|  |  |  |
| --- | --- | --- |
| **Gerry Stobo**Tél 613-787-3555 | Borden Ladner Gervais S.E.N.C.R.L., S.R.L.World Exchange Plaza100 rue Queen, Bureau 1300Ottawa (Ontario) Canada K1P 1J9Tél. 613.237.5160Téléc. 613.230.8842 | BLG_Internal_K |

Memorandum Date : March 7, 2016

|  |  |
| --- | --- |
| To: | Laurie KarsonFrontier Duty Free Association |
| From : | Gerry Stobo |
| Subject : | **Buffalo and Fort Erie Bridge Authority RFP****Client: 338587/000005** |

**INTRODUCTION**

The Buffalo and Fort Erie Public Bridge Authority (“the Authority”), has issued a request for proposals (“RFP”) from potential tenants (each a “Proponent”) who will be responsible for and will operate a duty free shop at the Peace Bridge, for a minimum period of 15 years. You have asked for our views on the scope and reach of certain terms of the RFP, in particular those provisions dealing with “Prohibited Conduct”.

While it is not uncommon for RFPs, particularly those whose subject matter is a source of public interest or potential controversy, to have terms and conditions which prohibit bidders, or their agents, from lobbying during the bid period, the “Prohibited Conduct” provision of this RFP is broader in scope and reach than many clauses of this nature that we have seen. Clearly, the Authority is trying to foreclose all attempts by any person interested in the outcome of this RFP from trying to influence the conduct or outcome of this procurement process.

The Frontier Duty Free Association (“FDFA”) has, before the RFP was issued, been actively communicating with government officials about the impact of processes of this nature on the licensing rights of duty free operators throughout Canada. This issue is an important issue for duty free operators and extensive effort has been made to date with government officials to ensure that those operators do not lose their licensing entitlement through arbitrary processes conducted by private (or public) sector landlords.

**PROHIBITED CONDUCT AND NO COLLUSION PROVISIONS**

Perhaps with the knowledge of the potential controversy this RFP may cause to the incumbent duty free operator at the Peace Bridge location, and other members of the duty free community, the Authority has expressly prohibited certain types of communication regarding this procurement process. In particular, the RFP contains the following provisions:

G. Prohibited Conduct

i. No Lobbying

A Proponent, any Proponent team members including key personnel, and their respective directors, officers, employees, consultants, agents, advisors and representatives will not engage in any form of political or other lobbying whatsoever, to any party, in relation to the project, this RFP, CBSA licensing process, or the competitive selection process, including for the purpose of influencing the outcome of the competitive selection process. Further, no such person (other than as expressly contemplated by this RFP) will attempt to communicate in relation to this RFP, or the competitive selection Process, directly or indirectly, with any representative of the Authority, (including any member of the Board of Directors), or any director, officer, employee, agent, advisor, consultant or representative of any of the foregoing, as applicable, for any purpose whatsoever in relation to this RFP, or the competitive selection process, including for the purpose of influencing the outcome of the competitive selection process. Violation of this provision will be grounds for immediate disqualification. From the date this RFP is issued until the contract award has been announced, no Proponent-initiated contact with any Authority official shall be permitted regarding this RFP, other than written inquiries to the Authority’s Contact Person, as described in this section.

ii. No Collusion

A Proponent shall not engage in any illegal business practices, including activities such as bid-rigging, price-fixing, bribery, fraud, coercion or collusion. A Proponent shall not engage in any unethical conduct, including lobbying, as described above, or other inappropriate communications; offering gifts to any employees, officers, agents, elected or appointed officials or other representatives of the Authority; submitting proposals containing misrepresentations or other misleading or inaccurate information; or any other conduct that compromises or may be seen to compromise the competitive process provided for in this RFP. A Proponent and any Proponent team members, their employees, agents and representatives involved with the Proponent’s Proposal, including key personnel, will not discuss or communicate, directly or indirectly, with any other Proponent or any director, officer, employee, consultant, advisor, agent or representative of any other 10 Proponent (including any Proponent team member or key personnel of such other Proponent) regarding the preparation, content or representation of their Proposals. By submitting a Proposal, a Proponent, on its own behalf and as authorized agent of each firm, corporation or individual member of the Proponent or Proponent team, represents and confirms to the Authority, with the knowledge and intention that the Authority may rely on such representation and confirmation, that its Proposal has been prepared without collusion or fraud, and in fair competition with Proposals from other Proponents.

[emphasis added]

**ANALYSIS**

There are a number of issues raised by the components to the aforementioned provision. We will look at those various issues in turn.

