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**WITHOUT PREJUDICE**

May 10<sup>th</sup>, 2016

Buffalo and Fort Erie Public Bridge Authority  
100 Queen Street  
Fort Erie, Ontario  
L2A 3S6

Attention: William B. Hoyt III, Chairman

Dear Chairman Hoyt:

Re: Request for further Board of Directors Review of the  
RFP for a Canadian Duty Free Operator

The Frontier Duty Free Association (FDFA) is the national industry representative of land border duty free licensees from across Canada. We are writing to you in your capacity as Chairman of the Buffalo and Fort Erie Public Bridge Authority (PBA), to request that the PBA Board consider cancelling the RFP or alternatively deferring the selection of a duty free operator. As this letter discusses, there are a number of concerns that bring into serious question the transparency and fairness of this RFP. It is also our view that the RFP could subject the PBA to significant public scrutiny and criticism, and also 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.

We believe the PBA Board should also be wary since the current RFP has worked in direct opposition to the normal intent of such processes. In our view the 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 potential bidders in the RFP process. More specifically, no potential bidders, or their team members, 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 key factors that we believe the PBA Board should consider with respect to our request:

**Potential for Challenge and Temporary Closure of Canadian Duty Free Site**

The wording and content of the RFP should – in our view -- be cause for great concern to the PBA Board. 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 Canada Border Services Agency (CBSA).

Our legal review concluded that under CBSA policy, in respect of issuing new duty free operator licenses, CBSA will administer a competitive process and, "...the successful applicant is determined by the Minister on the basis of an evaluation." In conducting this evaluation, proposals are evaluated against specific selection criteria regarding management capabilities and retail/allied experience, site and building proposal business plan and proposed level of local employment.

It will be impossible for the government to run a transparent and open competitive process if PBA has already selected a new duty free operator. Therefore, the RFP process may result in a legal challenge on the basis that the RFP process, in effect, usurps the legal authority of the Minister to determine who is the best-ranked candidate to receive a duty free license. A legal challenge of this sort can result in the cancelling of the RFP with the possible consequence of closing the Peace Bridge duty free store for an indeterminate period.

Perhaps of greater concern is a news report included in *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 an investigation by the PBA to determine whether, and to what extent, the integrity of the procurement process has been impacted. 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.

### **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 a construction firm which built the existing duty free premises, and with the leading duty free millwork provider in the region.

From 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 this regard, we remind you of the prohibition against bidders having an unfair advantage where at 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 lawyer’s initial comment after a first read of the prohibited conduct provisions was “I have never seen anything quite so explicit and restrictive.” In our view this comment reflects that the RFP document is highly unusual and unduly defensive in nature. This should evoke added caution and review by the PBA board.

We believe the prohibited conduct provisions have caused great apprehension amongst potential bidders: due to the many arbitrary and excessive provisions that could disqualify any proponent out of hand; due to 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; due to the related financial commitments and risks that would be difficult to quantify absent detailed discussions with the federal regulator; and, due to 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. All of these factors might be expected to deter competition under the RFP, and therefore deliver suboptimal results to the PBA.

Based on the above noted considerations, we would ask that you and the PBA Board suspend the RFP and investigate the information referred to above. If following a thorough investigation, the information reveals any conflicts or perceived conflicts of interest, or unfair advantage, we trust the PBA will take appropriate action by cancelling the RFP. The PBA Board could then further analyze the leasing process to ensure it serves the best interests of the PBA, meets the high ethical standards expected of public authorities and, is able to withstand close public scrutiny.

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 long, sweeping underline that extends to the right.

Laurie Karson  
Executive Director