

**The Canada-US Procurement Agreement (Feb. 2010)
And Canadian Municipal Procurement**

Submissions made on behalf of the Council of Canadians

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I appear today on behalf of the Council of Canadians and serve as a member of its board of directors. Founded in 1985, the Council is Canada's largest citizens' organization, with 10s of thousands of members, many of whom participate actively in the work of the Council through dozens of community based Council Chapters.

As you've heard from several other witnesses, Canada-US Procurement Agreement (CUSPA) is a remarkably one-sided agreement under which most benefits flow to US companies seeking access to Canadian procurement markets, and this is particularly true for temporary procurement rules that require municipalities to comply with international procurement rules for the first time.

My remarks today will focus on these temporary rules, because under these rules Canadian municipalities¹ must open procurement for construction and related services to US companies, but US States and municipalities, many of which maintain local preferences that effectively exclude Canadian companies, are under no reciprocal obligation to do the same.

The egregiously one-sided nature of these arrangements will I hope, serve to underscore the pressing need for much greater transparency during the process of international trade negotiations if our international agreements are to serve rather than betray the interests of Canadians.

The Canada-US Procurement Agreement (Feb. 2010)

A little more than week after it was concluded, the Canada-US Procurement Agreement (CUSPA) went into effect on Feb. 16, 2010. The Agreement, which became public when it was leaked to civil society groups merely days earlier, is comprised of three elements:

- i) provincial and territorial procurement commitments under the General Procurement Agreement (GPA) of the World Trade Organization (WTO) for all provinces and territories (except Nunavut) in exchange for U.S. sub-federal GPA commitments (to which 37 states have made commitments);

¹ Unless exempt under the regime.

- ii) temporary Canadian procurement commitments for construction projects for some provincial/territorial agencies and for a significant number of municipalities, in exchange for the U.S. exempting Canada from the “Buy American” provisions of the Recovery Act for seven (7) federal programs; and
- iii) a commitment to explore the scope for a long term government procurement agreement between Canada and the U.S., within the next 12 months, to deepen on a reciprocal basis, procurement commitments beyond those in the WTO GPA and NAFTA.

The temporary agreement is particularly important because until now provincial and municipal governments have not had to comply with international procurement rules. Provinces/territories have declined to undertake such obligations because of concerns regarding the U.S. carve-out for mass transit and highway projects, and U.S. federal set-asides for small and minority business, both of which impede Canadian access to U.S. procurement opportunities. Remarkably, and as noted below, these U.S. exclusions under international procurement rules are essentially unaltered by the CUSPA.

The commitment to future negotiations is also relevant to municipal governments, but for present purposes our focus is on the temporary procurement commitments Canada has made because these now apply to municipalities, and have already gone into effect.

Temporary Canadian Procurement Commitments.

Part B of CUSPA sets out the terms of the Temporary Agreement on Enhanced Coverage (TEAC). Article 6 of this scheme provides that:

1. Canada shall provide access to sub-federal procurement of construction services to the United States in accordance with Appendix C of this Agreement. For greater certainty, this includes all U.S. iron, steel and manufactured goods used in a construction project, unless otherwise noted.
2. This Article shall remain in force through September 30, 2011.

Appendix C sets out the scope of the temporary regime which covers construction services contracts with a value greater than \$ Cdn 8,500,000. Part B of the Appendix sets out certain exceptions for measures relating to aboriginal peoples and for promoting development in distressed areas. It also lists the provincial entities to which the Agreement will apply, including many hundreds of Canadian municipalities.

Part B also sets out the substantive obligations and procedures of the procurement regime to which municipalities must now adhere. These preclude according favourable treatment to local contractors or those providing goods and services to such contractors. Governments are also prohibited from seeking “offsets” even where these are imposed on an entirely non-discriminatory basis.

An offset in government procurement:

means any condition or undertaking that encourages local development such as the use of domestic content, the licensing of technology, investment, counter trade and similar action or requirement.

As noted below, offsets and set-asides are virtually ubiquitous in the United States, and they will largely remain in force against Canadian suppliers and service providers under CUSPA.

Nevertheless, unlike their US counterparts, Canadian municipalities are not entitled to maintain such local preferences in construction procurement. This means that they cannot require, for example, that the successful bidder for a construction contract hire or source goods and services locally.

In return for these Canadian commitments under TEAC the US agrees to remove certain “by American” conditionality to US stimulus spending. Article 7 provides:

The United States shall modify its Annex 3 of Appendix I of the GPA by listing seven programs under List C and providing that with respect to those programs, the domestic purchasing requirement of section 1605(a) of the American Reinvestment and Recovery Act of 2009 will not be applied as a condition of financing those programs with respect to Canadian iron, steel, and manufactured products in procurement above the Annex 3 threshold for construction services through September 30, 2011. The United States shall include such modifications in its notification to the WTO Committee on Government Procurement, as set out in Appendix B to this Agreement.

