and under no circumstances shall it be interpreted as referring to a criminal investigation.

1.2. Applicable standard of evidence

In support of her opinions, reports and recommendations, the Inspector General imposes upon herself the burden of proof of the civil standard of the balance of probabilities.¹

The Inspector General has the duty to deliver quality reports that are timely, objective, accurate and presented in a manner that will ensure that the individuals and organizations under her authority are able to act in accordance with the information provided.

2. Context of the Office of Inspector General’s investigation

2.1. Scope of the investigation

This report is in response to a denunciation alleging that the public calls for tenders of the Office municipal d’habitation de Montréal (hereinafter “OMHM”) aimed at installing, replacing or adding generator sets were being directed and were not promoting free competition among Quebec generator distributors. The allegation was also made that the engineers responsible for drafting the specifications for the OMHM were responsible for this lack of fairness by preparing specifications likely to favour the products of a particular distributor.

To shed light on the facts that were reported, the Office of Inspector General began an investigation that required:

- Reviewing thousands of documents and several contracts awarded in recent years, and
- Meeting more than a dozen witnesses, including OMHM employees, engineers from outside firms responsible for drafting the specifications, general contractors, and Quebec generator distributors.

This report identifies certain observed practices that do not meet the applicable normative framework.

¹ Evidence is sufficient if it renders the existence of a fact more probable than its non-existence (see Article 2804 of the *Civil Code of Québec*).



2.2. Overview of the OMHM

The OMHM is a not-for-profit corporation constituted under the *Act respecting the Société d'habitation du Québec*², with over half of the nine (9) members of the board of directors being appointed by Ville de Montréal's agglomeration council.³ Its mandate is to “manage and administer the island of Montreal's housing stock and housing programs”⁴ for low-income residents.

To accomplish this mission, the OMHM administers a budget of more than \$400 million and manages more than 20,000 housing units⁵ within Ville de Montréal's city limits, for which it conducts various public calls for tenders for construction work. Since 2018, the OMHM has been subject to the contracting rules of *the Cities and Towns Act*,⁶ just like every other city and town in Quebec. To this end, the OMHM has established a *Contract Management Policy*⁷.

2.3. Contracts investigated by the Office of Inspector General

The investigation covers three (3) types of contracts involved at different stages of the OMHM's procurement of generator sets:

- Professional service contracts awarded by the OMHM to engineering firms for the drafting of documents for calls for tenders exclusively or incidentally aimed at installing or replacing a generator set;
- Contracts for the performance of work resulting from these calls for tenders awarded to general contractors;
- Subcontracts awarded by general contractors to Quebec-based generator distributors.

Each of these stages will be addressed in detail in section 2.3.1 below. For the purposes of the investigation that was conducted, it is important to note that the OMHM is not involved as a co-contractor in each of these stages, and the Office of Inspector General has focused on the relationship between two (2) of the players involved in OMHM calls for tenders involving generator installation: engineering firms and generator distributors.

² *Act Respecting the Société d'habitation du Québec*, CQLR, c. S-8.

³ Under section 57.1.9. subs. 5, par. 1(b), a legal person where more than half of the members of its board of directors appointed by Ville de Montréal are under the jurisdiction of the Office of Inspector General.

⁴ Office municipal d'habitation de Montréal, “About us,” online: <https://www.omhm.qc.ca/en/about-us> (page viewed on September 17, 2020).

⁵ Office municipal d'habitation de Montréal, “The OMHM in figures,” online: <https://www.omhm.qc.ca/en/about-us/omhm-figures> (page viewed on September 17, 2020).

⁶ *Cities and Towns Act*, CQLR, c. C-19, s. 573.3.5.

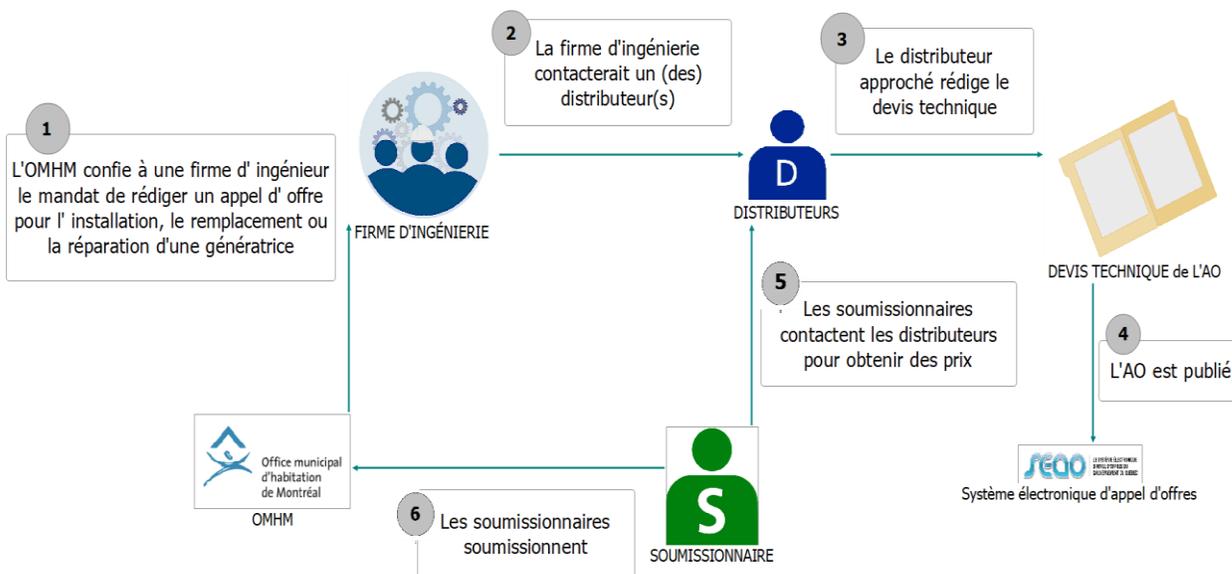
⁷ *Contract Management Policy*, Office municipal d'habitation de Montréal (PO 50-05), effective June 15, 2020.

2.3.1. Generator set procurement process

The OMHM manages a large building stock that requires ongoing maintenance. Hence, it may be required to manage up to 200 calls for tenders per year for various work for which engineering firms will have drafted electrical specifications.

As mentioned above, the procurement process is divided into three (3) stages, as shown in the following chart:

Call for tenders process and relationship of players involved.



2.3.1.1. Professional engineering services contracts

First, the OMHM awards professional engineering services contracts in order to obtain the expertise and assistance needed when work has to be performed on its buildings. The professional services required by the OMHM in relation to these contracts are varied, and the mandates may include installing or upgrading generators as well as installing a fire pump or bringing the fire alarm system up to standard. As a general rule, subcontracting is prohibited for these professional services contracts, unless specifically authorized by the OMHM.

The engineering firms awarded the contracts are then responsible for designing the plans and specifications for future calls for tenders that require adding or replacing the generator set. In this regard, the Office of Inspector General's investigation focused on the performance of these contracts by engineers at the specifications drafting stage.



2.3.1.2. Construction contracts

Generator installation and upgrading is typically part of a public call for tenders that may also include other types of work. The contractors who were awarded the contracts being investigated are general contractors that may use subcontractors to perform the generator work. They are responsible for including a generator in their bid that meets the requirements of the specifications prepared by the engineering firms. The generators are valued at \$60,000 to \$120,000, while the total value of the construction contracts being investigated ranges from \$200,000 to \$400,000 on average. The Office of Inspector General's investigation focused on the awarding of contracts that involved the purchase and installation of a generator set.

2.3.1.3. Supply of a generator by a subcontractor

As mentioned above, the OMHM does not purchase its generators itself and does not contract directly with distributors. Instead, the general contractors are the ones who handle the purchase based on the OMHM's generator requirements.