First, in our view, even though the prohibition applies to a “Proponent”, (i.e. a term usually reserved for entities that have submitted a bid), in the context of this RFP, that term is clearly intended to include potential proponents (i.e. entities who are considering submitting a bid).

Second, the prohibition is broadened to include “…Proponent team members including key personnel, and their respective directors, officers, employees, consultants, agents, advisors and representatives.” As noted earlier, this is a very broadly worded clause and is clearly intended to capture the lobbying efforts of anyone who is in any way associated with a potential Proponent. It is difficult to be precise as to whom this category of persons will include, but it is crafted in such a way as to include a wide range of people who may be working with, or on behalf of, the potential Proponent. It is quite possible to include within this category, persons whose advocacy or communications, while not specifically intended to advance the interests of a particular Proponent, could nevertheless have that affect if the cause the persons are advancing could impact issues relevant to this RFP.

Third, broad though this provision is, in order for conduct to be prohibited, the conduct undertaken must in some way be linked to a potential Proponent involved in this RFP. In other words, it would not be prohibited conduct if someone completely unrelated (i.e. not included in the category of prohibited persons – such as employees, agents, representatives, etc.) to any of the potential proponents undertook lobbying efforts with either the Authority or government officials on matters related to this RFP.

Fourth, the prohibited conduct itself is also broadly worded to include “…any form of political or other lobbying whatsoever, to any party, in relation to the project, this RFP, CBSA licensing process, or the competitive selection process, including for the purpose of influencing the outcome of the competitive selection process.” It is important to note that the RFP does not tie the term “lobbying” to any specific legislation, such as the federal *Lobbying Act* or provincial lobbying laws. Nevertheless, it would appear that the phrase “…any form of political or other lobbying” was written to encompass the broadest meaning of communicating with government officials regarding any matter which may impact the RFP or its competitive environment. Consequently, we believe that the prohibition in this RFP would include communication with government officials about any aspect of the CBSA-mandated licensing process, whether or not that communication is intended to influence the outcome of the RFP.

As I understand it, the FDFA is planning to meet with government officials to (continue to) discuss duty free licensing issues. Although the communication with government officials would be focussed on broader issues, and not be specific to this RFP or a potential Proponent, there is little doubt that the issues being addressed in any future meeting with government officials would, at least tangentially, impact (or be referable to) this RFP. The fact that the FDFA would not, in those meetings with officials, be attempting to influence the competitive process or its outcome, there is little doubt that those communications could, if successful, have an impact on the continuation of the RFP. In other words, these types of communications could affect the conduct of the competitive process. We believe therefore that the type of planned communication should be considered to be captured by the term lobbying for the purposes of section G of the RFP.

Although it may be possible to challenge such a disqualification, this would be a complex and likely lengthy legal process. Unless a person challenging a disqualification was able to obtain an injunction from the Court (see Applicable Law, page 27 of the RFP), it is unlikely that a Court challenge would be resolved until well past the close of the RFP and leasehold award.

**RECOMMENDATIONS**

In view of the potential significant consequences arising from the “Prohibited Conduct” provisions of the RFP, it is our recommendation that potential Proponents should avoid taking any actions either directly, or indirectly through anyone or any organisation who may be seen to be acting on their behalf, that might be considered to be in violation of those provisions.

Taking into account the very broad wording of the Prohibited Conduct provisions, the Authority may draw the conclusion that any members (including association members who may be potential proponents) of the FDFA have engaged in prohibited conduct if the FDFA undertakes lobbying efforts with government officials regarding the duty free licensing scheme.

To avoid being disqualified on this basis, it is our recommendation that FDFA members who may be potential Proponents should either formally disassociate themselves from any FDFA activities that might be considered prohibited conduct (i.e. lobbying) or temporarily withdraw from the FDFA while this RFP process is underway.

As a first step, the FDFA should not undertake any lobbying until association members have been notified of the possible consequences to potential Proponents if they do not disassociate themselves from future lobbying efforts undertaken by the FDFA. Moreover, the FDFA should not undertake any lobbying until they have given potential Proponents who are members of the FDFA a meaningful opportunity to consider and communicate to the FDFA their position with respect to either disassociating themselves by way of recusal from the FDFA on issues related to the RFP, or if they choose, to withdraw from the association while this RFP is being conducted.

