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IN-CAMERA

To: GVWD Board

From: Marvin Hunt, Water Committee Chair
Johnny Carline, Commissioner

Date: June 28, 2001

Re: **Water Design-Build-Operate Projects**

Recommendation:

1. That the Board direct staff to halt the process for establishing the Seymour filtration plant on a design-build-operate basis, and instead pursue both the Seymour and if approved, Capilano filtration project on a conventional, or design-build basis.
 2. That the Board direct the Chair and Commissioner
 - (a) to advise the Federal Government of the concerns that have been raised with respect to the potential applicability of trade treaties to water treatment projects in Greater Vancouver;
 - (b) to seek public assurances that the Federal Government will, in the negotiation of new treaties or re-negotiation of existing treaties, absolutely protect the ability of local authorities to set water quality standards; operating conditions and to contract in or out for the provision of these services without exposure to repercussions of any kind from private companies, other nations or the Federal Government as a result of those treaties.
 3. That if recommendations 1. and 2. are approved, the Board authorize the release of its decision and this report immediately following the in-camera meeting.
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1. PURPOSE

The purpose of this report is to update the Board on developments in the issue of whether to use a design-build-operate approach to the Seymour filtration plant and to recommend appropriate actions. The report is in camera because it considers the possibility of grounds for litigation if the Board decides to continue with a design-build-operate approach.

2. CONTEXT

2.1 History

In 1998, the Board made a decision to proceed with the Seymour filtration plant on a design-build-operate (DBO) basis. Staff have been going through a process which would lead to a request for proposals (RFP) for a DBO filtration project on Seymour and have reported to the Committee periodically on this matter. Prior to making a final commitment to issue an RFP, the Board directed staff to hold public information meeting(s) on this matter. These are currently underway.

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Concurrently the Board is considering advancing filtration for the Capilano ozone and public consultation meetings are being held on this proposal. The DBO proposal is proving to be contentious and this report is being submitted at this time with the perspective that if the Board is likely to change course from a DBO project to either a more conventional or a design-build-operate, it would be better to make that decision now rather than later.

2.2 Three Dimensions to the Issue

2.2.1 Cost/Benefit

The basic rationale for pursuing DBO is that it provides a market/profit incentive for the most cost-effective project integrating both capital and operating costs. The alternative approach requires the 'client' (i.e. the GVRD) to police the process to ensure that what appears to be savings in design/construction costs do not re-appear in additional operating costs; and vice versa, that attempts to minimize operating costs do not result in an unduly expensive design/construction cost.

It is difficult to quantify the savings resulting from a DBO approach. Experience in other cities, particularly Seattle, suggest the savings can be substantial. On the other hand, the fact that the District has already completed extensive engineering design review, suggests that for the Seymour project, these savings would not be as great as those achieved in Seattle.

Taken in isolation, even though the business case cannot be precisely quantified, on a cost-benefit basis it would seem the DBO approach offers the opportunity for some efficiencies that would be worth pursuing if this were the only dimension to the problem.

2.2.2 Public Opinion

There are three separate but overlapping issues involved in assessing public opinion. These are: (a) public versus private operation; (b) Canadian versus foreign operation; (c) multi-nationals and trade treaties.

The first sub-issue can be viewed as essentially a contracting out issue (as opposed to full privatization where ownership and full control passes out of the hands of the local authority). The decision of whether to contract out some aspect of GVRD operations is usually a management decision of little interest to the general public other than those who might have a vested interest, such as private sector service suppliers, or organized labour. As such, public consultation on such matters is normally neither needed nor appropriate. In water, however, there is a public sensitivity about potential impacts on water quality. Those who express this concern argue that the profit motive involved in private sector operations undermines the commitment to water quality and public health, that should be absolute. Those who argue to the contrary suggest that the separation of the regulatory body from the supplier as owners in outsourcing, results in a more rigorous regulatory regime than when the same body is responsible for both supplying the water and regulating the operations of the water supply system. The private sector suppliers also argue that their sensitivity to impacts on their reputation (and therefore success in the market place) creates an equal commitment to ensuring standards are met.

