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SENT VIA E-MAIL: ibeverley@waterfronttoronto.ca

CONFIDENTIAL LAWYER / CLIENT PRIVILEGE

Mr. Ian R. E. Beverley
General Counsel
Waterfront Toronto
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RE: Observations on Quayside RFP Process

Dear Ian;

You have asked us to provide our observations and advice regarding the Quayside RFP process (Waterfront Toronto RFP no.: 2017-13) and resulting proposed agreement. In particular, you have asked us for our views on the following questions:

- (a) Does the proposed Innovation and Funding Partner Agreement (Framework Agreement, Execution Copy, provided to us October 8, 2017, the "Agreement") comply with Waterfront Toronto's Procurement Policy?¹ In particular, are the provisions of the Agreement regarding future procurement processes and Fair Procurement Standards consistent with the Procurement Policy?
- (b) Does the Agreement restrict access to technology companies or others to future procurements that may be undertaken with the Innovation and Funding Partner?
- (c) Does the Agreement comply with the procurement policies of the federal, provincial and City of Toronto governments?
- (d) Is the Quayside RFP process subject to any trade agreements signed by the Government of Canada or the Government of Ontario and, if so, whether the process complied with the requirements of such agreements? In particular, was the process subject to the North American Free Trade Agreement ("NAFTA"), the Canada Europe Comprehensive Economic and Trade Agreement ("CETA") and/or the Canadian Free Trade Agreement ("CFTA").
- (e) Was the Quayside RFP process carried out in compliance with recognized procurement best practices and with the *Competition Act*?

¹ http://www.waterfronttoronto.ca/nbe/wcm/connect/waterfront/a388d6de-80b4-4b7f-929f-4b4b973c6463/procurement_policy_revised_oct_7_2015_1.pdf?MOD=AJPERES.

- (f) Is the proposed Agreement consistent with the RFP process? In particular, does the scope of the Agreement exceed the scope reasonably anticipated by the RFP?
- (g) Generally, to the extent we were involved in the preparation of the RFP documents, the process of identifying the selected proponent pursuant to the RFP and the negotiation of the Agreement, did we identify any material procurement fairness concerns?

a) Compliance with Procurement Policy

In our view, the Agreement complies with Waterfront Toronto's Procurement Policy. In particular, the provisions of the Agreement regarding Fair Procurement Standards (sections 14.5, 18, 29 and Schedule 1) align with the Policy's requirements to carry out fair and open procurement.

Generally, Waterfront Toronto's Procurement Policy requires that the organization's source goods and services through competitive processes that ensure the organization achieves value for money and that procurement processes be "fair, open and transparent". To implement its general objectives, the Policy sets a variety of specific directives and baseline requirements dealing with process and accountability in procurement.

When the RFP was being finalized, we were involved to review it from a procurement risk and compliance perspective and to advise on issues related to, among other things, its scope. In that context, we did not identify any instances of non-compliance of the RFP (or of the agreement anticipated by the RFP) with the Policy. We, likewise, do not see anything in the Agreement that is inconsistent with the Policy.

Pursuant to paragraph 14.5, the Agreement's provisions regarding Fair Procurement Standards are part of the agreed "Initial Plan Milestones" and are intended to, among other things, ensure that "purposeful solutions that cannot be sourced from the market" and that are procured from Sidewalk Labs (or one of its affiliates) are demonstrably purchased in a manner that provides fair value to Waterfront Toronto. Section 14.5 further provides that the parties will agree on the procurement processes that will apply to other solutions that are available from the market. In our view, there is nothing in this contractual statement of common intent that is contrary to the Policy or, more generally, to prudent procurement practices.

Schedule 1 provides added details regarding the Fair Procurement Standards to be developed by the parties. Notably, at the outset, Schedule 1 specifically reaffirms Section V and Subsection A5, c., vii of Appendix C of the RFP, the latter of which provides as follows:

*vii. **Competitive Pricing:** In the event that Proponents have the opportunity to provide products and/or services in the development of the Project in the future, Proponents should outline a process whereby Waterfront Toronto can ensure:*

a. innovation and competitive pricing for the products and/or services;

b. that the selection of the Proponent's products and/or services is based on an impartial assessment of their merits in comparison to competing products and/or services; and

c. that the Proponent's product and/or services offer the best value for the need being met.