If a member decides that it will disassociate him/herself from future FDFA lobbying efforts while the RFP is underway, they should formally notify the FDFA of this disassociation in writing. Those members should not participate in any FDFA meetings where lobbying initiatives or strategies are being discussed. Those “recusing” members should not discuss with other FDFA members anything to do with the FDFA lobbying efforts, and they should not receive any information about the lobbying efforts undertaken by the FDFA from either the association itself, or other members. Those members who recuse themselves should make it clear to the FDFA that they are not going to participate in any way with the FDFA regarding any matters arising from, or issues involving, the RFP. Finally, a recusing member should make it clear that the FDFA is not a consultant, representative, agent, advisor or representative acting on behalf of the potential Proponent on any matters related to the RFP or any lobbying activities that might impact or touch upon issues raised in the RFP.

The FDFA, for its part, will need to ensure that those members who do recuse themselves from any involvement on this issue do not vote on any resolutions related to lobbying efforts that relate to this RFP, and do not participate in any discussion within the association and do not receive any information from the association, its staff, members or officers. The FDFA should ensure that recusing members cannot access any electronic database where information relevant to the lobbying efforts is stored. This may require that the FDFA “wall” off access to parts of its database so that recusing members cannot access information related to the lobbying initiative.

It will be important for the FDFA to send to its staff, other association members and any representatives assisting the FDFA with these issues, a directive that expressly prohibits them from communicating with the recusing members on these issues. Finally, the FDFA should keep a record of its discussions about the lobbying issues and ensure that those records reflect who was present for the discussions. Consistent with what we discussed above, those records should not be accessible to any recusing member during the conduct of the RFP. Finally, the FDFA should make it clear that it will not be acting as a consultant, representative, agent, advisor or representative acting on behalf of the potential Proponent in respect of any matter that may impact or touch upon issues raised in the RFP.

The second approach to insulating themselves from disqualification is withdrawal from the association during the time the RFP is being conducted. While this may seem a dramatic step to take, and one which would deprive a member from participating in other FDFA work and issues, the greater the separation a potential Proponent has from the lobbying efforts of the FDFA, the greater their ability to demonstrate that they did not engage in prohibited conduct. If a member does withdraw, it should send correspondence to the FDFA confirming their withdrawal and the FDFA should, in turn, acknowledge that withdrawal. This exchange of correspondence would be evidence to demonstrate that a potential Proponent has not either directly or indirectly lobbied anyone with respect to matters raised in the RFP.

As I mentioned in our telephone call this morning, given the very broad terms of the “Prohibited Conduct” clause, we cannot be certain that the Authority will not disqualify a Proponent who is a member of an association (the FDFA) who engaged in lobbying on matters related to the RFP. As I stated, the members of the FDFA will have to conduct their own risk analysis to determine which course of action (if any at all) they wish to take in order to participate in the RFP.

If the Authority does disqualify a member who has taken steps to recuse itself from the lobbying issue, or who withdrew from the association during the RFP period, it would be necessary to challenge that disqualification in Court. In any court proceeding, a judge will look first at the wording of the RFP to understand what bidders were told would be the rules of the process, and then look at the steps taken by a potential Proponent to ensure they did not violate the terms of the RFP, including the “Prohibited Conduct” provisions. It is important to keep in mind that any judicial challenge will, in all likelihood, not be resolved until well after the RFP bid closing date, and after the leasehold contract has been awarded to the winning bidder.

While a Court will respect the terms and conditions of the RFP, it will also have regard to the steps taken by a disqualified Proponent to avoid engaging in prohibited conduct during the RFP. In analysing that issue, a Court will take into account the steps taken by the Proponent and the FDFA to ensure that neither the Proponent, nor their consultants, advisors, agents or representatives, participated in, or influenced the conduct of, any lobbying efforts undertaken. Evidence in support of this would be the exchange of communications between the recusing, or withdrawing, member and the FDFA and the directions given by the FDFA to prevent information being provided to those recusing or withdrawing members about the lobbying issue.

**CONCLUSION**

The “Prohibited Conduct” provisions in the RFP are broadly worded to capture a wide range of communications with the Authority and government officials with respect to matters raised in the RFP. It is important therefore that FDFA members, who may be considering submitting a bid in response to the RFP, take appropriate steps to avoid disqualification.

As we noted above, it is difficult to give assurances that the Authority would not disqualify a recusing member, or even a withdrawing member, if the FDFA engages in a lobbying effort in respect of matters raised in the RFP. While we think there are a number of risk mitigation steps the FDFA and its members can take to minimise the risk, we cannot give assurance or a roadmap that will eliminate the risk entirely. Members will need to consider their particular circumstances, taking into account the terms of the RFP, and make a decision based on their tolerance for risk.