When a call for tenders is published on the SEAO electronic tendering site, bidders contact the various potential distributors in order to obtain a model and a price that they include in their bid. However, the OMHM has the right to refuse a model submitted by a contractor that does not meet the requirements in the specifications. The Office of Inspector General's investigation focused on the design of the generator set specifications and their impact on the purchase of the generator during the call for tenders.



2.3.2. The sizing report

To determine what type of generator power rating is required in the call for tenders to meet the needs of the apartment building in question, a sizing report must first be prepared. The report must be prepared by an engineer based on the load report.

The client's needs assessment begins with a report of the building's loads to be connected to the emergency network in accordance with applicable standards. This network includes all apartment building elements that can be used in an emergency, such as fire pumps or lighting. The load report indicates the maximum power used in the building and can be adjusted to meet the building's subsequent future needs.

Then, once the load report has been completed, the designer prepares a sizing report for the generator that indicates the generator's properties, including motor and generator power, to be provided in response to the call for tenders.



2.4. Generator industry: manufacturers and distributors

An overview of these two (2) types of companies in the Quebec generator industry is required to fully understand the scope of the Office of Inspector General's investigation. The companies consist of manufacturers and distributors.

Manufacturers design and manufacture various generator models for commercial and industrial use, such as apartment buildings for the OMHM. Most of them do not sell their products themselves in Quebec, but rather deal with regional distributors who sell their generators throughout the province. The Inspector General's investigation does not pertain to manufacturers given that they did not have a contractual relationship with the OMHM for the projects in question.

These distributors are responsible for selling the generators built by a specific manufacturer and compete with other distributors that sell generators from other manufacturers. The relationship between the generator distributors in Quebec (hereinafter, the "distributors") and the engineers retained by the OMHM to prepare call for tender specifications was the subject of the investigation. During the publication of an OMHM call for tenders, a general contractor will contact the distributors to obtain a generator that meets the requirements of the OMHM's specifications.

2.5. Standard CSA C282

Standard CSA C282 is a mandatory building safety standard that applies to the design, installation, operation, maintenance, and testing of equipment that provides electrical power to a building. Its provisions are designed to ensure the safety of a building or facility in the event of a normal power failure. The standard is necessary when emergency power is required by the National Building Code of Canada, and when emergency generators are to be used in health care facilities in accordance with applicable standards.

3. Facts revealed during the investigation

The Inspector General noted irregularities in the design of the tender documents until the publication of the OMHM's call for tenders. These practices could favour certain generator distributors and thus compromise fairness among the bidders.

The assistance that distributors provide to engineers in the design of specifications and their reliance on that assistance poses a risk to the integrity of calls for tenders. In fact, they can take advantage of this opportunity to give their products an edge by including requirements that favour the generator they are selling.

It should be noted, however, that the evidence gathered to date by the investigation does not show that any criminal acts were committed (e.g. fraud or corruption) by OMHM employees, engineering firms, general contractors or generator distributors.

Without resulting in the termination of contracts or the cancellation of the call for tenders, the findings of the Inspector General's investigation must be brought to the attention of the

OMHM and City Council to prevent future breaches of the integrity of the contracting process, ensure transparency, and favour free competition in these contracts.

3.1. Needs assessment

The first step in the public tendering process is to define the needs for the building involved by the construction work. Following discussions with OMHM employees, the engineering firms responsible for drafting the specifications must determine the required characteristics of the generator set based on the needs of the OMHM's building. As when preparing any other public call for tenders, determining the client's needs is a critical step that can open up or restrict the market during the tendering process.

All the engineers that were met explained, as did the distributors, that as soon as the needs have been defined, the generator sizing report is prepared or validated by a distributor at the engineers' request. In these cases, the OMHM's needs are therefore not defined subsequent to the analysis performed by the OMHM-mandated engineers, but by a company with a pecuniary interest in the OMHM's future contract.

3.1.1. Problem with generator specifications

The witnesses that were met agreed that the operation of a generator is very complex and not very well understood by those who do not work exclusively in this industry. This observation was also shared by the engineers interviewed during the investigation, even though they were the ones actually responsible for designing the specifications for the OMHM's future calls for tenders. These engineers explained that they are not generator experts but are rather "generalists" who need to have adequate knowledge in a multitude of fields related to buildings and electricity to draft the technical specifications.

The engineers that were interviewed said they consider the distributors to be the experts in this field and admitted consulting them in order to prepare the generator set specifications. Two engineers who were met gave the following reasons for seeking such assistance:

Engineer #1: *"Currently, when I have questions, I often work with [name of distributor]. I get a quick response to my answers from [name of distributor]. So from an engineering standpoint, sizing, drawing, being able to ask where my bearing points are, my load... I get all my answers quickly."*

Engineer #2: *"For a generator, with the motor, batteries, things like that, it has to be well defined to work with, together properly, and you need a supplier's advice for that."*

This determination was also shared by an employee of a distributor who is regularly contacted by engineers for the design of generator set specifications. He explained that according to him, it is standard practice for an engineer to contact him because they can't know everything:

"An engineer can't know everything. You would like him to know everything, but that's not how it is. [...] It doesn't work that way. [...] Then that's why, what



I think about engineers... The engineers that do the best work are those who work with the best advisors. [...]

“Regarding load calculations, I would say... that... the engineer shouldn’t be the one who does them. You’ll find this strange... But I tell engineers to send me their load list and I’ll enter the loads in the software. Then I’ll get back to them with a report. The way I operate, I always justify why I select a certain generator... In the report he can see how many loads the generator has, how many cords for... What are the voltage dips, frequency drops, like the fire pump.”

This is how engineers justify asking distributors for assistance at the needs assessment stage.

3.1.2. Sizing report

As mentioned in point 2.3.2, an engineer must perform calculations based on the building’s safety factors in order to determine the generator’s power requirements. The results will be entered in a sizing report that includes, for example, the recommended motor, alternator and generator power rating.

While the responsibility for writing the reports rests with the engineers who are the OMHM-mandated professionals, the investigation revealed that the sizing reports were produced by distributors at the direct request of engineers in charge of drafting the tender documents. The distributor is thus the one that defines the generator needs for the OMHM project and not the engineer in charge of this task, even though this distributor will eventually be called by general contractors in order to bid on the call for tenders.

All of the witnesses that were met confirmed that the distributor produces the sizing report for the engineer for free and without any other consideration. However, it appears clear that this allows the distributor to influence the specifications and place its product in the forefront for the upcoming public call for tenders.

3.1.3. Comparison between sizing report and final specifications

In fact, the investigation revealed that the distributor can direct the requirements of the upcoming call for tenders when producing the sizing report, since the result is always based on one of its generator models. A sizing report prepared by a distributor states the number of a specific model of one of the generators it sells that thus meets the building’s needs. The distributor then provides the engineer with specifications that include a detailed description of the generator and correspond to the technical specs.

For instance, the investigation revealed that several characteristics of the generator identified by the distributor in the sizing report then appeared in the specifications. In fact, when comparing the technical specs of the target generators against the tender specifications, several characteristics are identical, particularly:

- Generator power (kW)
- Alternator power (kW and kVA)
- Startup power (kVA)
- Motor volume (L)
- Motor power (HP)
- Size of inverter cabinet (mm)

Some of the characteristics of the generator proposed in the distributor's sizing report subsequently became requirements in the OMHM call for tenders specifications. It then became easy for the distributor to make sure that its generators complied with the requirements of the call for tenders in which it could end up participating as the generator's supplier.

3.2. Design of specifications

In theory, after completing the initial stage of the needs determination of the generator set to be installed in the building involved, the engineers must prepare the technical specifications to be included with the public tender documents. The generator set is part of the electrical specifications that contain all the detailed requirements which the generator must meet for a bid to be compliant.

