

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Baltimore City Entertainment)
Group, LP)
) Docket No. MSBCA 2690
Under)
Video Lottery Facility Location)
Commission RFP #2009-0101)

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OPINION BY BOARD MEMBER DEMBROW

This bid protest arises from the State's effort to attract, identify, and license a private entity to develop and operate a gaming facility to be located in Baltimore City, as constitutionally and statutorily authorized and delineated. Appellant asserts that the rejection of its proposal was improper but in order to facilitate timely decision-making and action on this procurement while also achieving fairness and equity in the application of all governing provisions of the Maryland Constitution, law, and regulation, the Board deems the State action in this matter to be reasonable, justified, and lawful.

Findings of Fact

1. After many years of heated policy debate and division in the Maryland General Assembly concerning the potential costs and benefits of legalizing forms of gambling beyond the State Lottery, by majority vote on a referendum question included in the 2008 General Election, voters ratified an Amendment to the Maryland Constitution authorizing the introduction of slot machines in the State, to be allowed at specified locations following licensure by the State of selected privately owned entities offering to construct and operate gambling sites for slot machines, also known in modern parlance and hereafter referred to in this Opinion as video lottery terminals (VLTs).
2. The subject approved Constitutional Amendment is enumerated as Article XIX and sets forth with some specificity various limitations on VLT gambling newly allowed in the State, including the disallowance of any single entity from holding more than one (1) VLT location license, as well as the geographic parameters of the five (5) separate deliberately selected and interspersed locations at which VLTs are permitted, including one location in the City of Baltimore. (Ex. 1; Maryland Constitution, Art. XIX, Sec. 1.)
3. Specifically, the Baltimore City site is limited to property that is owned by Baltimore City on the date the application for a video lottery operation license is submitted, zoned for non-residential use and not located within one-quarter (1/4) of a mile of property that is zoned and used for residential dwelling, and situated within one-half (1/2) mile of Interstate 95 and MD Route 295 (the Baltimore-Washington Parkway). (Maryland Constitution, Art. XIX, Sec. 1(c)(3)(v).)
4. In addition to the foregoing geographic restraints, the subject Constitutional Amendment also specifically limits

the overall magnitude of permitted VLT gambling as follows:

(c)(1) Except as provided in subsection (e) of this section, the State may issue up to five video lottery operation licenses throughout the State...

(2) Except as provided in subsection (e) of this section, the State may not authorize the operation of more than 15,000 video lottery terminals in the State...

(d) Except as provided in subsection (e) of this section, *on or after November 15, 2008, the General Assembly may not authorize any additional forms or expansion of commercial gaming.*

(e) The General Assembly may only authorize additional forms or expansion of commercial gaming if approval is granted through a referendum, authorized by an act of the General Assembly, in a general election by a majority of the qualified voters in the State.

(Maryland Constitution, Art. XIX, Sec. 1.)

5. Contingent upon the voters' ratification of Article XIX, a statute implementing the State's video lottery program also became effective, adding a new Subtitle 1A to Title 9 of the State Government Article of the Maryland Annotated Code (SG) to provide a licensing and regulatory framework for issuing licenses for private entities to operate up to five (5) VLT sites in the State, and regulations were thereafter promulgated and adopted prescribing additional requirements of licensure. (2007 Md. Laws (Special Session), Chap. 4; Code of Maryland Regulations (COMAR) § 14.01.10 *et seq.*; Smigiel v. Franchot, 410 Md. 302 (2009).)
6. The enacted Constitutional Amendment permits no more than 15,000 total VLTs in the State and the statute implementing the plan allows no more than 4,750 VLTs at a single location and no more than 3,750 VLTs at the Baltimore City location. (Maryland Constitution, Art. XIX, Sec. 1(c)(2); SG § 9-1A-36(f)-(i), Ex. 4 (hereinafter referred to as RFP) §§ 2.4,

6.6.2.)

7. Responsibility for soliciting and selecting successful vendors to construct and operate VLT sites in the State is vested by statute in a newly created Video Lottery Facility Location Commission (Location Commission), which consists of seven (7) members appointed by the Governor, the President of the Senate, and the Speaker of the House of Delegates, with procurement and management support provided by the existing staff of the Maryland Lottery Commission (Lottery Commission), the Department of Legislative Services (DLS), and lawyers with the Office of the Attorney General. (SG §§ 9-1A-04, 9-1A-36.)
8. In addition to using the legal and procurement resources of the state agencies identified above, DLS is statutorily mandated to retain private expert consulting services to provide independent assistance and advice to the Location Commission in its evaluation of applications for VLT licenses by reviewing applicants' gaming proposals to determine whether they may reasonably be expected to maximize revenue for the State; and DLS did so retain Price Waterhouse Coopers (PWC) for that function. (SG § 9-1A-36(e); Ex. 135; T: III-52, IV-99.)
9. Procurement of the necessary services to implement VLT gambling as prescribed by constitutional amendment and law is unique in several respects but nonetheless statutorily required to take place "through a competitive bidding process consistent with the process for competitive sealed proposals under Title 13 of the State Finance and Procurement Article." (SG § 9-1A-36(f).)
10. In addition to incorporating these ordinary procurement principles by public issuance of a Request for Proposals (RFP) and subsequent evaluation of responses deemed reasonably susceptible of being selected for award in order

to determine which proposal is most advantageous to the State considering the evaluation factors set forth in the RFP, many specially enacted duties are also set forth in statute governing this particular unique procurement. (SG § 9-1A-01, *et seq.*)

11. According to the testimony of DLS Staff to the Location Commission, the view of the Location Commission and its staff regarding the process to be followed to achieve VLT license award:

in drafting the RFP and in going forward with the RFP was to make it as consistent as possible with State Procurement Law, while recognizing that it was a unique -- that what we were doing was awarding licenses, not awarding a contract. And so that made it unique. And it didn't fit neatly into an existing State RFP, and that we were going to do our best to follow a process that was as consistent as possible to State Procurement Law.

(T: IV-77.)

12. In accordance with statute, the Location Commission is responsible for awarding licenses, but is not obligated to award any license and is forbidden from awarding a license contrary to the public interest. (SG § 9-1A-36(p); RFP § 8.6.1.)

13. Consistent with the foregoing, the RFP expressly provides:

If at any time in the evaluation process an Applicant is determined to be not qualified or a proposal is determined to be unacceptable, the proposal will be dropped from further consideration in the awarding of the License...[and]

Notwithstanding any of the provisions contained herein, the Location Commission may not award an operation license unless the Location Commission determines and declares the proposal selected for award of the license is in the public interest and

consistent with the purposes of the applicable law.

(SG § 9-1A(q)(2); RFP §§ 8.1, 8.6.1; T: III-125; emphasis supplied.)

14. The RFP also expressly empowers the Location Commission with broad discretion to reject all proposals and cancel the procurement, stating: "the Location Commission may cancel this RFP or reject all proposals submitted in response to this RFP when this action is determined to be in the State's best interest." (RFP § 3.16.)

15. In addition, the RFP states as follows:

The Location Commission *reserves the right to accept or reject any or all proposals*, in whole or in part, received in response to this RFP, to waive or permit cure of minor irregularities, and to conduct discussions or negotiations with all qualified or potentially qualified applicants in any manner necessary to serve the best interests of the State. This may be followed by submission of Applicant-revised proposals and a Best and Final Offer ("BAFO"). This request does not commit the Location Commission to award a License. (RFP § 3.17; emphasis supplied.)

16. The Lottery Commission is charged with the statutory responsibility of determining whether each pending applicant is qualified to hold a video lottery operation license and thereafter informing the Location Commission of that determination. (SG § 9-1A-36(m).)

17. An applicant for VLT licensure has the burden of establishing by clear and convincing evidence that it is qualified to hold a license by demonstrating to the Lottery Commission such factors as financial stability, integrity and responsibility; integrity of financial backers, investors, mortgagees, bondholders, and holders of other indebtedness that bear a relation to the application; good

character and honesty; and sufficient business ability and experience. (SG § 9-1A-07(c)(7).)

18. The RFP establishes that background investigations of all applicants are conducted by the Lottery Commission at the expense of the applicant, stating:

All administrative costs of the background investigation process shall be reimbursed to the Lottery Commission. The Lottery Commission will provide to the Applicant for an Operation License a bi-weekly invoice itemizing all background investigation amounts due. Payment shall be due within thirty (30) days of the invoice date. *Failure to reimburse the Commission shall be grounds for disqualification of the Applicant.* Any unpaid amounts shall become a lien against the Initial License Fee and shall be deducted from any refund of the Initial License Fee that may be otherwise due.
(RFP § 5.2; emphasis added.)

19. Specifically allowing a variety of forms of communications with applicants, the RFP further provides:

The Location Commission may enter into discussions with qualified or potentially qualified Applicants. Discussions, however, need not occur. Applicants may be asked to participate in face to face discussions with the Location Commission or other State representatives concerning their proposals. Discussions may be conducted by telephone, or may be in the form of written questions to be answered by the Applicants and conducted by mail, e-mail, or facsimile transmission at the discretion of the Location Commission.
(RFP § 8.4.)

20. The RFP also allows applicants to revise proposals at the request of the Location Commission, using a Best and Final Offer (BAFO) process, stating specifically:

When it is deemed in the best interest of the State, the Location Commission may permit a qualified Applicant to revise its initial proposals by submitting a Best and Final

Offer ("BAFO"). The Location Commission shall notify each qualified Applicant of the scope of the requested BAFO and shall establish a common date and time for the Applicant's submission...
(RFP § 8.5.)

21. An important condition of submitting application for a license as well as receiving a license is payment of all fees associated therewith, including the license application fee of \$3 million per 500 VLTs proposed, classified under the heading "Minimum Requirements" in the RFP, and providing in pertinent part as follows:

All Proposals received by the deadline for receipt will be first reviewed by the Location Commission to determine if the Minimum Requirements specified in Section 1.2 have been met and to determine compliance with the submission requirements of the RFP. *An Applicant or proposal not meeting the Minimum Requirements will be determined to be unacceptable and the proposal not further considered...*

and later in the RFP:

A License shall not be issued to an Applicant that has been selected for award until:

...

