

<p>Proud sponsor:</p>  <p>MISSING CHILDREN SOCIETY OF CANADA</p>	 <p>FRONTIER DUTY FREE ASSOCIATION ASSOCIATION FRONTIERE HORS TAXES</p> <p>Laurie D. Karson, Executive Director 402 - 116 Lisgar Street Ottawa, ON K2P 0C2 (O): 613-233-1946 (F): 613-701-4289 (C): 613-868-6369 FDFA Website: www.fdfa.ca</p>
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CONFIDENTIAL

WITHOUT PREJUDICE

May 19th, 2016

Mr. Martin Bolduc
Vice-President, Operations Branch
Canada Border Services Agency
191 Laurier Avenue West, 18th Floor
Ottawa, Ontario
K1A 0L8

Dear Mr. Bolduc:

I am writing to follow up to your email to Peter Brain dated February 12, 2016, as well as our meeting with Mr. Peter Hill and other CBSA officials on April 18, 2016. Subsequent to our meeting and your email, significant developments have taken place with respect to the current RFP process for the Peace Bridge Duty Free Store in Fort Erie, Ontario that we wish to bring to your attention.

Recent events outlined below only amplify our strong belief that there are a number of concerns which bring into question the transparency and fairness of the Peace Bridge RFP. Given these concerns, it is our view that the RFP and the subsequent decisions that it could force upon the Federal Government with respect to a Duty Free Licensee at the site could subject the CBSA to potential public scrutiny and criticism. Additionally, we are concerned that it could be challenged in such a way as to cause a temporary closure of the Canadian duty free store. This outcome would reflect poorly on our sector and severely impair customer service at the Peace Bridge crossing.

As you are aware, the Board of Directors of the PBA issued an RFP on March 1, 2016 to solicit bids for operators of the Duty Free Store on the Canadian side of the bridge. The closing date was extended past the original date, to May 9, 2016.

The current RFP has worked in direct contradiction to the normal intent of such processes. Considerations outlined below may have reduced competition under the RFP, rather than to elicit interest from the broadest possible audience of qualified proponents. Before making our comments, we want to assure you that this letter is not being sent on behalf of any bidders in the RFP process, nor is it being sent on behalf of any others that chose not to bid. No one connected to a bid or anyone who considered a bid, including key personnel, respective directors, officers, employees, consultants, agents, advisors and representatives, have provided any input into this letter, nor have they seen or endorsed its content.

Below are the key factors that we believe highlight our concerns:

Recent resignation of Mr. Anthony Annunziata and Possible or Perceived conflict of interest

We are concerned with a news report included in a publication called The Public on May 3, 2016 which reported that Anthony M. Annunziata recently resigned from the Board of Directors of the PBA. According to the news report, “[Mr.] Annunziata does marketing consulting for a firm that hopes to win the lucrative lease for the Canadian duty-free shop at the Peace Bridge.” If these claims are in fact true, they raise serious concerns about the fairness of the RFP process currently underway.

We note that in section G (iii) of the RFP, conflicts of interest can result in the disqualification of a bidder. Our legal counsel advises us that successful legal challenges have been brought in cases where, similar to the alleged facts here, there has been personal or business relationships between bidders and someone working for, or associated with, the procuring authority (see for example: *Bluedrop Performance Learning Inc. v. Canada (Public Works and Government Services)*, 2008 CanLII 55959 (CA CITT)). In that case, a former government official with responsibilities for a particular program while in the public service was, after leaving government service, retained by a contractor who then bid on, and received, a contract to provide services on the program the former official was involved with. The federal bid challenge authority determined that relationship gave rise to an impermissible conflict of interest.

In our opinion, the claims made in the news article require the Canadian Border Services Agency to conduct a thorough review to determine whether, and to what extent, the integrity of the procurement process has been impacted. This full review must be done prior to awarding a duty free license to any applicant that applies for a license pursuant to the RFP. Keep in mind that if a legal challenge is initiated on the basis of an alleged conflict of interest, it could have the effect of stopping the RFP process which in turn could lead to the closing, at least temporarily, of the duty free store.

Also, current regulations pursuant to the Customs Act state that the Minister may cancel a duty free license if a licensee does not have a lease to operate an approved duty free site. We would suggest that given the circumstances surrounding the RFP outlined above, the CBSA should refrain from any cancellation of the existing duty free license in Fort Erie to avoid any connection to the possible conflicts outlined above.