However, the Office of Inspector General's investigation revealed that the solicitation of distributors by engineers went beyond drafting the sizing report, which may lead to participating in the drafting of the electrical specifications related to the generator set.

3.2.1. Solicitation of distributors by OMHM-mandated engineers

The Office of Inspector General's investigation revealed that OMHM-mandated engineers were soliciting a distributor to obtain its assistance in designing the specifications for the generator set. The engineers that were met explained that they only contact one (1) supplier, usually the same one for each project they are carrying out. The meetings held by investigating officers shed light on how widespread this practice is when engineers are preparing the generator set specifications.

The following example shows the extent of the distributor's involvement in the design of the specifications and its influence on the choices made by the engineer. For this project, the engineer had first made his own calculations for the sizing report, based on which the generator's power was to be 125 kW. However, the engineer asked the distributor's



employee to confirm them and send him specifications for the generator set by indicating the loads to be connected to the generator:

De : [redacted] [mailto:[redacted]@[redacted].com]

Envoyé : 9 [redacted] 2017 15:38

À : [redacted] <[redacted]@[redacted].ca>

Objet : [redacted]-OMHM-Hab. [redacted]-Remplacement groupe électrogène

Bonjour M. [redacted]

Je vous ai déjà parlé de 3 projets de remplacement de génératrices avec l'OMHM. Voici le premier projet pour l'habitation [redacted]. En premier lieu, pourriez-vous me valider le calcul ci-joint que j'ai réalisé avec votre logiciel "[redacted]" ?

Les charges à raccorder sur l'urgence sont :

- Charges mécanique : 5HP + 5HP
- Ascenseur : 15HP
- Éclairage et prises : 35KVA
- Pompe incendie : 25HP

La nouvelle génératrice sera installée à l'extérieur avec capot insonorisé de 55dBA à 3m.

Pourriez-vous m'envoyer le devis, l'estimation budgétaire ainsi que les spécifications techniques. Nous souhaitons aller en soumission d'ici la fin du mois courant.

Merci.

Image 2. Naming elements that enable individuals to be identified have been redacted. Underlining has been added for the purposes of this report.

After some discussion regarding the project's specific characteristics, the distributor's employee sent back a new sizing report, but proposed a power of 100 kW instead of 125 kW, as originally determined by the engineer.

RE: [redacted]-OMHM-Hab. [redacted]-Remplacement groupe électrogène

[redacted] A [redacted]



Bonjour M. [REDACTED]

J'ai pris pour acquis qu'on parle ici d'un groupe électrogène diesel.

J'arrive avec un groupe de 100kW, chargé à 77kW, ce qui offre une possibilité d'expansion de 14kW pour du futur. Un 80kW pourrait faire la job, mais il n'offre pas le 10% de marge exigé par le CSA C282 au-dessus de la charge calculée. Si c'est OK pour vous, j'airai de l'avant avec le devis pour ce modèle. Si 14kW de jeu n'est pas convenable pour vous, alors ça sera un 125kW.

Pour le budget, voir le fichier joint.

SVP me confirmer que le 100kW est OK pour vous ou non, que c'est un groupe diesel, et je ferai le devis en conséquences.

Salutations,

The engineer then responded to the distributor that he could “go ahead with 100 kW,” thus agreeing to change his initial choice based on the distributor’s suggestion. The next day, the distributor sent the engineer specifications for a 100 kW generator for the OMHM project.

This example thus shows that the contact between the OMHM-mandated engineer and the distributor was not limited to gathering information on the generator models available on the market. On the contrary, it can be noted that the distributor managed to change the engineer’s sizing report and drafted the specifications for the engineer. In addition, from his first email reproduced above, the engineer reminded the distributor that a total of three (3) generator replacement projects for the OMHM were coming up. This shows the nature of the relationship between the engineer and the distributor, namely that the former perceived the latter as a long-term partner.

The investigation revealed that this was not an isolated case. In fact, several engineers that were met said that they also needed this type of help given that the operation of a generator is very complex and the distributor’s know-how is crucial to them. For example, an engineer with several years of experience admitted that the project he was working on was his first generator specifications and this is why he contacted the distributor.

However, professional service contracts between engineering firms and the OMHM clearly state that the mandates they may be given often include generator set work.

Contract #1: “Among the expert assessment and/or project execution contracts that are usually awarded, the following examples show the issues most often encountered:

- *Replacement and upgrade of obsolete electromechanical systems (e.g. ventilation and air-conditioning systems, generator sets, fire alarms, sprinkler systems) [...]*”

Contract #2: “Among the expert assessment and/or project execution contracts that are usually awarded, the following examples show the most common electromechanical problems encountered at the OMHM:

[...]



- *Generator installation and upgrade;” [Translation]*

Other engineers that were met said that they have been working this way for several years and that distributors provide them with excellent assistance when they require it. Some even added that it was easier to rely on the distributors’ generator know-how because they are more familiar with the C-282 standard than the engineers are themselves.

3.2.2. Transmission of technical specifications to the engineer

At the engineer’s request, the distributor would then email him the specifications as attachments along with the generator specs. An employee of a distributor even claimed at a meeting that it was part of his job to provide generator technical support to engineers. The employee said that it took three (3) hours on average to draft specifications, but that this could vary depending on the project. Another witness that was met, with several years of industry experience, explained that because of a project’s complexity, drafting specifications may have required more than 15 hours of work.

However, all the witnesses stated that the drafting part was done for free by distributors without any guarantees. According to one of them, this is part of his sale strategy for the OMHM, which is a “major client” for them. In fact, with respect to the OMHM, the main purpose of drafting specifications was to maintain good relations with engineers, prevent errors in the specifications, and increase opportunities to sell generators.

This employee described the benefit of maintaining a good relationship with engineers as follows:

“If you want to be in business, you have to sell [...] But how do you sell? What strategy can we use? Well, it’s clear that if we have the engineer on our side [...], that we “debug” with him everything where there could have been “bugs” and we have no problems after that... It allows us to be more competitive, because instead of including in my price the cost of sending my technician on site three (3) times, I’m going to send him out only once.”

According to this witness, engineers do not have the knowledge required to draft generator specifications. His involvement prevents mistakes and allows him to better prepare his bid price.

In short, although the work was done for free by the distributors, it appears that it is part of a strategy to increase potential sales. By participating in the drafting of the specifications, distributors are aware of the requirements ahead of time, unlike their competitors, and can prepare more competitive prices for the bidders who will be contacting them.

3.2.3. Comparison between the specifications written by distributors and those published in the OMHM's calls for tenders

Wherever possible, the specifications prepared by the distributor for the engineer were compared against the final specifications available to all bidders on the SEAO electronic tendering site. The aim of this assessment was to verify whether the engineers would revise the specifications received from the distributor, and if so, to what extent.

The investigation revealed that some engineers did in fact revise the document and modify several sections of the specifications before submitting them to the OMHM. However, the extent of these revisions would vary depending on the engineers involved. A review of the contract documents shows that portions of the specifications obtained from the distributors were found in their entirety in the final specifications. In three (3) cases that were reviewed, the engineer did not make any changes to the specifications received from the distributor before incorporating them into the call for tenders.

For one of the projects that was reviewed, investigating officers obtained a copy of exchanges between the engineer and his contact person at a distributor's company during the design of the specifications. The documents obtained by the investigating officers show that the two (2) persons exchanged information about the characteristics of the future generator, such as the muffler, power rating and exhaust pipe. In addition to the specifications, the distributor also sent him the design of a generator for the same project, and the engineer replied that he would "manage to make it work":

De : [REDACTED] <[REDACTED]@[REDACTED].ca>
Envoyé : 4 [REDACTED] 2020 14:35
À : [REDACTED] <[REDACTED]@[REDACTED].ca>
Objet : RE: dessin [REDACTED]

Merci!

