

May 25, 2004

Governor Mitt Romney
State House
Boston, MA 02133

Dear Governor Romney,

I am writing to express my concern over a push by the United States Trade Representative (USTR) to obtain states' commitments to be bound under the procurement chapters of upcoming trade agreements. A September 2003 letter from the United States Trade Representative requested Governors to commit their state to be bound to the procurement constraints set forth in a long list of international trade agreements now under negotiation. I am writing to urge you to write the USTR to inform him that Massachusetts will not be bound to these pre-emptive rules. I would appreciate an opportunity to meet with your staff to discuss a process for dealing with an array of activities of the federal trade negotiator which greatly impinge our state sovereignty and authority and how our state will obtain a role in the U.S. federal trade policy-making process so that our interests are preserved.

The USTR letter asking for your commitment to the pre-emptive procurement rules focused only on the potential benefits for Massachusetts companies to be able to bid on procurement contracts in other countries, skipping the issue of how our domestic procurement policy-making authority could be curtailed. Moreover, at the time the USTR letter was sent, none of the agreements in question were completed.

Since then, one of these agreements, the Central American Free Trade Agreement (CAFTA), has been completed and its text was released in early 2004. Analysis of CAFTA's procurement agreement reveals that existing Massachusetts procurement policies fall outside of the CAFTA's procurement rules. Under CAFTA Article 9-2, the domestic procurement policies of the entities bound to the agreement must be consistent with the constraints set forth in the CAFTA procurement text—meaning we would have to change some existing procurement policies, for instance regarding recycled content and the state's renewable portfolio standards. The state legislature would be greatly limited in our future ability to enact procurement laws that ensure tax dollars are spent responsibly and in a manner that reflect the values of our citizens. Policies in your own recently released Massachusetts Climate Protection Plan would be jeopardized.

Due to the complicated nature of the issues surrounding trade agreements generally and the specific problems in CAFTA's procurement text, I believe several urgent steps are necessary.

First, I urge you to write to the Office of the U.S. Trade Representative to make clear that Massachusetts is not willing to be bound to CAFTA's procurement rules. It is urgent that Massachusetts not appear on the list of committed states when the CAFTA is signed on May 28, 2004 so that there is no confusion as to our CAFTA obligations.

One cause for alarm is the largely irreversible nature of commitments under these agreements. If a state does not clearly state it does NOT agree to be bound and ended up being listed in the agreement when it was approved, it would be forced to conform to the pre-emptive rules unless it could convince the federal government to offer compensatory adjustments to the other parties to the agreement for lost business opportunities. This obligation makes it prohibitively difficult to remove a state. This aspect of the current

process used to solicit consent is especially troubling, given it means one governor would accept policy constraints on behalf of all future governors and legislatures as well.

Moreover, sending such a letter explicitly stating that Massachusetts will not be bound to these agreements is important because the USTR was seeking blanket approval for a long list of future agreements not yet completed. It is vital to consider each procurement agreement as it is completed, given differences in a particular agreement's language or scope could result in Massachusetts assuming an array of different obligations and commitments which may or may not be in our state's interest.

I ask that you schedule a meeting with legislators as soon as possible to talk about the process by which Massachusetts will consider whether or not to sign-on to assorted international trade agreements, including future procurement agreements, as well as consider our state's response to ongoing negotiations at the World Trade Organization regarding the General Agreement on Trade in Services (GATS) which also deeply impacts state authority.

We need a new process for considering such requests because there are many policy issues at play. Procurement laws are an important way in which Massachusetts can use its market power to reflect the values of its citizens. Purchasing preferences help to ensure that tax dollars are used in a responsible way.

Yet, the procurement agreements in international trade agreements generally prohibit governments from favoring in-state businesses and require that governments use performance-based standards in making purchasing decisions. This means that state procurement policies giving preferences to local goods and services and local companies would be forbidden. Procurement rules focused on the way in which a product is manufactured—for instance that energy purchases be in part from renewable sources, that goods be made without sweatshop labor, or that goods with recycled content get preferences—are forbidden.

There are very limited exceptions to these principles. In its general exceptions clause, the CAFTA procurement text does not include the standards exception for “conservation of exhaustible natural resources” which appears in the WTO. Instead, there is rhetorical, tautological language stated in non-binding terms that permits procurers to consider environmental concerns as long as it is done in a manner complying with the agreement's other terms—including those which forbid such considerations.

In Massachusetts and many other states, there has been interest in requiring that companies employ local workers when the state purchases goods and services. Such a policy would violate the “non-discrimination” principle that is at the core of each of these trade agreements' procurement rules that forbid consideration of a bidder's identity or country-of-origin.

Other typical state procurement legislation prefers companies that have proven to be reliable in past contracts. Future legislation in this area may include advantages for businesses that comply with human rights standards (including companies that avoid the most egregious forms of child labor and slave labor) and companies that have proven to comply with applicable business laws. By consenting to coverage under the upcoming agreements we would lose the authority to act in these important areas.

We need to protect the state's ability to keep its current procurement laws and make future laws that reflect our state's values. It is therefore vital that the USTR be informed that Massachusetts is not willing to be bound to the rules and that we are working together to determine what sorts of commitments will promote our state's interests. The current process for assenting to procurement agreements without consulting the legislature does not adequately protect our state's interests.

While the Legislature maintains a strong position of support for international trade, Massachusetts must act to ensure that our laws are protected.

Thank you for your consideration of these important concerns. I look forward to working with you to develop a letter that clarifies the state's position on both the substance of international trade agreements and the process by which they are negotiated.

Sincerely,

J. James Marzilli
State Representative

CC: Speaker Thomas M. Finneran
Senate President Robert Traviglino
Secretary Douglas Foy
Secretary Ranch C. Kimball