

CUPE Backgrounder

Privatization makes municipalities vulnerable to new trade restrictions

If local governments opt for public private partnerships (P3s), something which is under consideration for the Capital Regional District's sewage treatment project, they are more vulnerable to the restrictions of the Canada-United States Procurement Agreement (CUPA).

The trade agreement, in effect from February 16, 2010 to September 2011, will impose serious constraints on local governments seeking to place a priority on community economic development, environmental and resource conservation goals and other goals when procuring public projects.

The CUPA is supposed to allow Canadian companies to participate in U.S. infrastructure projects financed under the American Recovery and Reinvestment initiative and in particular, in the face of "Buy America" provisions.

Steven Shrybman of Sack Goldblatt Mitchell LLP Lawyers says that Canadians gave away much – including an historic requirement for Canadian municipalities to open up their procurement markets to foreign bidders – and that we got very little in return.

Shrybman was asked to review the CUPA in the context of the Capital Regional District's wastewater treatment program. He concludes that the CUPA contains temporary rules that will make it difficult for the CRD to achieve many of its objectives for the sewage treatment project, including environmental protection and local economic development – especially if the CRD chooses a public private partnership (P3) model.

Shrybman compares CUPA with the Agreement on Internal Trade (AIT) and the Trade Investment and Labour Mobility Agreement (TILMA) – and finds that the constraints the CUPA imposes on CRD procurement options go well beyond the two existing agreements. Moreover, Shrybman says that unlike the other agreements, the CUPA does not exempt procurement related to water, water related services and the protection of the environment.

Where the CUPA rules apply, they impose significant constraints on the ability of the CRD to meet important public policy goals including those related to economic development, environmental protection, green technology, and predictable project management. In particular, the CUPA:

- prohibits the CRD from requiring that construction contractors use some proportion of local or Canadian goods, services or labour in carrying out the sewage treatment project. This would work against the CRD's project goal of providing "maximum economic benefit to the CRD and British Columbia in terms of jobs and other economic benefits".

- prohibits the CRD from supporting a market for innovative Canadian environmental or energy design or for Canadian green technologies.
- creates a litigation risk arising from the rights US companies have under CUPA to challenge both the method and the terms of certain CRD procurements.

Shrybman says that the conventional public approach to procurement offers several important advantages over a public private partnership (P3) model, allowing the sewage treatment project to avoid being captured by the CUPA rules, including:

- Allowing key project functions to be carried out by in-house staff or consultants retained by the CRD rather than as part of a procurement for construction and related services;
- Allowing non-construction services, such as environmental design, energy conservation, and various financial services to be hired or procured separately from any procurement of construction and related services; and
- Adopting a staged approach to procurement that would allow certain construction projects to be procured beyond the September 2011 date when the CUPA expires.

Because a P3 model contemplates a much larger and comprehensive procurement for the sewage treatment project services, goods and technology, Shrybman believes it would invite the application of the CUPA constraints to a broad array of service and projects that may be only indirectly related to the project construction. This could preclude encouragement for local environmental businesses with innovative resource recovery ideas or preferences for local technology suppliers with a facilities operations solution.

The Canadian Union of Public Employees commissioned the opinion from Stephen Shrybman of Sack Goldblatt Mitchell LLP Lawyers.

The full report can be found at: www.cupe.bc.ca/campaigns/water-watch/reports-research.