Je vais faire en sorte qu'elle fasse l'affaire!

Entre-temps, j'attends ta réponse pour le dégagement de chaleur qui est moitié moins grand qu'avec l'autre modèle!
Est-ce que le devis va changer beaucoup étant donné que c'est un autre style de machine?

Salutations!

[REDACTED], ing

[REDACTED]

[REDACTED]

[REDACTED] (Québec)

[REDACTED]

Bur : [REDACTED] Cell : 514-[REDACTED]

The engineer also asked the distributor whether the changes to the generator model would affect the specifications for this call for tenders, to which the distributor replied that "the specifications will not change much," while pointing out the necessary modifications. The two (2) persons continued to discuss the generator's needs for the project, and the engineer told him about the problems with the muffler for the project and asked the distributor for possible solutions. After the last email that was sent, the engineer chose one of the distributor's mufflers:



"I have too much height restrictions, so I'm going to go with your muffler [model name] model [model number].

[...]

Could you redo the calculations for me using this muffler that will be provided by you! Also, since you are supplying the muffler, just change the part of the muffler specifications, please (item 12 on the specifications) and add what you think is missing!"

This response indicates that the engineer appeared to already be convinced of the outcome of the upcoming call for tenders several weeks before it was to be issued. Furthermore, at his meeting with the Office of Inspector General investigating officers, the engineer defended himself of not changing the distributor's specifications, but agreed that the generator's characteristics remained the same:

"Well, no, some things were changed. Some things were definitely changed. We're changing something, and by the way, if you look at the, the specifications, I don't know how [Name of distributor] started out with it, but the specifications from [Name of distributor], what's changed– it's like I was telling you– it's not the characteristics of the machine – those stay the same – but what goes beside the machine. Whether it's the soundproof enclosure, or... If it's a soundproof enclosure, it's the type of power supply, type of tank, whatever we're looking for... Look, we're the ones that will be changing that.

Q: Do you ever contact [name of distributor] to ask for specs and put them in your quote?

A: The specifications that will be produced, if he comes [name of distributor], because, as I was telling you, there are sections that can come from [name of distributor], other sections that can come from [name of other distributor], and then sections that can come from another manufacturer... Generally speaking, some things are innovative, so we have no choice. We're going to use– we're going to use– maybe one section. As I was telling you, I can't reinvent the wheel [...]. Yes, it happens."

This excerpt shows the close contact between the engineer and the distributor when designing the generator set specifications and the favourable treatment given to a generator distributor.

3.3. Specific generator requirements and generator sold by the distributor

The collaboration between a distributor and an engineer at the needs assessment and specifications design stage may result in specifications being included in the tender documents that favour a generator model of the distributor who was involved in preparing the specifications. In addition to the previous example of where the specifications written by the distributor are included in their entirety, the specs may pertain to motor power and the choice of alternator and reference product in the specifications.

3.3.1. Generator power

Generator power is measured in kilowatts and, as previously indicated, this choice is made at the specifications design stage based on the needs the generator will have to meet in the event of an emergency. For the OMHM's buildings, the power rating of the various generator sets ranges from 50 to 200 kW depending on the type of project involved.

The price of a generator is generally related to its power rating and tends to increase with it. Manufacturers offer models with different power ratings, but some are more competitive in specific power ranges. For example, one (1) manufacturer may offer a model with a maximum power rating of 100 kW but with a smaller motor, thus costing less than its competitors. It can therefore be beneficial for a distributor to require a very precise power for the generator set that in fact corresponds to one of the models it sells.

The investigation revealed such a case involving a motor where the power rating required in the specifications was such that a distributor was given an advantage over the competition. Both of the calls for tenders in question required that the generator's power rating be X⁸ kW, which was slightly above the 150 kW that its competitors could provide with their generators. These other bidders must then propose a more powerful model with a power rating of 180 kW, which will be more expensive than their 150 kW model.

Moreover, the investigation revealed that including such a specific power rating in a call for tenders resulted from the OMHM-mandated engineer consulting the distributor in question.

When interviewed by the Office of Inspector General's investigating officers, an employee of the distributor admitted that he was the one who determined the generator capacity in the sizing report based on the prescribed loads. Although he acknowledged that indicating a specific kW power rating in the specifications would benefit his employer, he said that he "doesn't do that":

"We don't want to prevent competition.... I'll give you an example that comes to mind: I have a generator model with a rating of [X] kW, and the market standard is 150 or 180. If you want to make a directed specification, you're going to mark a specification [X] kW, all my competitors are going to have to "quote" 180, and I've just pushed them all to the side... But we don't do that."

However, an engineer in charge of one of the projects requiring said power of [X] kW had something else to say. Not only did he confirm that the distributor was involved in writing the specification, he said that he could not account for the origin of this specific mention in his specifications as a need since he was not the one who did the calculations or determined the generator's power rating.

"Q: How do you explain [X kW] there?"

A: Well, that's.... Actually, yeah, that's the specifications from [Name of distributor]"

This conversation shows the extent of the influence that generator distributors have on engineers with respect to those aspects of the specifications they are responsible for

⁸ In order not to disclose nominative information that would enable the company or witness in question to be identified, the Inspector General used values other than the actual power rating of the generator set used in the example.



determining. It also shows the impact that collaboration between engineers and distributors can have on the call for tenders at the needs definition stage.

3.3.2. Alternator

An alternator is used to convert the motor's thermal energy into electrical energy which the generator will generate in an emergency. This is an essential component of a generator set, and each distributor has alternators with different characteristics.

In one call for tenders, investigating officers noted that the power rating required in the electrical specifications for the alternator was identical to that of the product from a distributor whose employee had also participated in the design of the specifications with the engineer mandated by the OMHM. The following images are an excerpt of the electrical specifications and the distributor/manufacturer's technical specs:

Excerpt of alternator specs

25.7 GROUPE ÉLECTROGÈNE (SUITE)	
7.8 ALTERNATEUR :	
.1 ALTERNATEUR : CONFORME À LA NORME NEMA MG-1.	
.2 PUISSANCE NOMINALE EN TRIPHASÉ, aa KW, bb KVA, 347/600 VOLTS, 60 CYCLES	
ISOLATION <u>CLASSE H</u> , ÉLÉVATION DE TEMPÉRATURE DE ee °C DANS UNE	
TEMPÉRATURE AMBIANTE DE 40°C, PUISSANCE DE DÉMARRAGE DE 345 KVA	
SOUS UNE CHUTE DE TENSION TRANSITOIRE DE ■ %.	

Excerpt of manufacturer's technical specs

POWER in kW	aa
POWER IN kVA	bb
CLASS	H
TEMPERATURE RISE in degrees Celsius	ee

To avoid revealing the company's identity, the nominal information used to identify the distributor has been redacted.

A comparison between these two (2) documents shows that the alternator's requirements in terms of kilowatt power (aa), kilovolt-ampere (bb) and temperature rise (ee) are identical to those on the manufacturer's technical specs with its associated distributor. In other words, some of the key alternator requirements that all bidders must meet in order to be compliant are those of an existing model sold by a distributor.

Similarly to the generator power, the building's needs may require, with respect to the alternator, the technical specs found in the electrical specifications. However, these requirements must have been determined by the engineer, who is the unbiased professional working for the OMHM and who will not have any interest in the subsequent

call for tenders. Documents obtained during the investigation show that the alternator power was not determined by the engineer but rather by the distributor's employee who was involved in the design of the specifications.

In fact, the engineer first sent his preliminary specifications to the distributor, which indicated a power rating of 100 kW for the alternator. He asked for his feedback, for both his specifications and for other aspects related to the OMHM project. The distributor's employee then sent him new specifications containing changes, including the required alternator power rating. In the distributor's specifications, the alternator power rating was increased to [aa] kW and [bb] kVA, and not 100 kW, as found in the preliminary specifications.

