MEDEC

CANADA'S MEDICAL TECHNOLOGY COMPANIES

LES SOCIÉTÉS CANADIENNES DE TECHNOLOGIES MÉDICALES

Ensuring the Efficiency and Integrity of Health Care Purchasing Processes

Brief submitted for public hearings on Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*

September 2016

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Summary

MEDEC is the national association created by and for the Canadian medical technology industry and includes 150 active businesses in Canada. The Quebec medical

technology market is worth $1.5 billion per year, and the sector is responsible for over 6,200 jobs.

MEDEC recognizes the importance of ensuring the integrity of Quebec's public markets. The organization therefore supports several provisions of Bill 108. MEDEC in particular agrees with the ability of any supplier to file a complaint about a purchasing process with the Autorité des marchés publics (the Authority), a neutral body with regards to this process. However, the time limit for filing a complaint should be adjusted so that these provisions can be truly applied.

MEDEC also invites the government to go even further in the right direction, particularly by including the concepts of performance and quality in the Authority's mission, to maximize the efficient use of public funds. In general, MEDEC recommends adopting a value-based procurement approach. MEDEC also recommends that the position of "vice-president of health" be created at the Authority.

Finally, MEDEC would like to bring three important issues to the attention of legislators reviewing Bill 108:

- The lack of accountability, efficiency and transparency of the group purchasing organizations (GPOs) that are active in the health sector.
- The impossibility of applying, as drafted, section 126 regarding criminal sanctions for communicating with a member of a selection committee.
- The need to put an immediate end to the practice of mandatory rebates, which amount to an estimated $10 million per year.

MEDEC also provides constructive recommendations for each issue raised.

About MEDEC

MEDEC is the national association created by and for the Canadian medical technology industry and includes 150 active businesses in Canada. It represents the sector with its partners and acts as the main source of information and education about its sector for its members, the health care sector, and the general public.

For over 40 years, MEDEC has worked and collaborated with governments, health care providers and patients to improve the health of Canadians and create a sustainable health care system.

MEDEC members sell devices, instruments, equipment, supplies, applications and many other innovations that are used every day to diagnose, treat and enhance the quality of life of patients in Canada and around the world. These technologies translate into many benefits, including early diagnosis and more accurate and less invasive procedures, which lead to faster recovery, reduced hospital stays, better treatment options, and decreased wait times. In addition to providing better health outcomes, these technologies also provide substantial value and make significant contributions to the development of Canada's health care system.

We want to improve the performance of health care to ensure patient well-being, and we strive to promote the growth of our industry in Canada and Quebec. To do so, we focus on access to proven and safe technology and medical innovations, which are often developed here by our member companies themselves.

Medical technology: a very important industry

The global medical technology industry is estimated to be worth $350 billion. The Canadian industry is mainly located in Quebec, Ontario and British Columbia.[1] Quebec represents one third of the Canadian medical technology industry, and over 30% of all Canadian medical technologies approved by the U.S. Food and Drug Administration come from Quebec.[2]

While public health spending in Quebec is projected to reach $61.1 billion in 2030, or 13.5% of GDP and 68.9% of the Government of Quebec's total revenue,[3] expenditures for medical technologies in Quebec and Canada will only represent 3.41% of these expenditures, or 0.37% of GDP, and have been declining on a per capita basis.[4] This low use of health technologies places Canada 34th out of the 66 member countries of the Organisation for Economic Co-operation and Development (OECD). This means that the solution to the health care system's financial challenges certainly does not lie in further reducing medical technology expenditures.

The Quebec medical technologies market represents an estimated one quarter of the Canadian market, or $1.5 billion per year, and 0.5% of the world market.

However, the medical technology sector remains very important for Quebec, as it represents over 6,200 jobs and is growing.[5] The industry comprises 146 companies, nearly three quarters of which are SMEs. Its development depends above all on an ability to innovate, manufacture and efficiently distribute products based on complex and varied technologies that include devices, equipment, supplies and Health ICT (information and communication technologies). This sector is in fact one of the strategic sectors targeted by the government.

Quebec's 34 health care institutions resulting from the 2015 reorganization have a budget of approximately $17 billion (excluding medical fees), and it is estimated that $4.1 billion goes to various materials and supplies, excluding construction.