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People who argue either of these perspectives forcefully, appear to do so on normative grounds (i.e. on what they think the logic of the situation suggests will happen as opposed to actual evidence of what does or has happened). Looking at what has happened in the UK and Canada over the last few years, it would seem difficult to sustain the argument that involving the private sector in operations results in an inherently less safe system, but we know of no study that has gone beyond anecdotal evidence to test these arguments in a systematic empirical manner.

The second dimension to public opinion is the question of whether Canadian water systems should be operated by non-Canadian firms. Some of the concern is part of the broader issue of whether there should be a preferential procurement policy in the public sector favouring domestic over foreign suppliers. This was recently dealt with by the Board, but in any event does not appear to be a predominantly strong element of the public concern over the DBO proposal. The other part of the concern is that by involving non-Canadian firms, the provisions of trade treaties either are or could be involved, and that control over our water system, at either the local or national level, will be lost as a result. This leads directly to the third dimension of public opinion, which is the whole concern of the impact of trade agreements.

It is perhaps no coincidence that the growth in public interest in the Seymour DBO has generally run parallel to the surge in public concern about world trade organization issues and related treaties. The campaign by CUPE to bring attention to these matters has been a catalyst, but the concern extends beyond organized labour. In the public meetings held to date and in correspondence reviewed, while the opinions expressed have run the gamut from very well informed to substantially less informed, there is undoubtedly a deep fear that trade treaties would compromise the ability of local authorities to operate their water systems in the manner they deem to be in the community's interest. Even if, in weighing the public response so far, greater weight is given to those responses that appear informed and well considered, and correspondingly less to those that have little content or are based on error, at the very least one would have to conclude that the public who are responding are saying "no prospective gains in efficiency would be worth any prospective risks of losing control of the water system to multi-national corporations using trade treaties for their private goals".

2.2.3 Trade Treaties

There are two tasks in assessing the implications of trade treaties. The first is to interpret what these treaties might mean for a local water DBO project. The second is to assess the confidence or certainty attached to those interpretations in the context of treaty dispute adjudication procedures and possible future treaty provisions.

The interpretation of the NAFTA provisions is that the bulk of NAFTA has not been made applicable to local governments. The significant exception is "Chapter Eleven", and in particular the provisions related to the expropriation of investments. Under these provisions a firm from one NAFTA country with 'investments' in another NAFTA country can challenge the latter country if that latter country has taken a measure which expropriates the value of the investments.

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In the case of the Seymour DBO, this could mean that if an American or Mexican firm were awarded the contract, and if during the contract the GVRD enacted a 'measure', such as a new procedure or standard, that prevented the firm from realizing the profit it might otherwise have made, the firm could seek to recover those foregone profits from Canada through the NAFTA tribunal process.

While this sounds ominous, in some ways it can be viewed as a similar process to allocating risk and responsibility in the event a contract cannot be fulfilled as a result of an action by one of the parties, in this case the GVWD. Further, these matters are intended to be expressly addressed in the contract. The interpretation of these applicable provisions of NAFTA is, therefore, that they should not materially increase the risk that would be inherent in the service contract that would be negotiated anyway.

This would appear to be a rational interpretation in which one should have reasonable confidence. That assessment has to be tempered by: (1) the fact that nothing prevents the firm from appealing to NAFTA, (2) the adjudication process involves panels which operate entirely in camera, (3) the challenge would be made against Canada and the GVRD would have no control over how Canada would react to such a challenge. The initial judgement was that even with these qualifications NAFTA should not pose a significant concern. The public response, however, has been overwhelming in favour of avoiding any such risk, however, great or small.

The interpretation of the second set of treaties which has been raised as a potential concern, GATS, is that they do not apply to a project such as the Seymour DBO. This interpretation is based on three points:

- (a) Article I of GATS excludes services supplied "in the exercise of government authority", which are defined as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". If the Seymour DBO project falls under this definition, and it would clearly appear to do so, the water filtration plant would fall outside the GATS regime entirely.
- (b) Canada has not added water supply or treatment to the GATS schedule.
- (c) Even if Canada adds water supply or treatment to the GATS schedule in the future, Article XIII excludes the Most Favoured Nation Treatment, Market Access and National Treatment provisions from applying to laws, regulations, or requirements governing the procurement by government agencies of services purchased for government purposes and not with a view to commercial resale, or with a view to use in the supply of services for commercial resale. Article XIII would not exclude the application of the articles on Domestic Regulation or Monopolies and Exclusive Service Suppliers.

