

# Newsletter



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## The Court of Appeal provides interesting insight on unit price quotes and the assessment of damages in public tenders

*In a judgment released last March, *Municipalité de Val-Morin c. Entreprise TGC inc.*, 2019 QCCA 405, the Court of Appeal allowed an appeal submitted by a municipality and concluded that evidence of damages was not established by the respondent. The Court also concluded that bids must include proportionate unit prices as they are an essential condition of tender documents.*

Entreprise TGC inc. [TGC] filed suit against the Municipality of Val-Morin [Municipality] for damages allegedly sustained following the Municipality's refusal to grant TGC two contracts for which it was the lowest bidder. The Municipality rejected TGC's tenders on the grounds that they were not compliant documents as they did not include a proportionate unit price for the work to be carried out, contrary to the tender documents' requirement to do so.

At trial, the Superior Court was of the opinion that the tender documents' requirement for a proportionate unit price

was not an essential obligation since that information did not affect the price or the balance between bidders.

Though the Superior Court recognized that the Municipality had the discretion to refuse tenders with minor irregularities, it concluded that the Municipality did not act in a fair manner towards TGC since it awarded the contract to another contractor who also did not meet the requirement of including proportionate unit prices.

With respect to the damages suffered by TGC, the Superior Court determined



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that the evidence adduced, notably the proof of loss of profits submitted by TGC, was sufficient, and in the absence of any evidence to the contrary, granted TGC's claim for the amount of \$372,529.41.

The Court of Appeal, on the other hand, found that the evidence produced by TGC to establish its loss of profits has no probative force and rejected TGC's action. The Court of Appeal noted that the Municipality had asked TGC to disclose its financial statements and accounting documents during the examination on discovery of TGC's representatives, which they refused to provide. The Court of Appeal also found that the Municipality was correct in objecting to TGC's use, during trial, of a chart that was prepared in-house, as this evidence of damages was insufficient. Without it being necessary to produce audited financial statements, TGC should have

put its gross margin into evidence in order to calculate its profits.

The Court of Appeal also agreed with the Municipality's position that, as part of a tendering process for a price unit contract, the requirement to submit a proportionate unit price for each item of the bid is an essential condition, as it allows the Municipality to have a comparison basis for the bids received, to avoid excessive costs in case of exceeding quantities, and to prevent collusion in public contracts.

We retain from this judgment that contractors must be cautious when bidding for a unit price contract and make sure to include proportionate prices for the value of work or materials otherwise they will hardly be able to contest a public authority's decision to refuse their submission.