We also underscore the following excerpts of Schedule 1, which elaborate on the principles that will guide the parties in establishing Fair Procurement Standards:

...Consistent with the legal requirements that may affect TWRC, such procurement strategies will include: (1) significant consultation and engagement with TWRC on deployment of urban technologies, (2) assurance that transactions by the Master Developer with affiliates or third parties will be on demonstrably arm's-length terms; and (3) flexibility for the Master Developer to attract capital investments.

All procurement by the Master Developer will be subject to the applicable provisions of the Master Innovation and Development Plan as approved and overseen by TWRC. The Master Innovation and Development Plan will identify areas where Master Developer's and its affiliates' incubation or technology investments may represent purposeful solutions that cannot be sourced from the market. Subject to adequately safeguarding any proprietary, confidential or commercially sensitive information of Master Developer and its affiliates, the parties will explore ways that might be used to insert the appropriate level of objectivity into the Fair Procurement Standards for objectively demonstrating that particular solutions or technologies are not available from the market. Any such agreed objectivity protocols shall be included in the MIDP and/or other appropriate Definitive Documents. Such exploration by the parties may include discussion of potentially utilizing some of the following protocols, to the extent practical, in appropriate circumstances:

- a) advance public notice of the intention to source a technology or solution on a sole-source (not openly competed) basis providing potential competitors a reasonable opportunity to demonstrate that they are already able to provide suitable alternatives on a competitive basis;*
- b) independent third party validation that no suitable alternative can be sourced from the market; or*
- c) other protocols as may be agreed aimed at providing impartial demonstration that no suitable alternatives are available from the market.*

In our view, the above is consistent with the Policy's objectives regarding open, fair and competitive procurement in that it anticipates limited boundaries in which non-competitive procurement will be allowed to occur, namely, when particular solutions, goods or services are not available from the market. In our view, this aligns with the limited use of directed (or sole source) procurement allowed under most regulatory procurement frameworks, such as those of the Ontario Government (for example, in the Broader Public Sector Procurement Directive²) and the federal government (under the Government

² <https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/EN/bps-procurementdirective>.

Contracts Regulations³ and the Supply Manual Published by Public Services and Procurement Canada⁴). We also note that trade agreement procurement provisions also generally allow sole source procurement where only one supplier can provide the goods or services.⁵

b) Restriction on Access to Opportunities

In our view, the Agreement does not set restrictions on access to future opportunities for third party technology companies (or anyone else). As explained above, the Agreement anticipates that the Fair Procurement Standards to be developed will provide that where it is demonstrated that Sidewalk Labs or its affiliates have a unique technological solution that is not otherwise available from the market, mechanisms will be implemented to verify that there is only one supplier capable of meeting the requirement and that the solution is being procured at fair value.

c) Consistency with Federal, Provincial and Municipal Procurement Laws/Policies

Waterfront Toronto is established as a separate, independently managed entity. As such, the procurement laws, regulations, by-laws, directives and guidelines that govern procurement carried out by the federal government, the provincial government and the City of Toronto do not apply to Waterfront Toronto. We note, as well, that the current RFP process is not subject to a funding agreement by these levels of government. As such, the governments have not used their funding authority to dictate that the Agreement is subject to any particular procurement rules or process.

It is the Procurement Policy of Waterfront Toronto that governs this procurement and not those of other governments. As explained above, we have no reason to conclude that the process has been carried out in a manner that is contrary to the Policy.

To the extent that Waterfront Toronto is subject to any Common Law standards of fairness and equitable treatment in competitive procurement, we have likewise no reason to believe that the RFP process or the Agreement failed to live up to such standards.

d) Consistency with Trade Agreements

In our view, the RFP process does not raise concerns under any applicable trade agreement.

a. NAFTA

At the outset, we note that NAFTA's procurement Chapter (Chapter 10) only applies to specifically listed federal government entities. Waterfront Toronto is not included.⁶ Waterfront Toronto is, therefore, not subject to the procurement-related commitments of the NAFTA.⁷

³ SOR/87-402.

⁴ <https://buyandsell.gc.ca/policy-and-guidelines/Supply-Manual>.

⁵ See, e.g., NAFTA, para. 1016.2(b).

⁶ See NAFTA, Article 1001 and Annex 1001.1a-1.