As shown in the table below, it was the power rating selected by the distributor that was ultimately included in the specifications for the project's call for tenders.

COLUMN A: ENGINEER'S INITIAL SPECIFICATIONS	COLUMN B: DISTRIBUTOR'S SPECIFICATIONS	COLUMN C: PUBLIC CALL FOR TENDERS SPECIFICATIONS
25.6.9 PMG ALTERNATOR	1.7.8 Alternator	7.8 ALTERNATOR
1. ALTERNATOR: CONFORMS TO NEMA MG-1.	1. Alternator: conforms to NEMA MG-1.	1. ALTERNATOR: CONFORMS TO NEMA MG-1.
2. THREE-PHASE RATED POWER, 100 kW, 347/600 VOLTS, 60 CYCLES, CLASS H, TEMPERATURE RISE OF 130°C WITH AN AMBIENT TEMPERATURE OF 40°C	2. Three-phase rated power, [aa] kW, [bb] kVA, 347/600 Volts, 60 cycles, Class H insulation, temperature rise of [ee]°C with an ambient temperature of 40°C, startup power of [cc] kVA under a transient voltage drop of [dd]%.	2. THREE-PHASE RATED POWER, [aa] kW, [bb] kVA, 347/600 VOLTS, 60 CYCLES, CLASS H INSULATION, TEMPERATURE RISE OF [ee]°C WITH AN AMBIENT TEMPERATURE OF 40°C, STARTUP POWER OF [cc] kVA UNDER A TRANSIENT VOLTAGE DROP OF [dd]%.
3. ROTARY FIELD, BRUSHLESS	3. Rotary field, brushless	3. ROTARY FIELD, BRUSHLESS
4. DRIP-RESISTANT.	4. Drip-resistant.	4. DRIP-RESISTANT.
5. DAMPER WINDING	5. Damper windings	5. DAMPER WINDINGS
6. SYNCHRONOUS	6. Synchronous	6. SYNCHRONOUS
7. DYNAMICALLY BALANCED ROTOR PERMANENTLY ALIGNED WITH THE MOTOR THROUGH FLEXIBLE DISC COUPLING.	7. Dynamically balanced rotor permanently aligned with the motor through flexible disc coupling.	7. DYNAMICALLY BALANCED ROTOR PERMANENTLY ALIGNED WITH THE MOTOR THROUGH FLEXIBLE DISC COUPLING.



8. EXCITER: PERMANENT MAGNET EXCITER (PMG).	8. Permanent magnet exciter (PMG) with a capacity of 300% for 10 seconds and 150% for 1 minute. This performance ensures alternator priming under any conditions and allows for selective coordination with the downstream circuit breakers (as required by CSA C282-09, sections 8.6 and 8.7.1).	8. PERMANENT MAGNET EXCITER (PMG) WITH A CAPACITY OF 300% FOR 10 SECONDS AND 150% FOR 1 MINUTE. THIS PERFORMANCE ENSURES ALTERNATOR PRIMING UNDER ALL CONDITIONS, AND ALLOWS FOR SELECTIVE COORDINATION WITH UPSTREAM CIRCUIT BREAKERS (AS REQUIRED BY SECTIONS 8.6 AND 8.7.1 OF CSA C282-09).
9. ROTOR INSULATION: EEMAC CLASS H.	9. Junction box for easy access to breaker(s).	9. JUNCTION BOX FOR EASY ACCESS TO BREAKER(S).
10. ALTERNATOR PROTECTION AGAINST ALL OVERVOLTAGES VIA THE UNIT CONTROL PANEL.		
11. EFFECTIVE POWER AT AN AMBIENT TEMPERATURE OF 40°C: 100% OF FULL LOAD IN STANDBY MODE.		

A comparison between the distributor's specifications (Column B) and the final specifications (Column C) reveals that the engineer had copied the distributor's specifications in their entirety, including the reduction in the total number of paragraphs and the typo in point ".5." In addition to reducing the number of paragraphs from 11 to 9, in point ".5" there was a typo in the word "*enroulement*" (winding) and a specifier was missing, whereas the engineer had written it correctly in his initial specifications ("*enroulements amortisseurs*").

3.3.3. Selection of reference product

A reference product is a specific model indicated in the specifications that meets the requirements of the project's generator set and establishes the basis of assessment for all the other models submitted for as equivalents. Since 2018, at least 8 specifications reviewed by the investigating officers included not only all the generator set requirements

(e.g. motor, circuit breaker, pump system), but also a generator model that met all these requirements:

“The described generator set corresponds to the [name of model] model by [name of company], distributed by [name of distributor].”

However, the investigation revealed that when a distributor is involved in designing the specifications, its generator model is indicated as the reference model. This gives the distributor a clear advantage. In fact, from the general contractor’s perspective, it is simpler to include the reference model in its bid, as this ensures that it will comply with the requirements of the call for tenders.

A few specifications reviewed by investigating officers mentioned the names of other manufacturers deemed acceptable equivalents. However, no reference was made to a specific model from these other manufacturers. This means that a general contractor that would like to choose another generator would have to contact the distributors selling the products of these other manufacturers, determine a generator that would meet the OMHM’s needs, and then submit it for approval as an equivalent by the organization.

The general contractors who met with the Office of Inspector General confirmed that they found it easier to submit a bid using the reference product:

Contractor #1: “It’s easier to use the machine that is indicated; no changes have to be made to the plan, there are no changes to be made anywhere. Everything is already taken care of, the work has already been done.”

Contractor #2: “We always quote, when we have a bid. We always quote with the equipment indicated in the specifications. We’re not the kind of company... The engineer tells us that, and we tell him it’s okay.”

In addition to the generator, the investigation revealed that the specifications also referred to other essential generator set components. For example, in a public call for tenders issued in 2019, the specifications also indicated a reference product for the automatic inverter:

L'INVERSEUR AUTOMATIQUE DÉCRIT CORRESPOND AU MODÈLE
[REDACTED] ET [REDACTED] DE [REDACTED]
[REDACTED], DISTRIBUÉ PAR [REDACTED], AVEC LES ÉQUIPEMENTS ASSOCIÉS.
LES FRAIS D'INSTALLATIONS INHÉRENTS À UNE ÉQUIVALENCE SERONT À LA
CHARGE DE L'ENTREPRENEUR.

The tender documents thus included two (2) reference models (the automatic inverter and the generator) that identified two (2) products essential to the generator set and marketed by the same distributor. It turns out that at the time the tender documents were being written, one of the distributor’s employees had submitted to the OMHM-mandated engineer specifications indicating these two (2) models and that he had not made any changes prior to the publication of the documents on SEAO.



3.4. Equivalencies

The purpose of equivalency requests was to stimulate competition in order to obtain a more competitive price among bidders. It is therefore in the client's best interests that these clauses be written in such a way as to encourage contractors to take the initiative with proposals that benefit the client.

As mentioned above in Section 3.3.3, it is up to the bidders to prove that their product is in fact equivalent to the reference product. For its part, the public body must treat these requests fairly. If an equivalency request is accepted, this means that the public body considers the product to be of a quality equal to the reference product indicated in the specifications.

The investigation revealed restrictive equivalency clauses in some OMHM calls for tender. An overly restrictive clause could discourage bidders from submitting equivalencies and thus benefit the reference product in the specifications.