The three group purchasing organizations (GPOs negotiate 37% of these purchases, which amount to $1.5 billion. Although no specific data has been published on this subject, MEDEC estimates that nearly $500 million in purchases of medical

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[1] Industry Canada, *Medical Devices Industry Profile, 2013,* https://www.ic.gc.ca/eic/site/lsg-pdsv.nsf/fra/h_hn01736.html (last retrieved May 6, 2015)
[2] MEDEC, *Profile of the Medical Technology Industry in Quebec*, 2014
[3] CIRANO, Clavet et al. *Les dépenses en santé du gouvernement du Québec, 2013-2030 : projections et déterminants*, 2013
[4] MEDEC, *Profile of the Medical Technology Industry in Quebec*, 2014
[5] SECOR/KPMG, *Valeur économique de la chaîne d'innovation en SVTS, actualisation de l'analyse de 2011*, report to Montréal InVivo, May 2015

technologies go through the three GPOs (SigmaSanté, GACEQ and GACOQ), based on the analysis of their annual reports.

Unlike most other economic sectors, the main—if not sole—market outlet for the Canadian medical device and instrument industry is public markets and the related calls for tender.

According to the most recent statistics on the contracts of public bodies in the health and social services network,[6] 2,864 purchasing contracts of over $25,000, or more than 55 per week, were entered into in Quebec in 2013-2014. The health and social services sector represents 65% of the value and 44% of the total number of government procurement contracts.[7]

[6] http://www.tresor.gouv.qc.ca/faire-affaire-avec-letat/publications/statistiques-sur-les-acquisitions-gouvernementales/

[7] http://www.tresor.gouv.qc.ca/fileadmin/PDF/faire_affaire_avec_etat/statistiques/1415.pdf

Our understanding of Bill 108

As the creation of the Autorité des marchés publics (the Authority) is the primary recommendation of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry,[8] the main goal of this bill is to implement the required measures to provide Quebec with rigorous policy frameworks for its public markets. Although the bill's primary focus is on the oversight of contracts, we must remember that the government's ultimate goal is to ensure that public funds are used efficiently and with integrity. From our point of view and in keeping with the principle of the bill, this goal goes beyond the construction sector alone.

The government is also taking this opportunity to refocus measures that, until now, were entrusted to other bodies that report to the Authority, such as the granting of the authorization to contract, which is the responsibility of the Autorité des marchés financiers.

The bill also amends provisions of *An Act Respecting Contracting by Public Bodies* (ARCPB).

The rest of this brief will highlight the positive aspects of the bill and the areas to improve—in our association's opinion—and will make recommendations to enhance the bill, particularly to allow the Authority to fully carry out its mission to provide oversight and help public bodies soundly manage public funds.

[8] https://www.ceic.gouv.qc.ca/

The strengths of Bill 108

Bill 108 includes many provisions that MEDEC openly supports.

Processing of tenderer complaints by the Authority (Chapter IV)

MEDEC welcomes this very important component of the bill as a necessary means to restore balance between public bodies and suppliers. This measure was also proposed by Passeport Entreprises[9] to provide companies with recourse in these situations.

In fact, MEDEC's members inform it almost every week about calls for tenders that include unacceptable clauses or other unreasonable requirements that may detract from a supplier's willingness to submit a tender. These members are nevertheless "forced" to comply if they hope to obtain their market share, since the nature of the goods does not allow for sale other than in the health care network.

It should also be noted that the term "negotiated contract" does not apply to procurement contracts arising from calls for tenders in Quebec. No negotiation is possible in these cases, and tenders are only considered based on compliance and price (up to 30% of which may or may not be adjusted based on quality), without any platform for dialogue between tenderers and public bodies once the call for tenders is issued, aside from a formal question-and-answer addenda process.

Too often, our members are faced with inflexible and uncompromising attitudes. This obliges them to turn to the ordinary courts, which do not provide coercive results in a timely manner and represent a substantial area of expense. The issuance of safeguard orders by the courts is generally not a feasible option, as the courts have repeatedly stated that dissatisfied tenderers must ask for damages instead of attempting to suspend a tendering process.

The consequence of this rigid monopsony (single-client) approach is that if a company feels that the terms and conditions of a call for tenders is unfair, unrealistic, or inappropriate and cannot submit a tender as a result of this situation, it may lose the only contract that it can potentially access for a period of five years. The company may therefore have to reduce staff in Quebec, reduce its investment, and develop other markets. For Quebec SMEs, the lack of a major source of revenue may eventually cause the company to close.

It would therefore be highly useful for suppliers to have recourse to a body that is "neither judge nor party," like the future Authority, and that will enforce their right to fairness in the call for tenders process, as long as the time frames to use this recourse are sufficient. We hope this will prevent economic impasses that may be harmful to the public interest.

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[9] https://www2.gouv.qc.ca/entreprises/portail/quebec/actualites?lang=fr&x=actualites&e=2567028724

Generally, the provisions of Chapter IV of the bill are therefore quite appropriate.