⁷ Waterfront Toronto is similarly not subject to the WTO Agreement on Government Procurement.

b. CETA

With respect to CETA Chapter 19, its application to Waterfront Toronto and to the RFP is unclear. CETA Article 19.2(2) states that covered procurement means procurement for governmental purposes:

- (a) *of a good, a service, or any combination thereof:*

 - (i) *as specified in each Party's Annexes to its Market Access Schedule for this Chapter; and*
 - (ii) *not procured with a view to commercial sale or resale, or for use in the production or supply of a good or a service for commercial sale or resale;*

- (b) *by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy;*
- (c) *for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party's Annexes to its Market Access Schedule for this Chapter, at the time of publication of a notice in accordance with Article 19.6;*
- (d) *by a procuring entity; and*
- (e) *that is not otherwise excluded from coverage in paragraph 3 or a Party's Annexes to its Market Access Schedule for this Chapter.*⁸

Assuming the nature of the RFP meets the criteria set out above, the annexes to Chapter 19 then set out the entities that are subject to the procedures and obligations of the government procurement chapter. The annexes for this chapter are organized to separately identify the entities at the central government level, sub-central government level, and other entities such as Crown corporations or public utilities.⁹

Waterfront Toronto is not specifically listed in any of the government entity schedules. Thus, it appears to not be *prima facie* subject to the procurement commitments in Chapter 19 of the CETA, but the issue is not entirely free of doubt. Annex 19-A is the Market Access Schedule of Canada, and Annex 19-2 within this Annex sets out the sub-central government entities that are subject to Chapter 19.¹⁰ Annex 19-2(9.1) covers the province of Ontario, and states that procurement by the following entities (subject to certain value thresholds) are covered by Chapter 19:

⁸ See: <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/19.aspx?lang=eng>.

⁹ See: http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter_summary-resume_chapitre.aspx?lang=eng#a19.

¹⁰ See: <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/19-A.aspx?lang=eng#a>.

1. provincial ministries and classified agencies but does not include energy agencies, agencies of a commercial or industrial nature, and Ontario Infrastructure and Lands Corporation;
2. school boards and publicly-funded academic, health and social service entities; and
3. municipalities but does not include municipal energy entities.¹¹

While the term "social service entities" is not explicitly defined in the CETA or the Annex to Chapter 19 of the CETA, Waterfront Toronto is not likely captured by this phrase which is generally understood to refer to social services such as social assistance services and support to vulnerable or disabled members of society. On balance, while an argument could conceivably be made that Waterfront Toronto is a "social services entity" (in that it carries out a socially useful service), we do not believe such an argument is likely to succeed.

We also note that the CETA came into force as of September 21, 2017. As such, the RFP was issued and most of the procurement process was completed before the CETA was in force. Thus, in order to successfully complain that a CETA violation had occurred, an unsuccessful proponent would need to establish that a violation of the commitments in Chapter 19 occurred after September 20, 2017. This makes the prospect of complaint under CETA even less likely.

In any event, we are not aware of any aspect of the RFP process or the contract that would be in violation of any of the substantive commitments of CETA Chapter 19. In our involvement in the process, we did not identify any feature of the RFP process or the proposed Agreement that would violate the various transparency, non-discrimination, process or other commitments of Chapter 19. In our view, based on the information available to us, we believe the possibility of a successful complaint under CETA to be remote.

c. AIT/CFTA

It is not entirely clear if Chapter 5 of the CFTA (formerly, the Agreement on Internal Trade) applies to Waterfront Toronto or to the RFP. We note that the scope of "procuring entities" covered by the CFTA is very broad. However, as an entity created and funded by the federal and provincial governments, its status under the procurement chapter of the CFTA is not clear.¹² At the same time, the RFP may be in the nature of a "public-private partnership", which is largely excluded from the disciplines of the Chapter.¹³ In any event, even if the CFTA does apply, we have identified no reason to believe that the RFP process or the procurement-related provisions of the Agreement are inconsistent with this trade agreement.¹⁴

¹¹ See: <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aeqc/text-texte/19-A.aspx?lang=eng#a>.

¹² We have not had an opportunity to carry out an in-depth analysis of this question, but will be pleased to do so if required.

¹³ Article 504.10.