2) all required fees have been paid, including but not limited to License fees and background investigation costs.

(SG § 9-1A-36(j)(1); RFP §§ 1.2, 3.10.1, 6.1.3, 8.1.1., 8.2, 8.6.2; T: III-110; emphasis supplied.)

22. Statutory as well as the contractual obligations set forth in the RFP also required applicants to expend a total capital investment in facility construction of at least \$25 million per 500 VLTs licensed. (SG § 9-1A-36(j)(3); RFP §§ 1.2.2, 6.1.3.)

23. The RFP specifically identified two contiguous properties in Baltimore City that met the criteria for a VLT facility, referred to in the RFP as Site A, located at 1411 Warner Street, and Site B, located at 301 Stockholm Street, as well as an additional parcel suitable for off-site parking and other services needed to support a VLT facility on Sites A and B, namely, Site C, located at 701 Ostend Street. (RFP § 6.6.3.4; Ex. 45, 103; T: II-235.)
24. An unsuccessful bidder aggrieved by a determination of the Location Commission is specially permitted by statute to seek review before the State Board of Contract Appeals (Board) under the ordinary procurement grievance processes set forth in Title 15 of the State Finance and Procurement Article of the Maryland Code (SF&P). (SG § 9-1A-36(o).)
25. The decision by the Location Commission to award or not to award a video lottery operation license for a particular location is the final decision of the Location Commission which forms the basis upon which an appeal to the Board is permitted and for which exhaustion of administrative remedy is predicate to appellate review in a judicial forum. (Laurel Racing Assoc. v. Video Lottery Facility Location Commission, 409 Md. 445, 466 (2009).)
26. The day after its first public meeting culminated in a unanimous vote of approval, the newly-formed Location Commission on December 19, 2008 publicly promulgated an RFP commencing the statewide VLT licensing process which was then hoped to conclude in about a year's duration by the fall of 2009, in time for the Commission to report its progress to the legislature in the 2010 session of the Maryland General Assembly. (RFP § 3.5; Ex. 135, 136, 137; T: IV-21.)
27. Consistent with statute, the RFP requires the Location Commission to evaluate proposals using the following

weighted factors: 70% based on business and market factors including, *inter alia*, "the highest potential benefit and highest prospective total revenues to be derived by the State;" 15% based on economic development factors; and 15% based on location siting factors. (SG § 9-1A-36(k); RFP § 8.3.)

28. The initial due date for submitting responses to the RFP was no later than February 1, 2009, but because that date fell on a Sunday, the deadline for submission of license applications was extended by the Location Commission to the following business day, namely, Monday, February 2, 2009 at 2:00 p.m. (SG § 9-1A-36(j)(1); RFP § 3.9.1).
29. On January 12, 2009, the Location Commission conducted a pre-proposal conference that was advertised in the RFP and in response to questions posed that date, the Location Commission informed applicants that offers of fewer than the maximum number of allowable VLTs would be accepted for consideration, but cautioning that proposals for less than the maximum allocation would expose the offeror to the possibility that such proposals could be deemed less attractive than others, and also warning that the Location Commission could not guarantee that an applicant would be permitted to add more VLTs at a later date.
30. After holding the pre-proposal conference on January 12, 2009 and receiving a variety of inquiries, the Location Commission issued a series of written questions and answers which included one instructing applicants of the obligation to remit at the time of the initial submission a total application fee calculated on the basis of the number VLTs ultimately desired, and not just the limited number of VLTs that may be contemplated by an applicant in earlier phases of a proposal, stating:

23. QUESTION: The rules refer to a maximum

number of VLTs in each zone. If an applicant contemplates phasing in the scope of their project and the amount of VLTs on the floor, how should the initial application be presented (phase I or multiple phases)?

ANSWER: *The Initial License Fee must be paid in a single total payment with the Proposal. The Initial License Fee is based on the maximum number of VLTs being proposed by the Applicant, regardless of whether the Applicant is proposing to commence operation with the maximum number of VLTs or proposing to phase in the number of VLTs.*
(Ex. 46; emphasis supplied.)

31. In response to another question concerning applicants' responsibilities in the event of initial licensure for a smaller number of VLTs than the maximum authorized, and subsequent request to expand a site with additional VLTs, the Commission's written follow-up to the January 12, 2009 pre-proposal conference also included the following:

78. QUESTION: VLT Allocations - If an Applicant proposes a less number of machines than is statutorily allowed in a jurisdiction, i.e. 1500 in the Cecil jurisdiction, what would be the process to apply for the rest of statutory allocation and would they have to pay a license fee?

ANSWER: The Applicant must pay an Initial License Fee of \$3 million per 500 VLTs based on the maximum number of VLTs contained in its Proposal, regardless of when the VLTs are actually allocated. If the Applicant proposes and is awarded a License for fewer VLTs than the maximum amount specified for a location, the Applicant/Licensee has no assurance that additional VLTs will be available or added to its License at a later date. If the State determined that it would award additional VLTs to the Licensee and the Licensee accepted the additional VLTs, the Licensee would be required to pay an additional License Fee at that time. The Law

authorizes the Location Commission to award less than the 15,000 authorized VLTs initially. To the extent that occurs, the Location Commission may allocate additional VLTs and re-allocate VLTs through its expiration in January 2015. Following that date, the Lottery Commission has the authority to allocate and re-allocate VLTs every three years. The process for such requests has not yet been determined. (Ex. 5, 105.)

32. Although arguably consistent with RFP § 8.6.2 requiring payment of "all required fees" before a license may be issued, the foregoing statement regarding the due date for payment of the application fee to expand the number of VLTs allowed, (specifically, "[i]f the State determined that it would award additional VLTs to the Licensee and the Licensee accepted the additional VLTs, the Licensee would be required to pay an additional License Fee at *that time* [i.e., post award rather than at time of application]") appears to be at odds with the information provided by the State's Answer to Question No. 23 and elsewhere throughout the RFP and as provided by statute that the application fee has to be remitted at time of application, not award.
33. Except for legal pleadings and argument after the filing of the instant appeal (and the rejected offer from BCEG on November 10, 2009 to remit the full application fee on December 10, 2009), the record is devoid of any question or complaint from BCEG concerning its obligation to remit the entire amount due for all prospective VLTs ultimately desired for a location at the time of application and not later in the process.
34. An additional response to pre-proposal questions advised potential applicants as follows: "This is not a State contract. As required by the Law, the Location Commission will award Licenses through a competitive process consistent

with the process for Competitive Sealed Proposals and the Law while taking into account the unique nature of this project." (Ex. 46A, #65.)

35. In an effort to promote submission of thorough bids by responsible entities and in recognition of the difficulty of completing the VLT application within the six (6) week period between the RFP issuance date of December 19, 2008 and the bid submission due date of February 2, 2009, the Location Commission authorized applicants to supplement proposals by additional submission on or before April 15, 2009, though applicants were also informed that they were "required to submit proposals that are as complete as possible on February 2nd" and that it was "the Location Commission's preference that *all* information be submitted by February 2nd." (RFP § 3.5.)
36. The Commission's allowance of an April supplement to the February proposals was not intended by the Commission to create an opportunity to make significant changes to the proposal, but instead, limited substantive changes as follows:

In the Supplement, the Applicant may expand upon the information previously submitted in response to Section 7.3.5 with its Proposal and submit any required information or supporting documentation that was not previously submitted with its Proposal. *Information submitted in the Proposal may not deviate from that submitted in the original Proposal and changes to the Proposal shall not be permitted in the Supplement.* Applicant shall provide a full detailed description of the Facility being proposed and all supporting documentation... (RFP § 7.4.2; emphasis supplied).

37. Further addressing the limitations on supplemental proposals, on January 17, 2009, the Location Commission issued a second set of answers to questions about the RFP,

stating that in the event of a material change in the original proposal, the Location Commission "may consider such requests under extraordinary circumstances, in [its] discretion" and specifically with respect to the Baltimore City location, the Location Commission stated that the "overall concept of the proposed Facility must be consistent between the original Proposal and the Supplement," but also that the "Location Commission may consider requests for modifications of a proposal under extraordinary circumstances, in [its] discretion." (Ex. 46A, # 74, 75.)

38. Also on January 17, 2009, the Location Commission explained that the RFP did "not anticipate nor allow for changes after the April 15, 2009 date for submission of the Supplement," but advised applicants that it might "request Best and Final Offers (BAFOs) from Applicants and reserve[d] the right to allow an Applicant to modify its proposal if the Applicant has acted in good faith and demonstrates that extraordinary circumstances exist." (RFP § 7.4.2, 8.5; Ex. 46A, #76.)
39. In addition, on January 17, 2009, the Location Commission promulgated a formal Amendment to the RFP reiterating the obligation to remit a license fee of \$3 million per 500 VLTS proposed and authorizing payment of fees by wire transfer. (Ex. 127.)
40. When proposals were opened on the application due date of February 2, 2009, it was discovered that competition for the five (5) planned VLT site locations in Maryland was far less robust than originally hoped, the disappointing response said to be in part due to the ongoing global economic downturn that occurred just prior to and during this particular time which was associated with a shortage of capital lending capacity, but also because of various restrictions and obligations imposed upon Maryland applicants, including the limitation of a single license per

- applicant, the required \$3 million licensing fee per 500 VLTs proposed, the large portion of profit to be paid to the State, and State control of the actual VLTs being permitted.
41. Specifically, the Location Commission received only six (6) proposals for VLT licensure: two (2) for the Anne Arundel County site, and only one (1) each for the sites in Baltimore City, Allegany County, Cecil County, and Worcester County. (Ex. 128.)
 42. The single proposal for the Baltimore City location was submitted by appellant, Baltimore City Entertainment Group, L.P. (BCEG) for operation of a VLT facility located on the three (3) parcels of property referenced in the RFP as Sites A, B, and C. (Ex. 5, 128.)
 43. Of the six (6) applications received by the Location Commission in response to the December 19, 2008 RFP, only the BCEG proposal was not self-funded, but relied instead upon partnering or creating some other financial relationship with separate investors to secure the necessary capital to construct and operate the proposed VLT site.
 44. The transmittal letter that BCEG attached to its proposal, as well as the Executive Summary of the Proposal itself, stated that application was being made by BCEG for the maximum allowable number of 3,750 VLTs at the Baltimore City location, and also that the corresponding initial license application fee of \$22.5 million had been wired to the Lottery Commission as required for an application for a license for 3,750 VLTs; and the details of the proposal submitted by BCEG on February 2, 2009 reiterated a proposal for 3,750 machines. (Ex. 5, 8; RFP § 7.3.1, 7.3.4; T: III-183.)
 45. In fact, on February 2, 2009 BCEG remitted a license application fee of only \$3 million, not \$22.5 million, and in a separate letter to the Location Commission attached to

its application, BCEG clarified that its ultimate goal was to secure a license for 3,750 VLTs, but that it had remitted an initial license fee for only 500 VLTs as the first phase of a long-term plan for 3,750 machines.