The One-sided Nature of the CUSPA

It may not be immediately apparent from these provisions how truly one-sided the TEAC bargain is.

One, but by no means the only measure of the lop-sided nature of this scheme is offered by a comparison of the value of the procurement markets in question. According to an uncontroverted assessment carried out by the Canadian Centre on Policy Alternatives (the CCPA), even if taken at face value, Canadian companies will gain access to only a small portion of US stimulus spending under CUSPA. In return Canada offers US companies unfettered access to many times the value of Canadian public procurement. By the CCPA assessment, Canadian companies would be able to compete for approximately 3% of \$178 billion in US stimulus program funding, but even then subject to several qualifications and exclusions that greatly reduce even this modest access to US procurement.

Consider for example that under Article 7 of CUSPA, the US only agrees to modify its WTO procurement commitments by:

“listing seven programs ... and providing that with respect to those programs, the domestic purchasing requirement of section 1605(a) of the American Reinvestment and

Recovery Act of 2009 will not be applied as a condition of financing those programs with respect to Canadian iron, steel, and manufactured products in procurement “

In other words, under CUSPA the US is only agreeing to remove the stipulation that as a condition of federal funding states and local governments must only purchase US iron, steel and manufactured products. But most U.S. offsets, set-asides and local preferences are established at the state and local level, and as noted under CUSPA, these would remain in place.

This means that while the US has agreed to remove domestic purchasing requirements as a condition for funding under the 7 federal programs, it does not commit to have state and local governments remove their own barriers to Canadian bids on the very projects funded by the 7 listed federal programs referred to, and state level restrictions on Canadian bids are often more onerous than those set out in the federal programs.

In other words, while Canadian provinces and municipalities are obliged to open their procurement markets to US bidders for construction services, US states and municipalities are under no reciprocal obligation. This means that a construction company based in Seattle, Portland, Anchorage, or anywhere else in the US is entitled to bid for municipal procurement for construction in Canada but Canadian companies have no similar rights to bid on U.S. projects.

Moreover, as stipulated in attachments to CUSPA, even the limited waiver it offers with respect these 7 federal programs would apparently not apply to projects carried out by governments in 17 states that have made no commitments under the WTO, including Alaska.

Yet, another asymmetry between US and Canadian obligations under CUSPA is that the US has committed to removing federal purchasing preferences only for iron, steel and other manufactured products. Canada on the other had has committed to opening its procurement markets to all construction contracts, including the goods (iron, steel other products) and the services related to these contracts.

To illustrate the practical reality under CUSPA, consider for example Oregon procurement rules that establish a number of mandatory procurement preferences for Oregon goods and services, including for example the following:

(2) For the purposes of awarding a public contract, a contracting agency shall:

(a) Give preference to goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal; and

(b) Add a percent increase to the bid of a nonresident bidder equal to the percent, if any, of the preference given to the bidder in the state in which the bidder resides.

Alaska maintains a broad array of local preferences for lumber, fisheries products and other goods harvested or produced in the State. It also imposes other preferences and restrictions on most state procurement. For example, the following general rule applies to state contracts:

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference of five percent, an Alaska products preference, and a recycled products preference In this subsection, "Alaska bidder" means a person who

(1) holds a current Alaska business license;

(2) submits a bid for goods, services, or construction under the name as appearing on the person's current Alaska business license;

(3) has maintained a place of business within the state staffed by the bidder or an employee of the bidder for a period of six months immediately preceding the date of the bid;

(4) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, or is a partnership and all partners are residents of the state; and

(5) if a joint venture, is composed entirely of ventures that qualify under (1) - (4) of this subsection.

Moreover, because Alaska has made no commitment under the WTO procurement agreement, even the limited waiver of federal "buy American" provisions would not apply to projects in Alaska carried out with federal funding.

Conclusion:

Even a broad overview of the CUSPA temporary agreement reveals how entirely one-sided this scheme is. Fortunately, the direct impact of CUSPA rules on municipal procurement authority is limited to construction services and expires in Sept. 2011. The challenge now will be to ensure that the dynamics that lead to this Agreement are not repeated.

In this regard I want to recount a recent conversation with a senior Canadian trade official in which one of the negotiators of this scheme is quoted to have said with respect to CUSPA negotiations that "any agreement is better than no agreement". I take those remarks to indicate that Canada's agenda in bi-lateral negotiations with the US reflected a parochial political mandate, not one that had the interests of Canadians, or the Canadian economy, at heart.

It is frankly inconceivable that such an egregiously one-sided agreement could have resulted were Canadian negotiators actually instructed to strike a fair bargain that served Canada's interests, or failing which, to walk from the negotiations.

We are also very concerned these same officials, responding to similar political direction, will do as poorly in serving Canada's interests in free trade negotiations with the European Union, as they have in bi-lateral procurement negotiations with the US.