3.4.1. Credit for equivalency request

In at least five (5) calls for tenders, the Office of Inspector General's investigation revealed a type of equivalency clause that required bidders to provide a credit to the OMHM for the equivalent product proposed by the bidder. Here is an example of such a clause:

1.8. ÉQUIVALENCE

- Le groupe électrogène décrit correspond au modèle de [REDACTED] distribué par [REDACTED], avec les équipements associés et c'est avec cet équipement que les entrepreneurs doivent déposer leurs propositions. Si, par contre, un entrepreneur désire proposer un groupe électrogène en équivalence, il peut le faire, en annexe. Les frais d'installation inhérents à l'équivalence seraient à la charge de l'entrepreneur et il devra alors fournir les renseignements suivants:
- Le crédit offert pour le groupe proposé;

Under a clause of this type, with credit, the contract is awarded to the bidder that submitted the lowest compliant bid with the specified product. Only then would the equivalency be reviewed, and only if the contractor proposed it as an annex to its bid with a credit. Therefore, the equivalencies that other bidders may have found will never be considered even if their bid could have been the lowest based on the credit.

The fact that the bid must be submitted with the model and brand specified, and that such a credit is required, gives an edge to the distributor whose product is the reference model in the specifications. There is then little incentive for contractors to propose equivalents, especially since they must bid with the reference product anyway. Moreover, such a requirement penalizes the client since it does not stimulate competition among potential generator distributors during the call for tenders.

For a bidder, such an equivalency clause means that if it stays with the designated product, he has nothing else to do to comply with the call for tenders requirements or to

worry about assessing a credit to be granted on the price of an equivalent cheaper product that he may have found. These two (2) findings combined benefit the distributor whose product is the reference model in the specifications.

3.4.2. Exclusion of a competitor

In several of the specification clauses that were reviewed, in addition to the reference product, three (3) manufacturers with their respective distributors were considered as providing “acceptable equivalent products,” although without specifying any of their models in particular. It is therefore up to the bidder to verify with the distributors of these three (3) companies whether one of their models could meet the OMHM’s needs.

The investigation revealed that when one of the distributors was involved in drafting the specifications as shown in section 3.2, it excluded a fourth company (hereinafter “Company B”) from this list because of the latter’s negative perception of its competitor’s products. This clause of the specifications was generally written as follows:

LE GROUPE ÉLECTROGÈNE DÉCRIT CORRESPOND AU MODÈLE ██████████ DE ██████████, DISTRIBUÉ PAR ██████████, AVEC LES ÉQUIPEMENTS ASSOCIÉS. LES FRAIS D'INSTALLATIONS INHÉRENTS À UNE ÉQUIVALENCE SERONT À LA CHARGE DE L'ENTREPRENEUR. PRODUITS ÉQUIVALENTS ACCEPTABLES SI LES ÉQUIPEMENTS PROPOSÉS RENCONTRENT LES EXIGENCES TECHNIQUES DE CE DEVIS:

- .1 **Entreprise C** ██████████, DISTRIBUÉ PAR ██████████.
- .2 **Entreprise D** ██████████, DISTRIBUÉ PAR ██████████
- .3 **Entreprise E** ██████████, DISTRIBUÉ PAR ██████████

However, note that the investigation did not reveal any technical justification in support of such an exclusion, all the more so as Company B had in the past provided certain models of generators for OMHM projects.

At a meeting with the Office of Inspector General's investigating officers, the distributor's employee who worked with the engineer in drawing up a clause such as the one shown above confirmed that he had a negative opinion of Company B and he never included it in his specifications:

“If the specifications are written by us, you will always see... Well, there are five— in the generator market, there are five manufacturers. I’m excluding backyard assemblers [...] Basically there are five. Of those five, I would say there are four (4) that are good quality products. There’s one that’s really a lower-quality product. What I say to engineers, I usually don’t write down that manufacturer, because I don’t find.... The [Company B] product is not as good. [...] I don’t find that we’re helping the client by doing that. [...]”

“It’s just [Company B] that I don’t include.”

Excluding a company for a generator call for tenders may benefit the reference product because there are only five (5) in Quebec that distribute generator sets. By excluding one company, that’s 20% of the market that is not mentioned in the specifications that could



potentially offer a product and stimulate competition. In addition, as the above-mentioned employee explained, not all the companies he is proposing as equivalent are active in the OMHM's target market segment. In fact, the employee in question explained that a manufacturer (hereinafter "Company C") that he was proposing as one of his "acceptable equivalent products" specializes in larger-scale equipment and virtually never bids for generators at the level required by the OMHM:

"You won't see [Company C] on OMHM work sites."

As the employee explained, in addition to mentioning his own generator as a reference product, he did not include Company B as a potential competitor and proposed Company C as an "acceptable equivalent product," whereas he admitted himself that Company C was not actively involved in a market such as that of the OMHM. The review of more than 20 OMHM projects since 2016 corroborates this claim given that none of Company C's generators were installed by the OMHM.

A company employee cannot be faulted for having a negative opinion of a competitor and not suggesting their products, but that opinion is not objective since the two (2) companies are competing in the same market. It is not the role or mandate of the distributor's employee to open up the market, but rather that of the engineer responsible for drafting the specifications. Engineers who accept such a proposal put themselves in a position where their specifications may benefit the distributor that was consulted.

3.5. Contact during the call for tenders publication period

The person responsible for the call for tenders is the person designated by the contractor to respond to bidders' questions during the call for tenders. Moreover, the OMHM prohibits bidders or any person acting on its behalf from communicating regarding the tender with anyone other than the person responsible for the call for tenders.

Documents obtained during the investigation revealed that for at least three (3) calls for tenders, an employee of a distributor contacted the OMHM-mandated engineer regarding the drafting of the specifications during the publication of the call for tenders. These discussions primarily focused on the current call for tenders, in particular for the electrical specifications section involving the generator set. However, the engineer was not identified as the person responsible for the call for tenders, and the questions were not supposed to be sent to him.

In one instance, an employee of a distributor had sent specifications to the OMHM-mandated engineer during the preparation of the tender documents. During the posting period, the same distributor's employee contacted the engineer again to inform him of the many differences between his earlier specifications and those published on SEAO. Among these differences, the generator power rating, the communications interface, and the heating of the enclosure had been modified and the specifications no longer indicated a reference model. The same day, the engineer replied that an addendum would be issued that would include most of his comments:

“I will issue an addendum after the bidders’ visit this coming Thursday and include your comments so that you can bid, except for some of the following points.”

Ten (10) days later, an addendum was published with the changes the distributor had wanted in its email, with the distributor’s generator added as a reference product.

Regarding the second call for tenders that was reviewed, an employee of a distributor sent an email to the OMHM-mandated engineer, again during the call for tenders posting period, and without the latter being in charge of it. Initially, at the time of publication, the specifications did not indicate a reference product. As shown in the email below, the distributor’s employee then raised several issues with the engineer regarding the specifications, including the possibility of adding the name of the generator he was marketing to help him get more calls:

- 5- Si le nom de [REDACTED] pouvait apparaître dans l’addenda, ça nous aiderait. Normalement on a plein d’appels, mais lorsqu’on est pas nommé dans la liste des fournisseur, on a presque pas d’appels. Pour ce projet, un seul contracteur nous a appelé.

Merci et bonne fin de semaine.

[REDACTED]

Two weeks later, an addendum was published whereby the mention of the generator marketed by the distributor as a reference product was added to the tender documents.

4. Findings and Analysis

4.1. Professional service contracts

Whereas engineers were in charge of the design of the specifications, they allowed the distributor, who is neither neutral nor independent, to influence the drafting of the specifications.

4.1.1. Design of specifications

The investigation revealed that the contact between the OMHM-mandated engineer and the distributor was not limited to gathering information on the generator models available on the market. On the contrary, the Inspector General noted that engineers had a generator distributor handle all or part of the drafting of the generator set specifications. One engineer went so far as to incorporate the entire specifications prepared by a distributor in the public tender documents. This practice is unacceptable and must stop, because it increases the risk that the specifications will ultimately benefit the generator distributor during the call for tenders. It would never be acceptable for the OMHM to ask a distributor directly to draft specifications for a public call for tenders, and such a practice could not happen through an engineer who was in fact hired to prepare it.