46. One week after the due date for application submission, namely, on February 9, 2009, BCEG transmitted to the Location Commission further documentary description of its staged plan for a total of 3,750 VLT's beginning with an initial undertaking of only 500 VLTs in the first phase, which the applicant planned to expand with a request for an additional 1,500 VLTs up to two (2) years subsequent to facility opening, and another 1,750 VLTs as long as four (4) years after opening, in order eventually to achieve the total maximum allotment of 3,750 VLTs. (Ex. 7, 10, 11, 104.)
47. Faced with nonconforming applications submitted without payment of the required fee, at the public meeting on February 12, 2009 by written and oral advice, counsel to the Location Commission advised that the Commission could not consider an application submitted without the requisite fee, and indeed, had no discretion to determine whether or not to consider a proposal under those circumstances, though in the course of providing that advice, counsel also advised that a change in an initial proposal could be considered by the Commission provided that it was accompanied by the requisite license fee. (Ex. 9, 25, 125; T: II-228, 233, 256, III-1201.)
48. For the reason stated above, two (2) of the six (6) initial proposals were promptly rejected by the Location Commission at its public meeting on February 12, 2009 because they were deemed to fail to fulfill the minimum requirements of bid submission, namely, the application provided by Laurel Racing Association (LRA) for the Anne Arundel County site and the application provided by Empire/Rocky Gap for the

site in Allegany County, neither of which were accompanied by any application fee at all. (Ex. 128.)

49. At that same February 12, 2009 public meeting, the Location Commission deemed the BCEG application minimally sufficient for initial acceptance as a qualifying proposal and therefore voted to receive BCEG's application as satisfying the requirements of the RFP "[N]otwithstanding that BCEG had proposed initially, 500 [VLTs], and paid 3 million, with...a stated intent of later increasing to 3750." (Ex. 128; T: III-19.)

50. At this early juncture, the Location Commission sought not to disqualify BCEG from submitting application for licensure in order to enable BCEG to supplement its initial application, because it was hoped that BCEG would ultimately submit a proposal consistent with its stated intentions, namely, to expand its application to a total of 3,750 VLTs, the Chair of the Location Commission summarizing the reasoning of the Commission as follows:

We were waiting to see if they ever made [a revised application]...there was an indication that they hoped to, and we would be waiting to see whether or not they did so, along with the license fee We certainly would like to [have] 3750 [VLTs] in Baltimore City ... the maximum number that's permitted under the statute. There was a proposal in Baltimore City. We're happy to see that. And we're also --- the fact that it was the only - of the proposals that had some minority equity participation in it, and none of the other ones did. So we were hopeful that things might develop positively in that area.
(T: III-47.)

51. At no time, including to the present date, has BCEG paid any additional application license fee except the \$3 million required for a proposal for 500 VLTs paid February 2, 2009.

52. BCEG's April 15, 2009 Supplement included a Memorandum of Understanding (MOU) executed by and between BCEG and the Mayor and City Council of Baltimore promising to negotiate by July 31, 2009 a ground lease for BCEG's proposed VLT facility site to be located at 1411 Warner Street, but also providing for substitution of alternative sites within the statutory boundaries established for the VLT site permitted to be constructed in the City of Baltimore. (Ex. 11, 16, 23, 28, 29.)
53. Shortly after receiving BCEG's supplemental proposal on April 15, 2009, in order to garner a fuller explanation of BCEG's revised plan and fully assess its potential, the Location Commission Chair and staff met on April 27, 2009 with representatives of BCEG along with representatives of the Baltimore Development Corporation (BDC), which negotiates land lease agreements for the City, at which time BCEG orally indicated that it intended to submit to the Location Commission a written modification to its Proposal not only increasing the number of VLTs from 500 to 3,750 (and acknowledging its obligation to submit an additional initial license fee of \$19.5 million for the increase in the number of VLTs to the maximum allotted), but also changing the physical location of the planned facility from Warner Street to Russell Street; and furthermore, BCEG indicated at this time that it expected to file its amended proposal for a total of 3,750 VLTs in about six (6) weeks. (Ex. 11; T: III-190, 198, IV-44.)
54. According to the Minutes of the Location Commission's public meeting on April 28, 2009:
- [Location Commission] Chairman Fry asked as the Commission goes through this process, does it have the right to continue to work with the individual applicants to make modifications to those proposals to

ultimately arrive at a Best and Final Offer for them to submit. Mr. Howells [the Procurement Officer for the Lottery Commission and advisor to the Location Commission on this procurement] responded yes, the proposals are being handled consistent with competitive sealed proposals as stated in the law. The Commission will have the right to hold discussions with the applicants and ask for clarifications or modifications if needed. (Ex. 12.)

55. Counsel for BCEG notified the Location Commission in a telephone communication to Commission staff around the end of May that BCEG was considering a alternative approach to securing licensure, namely, returning to its original proposal for only 500 VLTs, and then immediately subsequent to initial license award, requesting an additional 3,250 additional VLTs. (T: III-192.)
56. All parties agreed with the sentiment that BCEG need not make further formal supplemental application of any sort until resolution of pending litigation filed by LRA, which was scheduled for oral argument in the Maryland Court of Appeals the next month, in June 2009. (T: III-193, IV-44.)
57. In order to afford BCEG adequate time to complete its proposal, Commission staff originally intended to schedule the Baltimore site visit as the last of the four (4) pending applicants; however, in late May 2009, counsel for BCEG asked for its site visit to be advanced because BCEG was making sufficient progress to overcome prospective barriers like zoning, and as a result, the Baltimore site visit was advanced to August 26, 2009. (T: III-203.)
58. For reasons unknown, in July 2009 BCEG reversed direction and requested that the Lottery Commission temporarily suspend its background investigation on BCEG. (T: III-202.)
59. On July 20, 2009, the Court of Appeals issued its opinion in the LRA appeal, holding that LRA had failed to exhaust its

administrative remedies before the Board. (SG §9-1A-36(o); Ex. 15.)

60. On July 29, 2009, a meeting was held with representatives of BCEG, Location Commission staff, representatives of the City, and others, during which BCEG informed the Location Commission of delay occasioned by negotiations between BCEG and BDC regarding the terms by which BCEG could be authorized to use City land to construct its VLT facility, which, under the original MOU, were supposed to have been finalized by July 31, 2009. (T: III-198.)
61. Prior to the legalization of slot machine gambling in Maryland, in March 2007, an entity then known as Cormony Development (Cormony) received from the City an Exclusive Negotiating Privilege (ENP) to develop a City-owned parcel adjacent to the parcels identified in the RFP here at issue, namely, the site of the Maryland Chemical Company on Russell Street, which ENP was transferred to Cormony's successor in interest, namely, Gateway South LLC (Gateway South), from which BCEG was then attempting to negotiate a conditional transfer of development rights subject to approval by the Baltimore City Board of Estimates. (T: I-170, II-236; Ex. 16, 106, 107, 108, 109, 110.)
62. BCEG sought to include the Gateway South property in its VLT proposal to the Location Commission because Gateway South included a parcel of real estate on Russell Street that was statutorily eligible for development as a VLT site and was considered by BCEG to have a far superior footprint and otherwise to be preferable to and more attractive than the three (3) other nearby parcels specifically referenced in the RFP. (Ex. 23, 101; T: I-120.)
63. BCEG advised the Location Commission on July 29, 2009 that it needed to conclude its lease agreement with the City before it would be ready to amend its proposal to 3,750

VLTs, which BCEG then anticipated would occur in August.
(T: III-198.)

64. Negotiations between the City and BCEG for definitive land agreements granting BCEG the right to develop, lease, and eventually purchase the Gateway South property, were reduced to a Land Disposition Agreement (LDA) and Land Development and Lease Agreement (LDLA) which were finally formally approved by the Board of Estimates prior to the Location Commission's meeting on October 21, 2009. (Ex. 28, 29, 30; T: III-219.)
65. In accordance with the complex LDLA, BCEG agreed to purchase certain parcels of land from the City, and in accordance with the Lease Agreement, BCEG agreed to lease from the City for 75 years three (3) parcels on Russell Street, and pay the City 2.99% of gross gaming revenue with a guaranteed minimum payment of \$8,000,000 in year one (1) of video lottery operations, \$10 million in year two (2), and \$15,956,000 in year three (3) and all years thereafter, plus annually either \$3,200,000 or property tax payable to the City, whichever is greater. (Ex. 28, 29, 113.)
66. Under the terms of the executed LDLA, the VLT facility site was identified as being in the 1500 block of Russell Street, and BCEG's right to use the property was subject to a series of conditions, including most critically, an approved license from the State to operate a gambling facility with at least 3,750 VLTs. (Ex. 29, p. 16.)
67. At the July 29, 2009 Location Commission meeting focusing on the various land agreements being negotiated by BCEG with the City, BCEG agreed to produce to DLS staff within two (2) weeks a timeline for receipt of BCEG's application for 3,750 VLTs and BCEG requested that the Lottery Commission renew work to approve its background investigation and also at that meeting gaming counsel for BCEG requested that the

Office of the Attorney General draft a letter intended to provide assurance or comfort to BCEG's tentative investors, though that letter was ultimately produced instead by BCEG counsel on September 4, 2009. (Ex. 47, 111, 138; T: III-201, IV-50.)