Public scrutiny due to claims of unfairness and lack of transparency

As you know, in Canada, public procuring entities are prohibited from providing a potential bidder with an unfair advantage over other potential bidders. Yet, it is our understanding that some companies who have expressed an intention to bid on the RFP may have been provided with information about the proposed RFP, and its terms, well before the RFP was issued on March 1, 2016. This would confer a significant competitive advantage given the short 60-day bid preparation window set out in the original call for proposals. In particular, advance notice of the impending RFP may have allowed one potential bidder the opportunity to secure an exclusive contractual relationship with the construction firm which built the existing duty free premises, as well as with the leading duty free millwork provider in the region.

From the information we have received, this “early knowledge” advantage enjoyed by at least one potential bidder led some companies who considered bidding on the RFP not to do so. In our view, providing information to one potential bidder creates an unfair advantage and has a material impact on the integrity of the procurement. In section L (10) of the RFP it states that the PBA can “disqualify any Proponent that in the Authority’s sole discretion has a conflict of interest or an unfair advantage, whether

real, perceived, existing now or likely to arise in the future or who has engaged in Prohibited Conduct as defined in this RFP”.

Unusual and restrictive prohibited conduct provisions of the RFP document

The unusual wording and content of the “prohibited conduct” provisions of the RFP – in our view – should also be a red flag warranting further review by the PBA Board. Our lawyers initial comment after a first read of the prohibited conduct provisions was “I have never seen anything quite so explicit and restrictive.” This comment reflects that the RFP document is highly unusual and unduly defensive in nature. This should evoke added concern.

We believe that the prohibited conduct provisions have caused great apprehension amongst potential bidders due to the following: the many arbitrary and excessive provisions that could disqualify any proponent out of hand; provisions that prevent proponents from directly engaging with the Federal Government to determine if the RFP is compatible with existing laws, regulations and policies governing licensing of land border duty free shops; the related financial commitments and risks that would be difficult to quantify absent detailed discussions with the federal regulator; and finally, provisions that essentially suggest the content developed by proponents (at their cost) are not proprietary, and that it could be used by the PBA and the selected RFP winner in a final negotiated agreement. Each of these factors might be expected to deter competition under the RFP, and therefore deliver suboptimal results to the PBA.

Laws, Regulations and Policies Relating to Duty Free Store Licensing

The wording and content of the RFP should – in our view – be cause for great concern. Owing to the extensive prohibited conduct provisions the FDFA was forced to undertake a costly legal review to determine whether the RFP was consistent with the duty free licensing regime administered by the CBSA.

Our legal review concluded that CBSA laws, regulations and policy, including Memo D-4-3-2, would apply with respect to anyone applying to establish a Duty Free Store at the Peace Bridge Site. It should be noted that in our meeting with Mr. Peter Hill and other officials on April 18, we believe there was some discussion that memo D-4-3-2 would not apply to any possible application for licensure at the Peace Bridge Site because Memo D-4-3-2 does not apply to “non Crown Land”. Our legal counsel has reviewed this issue and has advised us that Memo D-4-3-2 applies to licensing on both Crown and non-Crown land. We would appreciate confirmation from you that the legislation, regulations and policies of the Federal Government, including the provisions of Memo D-4-3-2, will apply to any applications for a duty free store license at the Peace Bridge. This is especially critical given the recent resignation of Mr. Annunziata.

Conclusion

In closing, we believe there are serious questions about the fairness and transparency of the RFP process. Given this, we would ask that the Minister exercise his authority pursuant to the Customs Act, regulations and written policies with extreme diligence.

More precisely, we are asking that the Government not immediately cancel the current license issued at that site if the lease expires. This will allow some time for the CBSA to satisfy itself that their role in licensing a Duty Free operator at this site is not in any way tainted by an RFP process that may ultimately be deemed to be not fair or transparent. We are particularly concerned based on our assessment of this matter, that on several grounds the current Peace Bridge Duty Free licensee can challenge any attempt

to cancel their license or issue a new one based on the RFP process used by the Buffalo and Fort Erie Public Bridge Authority. We believe it is in the best interest of CBSA to initiate a full review of this matter now, while there is still time before a winner of the RFP is publically announced, to determine if there is a solution that can avoid legal and other challenges by the existing licensee that could damage and embarrass our industry, CBSA and the Minister.

We would also like written clarification from you with respect to Memo D-4-3-2 and confirmation that the Government agrees with our legal interpretation that the policies outlined in this memo would be applied to any application for a duty free license at the Peace Bridge site that stems from this RFP process. This is especially critical given the concerns noted above.

Our representatives are available to meet at your convenience should you want to discuss this matter further. I can be contacted by email or phone using the details noted at the beginning of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Laurie Karson". The signature is fluid and cursive, with a prominent initial "L" and a long, sweeping tail.

Laurie Karson
Executive Director