Engineers who ask for the assistance of a single distributor to design generator specifications go against the very purpose of their professional services contract with the OMHM. These contracts are awarded to them as independent consultants who have no interest in the call for tenders that will stem from their design work. The engineers are responsible for defining the generator set needs and requirements based on the characteristics of the OMHM's building. They cannot do so if they delegate their responsibilities in this respect by using the services of the distributor of a generator model that may be acquired during the call for tenders. By using the services of such a distributor, which will be able to offer its generators and equipment during the call for tenders, the engineers are giving it a clear advantage of being able to influence the outcome and obtain information before all the other bidders.

It is surprising that the engineers that were interviewed did not find it unusual that the distributor never asked to be paid for the hours spent drafting specifications. The purpose of these companies is in fact to sell generators, not to write unbiased, independent specifications for free.

It is understandable that a distributor would provide assistance to engineers with the aim of increasing its opportunities to sell its generators during upcoming public calls for tenders. The Inspector General cannot blame a distributor for acting in this way since it is not the latter's mandate to treat all potential bidders fairly. The engineers are in charge of writing up specifications that do not unfairly favour a bidder in order to stimulate competition and obtain the most advantageous tender for the public body that mandates them. By abdicating some of their duties in this way, they are giving a distributor preferential access to the call for tender documents.

The fact that the distributors will not be submitting bids during the call for tenders process is not a valid excuse to justify this practice. Although there is other construction work to be done with the generator set, a call for tenders to replace or install a generator set inevitably involves the acquisition of a generator. Consequently, the distributor will at the very least be solicited by general contractors to act as a supplier or subcontractor in their bid. Hence, whether the generator set specifications represent an essential or incidental part of the work, it is inconceivable that the distributors be asked to draft the call for tender documents which they will subsequently be responding to, even indirectly.

The fact that the engineers consider distributors to be experts in the field of generators does not justify such a practice. As stated in the OMHM's mandate confirmation letters, engineers are awarded these specification design contracts by the OMHM because of their professional expertise in complex technical fields such as generators:

"This mandate, including all the required preparatory studies and surveys, is granted as electrical/mechanical experts consultants [...]"⁹ (emphasis added)

In addition, in two (2) of the professional services contracts that were reviewed during the investigation, the OMHM specifically stated that their expertise may be required for work related to the generator set. When an engineering firm submits a bid for purposes of being awarded a contract, it believes that its engineers have the necessary expertise to carry

⁹ Excerpt from a letter confirming a professional mandate sent to an engineering firm by the OMHM.

out the project. It is unacceptable that, once the contract has been awarded, they would turn to a distributor to help them with the needs assessment and drafting the specifications. By being dependent on a distributor's advice in this regard, engineers place themselves in a vulnerable position since they will not be able to validate the distributor's technical proposals or contradict it on the choice of certain requirements.

4.1.2. *Communication during the construction work call for tenders*

The investigation also revealed that communication had taken place between engineers and generator distributors during the publication of at least three (3) calls for tenders. As mentioned in Section 3.5, these discussions pertained to the contents of the generator set section in the electrical specifications, regarding which the distributor had questions and was looking to have the content changed in order to receive more calls from bidders. Even though this was not per se an act by a bidder but rather by a potential subcontractor, such discussions are not acceptable given the strict framework of communications during the publication period of a public call for tenders, under which bidders may only contact the person responsible for the call for tenders.

Such actions compromise the impartiality of the engineers as professionals who maintain such a close relationship with distributors. It is especially worrisome that a change such as the one requested by the distributor was subsequently made to the specifications. These unofficial communications channels and the engineers' responses only add to the appearance of favouritism toward the distributor involved in the drafting of the call for tenders.

As such, the Inspector General would like to point out that the OMHM's Contract Management Policy contains loyalty and confidentiality requirements on the part of individuals who, like the engineers concerned here, are involved in drawing up contract documents:

"All directors, officers and employees of the OMHM, as well as any individual who participates on behalf of the OMHM in the contract management process, shall act with loyalty and respect the confidentiality of information known to him or her in the exercise or in the course of his or her functions, unless otherwise provided by law or a court"¹⁰ [translation]

Such unofficial communications during a call for tenders cannot be tolerated, and any questions from a potential supplier must be referred to the person responsible for the call for tenders.

4.1.3. *Performance specifications*

On April 19, 2018, amendments were made to the *Cities and Towns Act* by adding section 573.1.0.14, which changed the way tender documents are written. Since this legislative amendment, the use of brands, models, serial numbers, etc. related to the sought-after products is to be avoided. Technical needs must be stated in terms of performance or

¹⁰ *Contract Management Policy*, Office municipal d'habitation de Montréal, (PO 50-05), effective June 15, 2020, sect. 7.5.4.



functional requirements. It is only exceptionally, if technical needs cannot be otherwise expressed, that a client can then target a particular make or model (what is referred to as “descriptive characteristics” in the legislation). In such a case, any equivalency to these descriptive characteristics, and therefore to the specified reference product, must be considered as conforming.

The Inspector General has found that in seven (7) of the reviewed specifications published since 2019, the drafting of the technical specifications does not comply with the wording of the amendments to the *Cities and Towns Act*.¹¹ These specifications are always written using descriptive characteristics of a generator model rather than in terms of performance criteria or functional requirements. Borrowing the specifications obtained from distributors does not convince the Inspector General that the engineers in charge of drafting that were hired by the OMHM were in a situation where performance specifications could not be drafted.

The purpose of the generator set performance specifications is to stimulate competition among distributors since they express the OMHM’s needs in terms of anticipated results and not based on a generator model that is available on the market. Distributors would thus no longer be able to benefit from a reference to one of their models since it would be up to the bidders to look for and propose those with the best price regarding the OMHM’s functional requirements.

Lastly, specifications that describe a generator set using performance requirements do not need to contain an equivalency clause. The use of specifications drafted in such a way eliminates the risks observed with the equivalency clauses presented in this report, such as excluding a competitor or imposing a credit to bidders.

4.2. Construction contracts

The interrelationship between engineers and distributors at the needs assessment and design stage of generator set specifications undermines the integrity of the tendering process. This unfair treatment of competitors stems from the privileged information available to the distributor involved and the opportunity which the latter has to influence the drafting of the specifications. The distributor’s economic interest creates an apparent conflict of interest for the distributor when the latter proposes requirements for the electrical specifications that are retained in the final specifications. Such practices cannot be tolerated, as they upset the level playing field between the suppliers and risk limiting competition for the benefit of the distributor that was consulted.

4.2.1. Unfair treatment of competitors

Most of the engineers that were met confirmed that they were used to working with the same distributor in designing the generator set specifications that they prepare for the OMHM. However, this practice allows the distributor to obtain information that has not been disclosed in the same manner to all competitors, which is to be aware before all its

¹¹ *Cities and Towns Act*, CQLR, c. C-19, sect. 573.1.0.14.

competitors that a call for tenders is being prepared for the OMHM and to know the respective details before the call for tenders is published.

For three (3) projects, this consultation enabled a distributor to write the entire section of the electrical specifications for the generator set, which would then be found in the public call for tenders. The distributor thus has the opportunity to influence the choice of technical specifications for the future generator by identifying the reference model and by drafting the section on equivalencies, for instance. Even in cases where the engineer revises and modifies the specifications he receives, the distributor has privileged information in relation to its competitors in order to prepare its price quote for potential bidders during the public call for tenders.

This practice of contacting the same distributor for help in designing the specifications also shows a favourable bias towards this distributor by the engineers.