68. On August 10, 2009, BCEG notified Commission staff that BCEG's submission of an amended proposal and increased initial license fee would be delayed until the week of September 2, 2009, and later assured staff that it would be submitted September 9, 2009. (Ex. 17, 19; T: III-205.)
69. On August 12, 2009, BCEG and Baltimore City entered into an amendment to their April MOU expanding the City's properties available for BCEG's proposed VLT facility and extending from July 31 to September 30, 2009 the date by which a definitive lease agreement would be completed. (Ex. 12, 18; T: III-213, 219.)
70. The LDLA expressly conditioned the leasehold arrangements upon BCEG's securing a VLT license that was "final and in full effect and the award may not be appealed to the State of Maryland," and BCEG agreed to purchase related parcels of land also contingent upon its obtaining a VLT facility operation license. (Ex. 29.)
71. At the August 13, 2009 public meeting of the Location Commission, the Commission Chair stated that a request from the applicant for the Cecil County site to increase the number of VLTs at that location from 500 to 1,500 could not be considered without payment of the required additional \$6 million license application fee. (Ex. 121, 123.)
72. On August 14, Commission staff provided to BCEG a list of issues that BCEG should address at its presentation at the August 26, 2009 meeting and site visit, stating:

the Commissioners will be interested in hearing about where the facility will

actually be located and when the applicant will submit the initial license fee as required by law for the Commission to consider the proposal for the additional 3250 machines they apparently plan to have in the facility.

(Tab 20, 21; T: IV-56.)

73. Just prior to the Baltimore City site visit, the Location Commission received correspondence from counsel to LRA dated August 21, 2009 arguing that the Location Commission should not consider any proposal involving the Russell Street site because the RFP did not identify that parcel as one eligible for development of a video lottery facility. (Ex. 119; T: II-237.)
74. Visiting both the Warner Street and the Russell Street locations on August 26, 2009, the Location Commission conducted its scheduled site visit and public hearing at which time representatives of BCEG informed the Location Commission that it had negotiated a three-way agreement with Baltimore City and the owners of the Gateway South project to locate the planned BCEG VLT facility on Russell Street instead of Warner Street, that it was BCEG's intention to increase its application to 3,750 VLTs at the new location, that it was prepared to pay the additional \$19.5 million license fee, and that it was BCEG's intention to open the facility during the second quarter of fiscal year (FY) 2011 following an accelerated construction period of 16-18 months after licensure. (Ex. 14, 22, 23; T: III-112, 132.)
75. During the August 26, 2009 site visit it was evident that Location Commission members were favorably disposed at the prospect of constructing a VLT site on Russell Street as compared to the Warner Street location, because Russell Street was better-traveled and more suitable to a proposal for 3,750 VLTs than the lots initially identified in the RFP; however, the Location Commission also expressed

frustration that BCEG had still not provided its formal amended proposal for 3,750 VLTs at the new location on Russell Street nor had it paid the increased initial license fee that needed to accompany that promised revision in order for the Commission to consider whether to allow modification of the original application for only 500 VLTs, which at that time was the only proposal that was formally and lawfully pending and for which the requisite application fee had been paid. (Ex. 23; T: III-146.)

76. Part of the Location Commission's discussion at the public meeting on August 26, 2009 pertained to the lawfulness and ability of applicants to revise their proposals at that late date, the Minutes of that meeting reflecting as follows:

Chairman Fry asked [Assistant Attorney Generals and legal advisors to the Location Commission] Ms. Kirkland and Mr. Fontaine to brief the Commission on the proposal revision process and the Commission's consideration of the revisions... Please brief us as to and in accordance with the law and your legal opinion as to what authority and discretion we have with respect to revisions of proposals beyond April 15, 2009.

Ms. Kirkland said...there are a number of provisions in the RFP that relate to changes in the proposals. While some of the provisions appear to limit the ability of applicants to make changes, once those proposals are submitted, the Location Commission has ample authority to accept changes at this point in the process within the parameters that I will set out. In the RFP there are several provisions that specifically talk about changes. The Location Commission reserves the right to accept or reject any or all proposals in full or part, to waive or permit the cure of minor irregularities, to conduct discussions or negotiations, and to qualify potential applicants in any manner necessary to serve the interest of the State. The Location

Commission may enter into discussions face-to-face, by phone, or in the form of written questions solely within their discretion. The Location Commission may permit a qualified applicant to submit a best and final offer or series of best and final offers. That is part of the discussion and evaluation process...

Mr. Fontaine added that any changes that are made must include whatever alterations to the proposals are necessary to meet the minimum requirements of the statute and the RFP. He then confirmed that an additional license fee must accompany a change in the number of machines and not come at a later date.
(Ex. 23.)

77. On September 1, 2009 BCEG submitted to Commission staff a "draft table of contents that will outline the detailed documents that we would like to submit as part of our September [9, 2009] submission." (Tab 25; T: III-214.)
78. Despite BCEG's long-standing and repeated promises that a revised proposal for 3,750 VLTs at the new location on Russell Street along with an increased initial license fee of \$19.5 million would be submitted by September 9, 2009, no revised proposal or payment was produced on that date. (T: III-147.)
79. Instead, BCEG advised the Location Commission that the proposal and additional license fee would be submitted September 23, 2009, the day of the next scheduled public meeting of the Location Commission. (T: III-147.)
80. By correspondence dated September 18, 2009, the Baltimore City Department of Transportation (DOT) notified the Location Commission that a comprehensive traffic impact study was then underway, and that at least preliminarily DOT foresaw no barrier to the construction of a casino facility on the Gateway South property "with only modest improvements to the local transportation network." (Ex. 112.)

81. On September 22, 2009, BCEG again notified Location Commission staff that BCEG would be submitting its amended proposal and license fee the following day. (T: III-216.)
82. In late September, BCEG's MOU with the City of Baltimore regarding use of the Russell Street site was extended again, this time until November 18, 2009. (Ex. 16.)
83. On September 29, 2009, BCEG notified Location Commission staff that BCEG would submit its revised proposal for 3,750 VLTs at the new location on Russell Street along with the required additional initial license fee of \$19.5 million on October 21, 2009, when the Baltimore Board of Estimates approved the agreements by which BCEG would be entitled to possession of the City-owned land on Warner and on Russell Streets. (Ex. 26, 28, 29, 113; T: II-196, III-220.)
84. On the morning of October 21, 2009, the lease agreement between BCEG and Baltimore City was conditionally approved according to which the VLT facility site was identified as being in the 1500 block of Russell Street, use and possession of which by BCEG was contingent upon BCEG's receipt from the State of a final non-appealable license to install and operate 3,750 VLTs at that site. (Ex. 17.)
85. At the public meeting of the Location Commission on the afternoon of October 21, 2009, the Chairman expressed increasing frustration and concern that BCEG had repeatedly failed to fulfill its obligations and still had not formally applied for licensure of the facility it was supposedly planning, other than its original application for 500 VLTs, even though BCEG had orally promised on multiple occasions to propose construction of a much larger facility on a completely different site. (Ex. 30; T: III-148.)
86. It was also made clear at the October 21, 2009 meeting of the Location Commission that its final meeting of the year

would take place on December 17, 2009, the Minutes of that October 21, 2009 meeting reflecting in addition:

Chairman Fry said with respect to Baltimore City, the Commission finds itself without a proposal other than the initial proposal for 500 machines. The Commission was told at a meeting in August 2009 that the location included in the initial proposal is not where the applicant now proposes the facility to be located. The Commission learned through press reports that arrangements for a different site had been made. Despite due dates that were given to the Commission by BCEG that the amended proposal and license fee for the additional video lottery terminals would be provided, as of this date the Commission still has not received a revised proposal or additional license fee. This does not give the staff and the consultants the opportunity to thoroughly review the proposal. The State Lottery Commission is still receiving additional information so that they can complete their work, which delays the Location Commission's actions as well because it cannot move forward until their work is completed. Chairman Fry said that with respect to BCEG, an amended proposal and the appropriate license fee should be received in the immediate future. BCEG should also provide to the State Lottery Commission all the information that is needed so they in turn can provide the information to the Location Commission to conclude their work in phase one of this process by December 17, 2009. He asked if this is consistent with the Location Commission's thoughts on this matter. The Commissioners were in agreement. Chairman Fry said the Commission will meet on November 12, 2009 at which time they anticipate receiving...an update when it may anticipate receiving a background investigation report with respect to the Baltimore City proposal." (Ex. 30; T: II-217.)

87. BCEG representatives did not attend the October 21, 2009 public meeting because it did not expect its proposal to be

a subject of that meeting, which dealt primarily with the application submitted for the VLT site proposed for Cecil County by Penn National Gaming, Inc. (Penn). (Ex. 30.)

88. The day after the October 21, 2009 Location Commission meeting, BCEG was notified by Location Commission staff that all appropriate documents and fees had to be received by November 6, 2009 in order to have its revised proposal properly before the Commission for consideration at its next scheduled meeting on November 12, 2009.
89. Follow-up conference calls between Commission staff and BCEG staff took place on October 27 and 30, 2009, during which BCEG was reminded that its formal application had to be submitted no later than November 6, 2009.
90. Internal communications between BCEG and its counsel confirm that DLS Staff informed BCEG that the Location Commission intended to "finish everything by the end of December" but BCEG counsel construed that prospective deadline related by DLS Staff as "just a remark." (Ex. 139.)
91. On October 29, 2009, pursuant to SG § 10-611 *et seq.*, counsel for an undisclosed party filed a formal Public Information Act request with the Location Commission, seeking documents pertinent to the underlying procurement and complaining that a prospective bidder had been prejudiced by relying upon on the specific geographic references set forth in the RFP as the Baltimore City site, rather than the alternative new site on Russell Street sought to be proposed by BCEG. (Ex. 48; T: II-237.)
92. On November 5, 2009 BCEG sent to the Location Commission Chairman an electronic communication advising that BCEG had attracted a new investor and stating that BCEG had finally "reached a stage which will complete the [B]altimore proposal" and in response, the Location Commission Chair responded to BCEG by return e-mail again expressing the

Commission's need for BCEG to submit its final amended proposal and additional licensing fee by the end of the next day in order for BCEG's proposal to be placed on the Commission agenda for consideration the following week. (Ex. 31.)