¹⁴ We also note that the CFTA came into force on July 1, 2017, while the RFP was unfolding. The transitional rules relating to procurements initiated before July 1 and concluded after that date are unclear. In our view, to the extent the former AIT governs, any risk of non-compliance is even more remote.

e) Consistency with Best Practices and Competition Act

The concept of "Best Practices" in Canadian procurement is not particularly well defined. As such, affirming that a procurement process is consistent with recognized best practices is more a matter of judgment than of measuring a process against established metrics. That said, in our view, the subject matter of the RFP and the Agreement may be innovative, but the manner in which Sidewalk Labs was selected as the proposed Innovation and Funding Partner is not unusual. The process generally followed normal proponent selection protocols.

We underscore that the process was in the nature of a request for proposals rather than a tender. As explained in Waterfront Toronto's own Procurement Policy (section 5.2), a tender is typically used in circumstances where the purchaser has determined a clearly defined scope of the goods or services and the only remaining matter to be resolved is establishing a competitive price. Successful proponents are normally (but not always exclusively) chosen based on the price submitted. The evaluation of price can include an evaluation of "best value" rather than simply the lowest price.

By contrast, RFP's are typically used when the purchaser wishes to carry out a quality assessment of a service provider or the product or service they provide. In most cases, price is a "weighted" factor but not the determining factor. Request for Proposals are also used where it is not practical to prepare precise specifications, or where alternatives to detailed specifications will be considered, which may be subject to further negotiation. This process allows vendors to propose solutions to arrive at the end product or desired result and allows for evaluation based on predetermined criteria in addition to price.

Normally, in the RFP model (as was the case here), the selected proponent is not automatically awarded a contract but, instead, is invited to engage in the negotiation of a contract, the full parameters of which are not yet known until after the negotiations are completed. The Quayside RFP falls within this latter type of process.

In our view, the main features of the Quayside RFP process were not unusual. This includes the Commercially Confidential Meetings and the Best and Final Offer ("BAFO") process which are both increasingly common features of complex procurement processes in Canada. We also note that the process provided for careful identification and mitigation of conflicts of interest, if any, and was monitored throughout by a fairness monitor (a former judge, the Hon. Coulter Osborne). Other features that were indicative of a process in line with recognized best practices included a disciplined Q&A and addendum process, a structured and staged evaluation process involving a multi-disciplinary evaluation committee, prudent protocols to protect bidder confidential information and equal access by bidders to a comprehensive data room.

In summary, in our involvement in the RFP process and with respect to the Agreement, we have not observed anything that we would qualify as deviating from accepted procurement best practices in Canada. On the contrary, we observe that this RFP process incorporated many accepted, modern hallmarks of an open, transparent and fair process. Finally, we understand that while bidders had ample opportunity to do so, none of them raised concerns related to the proponent evaluation and selection process.

With respect to the *Competition Act*, we do not believe anything in the RFP or the Agreement raises material compliance concerns. The provisions of the *Competition Act* that relate specifically to procurement cover conspiracies (section 45) and bid rigging (section 47). We do not believe either of these sections are engaged by the RFP or the Agreement. While conspiracies and bid rigging between bidders are always a possibility in relation to which procuring entities must be vigilant, we have not observed any particular "red flag" inherent in the RFP process or the Agreement. In our view, neither the RFP nor the Agreement create any unusual or enhanced risks of conspiracies or bid rigging.

f) Consistency of Agreement with the RFP

We were asked to opine earlier with respect to whether the scope of the Sidewalk Labs proposed Term Sheet exceeded the scope of the agreement that could be reasonably anticipated under RFP. As we explained in detail in our memorandum of September 15, 2017 (forwarded via email the same day to Kevin Newson), we believe the scope of the Term Sheet is consistent with the scope provided for in the RFP. We see nothing in the latest draft of the Agreement that changes that view. In our view, the nature and scope of the Agreement falls within the range of agreements that could reasonably be anticipated by proponents based on the contents of the RFP.

g) Fairness

As we have already noted, the RFP process involved a fairness monitor. We have not seen a report by the fairness monitor (normally such reports are produced at the conclusion of the process) and a comprehensive fairness analysis would be squarely within the monitor's responsibility rather than ours (we were not retained to carry out a comprehensive fairness review of the process). We do not know, therefore, whether the fairness monitor has specific reservations or concerns regarding the process. That said, in our involvement in the Quayside RFP, we did observe the commitment of Waterfront Toronto officials to treat proponents fairly and equitably and we are not aware of any material fairness concerns arising during the process.

We hope the above observations are of assistance and look forward to addressing any further questions you may have.

Yours truly,

Dentons Canada LLP



Paul M. Lalonde

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