Formalization of filing a complaint with a public body (section 83)

MEDEC also believes that it is important for public agencies to be required to maintain strict and respectful relations with their suppliers. We therefore welcome this measure. This type of formal process will undoubtedly improve relations with suppliers.

Power to cancel a tender process (section 27)

Section 27 sets out the power to amend or cancel a public call for tenders or an intention to enter into a contract by mutual agreement in certain problematic situations. This power, which is a corollary of the complaint processing system set out in Chapter IV, is required for there to be a tangible impact on the tender process.

The current situation allows neither the Ministère de la Santé et des Services sociaux (MSSS) nor the Secrétariat du Conseil du trésor (SCT) to quickly intervene or use the necessary power, other than moral authority, to suspend a call to tender, even if a tenderer believes to have been prejudiced in his rights. The only recourse is through legal channels, namely the courts, an option that is costly, risky for conducting subsequent business, and contrary to the general trend of avoiding court proceedings.

In general, MEDEC believes that for the regulatory framework of public markets to work properly, there must be a body with the necessary powers to enforce this framework in a timely manner. The courts should only be a last resort.

The role and powers of the Authority must also be reconciled with those of the SCT to avoid inconsistencies or friction within the public administration.

Mandatory notice of intention to enter into a contract by mutual agreement (section 82)

MEDEC welcomes this amendment to the ARCPB, as it will likely stimulate competition and allow potential suppliers to express interest if alternatives to the contract in question are possible.

MEDEC members regularly inform the association of contracts by mutual agreement that should have been subject to a competitive process and for which there is no way to challenge the tender other than through the courts.

While the sector is highly diversified, the number of potential bidders is limited for most product categories. For example, there are a maximum of three or four international companies that provide certain types of specialized equipment. How can an institution justify a contract by mutual agreement without first issuing a notice of intention so that all qualified businesses can express interest? Yet this situation indeed continues to occur today. We hope that this measure will help stimulate competition.

Consolidation of provisions regarding ineligibility for public contracts and prior authorization for obtaining a public contract

The bill includes various measures of this nature. MEDEC's opinion is that these measures will simplify the work of tenderers by reducing the number of bodies involved in these administrative checks.

Any measure that aims to simplify regulations and their application can only be positive for companies, especially SMEs, which generally do not have access to an internal legal service or the administrative resources to manage these requirements, which are not always necessary or relevant for our sector.

Administrative simplification is indeed one of the goals of Passeport Entreprises, and it goes without saying that this provision is essential for the bill.

Go further in the right direction

In addition to supporting many provisions of Bill 108, MEDEC believes that the government could go even further in certain areas to ensure sound contracting practices.

Include the concept of performance and clarify the Authority's mission (section 18)

MEDEC believes that Bill 108 should be an opportunity to improve the management of public contracts in Quebec. It is completely legitimate for the government to develop a body dedicated to the oversight of public markets that is itself not a stakeholder in these markets. This body will be in a good position to cast a critical eye on how contracts are managed by ministries and bodies. However, MEDEC believes that it would be a mistake to limit the Authority's mission to just the oversight of public markets.

MEDEC believes that procurement plays a key role in the health care system not only to keep costs at a reasonable level but also to provide access to innovative technologies that encourage efficiency in care. This finding has been highlighted in the scientific literature and is increasingly compelling.[10]

The concept of performance assessment in procurement not only is essential but also cannot be limited to price alone. The concept of "value" must also be measured, and this paradigm is becoming a significant trend, particularly in Europe.[11]

We therefore believe that the Authority should be invested with the responsibility and resulting powers to not only provide oversight over the awarding process for public contracts but also assess the efficiency of market strategies and adopted approaches.

Given the importance of ensuring the sound management of public funds and promoting the accountability of public bodies in this regard, MEDEC suggests that the Authority's mission be broadened to include oversight of the performance of public bodies in this area.

MEDEC recommends broadening the mission of the Authority by adding a paragraph that could read as follows:

- "To provide oversight and evaluate the performance of the public bodies under its authority, including the GPOS, with regards to the efficient use of public funds associated with awarded contracts."

We also believe that the Authority's mission should be clarified. We have noticed that the bill does not clearly state that the Authority can examine the merits of a public

[10] https://www.cirano.qc.ca/fr/sommaires/2016RP-09
[11] http://www.medtecheurope.org/node/752

body's decision to reject a tender or an evaluation committee's conclusions regarding quality. The bill refers to carrying out contract management in accordance with a normative framework, but this concept does not necessarily include these types of decisions. The obligation of public bodies to enter into a contract with a compliant tenderer and to assess received tenders in good faith and in a non-arbitrary manner does not fall under a normative legislative or regulatory framework. These obligations arise from the case law of our courts.