93. On November 6, 2009, BCEG submitted to the Location Commission neither its promised supplemental proposal nor the required \$19.5 million licensing application fee, but instead, sent to the Location Commission a follow-up letter disclosing a prospective new investor in the project, known as the "L" Group, and promised to submit required disclosure forms about the new investors "shortly." (Ex. 32.)
94. On November 10, 2009, counsel to BCEG directed further follow-up correspondence to the Location Commission informing the Location Commission that BCEG intended "to continue its progress at an accelerated rate" and also stating that its proposal would not be accompanied by the required licensing application fee, but instead, that it would "deliver the Amendment to the April 15, 2009 Supplemental Submission on or before November 20, 2009 and will pay any and all of the required fees on or before December 10, 2009." (Ex. 33; T: III-232.)
95. Justifiably impatient and aggravated upon receiving the foregoing notice from BCEG that it now suddenly did not intend to remit its licensing fee along with its proposal, but instead, to transmit its application fee separate and apart from its amended proposal, the Chair of the Location Commission contacted BCEG on November 11, 2009, the same day that BCEG's November 10, 2009 letter was received by the Location Commission, and advised BCEG that its application would be rejected if submitted without the required fee. (T: II-216, III-89.)
96. During the aforementioned telephone conference, upon being

notified again by the Chair of the Location Commission that BCEG's prospective plan for 3,750 VLTs would not be considered in the absence of a formal application, BCEG advised the Location Commission Chair that BCEG did not wish for its 500-VLT proposal to be evaluated, only its prospective proposal for 3,750 VLTs. (T: II-216, III-88.)

97. Again, on December 10, 2009, instead of remitting the additional \$19.5 million application fee as promised, BCEG counsel sent to the Location Commission a letter announcing yet another previously undisclosed prospective new investor, namely, York Capital Management (York), and requesting a "reasonable extension" to finalize financing of the project. (Ex. 35, 141.)
98. Also on December 10, 2009 York sent a letter to the Commission in which it indicated that it expected to reach agreement with BCEG "within a few days" but that its agreement was subject to completion of documentation and market due diligence that would take from 45 to 60 days. (Ex. 36.)
99. By correspondence dated December 11, 2009, the Office of the Mayor of the City of Baltimore joined BCEG in supporting an extension of time from the Location Commission for BCEG to submit its modified application, stating:

The purpose of this letter is to request respectfully that the Video Lottery Facility Location Commission give Baltimore City Entertainment Group (BCEG) additional time to satisfy the requirements to receive a Video Lottery Terminal (VLT) license..

Throughout this process we have enjoyed an excellent working relationship and are enthusiastic in seeing this project through to completion. The project has great benefits for all parties involved. Since BCEG was awarded the site, we have been in constant communication with its principals.

BCEG will communicate directly with you its new timeframe [sic]. We appreciate your patience through this process and know that the project will be a tremendous success for the State of Maryland.
(Ex. 37.)

100. Newly retained counsel for York had a telephone conference with the Location Commission Chair shortly after BCEG's initial disclosure of York's interest on December 10, 2009 and was informed by the Location Commission Chair that the Commission "had to decide whether or not we would even accept any adjustments at our December 17th date." (Ex. 133; Tr: III-90.)
101. During the course of the year, BCEG repeatedly failed to reimburse the Lottery Commission in a timely manner for costs associated with background investigation work on BCEG and its application, causing the Lottery Commission to send repeated invoices for the same background investigation expenses, and as of December 10, 2009 and continuing to the present time it is said that BCEG was and remains in arrears on its reimbursement obligation to the Lottery Commission in an amount totalling nearly \$200,000.
102. At its December 17, 2009 final meeting of the year, unresolved issues were placed on the agenda, including the pending proposal from BCEG, which in its initial form constituted an application for only 500 VLTs in Baltimore City and for which no additional application fee was paid beyond that initial request for licensure of 500 VLTs, which was 3,250 VLTs short of the maximum allotted for that prime site.
103. The December 17, 2009 Agenda for the Location Commission was not distributed until the day of that meeting and included the following headings:
 - I. Call to Order and Opening Remarks

- II. Discussion of the Baltimore City Facility License Proposal
- III. Evaluation of the Baltimore City Facility License Proposal (a portion may be held in closed session).
(Ex. 117.)

104. The Agenda made available online as late as the day prior to the December 17, 2009 public hearing of the Location Commission did not include Item No. III above, namely, "Evaluation of the Baltimore City Facility License Proposal," but instead, only "Discussion of the Baltimore City Operation License Proposal." (Ex. 116; emphasis supplied.)
105. Prior to the convening of the December 17, 2009 public meeting of the Location Commission, BCEG did not expect that its proposal would be evaluated at that time for approval or rejection, but instead, anticipated only an updated discussion of the status of its proposal.
106. Neither Commission staff nor PWC ever prepared a full economic and financial analysis for BCEG's application because BCEG did not submit a complete application for a 3,750-VLT facility nor did BCEG remit the required license fee associated therewith nor request that its proposal for only 500 VLTs be subjected to formal comprehensive market analysis. (T: IV-121, 156.)
107. PWC did perform for the Location Commission comprehensive Drive Time, Economic Impact, and Project Viability Analyses for other applicants at other VLT sites, but not for BCEG at the Baltimore site. (Ex. 130, 131.)
108. PWC did only a rudimentary review of the BCEG application for 500 VLTs, correctly using a 67% tax rate, significant lease payments to BDC, the requirement to invest at least \$25 million to build the venue "at a time when the capital markets were at their absolute worst...[and]...[t]here was

absolutely no liquidity in the market" with no way to access capital - and a facility that did not have sufficient infrastructure or inventory of machines" and, not surprisingly, concluded that a 500-VLT facility did not optimize potential revenue. (T: IV-119, 135, 147, 160.)

109. Attached to BCEG's February 9, 2009 submittal was its own comprehensive economic analysis reflecting that BCEG expected, after payment of substantial costs including lease and tax payments to both the City of Baltimore and the State of Maryland, to secure a healthy profit of nearly \$12 million in its first year of operation in Baltimore with only 500 VLTs (then anticipated to be in place in FY-2011), such earnings before interest, taxes, depreciation, and amortization (EBITDA) rising to more than \$100 million annually by FY-2015 with 3,750 VLTs in place upon full implementation of its long-term plan, and projected annual revenue at that time was expected to be well in excess of half a billion dollars; but there is no indication that that comprehensive spreadsheet projection prepared by BCEG was ever reviewed by the Location Commission or PWC, because no thorough economic analysis was performed for BCEG's proposals. (Ex. 104.)
110. At its final public meeting of the year on December 17, 2009, the Location Commission, with BCEG representatives in attendance, rejected BCEG's proposal as the Location Commission Chairman read aloud a proposed Decision Statement reciting that determination and the Commission thereafter unanimously voted to adopt that Statement. (Ex. 38, 39.)
111. In the Decision Statement, the Location Commission articulated the standards under which it evaluated BCEG's Proposal, stating:

[T]he Video Lottery Facility Location Commission was guided by the statutory

criteria and the best interests of the State. Under § 9-1A-36(k) of the State Government Article, the Commission must evaluate the following factors in awarding a license: business and market factors (70% weight); economic development factors (15% weight); and location siting factors (15% weight). The Commission's primary responsibility in evaluating proposals is to determine what is in the best interest of the State. While the statute authorizes 3,750 VLTs for the Baltimore City location, the only Proposal pending before the Commission is for 500 VLTs. Approving a facility with 500 VLTs in a prime market does not maximize the revenues for the State, the City, or the other beneficiaries of VLT revenue. Particularly given the required City lease payment, generating sufficient revenue at 500 VLTs is virtually impossible. In fact, the lease agreement with the City is conditioned on BCEG receiving a license award for at least 3,750 VLTs.
(Ex. 38, 39.)

112. The Commission described BCEG's inconsistent performance of its commitments during the period after supplementary proposals were received as follows:

The applicant has on numerous occasions indicated significant changes to the proposal would be requested including the location of the facility, the number of VLTs, and most recently, the financing and ownership structures including the controlling partner. The Commission appreciates that negotiating agreements for a location on city-owned land, as the law requires, makes the process more complex and time-consuming. However, the Commission believes it has been more than patient. Although the City agreements were finalized in October, the parties were engaged in negotiations since the April 15 submission. Further, given the delays and failure to meet several deadlines by the applicant, the Commission is not assured and has considerable doubt that additional time will produce a complete proposal including

the required license fee. In fact, the reason stated for the request of an extension of time is for the purpose of providing the new investor partner more time to complete due diligence. The requested extension does not provide assurances that the parties will complete settlement on the tentative agreement or submit the revised plan and required additional license fees.
(Ex. 38, 39.)

113. Finally, the Location Commission noted the presence of certain general external economic considerations apart from the deficiencies of the BCEG proposal, for which the Location Commission also deemed it in the best interest of the State to reject the sole bid and re-bid the project, stating in this regard:

[T]he global recession and tightened financial/capital markets dampened competition for all of the video lottery facilities in Maryland including Baltimore City. The Commission feels that a re-bidding of the Baltimore City license in 2010 under more favorable economic conditions and a better understanding of the available VLT facility sites, including the Russell Street location, could yield competitive proposals, which may include the current applicant.
(Ex. 38, 39.)

114. The Commission concluded: "For all of these reasons, the Commission finds that it is in the best and public interest of the State to reject the BCEG operation license proposal."
(Ex. 38, 39.)

115. On January 7, 2010, BCEG, through counsel, filed a protest with the Board of the Location Commission's Decision Statement, which was subsequently amended by new counsel and thereafter entertained by the Board at an initial hearing on dispositive motions conducted March 12, 2010, followed by the filing of the Agency Report in June, with comments and rebuttal through July 8, 2010, and ultimately presented to

the Board at a full evidentiary and testimonial hearing that commenced on September 29, 2009, for which briefs were filed October 29, 2010, and supplemented November 10 and 12, 2009.

Decision

To begin the Board's evaluation of this procurement at the appropriate starting point, we observe that this RFP is unique. At issue is not the ordinary state purchasing process which is designed to achieve a *contract* for provision of specified goods or performance of certain services, but instead, a process of *licensure* to enable independent construction and ongoing operation of a controlled facility.

