

Casting a long shadow

by Marja Hughes and Laura Eggertson

International trade agreements complicate municipal decision making

Johnny Carline, chief administrative officer of the Greater Vancouver Regional District (GVRD), has enough on his plate. Adding a potential international trade challenge to the list he ticks off before his municipal government makes decisions about public-private partnerships (P3) and procurement is not a welcomed addition.

“The fact that we could be open to a [trade] challenge is not a comfortable position for local governments to be in,” Carline said in a recent interview. “It’s already a very busy and complex job for people to manage large cities, or even small cities. To have a whole dimension like trade treaties that are enormously complex in their own right as something you should be worried about ... is really unacceptable.”

So why is the GVRD – a local authority – preoccupied with agreements struck between nation states?

The problem arose last year, when the district proposed building a \$117-million water filtration plant. In hopes of saving money, councillors wanted to try something different. Instead of having a private company design and build the plant for the GVRD to run, it proposed a design/build/operate scheme. P3s are an option many municipal governments are considering for a variety of projects.

After examining the legalities of their filtration proposal, the Vancouver district ran squarely into trade agreements. Or at least, says Carline, into the possibility that trade agreements might expose the district to a trade challenge in the future.

The water treatment plant issue revolved around whether a P3 of this kind would change the definition of the plant. Instead of being classified as providing a government service – clean water for the citizens of greater Vancouver – could a P3 mean the plant would

now be considered a commercial operation? And then, if the district later decided to return to operating the water filtration plant itself, would that expose the municipal government to the potential of a challenge under the North American Free Trade Agreement (NAFTA) or subsequent similar agreements?

Under Chapter 11 of NAFTA, private companies can sue governments for expropriation of “investments” if those governments do not compensate the firms for the impact of policy decisions, including bylaws. Because the chapter does not define investment or expropriation narrowly, the GVRD – alerted by some constituents, unions and the Council of Canadians – grew concerned that if it later decided to return the plant to public operation, it could trigger a trade challenge.

After seeking legal opinions and information from the Department of Foreign Affairs and International Trade (DFAIT), the district cancelled the plan to privatize the water filtration plant. It is building the plant, but the

municipal government will now run the plant in conventional fashion.

Ultimately, the lack of clarity about how trade agreements might apply to municipal government killed the proposal, says Carline.

“What we wanted was a clear statement from Canada that municipalities were exempt or indemnified against any action by anybody against us, on the basis of trade treaties. They weren’t supposed to apply to us, and if somebody wanted to make out that they did, we wanted to be protected or indemnified by some formal indemnification by the Canadian government,” says Carline. “Of course, we didn’t get it.”

As well, a trade challenge launched by the European Union and Japan against the state of Massachusetts has Carline worried that trade agreements could affect a municipal government’s ability to pass procurement policies. In 1996, Massachusetts passed a law to try to protest the repressive regime in Burma (Myanmar). The law stated that Mas-



sachusetts would not do business (procurement contracts) with any company that also supplied goods or services to Burma. More than a dozen US municipalities, including New York, Philadelphia and Los Angeles, had passed similar procurement policies. The EU and Japan challenged the law on the basis that it violated World Trade Organization (WTO) principles that the United States – and Canada – have agreed upon. Provisions in the Government Agreement on Procurement specify that no federal, state or local government can discriminate against a foreign supplier.

Before the trade challenge could be decided, the US Supreme Court struck down the Massachusetts law as unconstitutional. But the fact that the EU and Japan launched the challenge makes Canadian municipalities uneasy.

If a municipal government opts to procure “green” products to suit its sustainability policies, or to procure products certified free of child labour, those policies might also end up being challenged under future trade agreements that require international competition for procured services, says Carline. “The notion that a local government couldn’t reflect its local values [in procurement policy] is a concern. I think the answer is that you can’t.”

The federal government appears to concur.

“Governments participating in the government procurement agreements can and do apply policies which support environmental goals through procurement,” DFAIT wrote in

department said in its written response.

Government procurement at the provincial and municipal levels is also exempt from those trade deals – currently. But Canada has embarked upon the Free Trade Agreement of the Americas, which would extend NAFTA to Central and South American countries. That agreement includes a chapter on procurement.

The GATS is also being renegotiated among members of the WTO, including Canada. Other countries may wish to put government services, including procurement, on the negotiating table, says André Lemay, a spokesman for DFAIT. “The whole issue of procurement *per se* is not covered in the GATS. Whether it will be in the future we don’t know,” he says.

If other governments want to include procurement in the GATS, Canada will consult the provinces about what stance the federal government should take. “The only thing the federal government will put on the table is what provinces tell us will go on the table,” says Lemay.

The department has also formed a working group with municipal governments, through the FCM, to hear their views. However, the federal government will not reveal the details of its negotiating positions on the GATS or a proposed Multilateral Agreement on Government Procurement at this time. “We don’t want to give away our negotiation positions,” says Lemay.

The Canadian Council on Public-Private Partnerships believes municipal concern is

But after working with six law firms on the trade agreements issue, Peatch says she has been told that Canadian contracts already anticipate any problems that might create uncertainty for trade agreements. For instance, Canadian municipalities are already restricted from giving local suppliers preferential treatment under internal provincial trade agreements, she says.

Peatch also blames unions for creating a climate of uncertainty in order to “thwart municipalities’ efforts” to become involved in a P3. And in terms of the GVRD’s fears over its water plant, Peatch says she told the chairman of the district that he got bad advice and the fears were unfounded.

Donald Lidstone is a Vancouver-based lawyer who has provided legal opinions to the FCM and the GRVD about trade agreements on procurement and services. After a year-long series of meetings and consultations, Lidstone says the main problem for municipal governments remains a lack of clarity in the federal government’s position and in the agreements themselves.

“I believe the current uncertainty arising from the phraseology of GATS and NAFTA combined with the answers received to date from DFAIT have created uncertainty and unpredictability for local governments,” Lidstone says. “The rules around procurement have not been made entirely clear. That’s not good for business in Canada.”

Legal opinions received by the FCM – including one by Lidstone – conclude that NAFTA and GATS could potentially affect municipal regulatory authority, says John Burrett, FCM’s manager of economic and social policy.

“In FCM’s view, these concerns must be addressed before the federal government moves forward with further negotiations, and the municipal government sector must be held harmless from the constraining effects of trade agreements,” the organization says in a policy document. And, says Burrett, the federal government is not willing to give that kind of blanket guarantee.

“Municipalities are provincial jurisdiction, not federal,” says Lemay. “So we don’t really have a word to say in it.”

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a response to concerns expressed by the Federation of Canadian Municipalities (FCM). “In designing a policy, a government would need to take the provisions of the agreements into consideration.”

At the same time, however, the department says government services at the provincial and municipal levels are exempt from NAFTA and from the General Agreement on Trade in Services (GATS). “The GATS does not prevent governments, federal, provincial/territorial or municipal, from regulating,” the

largely unfounded. “The municipalities are being influenced by what their unions and the Council of Canadians is telling them,” says Jane Peatch, executive director of the council.

“At first it’s really easy to get sucked into the vortex of ‘there’s a bogeyman behind every letter of NAFTA,’” says Peatch.

She does agree that the language in trade agreements is particularly obtuse. “Some of the language – you should just kick the drafters around the corner and tell them to start talking English,” Peatch says.

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