
Email Transmission

April 10, 2025

File No.: 626 002

Mr. Gary Maclsaac
Executive Director
Union of British Columbia Municipalities
525 Government Street
Victoria, BC V8V 0A8

Dear Mr. Maclsaac:

Re: Local Government Response to U.S. Tariffs

We understand that a number of local governments have requested guidance from UBCM about potential amendments to their procurement policies in response to the tariffs on Canadian goods recently imposed by the United States Trump administration. We also understand that some local governments are considering "Buy Canadian" policies, while others may be considering policies which exclude United States (US) good and suppliers from consideration.

This letter provides general information that UBCM may find helpful as it works with local governments in B.C. to develop responses to the current US-Canada trade situation. However, local governments considering amendments to their procurement policies or bylaws should be encouraged to obtain their own legal advice.

Procurement decisions by B.C. local governments are affected by statute law, contract law, and administrative law principles, as well as regional, national and international trade agreements. Each has a bearing on the options available to local governments in the current trade environment, and the associated risks, and we will discuss each in turn.

1.0 Legislative Powers

The power to purchase goods and services is delegated to local governments by the Province of B.C. through the natural person powers given to municipalities under the *Community Charter*, and through the corporate powers given to regional districts under the *Local Government Act*. The *Community Charter and Local Government Act* do not require that local governments use competitive procurement practices when purchasing goods and services. However, to ensure value for money, and compliance with trade agreements, local government procurement policies typically establish purchasing thresholds beyond which some form of competitive procurement is required, which may range from a request for quotations from multiple suppliers for smaller purchases, to formal processes such as an invitation to tender or request for proposals for large-value procurements.

The courts have interpreted local government procurement powers as including the power to "discriminate" against specific suppliers or categories of suppliers¹, as long as the decision is based on valid business or commercial reasons, or is otherwise for a purpose that is within the local government's powers.

¹ See for example *J Cote & Son Excavating Ltd. v. Burnaby*, 2018 BCSC 1491

Municipalities and regional districts may exercise their statutory powers for municipal/regional district purposes², which include *fostering the economic, social and environmental well-being of their communities*. This means that obtaining “best value for money” need not be the sole deciding factor when purchasing goods and services, and many local governments have incorporated “social procurement” principles into their procurement policies. However, given that this discussion is taking place in the context of an international trade dispute, it is worth noting that in several cases Canadian courts have struck down local government decisions that were found to have been made in an attempt to influence matters outside of the local government's boundaries, without any apparent benefit to the local community.³

The imposition of US tariffs and the countervailing tariffs imposed by Canada will clearly have an economic impact on local communities in B.C., and will increase the cost of US goods imported to Canada. To ensure that their decisions are clearly grounded in concerns that are within their jurisdiction, Councils and Boards reviewing their procurement policies in response to US tariffs should consider and be prepared to articulate how any proposed change in policy – including the adoption of a policy which either discriminates against or prefers specific categories of suppliers - responds to the financial and economic effects that tariffs are expected to have on their community, and how the policy is intended to foster the economic, social and environmental well-being of their community.

2.0 Contract and Procurement Law

Canadian courts have consistently held that hidden or undisclosed procurement preferences violate the requirement for *fairness* that is usually an implied term of the "Contract A" that is formed between an owner who has issued an invitation to tender, and each supplier who submits a bid that complies with the terms of the tender. It is a well-established principle of contract and procurement law that local governments who invite bids or proposals from suppliers through a process that gives rise to Contract A obligations must clearly state any "local preference" or similar policy that will apply to the evaluation of bids or proposals. Local governments considering a "Buy Canadian" policy in response to US tariffs would need to ensure that the policy is clearly reflected in their front-end procurement documents.

3.0 Administrative Law

Even where Contract A obligations do not arise, courts may apply administrative law principles of procedural fairness - including the principle of "legitimate expectations" - to the review of local government procurement decisions⁴. Local governments seeking proposals or offers through a more informal request for proposals process can best ensure that they comply with the requirement for procedural fairness by clearly stating, and then following, the rules that will be applied to the evaluation of proposals or offers and the choice of suppliers, including any “Buy Canadian” preferences.