Ordinarily, the Board's authority and responsibility is strictly limited to review of a determination by a procurement officer. Here, there is no procurement officer. Instead, the Chairman of the Location Commission acts in the place of a procurement officer normally designated by a State agency head in the usual procurement process. For this unique RFP, an independent State agency is statutorily created and empowered with the achievement of this particular procurement as its singular function. That agency automatically dissolves by operation of law after the conclusion of its licensing mission.

And there are other reasons why the RFP here at issue is fundamentally different from others. This procurement is initiated not because a department secretary acting under the authority of the State's chief executive has determined to acquire some specified benefit to the State by soliciting the work of a private entity. By contrast, this procurement is undertaken because the Maryland electorate at large determined to embark upon a course of legalizing VLT gambling in the State. This RFP is specifically founded upon a precise constitutional

amendment, not just the general statutes and regulations governing other State procurements. Furthermore, beyond constitutional authorization, this RFP is subject to specific statutes and regulations which apply *only* to this procurement.

Finally, most State procurements (though not all) involve the expenditure of public funds to achieve certain objectives, but quite the opposite occurs by VLT licensure. By this procurement the State anticipates receipt of substantial revenue payments from entities selected by the State to be allowed to build and operate privately owned facilities. The Board is unaware of any other procurement in the history of state purchasing for which a similar level of revenue is anticipated to be generated as the sums expected to be paid to the State as a result of the licensing process here at issue.

None of the foregoing is intended to question the wisely enacted legislatively defined design of a Location Commission to conduct this procurement, nor the use of the existing review mechanism of the Board as specially provided by statute. The Board simply notes that the procurement evaluated here is distinct from other procurements and highly unusual in several respects. The Board is fairly directed by legislative mandate, therefore, that this procurement is bound to take place in a fashion that is fair to all interested parties and *consistent* with the normal process of conducting and reviewing competitive sealed proposals, but at the same time is not necessarily precisely constrained by all of the requirements related thereto as set forth in general statute and regulation governing other state finance and procurement.

It also bears emphasis in this preface to the Board's substantive analysis that the instant procurement is unusual not only as to the State's rights and obligations as provided by the Maryland Constitution, laws, regulations, and this RFP; but also, and importantly, with respect to the communications received by

the State from private entities responding to the RFP. Unfortunately, for this particular procurement a total of only four (4) qualifying proposals were submitted in response to the five (5) separate opportunities advertised. Surprising to many, not a single location received more than one (1) proposal that was eligible for consideration. Because of the shortage of responses, the overarching preeminent procurement duty for the State to assure that competing proposals are evaluated and otherwise treated the same may be fairly relaxed, because that goal loses much of its importance in application here.

For example, in this procurement, had a competing entity submitted a proposal for the Baltimore City site besides BCEG, it would have been incumbent upon the Location Commission to assure that all proposals were evaluated using the same methodology. Thus, hypothetically, it likely would have been a fatal flaw for the Location Commission to subject only one of the proposals to a full market analysis, but not the other. For the actual procurement at the Baltimore City site, however, BCEG was the only proposal submitted for review. Consequently, because there was no competition to the BCEG proposal, it cannot be fairly argued that the Location Commission's evaluation of the BCEG proposal was inequitable in comparison to a directly competing proposal due to the absence of a thorough market analysis performed on the BCEG proposal. There was no competing proposal. This empowered the Location Commission with additional discretion to determine how best to evaluate the BCEG proposal, because concern over treating a competing proposal the same way was substantially absent, even though the Commission nonetheless evidenced great care to assure fair and equivalent treatment of each proposal for each site for which VLT licensure is permitted.

Turning then to the Board's substantive evaluation, it is necessary first to determine what standard of review applies. It is undisputed that the initial determination by the Location

Commission is presumed to be valid and appellant bears the burden of proof by establishing sufficient grounds for reversal. (Hensel Phelps Construction, MSBCA 1167, 1 MSBCA ¶ 68 (1984).) Furthermore, the Board does not serve as a "Procurement Super-Evaluation Committee" making a *de novo* determination, but merely reviews all of the evidence supporting the determination of the procuring agency to evaluate whether its exercise of judgment and discretion was legitimate. (Eisner Communications, Inc., MSBCA 2438, 2443 & 2445, 6 MSBCA ¶ 560 (2005); ACS State Healthcare, LLC, MSBCA 2474, 6 MSBCA ¶ 564 (2005).) Appellant argues that the ordinary standard of Administrative Procedures Act (APA) review applies to this case; namely, the Board should sustain this appeal merely upon a finding that the actions of the Location Commission were arbitrary, capricious, unlawful, or contrary to the weight of the evidence. (SG § 10-301, *et seq.*; AGS Genasys Corp., MSBCA 1325, 2 MSBCA ¶ 158 (1987).) By contrast, the State contends that a higher standard attaches to this appeal; namely, appellant cannot prevail unless it successfully establishes by a preponderance of the evidence that the State's actions were "fraudulent or so arbitrary as to constitute a breach of trust." (TekXtreme, LLC, MSBCA 2451, 6 MSBCA ¶ 557 (2005).) This much more difficult standard for an appellant to satisfy attaches to an appeal of the State's determination to reject all bids. The higher standard serves to limit dramatically the ability of the Board to grant redress to a complainant when the State elects to nullify not just one, but all responses to a procurement.

The rationale for imposing such a burdensome standard of proof in reviewing an appeal of the State's determination to cancel a procurement altogether, or cancel and reissue an RFP, is best understood by examining the broad authority and discretion enjoyed by the State in this instance as set forth in § 13-207(b)

of the State Finance and Procurement Article of the Maryland Code (SF&P), which provides as follows:

(b)*Cancellation or rejection in State's best interests.* -- If, with the approval of the Board, a unit determines that it is fiscally advantageous or otherwise in the best interest of the State, the unit may: (1) cancel an invitation for bids, a request for proposals, or other solicitation; or (2) reject all bids or proposals."

Even if the foregoing statute were not in existence, § 3.16 of the particular RFP here at issue expressly includes substantially identical language but conferring direct authority upon the Location Commission to cancel the procurement or reject all proposals in its sole discretion, plainly stating, "the Location Commission may cancel this RFP or reject all proposals submitted in response to this RFP when this action is determined to be in the State's best interest." And the immediately subsequent section of the RFP repeats that right, providing, "The Location Commission reserves the right to accept or reject any or all proposals, in whole or in part, received in response to this RFP..." (RFP § 3.17.) Furthermore, additional statutory authority dictates affirmatively that the Lottery Commission is disallowed from issuing a license contrary to the public interest; and in addition, licensure is expressly permitted only after a determination is made that such action may reasonably be expected to maximize state revenue. (SG § 9-1A-36.)

It is essential to responsible fiscal planning that the State retain the option of canceling any procurement. A myriad of reasons are readily imaginable for the State's reasonable exercise of enormous discretion in this regard. All bids in response to an RFP may be in excess of allocated budgetary resources. Any number of circumstances may warrant a change in spending priorities. Review of proposals may cause the State to opt for an alternative method of achieving a desired result.

Consequently, statutory procurement authority makes clear that, based only upon whatever may be deemed to be "in the best interest of the State," any RFP may be cancelled or all proposals rejected. The State is simply not obligated to finalize a procurement and award a contract just because an RFP has been issued. The government rarely if ever forfeits its right to withdraw a solicitation, which may be forbidden only in the extraordinary event that such action is proven to be fraudulent or so arbitrary as to constitute a breach of public trust. This principle of government contracting is made quite clear in this RFP and rings especially true here in light of the statutes above applying specifically to this particular unique RFP, beyond general statutory and regulatory procurement authority.

Moreover, the State's freedom to cancel a procurement at any time is so broad that even after issuing a fully executed award, the government may unilaterally terminate a contract merely on the basis of its own convenience. Government contracting stands in stark contrast to private contracting in this regard, and those who bid on state or federal jobs well understand they are compelled to accept the potential pitfalls of such lopsided agreements. Of course the Board recognizes that the usual right of the State to terminate a contract for convenience does not apply to the award of a 15-year VLT license, but even this license is nonetheless statutorily crafted and defined as a revocable privilege. The simple point made is that the State is not mandated to award a license and may opt to reject all bids.

With respect to the instant appeal, the Location Commission determined on December 17, 2009 to reject all proposals for the Baltimore City site. It did so by rejecting the only proposal for that site, namely, the one submitted by BCEG. The Decision Statement read into the record that day and unanimously approved by the Commission members makes abundantly clear that the Location Commission properly considered "the best interest of the

State" and correctly determined that the BCEG proposal did not meet that objective which in the Location Commission's judgment would be better served by opening the procurement to re-bid. That conclusion was completely reasonable. Most assuredly, it cannot be correctly said that the December 17, 2009 determination was fraudulent or constituted a breach of public trust. Therefore the determination of the Location Commission to reject all bids must be sustained as entirely appropriate under the circumstances.

Even if the applicable standard of review had been much more forgiving to BCEG, as appellant urges should be the case, namely, the ordinary standard attached to APA review, the Board would still conclude that the determination of the Location Commission was neither arbitrary nor capricious nor contrary to law or regulation, nor in contravention of the evidence. In fact, its decision was rational, well reasoned, and justified.

To clarify the Board's conclusion in this regard it is essential to explain what offer constituted the BCEG proposal on December 17, 2009. The Board determines that the Location Commission was correct in deeming BCEG's proposal to be its initially stated application for a total of only 500 VLTs, far fewer than the 3,750 allotted for that location and desirable to maximize State revenue from that VLT site. Despite multiple promises that it would remit the additional application fee of \$19.5 million required to apply for an additional 3,250 VLTs, BCEG never actually paid that application fee in accordance with its stated plans and promises. It would have been absolutely improper for the Location Commission to consider BCEG's proposal as constituting a request for 3,750 VLTs without payment of the requisite application fee, especially in light of the Location Commission's prior decisions to reject other applications submitted without payment of the applicable fee.