However, while some grievances of our members relate to the requirements of tender documents, many complaints stem from decisions regarding tender compliance and eligibility as well as the sometimes arbitrary nature of the committee's quality assessment process. Consistency between the committee members and the people who draft the specifications is sometimes lacking.

For our members, the Authority must have the power not only to monitor the content of tender documents but also ensure that the process is applied fairly and not arbitrarily.

Health expert at the Authority (section 20)

With nearly 29% of the total number of government contracts and 37% of their value (and 65% of the number and 44% of the value of procurement contracts),[12] the health care network is a major sector of the government's contractual activity. Considering the nature of the industry that serves this network and its particular characteristics, we believe it is important that the Authority develop the necessary internal expertise to efficiently carry out its mission while respecting the interests of the parties involved, for two major reasons.

First, to correctly judge whether complaints about the contractual practices of public bodies are well founded, and to identify problematic situations that impact competition, we believe it is important for the Authority to rely on the judgement of internal professional resources who can provide a counterbalance to the opinion of professionals who work in public bodies.

This is all the more necessary given that the vast majority of observed problems arise from the technical sections of tender documents. This aspect is also the one that is subject to the fewest guidelines. It would therefore be ideal for the Authority to help increase the quality of tenders by requiring more rigorous preparation and drafting. The proper expertise is required for this to happen.

MEDEC therefore believes that a formal position of vice-president should be created within the organization whose exclusive mandate would be to oversee the health sector.

[12] http://www.tresor.gouv.qc.ca/fileadmin/PDF/faire_affaire_avec_etat/statistiques/1415.pdf

This person would also keep on top of trends in the public health markets outside of Quebec and make recommendations where appropriate.

This vice-president would also be responsible for measuring the performance of the GPOs.

MEDEC also proposes that a sectoral oversight committee be created for public health markets to promote continuous improvement.

Complaint procedure and time frames (section 33 and subsequent)

MEDEC has noted that the time frame for filing a complaint about a tendering process is short so as not to negatively impact tender deadlines.

However, we have also noted that the deadlines imposed by public bodies for calls for tender that are often complex are also often very short —if not too short— for potential bidders to even submit their tenders. Our members sometimes wonder whether these tight deadlines are a tactic to reduce the number of tenderers.

As a result, the minimum of three days to file a complaint with a public body would make it impossible for many potential suppliers to file their complaint on time, in particular for complex tenders or for companies whose headquarters are located outside of Quebec. We therefore recommend extending this deadline to 10 days.

If a longer time limit is not possible to allow all businesses, including those whose head office is not located in Quebec, to file a complaint in time, MEDEC suggests that the ARCPB be changed so that there is a minimum of 25 working days between the publication of a call for tenders on the Government of Quebec's electronic tendering system (SEAO) and the date of receipt of tenders.

MEDEC also suggests that the response of public bodies to the complaints of the tenderers always be communicated in writing, including email.

Intervention and cancellation: "conditional contracts"? (sections 51 and 58)

The Authority will have the power to intervene in a tendering or awarding process, which can include cancelling a contract. MEDEC believes that the Authority must indeed be given these concrete powers.

However, we must be very careful to ensure that this "retroactive" power of three months from the awarding of a tender does not create "conditional contracts" that may lead to the termination of contracts (i.e., standing offer agreements) between a public body and multiple suppliers who themselves are not involved in the problem identified in the complaint that requires intervention.

We recommend that better guidelines be established for this power to avoid bringing prejudice to successful tenderers who are not the subject of these complaints.

Not limiting complaints to the content of SEAO documents (section 83)

MEDEC does not understand why a tenderer cannot file a complaint about an ongoing tender process for reasons other than the content of the published documents.

For example, public bodies can provide information at meetings with suppliers or before the launch of a call for tenders and may give signals that cast doubt as to the fairness of the process. On top of this, MEDEC is aware that the questions raised by tenderers and the answers provided by public bodies are not always published on SEAO, even if several tenderers ask the same questions, which isolates suppliers and undermines the credibility of the process.

MEDEC is therefore of the opinion that complaints should be made for any justifiable reason with regard to documents, discussions and verbal instructions. To do otherwise would be unnecessarily restrictive.

Maximize quality, for the public interest (section 114)

MEDEC has found that the term “quality” only appears once in the bill, in section 114, in the context of contractor (supplier) performance evaluations.

To improve the oversight of public markets, in terms of both processes and the public interest, we believe it would be a good idea for the Authority’s mission to include the concept of quality in the oversight of the contractual role of public bodies and, more generally, for greater importance to be placed on quality in the assessment of supplier solutions.