Taken together this seems a solid case for concluding GATS does not apply to the Seymour DBO project. Further support for this position can be gleaned from the WTO Secretariat website itself (see attached).

Notwithstanding this, some uncertainty applies to this interpretation arising from the following:

- (a) The treaties are relatively new and interpretation of some of the terms may well be open to debate. Thus, for example, does the fact that White Rock has its own water supply system affect the interpretation of the word 'competition'? Does the fact that municipalities supply the water to some consumers at a per unit price, or the fact that Point Roberts purchases water

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- from the GVWD, affect the interpretation of the word 'commercial'? Would the involvement of private firms in any part of the process affect the interpretation of either of these terms? While what appears to be a reasonable, common sense analysis would suggest answers to these and similar questions would support the interpretation put forward above, i.e. that GATS does not apply, the fact that the questions can be raised indicates there are no guarantees.
- (b) The process of resolving these issues would be in a nation to nation context and factors might influence a resolution at that level, which are not apparent to us. The possible ability of powerful international corporations to exert influence is a cause of public concern in this context.
 - (c) The possibility exists that Canada might make a commitment to water in GATS that would not protect local authorities' ability to manage their water supply systems as they see fit. Again, it is worth noting that the WTO's own website states that "it is of course inconceivable that any government would agree to surrender the right to regulate water supplies, and WTO members have not done so." As comforting as that might be, the trade treaty disputes that have taken place and the process of resolving them have clearly eroded the confidence the public might place in such a declaration.

What might help would be for the Canadian Government to go clearly on record with a position that assured the community and local authorities that they would absolutely protect public water supply systems from the kind of threats to their authority that have been raised by the public, by explicit exclusions in treaties if necessary.

3. ALTERNATIVES

- (a) The Board could stay with the course it set in 1998 and proceed with a request for proposals on a DBO basis. The rationale for this position is that the DBO approach appears to offer cost efficiencies, even though not readily quantifiable; public concerns that private sector operation of water systems would be inherently less committed to public health than a public operation do not seem to be borne out by recent experience in North America and the U.K.; public concerns about the impact of trade treaties are substantially offset by the fact that most of NAFTA and all of GATS do not appear to apply and the portion of NAFTA that does apply seems capable of being handled in the context of the contract.
- (b) The Board could reconsider the 1998 decision and proceed on the terms of a conventional or design-build project, with operations in either case to be carried out directly by the District. The rationale for this position is that whatever the gains to be made by DBO are, they are probably not very great and in any event not sufficient to incur any trade treaty-related risks; that there are uncertainties about the interpretation of trade treaties, now or in the future, and even a small uncertainty is a risk not worth entertaining; and that this issue is one which sections of the public are opposed to in a way that no amount of public education or consultation could reconcile.

4. CONCLUSION

In weighing the alternatives and reaching a conclusion, two facts have been kept in mind. The first is that a significant policy 'issue' is almost by definition bound to have proponents and

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opponents, so some division on some issues is inevitable. The second is that a governance system can probably only tolerate a limited number of divisive issues before its ability to operate on a consensus basis becomes compromised beyond functionality. It is necessary, therefore, to choose the number and nature of potentially divisive issues to be dealt with wisely.

The regional governance system, defined broadly, is facing a number of divisive issues, particularly in transportation, and to add to that number at this time is a decision not to be taken lightly. In view of the fact that the benefits to be gained for the Seymour DBO are not of overwhelming importance, that there are some at least perceived uncertainties around the trade – treaty issue which have emerged, and that the public, and therefore the Board, would be deeply divided if the DBO approach continues to be actively considered, it would appear to be in the best interest of the region as a whole (regardless of the specific assessment of some of the specific aspects of the DBO approach) to set the DBO approach aside and proceed on a more conventional basis.

Further, in light of the lessons learned from recent trade treaty related disputes and the possible interpretations of the applicability of GATS, should Canada make a commitment on water systems, it would be appropriate to advise the Federal Government of the concerns that have been raised and seek the appropriate actions from the Federal Government to put those concerns to rest generally.

Attachment: GATS: FACT AND FICTION "The WTO is not after your water"