4.0 Trade Agreements

Regional, national and international trade agreements that the Canadian provinces and the federal government are parties to have been negotiated and ratified on the basis that Canada, the provinces, and their subsidiary organizations, including local governments, will provide open, transparent and non-discriminatory access to procurements covered by those agreements. The procurement thresholds that local governments in B.C. are expected to comply with under current trade agreements are set out in the following table:

² *Community Charter* s. 7; *Local Government Act* s. 185

³ For example, *Labrecque v. City of Toronto*, 2023 ONSC 4616

⁴ See for example *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4

New West Partnership Trade Agreement (NWPTA)		Canadian Free Trade Agreement (CFTA)		Canada-European Union Comprehensive Economic and Trade Agreement (CETA)/Canada-UK Trade Continuity Agreement	
Goods and Services	Construction	Goods and Services	Construction	Goods and Services	Construction
\$75,000	\$200,000	\$133,800	\$334,400	\$353,300	\$8,800,000

The *Community Charter* and *Local Government Act* do not make compliance with trade agreements mandatory for local governments. However, a bid protest mechanism has been established by agreement among the four western provinces, under the *New West Partnership Trade Agreement*. Under that agreement, suppliers who believe that a local government's procurement process was inconsistent with the requirements of the NWPTA, the CFTA or CETA, and who are unable to resolve their concerns with the procuring entity, may request that the dispute be submitted to arbitration. If a supplier is successful, an arbitrator may award up to \$5,000 in costs, plus up to \$50,000 in bid preparation costs.

The *Canada-United States-Mexico-Agreement* (CUSMA) does not include government procurement obligations between Canada and the US. Both Canada and the US are parties to the World Trade Organization *Agreement on Government Procurement* (GPA), but the procurement provisions of the GPA do not apply to Canadian local governments. Accordingly, there are no trade agreements in place which require B.C. local governments to provide US suppliers with access to procurement opportunities.

Given trade agreements requirements, a preference for *local* suppliers could only be considered by a local government for the purchase of goods and services below the NWPTA thresholds.

Purchasing policies that give preference to Canadian goods, services and suppliers, or accord a preference to "Canadian value-added", are expressly authorized under the CFTA, provided such policies are consistent with Canada's international trade obligations, and are not implemented for the purpose of avoiding competition, or discriminating against another party to the CFTA. While this means that a "Buy Canadian" policy is permissible for the purchase of goods and services below the CETA thresholds, we note that the CFTA defines a "Canadian supplier" as a "supplier that has a place of business in Canada". A "place of business" is defined under CETA as "an establishment where a supplier conducts activities on a permanent basis that is clearly identified by name and accessible during normal business hours". In a highly globalized trade environment where companies operate in multiple countries, this highlights the potential complexities of defining who qualifies as a "Canadian" supplier. Any "Buy Canadian" policy would need to define in clear terms which suppliers and which goods qualify as "Canadian", and should be reviewed for consistency with the CFTA.

All trade agreements include exceptions and carve-outs which allow a departure from the agreement's procurement rules in certain defined circumstances. The exceptions and carve-outs vary from agreement to agreement, and local governments considering whether a particular exception or carve-out would apply in any given case should seek legal advice.

5.0 Options for BC Local Governments

The economic turmoil that is expected as a result of current US trade policies may have serious consequences for local communities in British Columbia. The Province of B.C. recently introduced Bill 7 – the *Economic Stabilization (Tariff Response) Act* - to the Legislature, and while it appears certain

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provisions of the Bill are being reconsidered, it is worth noting that the current trade situation, and the Canadian response, is evolving on to day basis, and that local government responses to the current situation may be affected by, and in some case may require, Provincial legislation.

With that in mind, as it stands we expect that local governments considering a change to their procurement policies in response to the current US-Canada trade situation would be considering the following options:

1. **Excluding US suppliers:** A procurement policy that excludes US goods and US suppliers from consideration would likely not violate a local government's trade agreement obligations, but the rationale for such a policy would need to be carefully considered to ensure that it is within the local government's powers. Additionally, it may not be a simple matter in any case to decide whether a particular supplier or good is a "US supplier" or a "US good". Legal advice should be sought, and the parameters and reasons for such a policy would need to be carefully considered.
2. **Local preference policies:** Purchasing policies that give preference to *local* suppliers should only be applied below the procurement thresholds established by the NWPTA, to avoid challenges under the trade agreements that local governments are expected to comply with.
3. **Buy Canadian policies:** A "Buy Canadian" policy that applies below the CETA thresholds may be consistent with the CFTA, but as suggested above the policy would need to define in clear terms which suppliers and which goods qualify as "Canadian" and should be reviewed for consistency with the CFTA.

Yours truly,

STEWART McDANNOLD STUART

Per:



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