This would ensure that suppliers whose performance is considered adequate can continue doing business with the government. It would also serve the public interest by pushing the two contracting parties to do whatever necessary to maximize value for taxpayers.

Towards a reform of the province's joint procurement groups

In addition to these recommendations, if we wish to have a positive overall impact on Quebec's public markets, we cannot forget the GPOs, which play a growing role in health sector procurement and do so in a context of ambiguous governance and without necessarily demonstrating the value of their services.

Although they are recognized as public bodies within the scope of *An Act Respecting Contracting by Public Bodies*, they are not considered as such under the *Lobbying Transparency and Ethics Act* or *An Act respecting Access to documents held by public bodies and the Protection of personal information*. Although each group publishes an annual report on its website, we believe that they should release much more information on their management and performance, which would include reporting to suppliers, who are responsible for part of their funding through the mandatory rebates system.

We believe it is important to address this issue and that Bill 108 is an opportunity to do so, provided there is the will and necessary means.

According to the annual reports of the GPOs, the savings they achieve, which are calculated using approximations and/or methods that are undisclosed, hypothetical and perhaps not sufficiently robust due to their forward-looking nature,[13] do not exceed 4% of the total negotiated amount. Elsewhere in Canada, this difficulty of accurately assessing the health care savings generated by joint procurement groups was raised by the Auditor General of British Columbia in winter 2014 in a report that clearly outlines the issue,[14] and everything points to the fact that this situation is exactly the same in Quebec.

SIDE BAR:

	2006	2012	Difference
Canadian health care expenditures[15]	$151B	$207B	+27%
Expenditures for medical technologies	3.5%[16]	3.1%[17]	-0.4%

Given that the purchase of medical technologies represents only about 3.4% of total health care expenditures,[18] we can see that the effort put into joint health care

[13] For example, in the sector of equipment, tenderers are asked to disclose the submitted price if the call for tenders had not been grouped.
[14] http://www.bcauditor.com/pubs/2014/report11/summary-report-winter-2014
[15] CIHI, National Health Expenditure Trends, 1975 to 2015
[16] CHPI, Medical devices and healthcare costs in Canada and 65 other countries, 2006 to 2011
[17] Medical devices industry profile, Industry Canada, 2013

procurement does not fundamentally change the budgetary profile of the health care network.

Even if the GPOs report worthwhile price reductions for certain product categories, there is no evidence that these reductions are due to their specific intervention in the market. For example, for medical implants, U.S. data show standardized price reductions between 17% and 34%, depending on the category, for 2007-2011.[19] As the medical technologies market is highly competitive and globalized, nothing indicates that Quebec is following a different trend. It would be surprising if Quebec's GPOs did not also benefit from this trend as well without necessarily being the cause of it.

This ministerial strategy to leverage group purchases, which dates back to the 1990s, was renewed in 2013, and was updated this year in a ministerial memo,[20] produces its share of significant disadvantages for the health care system, the industry and ultimately for patients.

The medical technology industry understands and supports efforts to consolidate public finances, in particular by striving for greater fiscal discipline, reducing waste, and increasing efficiency and productivity.

Joint purchases can contribute to this goal, and most of the world's health care systems use this type of approach.

What is unique about the Quebec market is a narrow regulatory framework that applies to all of its public markets without allowing for the necessary flexibility to meet the specific needs of the health care sector.

Also, the heavy emphasis on awarding contracts to the “lowest compliant tenderer,” including for tenders in health care, makes Quebec an outlier compared to Western societies, which, for the most part, provide the essential latitude for public markets to take advantage of innovation and the resulting value for the benefit of patients and the health care system.

> SIDE BAR: In global public markets, invitation to tender methodologies have emerged based on results and therefore on the “value” of tenders. These two-step processes ensure better alignment between needs and available technologies. These approaches are much more likely to

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[18] Canadian Health Policy, http://www.canadianhealthpolicy.com/products/medical-devices-and-healthcare-costs-in-canada-and-66-other-countries--2014-annual-report.html

[19] Recent Average Price Trends for Implantable Medical Devices, 2007-2011, September 2013, Genia Long, Richard Mortimer and Geoff Sanzenbacher Analysis Group, Inc.

[20] http://msssa4.msss.gouv.qc.ca/fr/document/d26ngest.nsf/3f4763bf7e3c23a78525660f00727c27/7d5c1defaec7b66785257b1f006c93a0?OpenDocument

stimulate innovation than the “lowest price at any cost” standard generally seen in Quebec.