It is also self-evident that a facility offering only 500 VLTs in a prime market does not maximize State revenue. It was not necessary for the Location Commission to waste the expensive resources of its private consultant, PWC, to make that determination. The numbers of VLTs statutorily allowed at each site under the constitutional limitation of a total of 15,000 VLTs statewide were not randomly assigned. They were the result of a thorough and painstaking analysis. Having a sufficient number of VLTs at each permitted location is essential to the success of each facility itself, as well as the goal of generating the maximum amount of revenue for the State. Prospective bidders were specifically cautioned in this regard prior to the due date for submission of proposals. BCEG acted at its own peril when it paid an application fee for a license for only 500 VLTs, a number woefully inadequate for Baltimore City, the urban center of the State of Maryland and the designated location of the second highest number of VLTs permitted anywhere in the State.

There is a vast difference between a proposal for 3,750 VLTs with the attendant requirement of a capital investment of nearly \$200 million, and a proposal for only 500 VLTs with a capital investment of only \$25 million. The only reason that the BCEG proposal was not rejected offhand at the outset of considerations was the evident optimism of the Location Commission in its hope that BCEG would ultimately live up to its repeated promises from the date of its first submission that it actually sought to apply for 3,750 VLTs. Unfortunately, it never did.

One of the worries of the Board that may also have factored into the Location Commission's hopeful evaluation of the BCEG proposal is the future potential of stagnation of a VLT facility operator after licensure. Suppose, for example, a given entity were to be initially licensed to operate only 500 VLTs at a site where 3,750 are permitted, 3,250 less than the number sought by

the State, with the expectation that that licensee would apply for additional VLTs at a subsequent time, as BCEG contemplated from time to time in the course of this procurement. Suppose furthermore that that licensee, due to economic conditions or particular capital constraints or business decisions or any number of *bona fide* or less than honorable reasons, later changed course and decided not to seek expansion. The Board is unaware of any mechanism by which the State could compel the licensee to expand or even to apply for the right to expand. Even if there were such a mechanism, what would happen if the licensee simply couldn't access the additional capital to build a larger facility or perhaps even to pay the requisite application fee associated with a request for more VLTs? In this circumstance, could the licensee dictate to the State a smaller number of VLTs than the State desired? Would the State be forced into the posture of having to waive the capital investment requirements or the application fee for such a troubled licensee? Could the City be compelled to take recourse to foreclosure or tax auction and accept title to a partially constructed facility as a public asset, but also as an undesired new City burden? Could the State? Surely the State would wish for the facility at that site to be enlarged. How would other actual or potential bidders respond to an effort on the part of the State to extend special development and operational rights and privileges only to a single vendor in response to a licensee's resistance to State direction?

Granting an initial request for licensure of only 500 VLTs in downtown Baltimore, representing less than 15% of the maximum, would pose the real potential of a procurement nightmare. Prior to licensure, the State holds considerable power and leverage to control a licensee's future behavior, but subsequent thereto, the successful licensee may be constrained to some extent, but only at considerable risk and effort on the part of the government.

It is vital to the State that the Location Commission handle its responsibility properly in advance of licensure by selecting the best proposal from the superior offeror. Later the State will rely upon the successful applicant to deliver its proposal in accordance with all assurances made and all obligations imposed by law or contract. That is to say that the State must have confidence in the reliability of the successful applicant. Cause for such confidence is lacking in the proposals and communications put forward by BCEG to date.

BCEG asserts in its appeal that as the sole bidder for the Baltimore City location up to the present time, it is the only entity which the State may now or ever be legally allowed to receive a VLT license in Baltimore, without adoption of a new constitutional amendment. In support of this argument, BCEG claims that the Location Commission is barred from reissuing an RFP for the Baltimore City location because of the restraints of the adopted Constitutional provisions that allow VLT gambling in Maryland. The pertinent sections state as follows:

(c)(1) Except as provided in subsection (e) of this section, the State may issue up to five video lottery operation licenses throughout the State...(2) Except as provided in subsection (e) of this section, the State may not authorize the operation of more than 15,000 video lottery terminals in the State...

(d) Except as provided in subsection (e) of this section, *on or after November 15, 2008, the General Assembly may not authorize any additional forms or expansion of commercial gaming.*

(e) The General Assembly may only authorize additional forms or expansion of commercial gaming if approval is granted through a referendum, authorized by an act of the General Assembly, in a general election by a majority of the qualified voters in the State.

(Md. Constitution, Art XIX, Sec. 1; emphasis supplied.)

The initial statute implementing these constitutional provisions was automatically enacted upon passage of the foregoing amendment in the 2008 voter referendum, thereby establishing a VLT license application due date of February 1, 2009, and such contingent enactment is lawful. (Andrews v. Governor, 294 Md. 285 (1982).) After adoption of the constitutional amendment in the November 2008 General Election, during the 2010 session of the Maryland General Assembly, legislation was enacted known as Chap. 624 or Senate Bill No. 882, which made various changes to the VLT licensing process. This legislation was primarily designed to encourage proposals for the Allegany County site, the only one (1) of the five (5) specified locations for which no VLT proposal was made, or at least none that was the subject of a formal application accompanied by the requisite fee. The statutory change in 2010 also was intended to induce offers to purchase the Rocky Gap Lodge and that legislation made a few other modifications as well. One section of the enacted bill appropriately included the deletion of the initially established but then past deadline of February 1, 2009 for submission of VLT proposals. (See Exhibit H to Appellant's June 30, 2009 Comments on Agency Report.)

Notwithstanding the deletion of the initial February 1, 2009 due date by statute enacted in 2010, BCEG argues that no VLT proposals may be allowed beyond the initial deadline for submittal of license applications, because that date is established not only by statute but also by constitutional imperative. This argument relies upon the above quoted prohibition set forth in the Maryland Constitution, which states in pertinent part, "on or after November 15, 2008, the General Assembly may not authorize any additional forms or expansion of commercial gaming" and "[t]he General Assembly may only authorize additional forms or expansion of commercial gaming if approval is granted through a referendum..." (Maryland Constitution, Art XIX,

Sec. 1.) Because a statute must fail if it is in direct conflict with a Constitutional provision, BCEG submits that the issuance of any future RFP pertaining to VLT licensure is absolutely barred unless approved by constitutional amendment.

While commending creative counsel for appellant for very skillfully advancing this postulation, the Board must reject it. The Constitutional amendment allowing and simultaneously limiting VLT gambling in Maryland forbids expansion of gambling beyond a total of 15,000 VLTs statewide, and bars VLTs from being located anywhere outside of the five (5) specified geographic parameters where VLTs are positively permitted. The amendment does not prohibit the re-issuance of an RFP for VLTs allowed within those two (2) constitutionally specified restrictions. Because the Baltimore City site is undisputedly set forth in the Maryland Constitution and laws as a permitted location, and the allowance of 3,750 VLTs at that site does not exceed the total number of VLTs allowed by the Constitution and by statute, re-issuance of the Baltimore City RFP at the discretion of the Location Commission is permissible. The Board does not believe that the constitutional amendment was meant to prohibit such action, nor did the voters who overwhelming supported its adoption intend or desire that result. (Stop Slots MD v. State Board of Elections, 406 Md. 135 (2008).)

BCEG also argues that it remains contractually entitled to the exclusive right to develop the eligible Baltimore City sites, but as a legal proposition, that assertion is incorrect because the contracts relied upon by BCEG in making that claim are expressly revocable and contingent upon unsatisfied conditions.

Of greater concern to the Board is the Location Commission's stated prospective use of a BAFO process as reflected in the April 28, 2009 Minutes of the Commission. BAFOs are governed by COMAR § 21.05.03.03(d), which states as follows:

D. Best and Final Offers.

(1) General. When in the best interest of the State the procurement officer may permit qualified offerors to revise their initial proposals by submitting best and final offers. The procurement officer shall establish a common date and time for the submission of best and final offers. The procurement officer may require more than one series of submissions of best and final offers and discussions if the agency head or designee makes a written determination that it is in the State's best interest to conduct additional discussions or change the procurement agency's requirements and require another submission of best and final offers. Otherwise, discussion of or changes in the best and final offers is not allowed before award..."

Ordinarily, recourse to a BAFO is undertaken by the State to permit a final opportunity for competing qualifying offerors one last chance downwardly to revise the total cost of a bid in order to maximize competition and thereby secure the most favorable price for the State, sometimes following the deletion of some contract element. The BAFO process is rigidly restricted by requiring that the identical opportunity and request be made to all. BAFO is not an opportunity to make substantial modifications to a proposal nor to re-write an RFP, which should take place by formal amendment prior to bid submission deadline, not by last minute BAFO.

Despite the reference in the April 28, 2009 Minutes to an inquiry concerning solicitation of a "Best and Final Offer," it appears to the Board that that remark was not intended to reference BAFO as a procurement term of art in the sense defined and limited by COMAR, but instead, merely in the pejorative context of finally coming to receipt of an actual valid and definitive proposal from BCEG. That is the reason why the Procurement Officer for the Lottery Commission advised the Location Commission at that April meeting in response to the

question about BAFOs, that discussions would be permitted with BCEG consistent with the law governing competitive sealed proposals. To sum, the Location Commission conducted permissible discussions with BCEG in lieu of a formal BAFO request. Therefore further analysis of BAFO duties is unnecessary.

It is only important to recognize here again that the application submitted by BCEG was the only proposal pending before the Location Commission for the Baltimore City site. Had there been a competing vendor, of course it would have been highly questionable to use a BAFO process to seek and permit modification of only one of the proposals being considered, which would have operated to the potential prejudice of others. Using a BAFO in that fashion without a precisely stated common date and time for final submission of a revised offer may well have been unlawful. But ironically, even in that case, the redress for such a violation would likely have been to compel the State to reject all bids and start over, exactly what the State presently seeks to do in this case.

Because the Location Commission did not engage in a formal BAFO process in the manner by which this procurement was handled, the Location Commission cannot be faulted for not following the BAFO process precisely, nor was the Location Commission obliged to follow all of the ordinary constraints of this or certain other conditional obligations of procurement law and regulation. In express accord with statute, the actions of the Location Commission are constrained not by the letter of the law but only by the spirit of general procurement requirements designed to assure fairness by requiring that evaluation of proposals be conducted in a manner consistent with established rules as applicable to the unusual conditions present in this unique procurement. This goal was achieved by the Location Commission's decisions and actions.