4.2.2. Appearance of a conflict of interest on the part of distributors

As recalled by the Supreme Court, the purpose of a call for tenders is to replace negotiations with competition¹². However, favouring a competitor in relation to a call for tenders affects the healthy competition needed to protect the public:

“When competition is vitiated by an irregularity – such as the client setting a condition on the tender to unfairly favour a bidder – the call for tenders would not result in a fair price. When the contractor is a municipality, the public interest suffers.”¹³

The Inspector General noted that there is an apparent conflict of interest when a generator distributor is involved in the needs assessment stage for the design of the generator set specifications. The facts revealed by the investigation show that such involvement provides an opportunity to influence specifications, whereas support for engineers remains a strategy used by distributors to increase their sales of generators. Therefore, there is every reason to fear that the requirements proposed by a distributor are not unbiased because of the potential gain that would result from the upcoming call for tenders.

Equivalencies

There is an apparent conflict of interest when a distributor proposes the list of the names of competing manufacturers to be included in the specifications equivalency section. On its face, the assessment made by the distributor of its competitors cannot be considered objective or impartial because it could end up in direct competition with them during the call for tenders. The distributor has no interest in stimulating competition for the OMHM, but it has an obvious economic interest during the call for tenders. Hence, the distributor has an advantage when the final specifications exclude or propose a competitor who is highly unlikely to submit a bid.

The distributor’s bias is revealed when a competitor’s name is deliberately omitted as an equivalent product, since this omission is based on its own assessment. This exclusion is

¹² *MJB Enterprises Ltd. c. Construction de défense (1951) Itée*, [1999] 1 R.C.S. 619, par. 41.

¹³ *Entreprise P.S. Roy inc. c. Magog (Ville de)*, 2013 QCCA 617, par. 63.



all the more inexplicable given that the competitor had been a generator supplier in the past and there were no reasons during the investigation to account for why it was excluded from the list of equivalencies.

The Inspector General also retained the same employee's ambiguous explanations for the choice of equivalencies. Although three (3) manufacturers with their respective distributors were proposed in its specifications as equivalent products, the employee himself agreed that one of them was not a real potential competitor in the OMHM's segment. It follows from this explanation that the employee acknowledged proposing a competitor whom he knew to have little chance of being a competitor during the call for tenders. Consequently, in a market where there are mainly five (5) main generator distributors, this employee explained that he would systematically exclude one of these five distributors, in addition to proposing one whose chances of participating in the call for tenders were historically low.

Selection of reference model

The selection of the reference model may also favour the distributor whose generator model was mentioned in the specifications. An analysis of the interviews with various contractors showed that submitting a bid with this model gave them two (2) advantages: they were assured that their bid would be compliant in this respect, and they would avoid the process associated with the acceptance of equivalencies.

However, the Inspector General noted that when a distributor is involved in the design of the specifications, it proposes its own generator as a reference model and not that of one of its competitors. In this regard, the distributor's email reproduced in Section 3.5 showed the extent to which being mentioned in the specifications provided a clear advantage in order to be solicited by bidders when the call for tenders was published.

Although some did not contain such a reference, most of the OMHM's calls for tenders since 2018 still contained a specific reference to a generator.

The Inspector General would like to reiterate that the drafting procedure that consists in referring to a specific item or equipment model should be avoided as much as possible under the new provisions of the *Cities and Towns Act*. Some of the contract documents that were reviewed were already drafted without a reference and bidders had to check with the various distributors to find a model that met the requirements. This is a practice that must become the norm and not the exception in future calls for tenders.

Selection of technical requirements

The appearance of a conflict of interest on the part of the distributor when drafting the specifications leads the Inspector General to question the choice of technical requirements for generators that originate from a distributor. In these cases, there is every reason to fear that the distributor will put its economic interests ahead of those of the OMHM.

The choice of a very specific minimum power rating for the generator or alternator, as seen in section 3.3, are examples of requirements that benefit a distributor. While it is possible that a project may require the generator to have a specific power rating of X kW, it is important that this need be determined by an unbiased professional so as to not unduly

limit competition. This choice definitely cannot be left up to a distributor who will have a clear financial interest in the call for tenders and who could use this opportunity to give an edge to its generator model.

It is true that including such types of requirements in the specifications does not prevent competitors from participating in the call for tenders. However, this is a significant economic advantage for the distributor with a generator or alternator with the power rating indicated in the specifications that it can offer to future bidders. Its competitors, on the other hand, will have to propose a higher power rating to meet the requirements of the call for tenders.

The Inspector General reiterates that it is crucial that technical requirements in specifications be determined by an unbiased and independent engineer and not by a distributor with an economic interest in the future call for tenders.

5. Meeting with the OMHM

In each of its reports, the Inspector General's general aim is always to propose realistic and applicable recommendations that are in line with the circumstances of municipal bodies. That is why, prior to the release of the report, OMHM management was invited to participate in a meeting with Office of Inspector General personnel to discuss the investigation's findings and the potential recommendations that could result from it. The meeting also enabled the OMHM to propose recommendations that could prevent the situations described in this report from recurring in other OMHM contracts.

From the outset, OMHM representatives mentioned that training had already been provided to 103 managers on the new section 573.1.0.14 of the *Cities and Towns Act* regarding performance specifications. The Inspector General applauds this initiative, but deplores the fact that engineers hired by the OMHM have not started implementing the changes in specifications drafting imposed by legislation.

Subsequent to the meeting, the OMHM proposed five (5) measures aimed at preventing the practices observed during the investigation from reoccurring in the future.

First, a reminder will be issued to its managers regarding the drafting of specifications in terms of performance and functional requirements. Second, this obligation will be included in its professional services contracts as a reminder to engineers of their obligations when starting each mandate. Third, a technical reference document will be finalized and implemented for calls for tenders involving the replacement or upgrade of generator sets in OMHM's buildings. Fourth, in the interest of continuous improvement, the OMHM will begin reflecting on new controls that could be put in place to ensure that integrity rules are observed when awarding contracts. Fifth, in-house training will be prepared to revise contract documents.

The purpose of this report is to make changes to prevent the breaches that were noted from reoccurring, with a view to ensuring the integrity of calls for tenders and healthy competition. The Inspector General supports the plan proposed by the OMHM and is



including these measures in her final recommendations, and will be overseeing their implementation.

Lastly, the OMHM's cooperation throughout the investigation and at the meeting preceding this report should be noted. In addition, the OMHM was notified on two (2) occasions that ongoing calls for tenders during the investigation still indicated a reference model for the generator set in the electrical specifications. On each occasion, staff made the decision to remove any reference to a specific manufacturer. These timely decisions by the OMHM demonstrate its commitment to promoting fairness among bidders within the normative framework.

6. Conclusions and Recommendations

FOR THESE REASONS,

The Inspector General

RECOMMENDS that, under section 573.1.0.14 of the *Cities and Towns Act*, the generator set technical specifications in the OMHM's future calls for tenders be described in terms of performance or functional requirements.

RECOMMENDS that, if this is not possible, the OMHM will take the necessary steps to identify more than one (1) product and reference model in its contractual documents (for both generators and other generator set components), and document the reasons for proceeding in this manner.

RECOMMENDS to the OMHM that it prohibit engineers, during the publication of the call for tenders they drafted, from having any type of exchanges with a potential supplier and potential subcontractor, or communicating with such a supplier, unless they are designated as the person responsible for the call for tenders.

RECOMMENDS prohibiting any person involved in preparing the tender documents from bidding or being a subcontractor in the resulting contract.

RECOMMENDS that the OMHM implement the five (5) measures proposed to the Inspector General aimed at guiding the preparation of the technical specifications, in particular under the new rules imposed by section 573.1.0.14 of the *Cities and Towns Act*.



INFORMS the *Ordre des ingénieurs* of the practices observed during the investigation on the part of engineers in charge of designing the specifications.

The Inspector General,

Ms. Brigitte Bishop

SIGNED ORIGINAL