The idea involves introducing a *value-based tendering process* that would spur solutions to increase efficiency in the health care system, improve the quality of patient care, and provide economic value.

For example, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement[21] encourages the acceptance of the most economically advantageous offers and urges institutions and the industry to develop objective assessment methods that measure quality and total cost and therefore the economic value that is most advantageous overall.

These value-based procurement approaches have emerged in Canada,[22] and MEDEC believes that we must make a concerted effort to adopt them in Quebec.

In addition to this very strict regulatory context is a systematic desire to consolidate, and therefore centralize, procurement decisions. Our market dynamics are therefore more rigid than necessary, which does not make Quebec an attractive market for suppliers. Furthermore, the significant administrative and legal requirements and regulatory burden taken on by tenderers are such that Quebec is known as one of the most difficult markets in terms of access to and integration of medical innovations.

Nevertheless, the industry continues to participate in public markets and comply with the policies and regulations in force. In fact, it does not have a choice since Canada’s health care systems are monopsonies, or monopolies of single buyers. Our industry participates in this market because it does not have a choice, and because ultimately this is the only way for suppliers in our industry to earn revenue.

SIDE BAR: In the monopsony of the medical sector, a single buyer transacts with multiple bidders, SMEs and large companies.

The monopsony has great purchasing power, which increases competition and optimizes the supply process for its benefit. Market prices and costs therefore tend to decrease.

In the long term, the monopsony forces some companies out of the market, particularly SMEs that do not have the resources to stay competitive, which

[21] http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=celex%3A32014L0024
[22] http://www.conferenceboard.ca/e-library/abstract.aspx?did=7480

creates oligopolies and reduces access to innovation. The supply of products and services is thus reduced, and savings are minimized.

The 2013 ministerial orientations renewed the intention to increase purchases through joint procurement groups. The MSSS was therefore given various management levers with regard to the province's health care institutions, and many categories of specialized equipment and supplies were included in the mandates of the GPOs.

To continue in this direction, specialist doctors had to be persuaded to support and adhere to this strategy. The Fédération des médecins spécialistes du Québec (FMSQ) was formally asked to appoint representatives to evaluate tenders and act as technical advisors to the MSSS and the GPOs.

While the industry finds it odd that external experts were entrusted to provide the clinical and technological expertise required to support medical technology procurement decisions (and what's more with a union that is under permanent negotiations with the government), it understands that having medical specialists help with the joint procurement process should in principle help successful suppliers realize the market share attributed in the tendering process.

MEDEC's members regularly report examples of joint call for tenders, most of which are for specialized supplies, for which the tender process is rife with issues (cancellations, inconsistent allotments, withdrawal of institutions, etc.). Clearly, the GPOs have difficulty unifying all of the clinicians involved in certain calls for tender. Because of sometimes counterproductive compromises and adaptations, the disadvantages of these groups exceed their benefits, and all of this solely to allow the GPOs to increase their "market share" in overall acquisitions.

This is why some tenders leave a certain volume "open" to the choice of clinicians within a price margin set out by the ARCPB's "standing offer agreement" mechanism and that is sometimes increased by authorization from the Conseil du trésor. This approach is called the "right to prescribe."

MEDEC completely agrees with the need to give clinicians all possible latitude to choose the best products available for their patients. The industry knows very well how important it is for medical staff to be on board with any integration of technology into the health care system. However, this situation perfectly illustrates that, for all intents and purposes, Quebec has reached the limits of its group procurement strategy, particularly for specialized supplies and equipment.

MEDEC has not only observed that selection committees have great difficulty achieving significant consensus for these categories of products but also seen signs of obvious

dysfunction on these committees along with a lack of transparency and too often signs suggesting that tenderers are not being treated fairly.

To access clinical expertise, should the MSSS not call upon organizations other than the FMSQ, such as the Quebec Medical Association, which is doing remarkable work to promote better clinical decisions, as illustrated by its commitment to the *Choosing Wisely* campaign?[23] Although the role of the Institut national d'excellence en santé et en services sociaux (INESSS) in procurement was recognized in the memo on GPOs procurement, this highly qualified body that could provide decision-making support is not involved at all—even for major tenders. This seems to be a missed opportunity, and the issue of reconciling the right to prescribe with the imperatives of public markets needs to be debated.

It should also be pointed out that to adapt prevailing regulations to the reality of joint calls for tenders (*An Act Respecting Contracting by Public Bodies*, or ARCPB), the GPOs and public bodies in the health network ask for—and receive—regulatory exemptions from the Conseil du trésor, which is responsible for enforcing the ARCPB. We have also noted that many calls for tender are repeatedly amended after they are published on the Government of Quebec's electronic tendering system (SEAO), even with changes to the rules, which shows that it is difficult for contract givers to effectively issue calls for tender, particularly when it comes to joint tenders.