Turning next to a final point of contention over which the Board must concur with appellant's related criticism of the actions of the Location Commission, it is apparent that a better form of notice should have been employed unambiguously to apprise BCEG of the November 6, 2009 final proposal due date and specifically warn BCEG in advance of the December 17, 2009 meeting that on that date the Commission sought to make a final determination to accept or reject the BCEG proposal. It would have served the interests of both BCEG and the Location Commission to have certain express and definitive documentation that such notice was made in writing rather than orally. The December 17, 2009 rejection of the BCEG proposal came as a surprise to BCEG, and that surprise likely gave rise to this appeal to the Board.

BCEG attended that final meeting of 2009 not even knowing that its proposal would be evaluated and unprepared for the task of presenting its case, expecting only to be called upon for an update on the status of its proposal. Evaluation of the BCEG proposal was not listed on the public agenda of the Location Commission prior to the meeting. While notice of prospective final action on December 17, 2009 was intimated at the public meeting of the Location Commission on October 21, 2009, it is uncontested that no BCEG representative attended the October meeting, which principally concerned another proposal, not BCEG. The record of the evidence is void of any writing simply, plainly, and fairly advising BCEG that its proposal would be finally evaluated at any particular time. Such express and certain notice could easily and should have been made.

The foregoing defect in the formal process of transmitting definitive notification to BCEG from the Location Commission is easy to detect in hindsight, as the Location Commission itself today may or may not agree. But the Board must temper its criticism in this regard because it is also readily apparent that

BCEG shares the blame in causing its own confusion. On many dates BCEG promised the Location Commission that it sought to make application for 3,750 VLTs. From the date of issuance of the RFP and the first pre-proposal conference, the State attempted to make it clear that for an application of 3,750 VLTs, an application fee of \$22.5 million was immediately required to be paid in full as required by statute as well as the RFP. Any assertion to the contrary is incorrect as a matter of law, and BCEG made no such contention prior to filing the instant appeal. Instead, BCEG repeatedly promised to remit the additional \$19.5 million due. BCEG should have paid \$19.5 million more toward its application fee on the bid due date of February 2, 2009; but, as sometimes occurs when the State appropriately encourages and supports those who seek to compete for a government contract, here the Location Commission exercised its discretion to deem the initial BCEG proposal minimally acceptable, anticipating prompt receipt of the balance of the application fee one (1) week later, on February 9, 2009, when BCEG confirmed its long-term plan for 3,750 VLTs.

Surely if not on February 2 or February 9, 2009, BCEG should have paid the outstanding balance of its application fee when its supplemental proposal was submitted on April 15, 2009 which again set forth its proposal for a total of 3,750 VLTs. BCEG was fully aware that its application fee was due. Failing that payment, at the very least BCEG should have remitted the additional \$19.5 million in advance of the site visit it asked to be scheduled for August 26, 2009, when its presentation included a new site and again confirmed a plan for a total of 3,750 VLTs.

Long prior, at the April 27, 2009 meeting in follow-up to BCEG's submission of its supplemental proposal on April 15, 2009, BCEG assured the Location Commission that it would make full payment of the outstanding balance of its application fee. At that time, the payment was promised to be made within six (6)

weeks, in June 2009. Failure to remit at that time was excusable, because appellate court process was then underway potentially affecting all proposals, and the Location Commission suggested that further action be deferred pending the possibility of judicial direction arising from the LRA case in the Court of Appeals. But after resolution of that case in July, BCEG should have made payment. On July 29, 2009, BCEG promised to remit in August. On August 10, 2009, the payment was promised no later than September 2, 2009, later extended to the following week, namely, September 9, 2009. On September 9, 2009 and again on September 22, 2009, BCEG promised to make payment of the application fee by September 23, 2009. On September 29, 2009, BCEG promised to remit by October 21, 2009. But even then, more than eight (8) months after the payment was due and payable, BCEG concedes that it still failed to live up to its own promises and self-imposed deadlines.

It is uncontested that at this point in the procurement evaluation process, the Location Commission had essentially run out of patience and therefore BCEG was informed repeatedly by Location Commission staff that its application and fee would have to be submitted no later than November 6, 2009. But for reasons unknown, counsel for BCEG incorrectly interpreted that orally stated deadline not as an ultimatum, failure of which would cause its proposal to be rejected, but instead as "just a remark." As a result, that deadline too, like all the others, came and went with only BCEG's original proposal for a mere 500 VLTs pending. BCEG promised yet again to remit its application fee, this time on or before December 10, 2009, but again, ultimately failed to remit beyond its deficient initial application fee of \$3 million. As late as December 2009 BCEG was still struggling to secure a viable investor, the latest of which was then asking for yet a couple of months more to make a final investment determination. By the time the Location Commission finally gave up and formally

rejected the BCEG proposal, nothing at all had been paid toward the \$19.5 balance of BCEG's application fee, which was then more than ten (10) months past due.

The BCEG proposal was and remains highly valued by the State and for good reason. The Board would be remiss if it were not to thank appellant for its stated interest in the Baltimore City site location and to recognize the substantial work, diligence, and investment made by BCEG to see that opportunity realized to fruition to the great benefit of both BCEG and the State. The identification of the Russell Street site as an alternative to Warner Street was brilliant and helpful. The Board recognizes that the subsequent work done by BCEG to secure the needed development rights through complex land transactions approved by the City were difficult, time-consuming, and expensive. That work was surely also constructive toward the eventual achievement of the urban renaissance that may confidently be expected to take shape someday soon throughout the entire vicinity of the designated VLT site in Baltimore City, led by the investment of the VLT licensee at that location.

The Board is not unsympathetic to BCEG's view that if the RFP is re-issued and permitted to be reopened for new proposals, its ideas and work may in effect be stolen and used by others who previously did not have enough interest to submit a proposal. But BCEG must recognize that at some point, the Location Commission is entitled to determine that it need wait no longer for the definite and demonstrable commitment of a capable investor acting on a proposal for which application has been formally made and finalized. The Location Commission is not mandated to wait forever, or well beyond due dates, while any particular interested party is permitted repeatedly to modify such critical elements of a proposal as its location, the number of VLTs requested, and the changing identity of financial

partners, all long after the February 2, 2009 deadline for submission of proposals.

Furthermore, certainly no one has suggested that the Location Commission be compelled to accept a proposal for only 500 VLTs at the Baltimore City site, nor that such a proposal should be deemed acceptable. At the same time, BCEG has never applied for anything else.

BCEG should have remitted an additional \$19.5 million on the bid due date of February 2, 2009, as it initially claimed it had done. Without comment regarding the lawfulness of that action, the Board can readily observe that the Location Commission was most generous and patient with BCEG in determining to accept its original application and patiently awaiting for a supplemental proposal accompanied by the required and repeatedly promised application fee. In fact, it is fair to say that the Location Commission bent over backwards to keep the BCEG proposal in the running for potential consideration and award. In strict compliance with statute and the express provisions of the RFP, it would have been perfectly understandable, acceptable, and lawful for the Location Commission to have rejected the BCEG proposal for only 500 VLTs any time after 2:00 p.m. on February 2, 2009.

But the Location Commission in the exercise of its sound and legitimate discretion opted not to act so precipitously in the face of but a single bidder for Baltimore, hoping beyond hope that the only proposal for this site would soon be lawfully and properly supplemented to preserve the prospect of a successful award at that important location. During this entire period, BCEG knew or should have known that its offer was at risk of rejection, from the date it initially submitted an incomplete proposal to the Location Commission until the day it was finally rejected more than ten (10) months later.

The Board also notes that the Location Commission would have been justified in rejecting the BCEG proposal on the basis of

non-payment of the costs of investigation pursuant to RFP § 5.2, but because that potential additional ground for bid rejection was not included in the Location Commission's December 17, 2009 decision, it is not properly before the Board.

One final word of *dicta* is also appropriate to put into perspective the duration of the procurement process here in question, for which some may wish to criticize BCEG, the Location Commission, or even the Board. In fact, implementation of VLT gambling in Maryland is progressing at a remarkable pace. In the Board's experience, it is certainly not unusual for a major State procurement to require at least eighteen (18) months at a minimum between initial concept and planning to final award. Complex procurements may take much longer. Good procurement officers, and the State has many of them, know to initiate procurement preparation well in advance of this time frame. For the highly visible, complex, controversial, indeed, historic procurements arising from gaming authorization in Maryland, authority to initiate any procurement activity at all was not secured until after voter approval of the constitutional referendum in November 2008 which commenced this process, first by the appointment of members of the Location Commission as a brand new independent State agency. Yet, today, just two (2) years later, one license is not only awarded; the facility approved is already fully constructed and operational in Cecil County. Another facility is expected to open imminently on the eastern shore. A third, the largest, just cleared a major obstacle to implementation by the results of the November 2010 General Election and is now said to be on the verge of licensure in Anne Arundel County despite the burden of having to secure a change in zoning requiring local voter referendum.

Moreover, at this relatively brief time following authorization of slot machine gambling in the State barely two (2) years ago, only the Baltimore City and Rocky Gap locations

remain largely unresolved and problematic. Both of those sites offer extraordinary opportunities. BCEG alone appreciated the potential of one of those sites and may yet achieve licensure at that location. Should it choose to submit another proposal for the Baltimore City site, BCEG is certainly eligible to do so and will have a leg up on competitors by virtue of all of the work it has already done. No one is correctly criticized for the understandable delay occasioned by BCEG's decision to take permitted legal recourse by filing the instant appeal. The rate of accomplishment achieved by the State to date in this arena has been impressive, especially in light of all of the circumstances present.

For all of the foregoing reasons and notwithstanding the State's continuing interest in appellant's prospective proposals, it is the determination of the Board that this appeal be dismissed with prejudice.

WHEREFORE, it is, by the Board, this _____ day of December, 2010, ORDERED that this appeal be and hereby is DISMISSED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2690, appeal of Baltimore City Entertainment Group, LP under Video Lottery Facility Location Commission RFP #2009-0101

Dated:

Michael L. Carnahan
Deputy Clerk