The industry understands that a certain amount of flexibility is required to make these processes efficient. However, it deplores the ad hoc nature of this method, which basically demonstrates the ARCPB's inability to meet the needs of the health care system and gives suppliers the impression that there are not really any clear rules. Given these conditions, would it not be better to foster a more flexible and adaptable framework?

Overall, MEDEC believes that the current government strategy concerning health care procurement does not maximize the public interest, and the greater the technological complexity of a tender, the less suppliers have confidence in the functioning of public markets.

We must take this opportunity to review the joint procurement system in health care, including the number of GPOs and their mission, and even take advantage of the purchasing power that the consolidated volumes of merged institutions already provide in terms of gains in efficiency and flexibility.

Given the significant financial responsibilities of the three GPOs, their impact on the medical technologies sector, and the importance of casting a critical eye on their

[23] http://www.choisiravecsoin.org/

performance, MEDEC would like the Auditor General to devote greater attention to them, particularly with regard to the calculations of potential savings and the issue of mandatory rebates.

The delicate issue of criminal offences (section 126)

MEDEC would like to separately address the delicate issue of criminal offences for communicating with members of a selection committee, as set out in section 126 of the bill.

For MEDEC and each of its members, there is no doubt that the integrity of parties involved in a public market must be beyond reproach and that any action to unduly influence the contracting process must be denounced. In 2005, MEDEC created a code of conduct with which its members are required to comply.[24]

Since the industry deals with health professionals on a daily basis, the question of ethics in its business relations is all the more important. This issue is therefore not a minor one for our association.

However, in the field of health care, the issue of selection committees is a complex and sensitive one.

The subject is complex, as we provide technology supply contracts whose technical and clinical components require particular expertise to be well understood. This subject is also complex because the preferences of users and health professionals play an important role in the decision, even for products which at the outset do not seem very complex. Here, the issue relates to training and medical practice.

The topic is a sensitive one because in a context in which purchases are increasingly grouped, the goal is to harmonize and standardize the choice of products with the hope of consolidating volumes and getting the best price. To do so, selection committees must represent a wide range of users who are not always willing to make the necessary compromises to obtain a consensus. Because of these different needs, a consensus is sometimes impossible.

Since the medical technologies field is fundamentally innovative by definition, products change quickly and users must work hard to stay informed of the most recent innovations that can facilitate their tasks and increase their performance.

The industry is therefore called upon every day to inform, train and present its new products to users, and it is inevitable that some of these users are members of selection committees. Industry representatives whose main duties are to promote their products, often already under contract, interact with users on a regular basis.

> SIDE BAR: MEDEC would also like to note that the *Lobbying Transparency Act* applies to the health and social services network and that this poses a known problem. Furthermore, the *Directive concernant la gestion contractuelle des*

[24] http://www.medec.org/page/Code_of_Conduct

contrats d'approvisionnement, de services et de travaux de construction des organismes publics (C.T. 215340, July 13, 2015) already sets out oversight mechanisms for communications that may influence contracts (section 8). We must therefore avoid unduly increasing measures to regulate communication between suppliers and clients so as not to introduce unnecessary friction in day-to-day affairs.

It should also be noted that measures to monitor the whereabouts of suppliers in institutions have increased and that the industry complies with these measures. Supplier accreditation requirements have also appeared in the health care network. To the extent that they respect employer management rights and privacy, MEDEC does not oppose them and even complies with the HSCN[25] National Standard for Vendor Credentialing.

When it comes to communicating with doctors, department heads (for example) are known members of these committees, and they generally serve on them for very long periods. The drawbacks of this long-term committee position include biases and personal preferences for particular techniques and associated products. A regular rotation in the composition of these committees should therefore be the norm.

However, like we see in other Canadian jurisdictions and elsewhere, the legislator could decide to impose consequences for the attempted influence of committee members during well-defined blackout periods, for example, between the date of publication of a call for tenders on SEAO up to the awarding of the contract.

As an example, below is a blackout clause based on a Canadian call for tenders that would be acceptable for the industry:

> *The GPOs recognize that tenderers must fulfill their duties in the normal course of affairs within member institutions of the GPOs. However, it is imperative that no communication take place regarding this call for tenders, upon penalty of disqualification.*
>
> *Communications and activities relating to products already under contract with the institution are permitted as are answers to service and customer support requests.*
>
> *NO discussions concerning competitive positioning, clinical aspects or product costs relating to any call for tenders are authorized during the blackout period.*
>
> *The blackout period starts when the call for tenders is issued and finishes upon the awarding of the contract. (Adapted by MEDEC)*

[25] *Healthcare Supply Chain Network*

Section 126, as it is currently worded, is therefore too broad and would be prejudicial to the interests of both public bodies and the industry. We believe that it is absolutely unacceptable and unworkable to apply a penal infraction to “anyone who communicates or attempts to communicate” with the members of a selection committee before the awarding of any contract. Furthermore, we must not overlook the possibility that a tenderer may be contacted directly by a member of a committee or that a spontaneous conversation may arise during a chance meeting at an institution.

While retaining the spirit of this section, this article should be clarified in a significant way so that it covers a determined period and refers to communication relating specifically to the purposes of the Act.

The government should also consider requiring members of the committee to disclose any conflicts of interest and, in the case of medical staff, to comply with the *Code of ethics of physicians*.[26] Recourse should also be possible in the case of breaches of ethics on the part of selection committee members.

[26] http://www.cmq.org/page/en/code-de-deontologie-des-medecins.aspx

$10 million in mandatory rebates

As a limit has been reached in terms of possible economies of volume for medical technologies in Quebec, the Government of Quebec should directly address another issue that affects both efficiency and governance. Contracts for medical technologies are currently subject to mandatory rebates, from the supplier to the customer, that amount to up to 12% of the sales of certain categories of specialized products, particularly those used in cardiology, orthopedics and ophthalmology, in addition to occasional rebates of 1% that go to the GPOs. These rebates are now called "partnership contributions," which is a euphemism for the same requirement. It has been estimated that these rebates total nearly $10 million a year, and there is no transparency about the use of these public funds.

MEDEC has already taken a position against imposed mandatory rebates. In our opinion, these requests raise ethical and legal issues, to the extent that some suppliers, including those subject to the U.S. *Foreign Corrupt Practices Act,* may refuse to run the risk of accepting these conditions for a market as small as Quebec. Furthermore, these amounts may not be subject to the sound management/governance that we expect from the public sector. Since these rebates apply to all suppliers starting from the first dollar of sales, we can imagine that this amount is then at least partially included in the price, similar to a tax. This means that Quebec essentially applies a surtax to medical technologies.

As a result, our medical instruments and equipment possibly cost up to 13% too much because of this rebate imposed by institutions and purchasing groups as a tax on suppliers. We do not know what is specifically done with this money, but suppliers have no choice but to pay this tax or include it in their prices accordingly, while denouncing the ethics and governance of this questionable practice. The Government of Quebec could potentially save an additional $10 million per year by putting an immediate end to this practice and demonstrating the full level of desired transparency and ethics in its public markets, as is done elsewhere in the world.

We should remember that in 2010, the SCT published a *Bulletin d'interprétation des marchés publics* banning these mandatory contributions.[27] We recommend that Bill 108 introduce this ban in the Act.

[27] http://www.tresor.gouv.qc.ca/faire-affaire-avec-letat/publications/bulletin-dinterpretation-des-marches-publics/2010-04-12-rcarcsrctc-5-1/

List of recommendations

Favourable recommendations

1. Adopt the main provisions of Chapter IV and section 83 concerning the processing of tenderer complaints.

2. Adopt the provisions of section 27 to modify or cancel a tender process when competitors do not seem to be treated fairly.

3. Adopt the provisions of section 82 amending the ARCPB so that a public body must issue a mandatory notice of intention to enter into a contract by mutual agreement.

4. Adopt the provisions that promote consolidating provisions relating to ineligibility for public contracts and prior authorization required to obtain a public contract.

Recommended modifications to Bill 108

5. Include the concepts of performance and quality in the Authority's mission of oversight to maximize the efficient use of the public funds associated with contracts awarded by public bodies.

6. Create the position of “vice-president of health” within the Autorité des marchés publics to ensure that it has the necessary expertise to efficiently carry out its mission with respect to contracts for the procurement of medical technologies.

7. Extend the deadline for filing complaints with the Autorité des marchés publics, as per sections 33 and 34, so that they can be filed within 10 days.

8. In sections 51 and 58, include more specific guidelines to avoid prejudicing successful tenderers not covered by a complaint.

9. Remove the reference to “tender documents” in section 83 so that an interested party may file a complaint about a call for tender in its entirety.

10. Subject the joint procurement groups (GPOs) to much greater accountability and oversight, in particular by subjecting them to the authority of the Autorité des marchés publics.

11. Adjust the provisions of section 126 based on existing blackout clauses in other jurisdictions so that these provisions are better suited to the medical sector.

12. Put an end to the practice of mandatory rebates in the health network.