

ATTACHMENT 1

Letter dated August 5, 2011 from Dr. Jon Wainwright to Secretary Beverley K.
Swaim-Staley

NERA

Economic Consulting

Jon Wainwright
Senior Vice President

National Economic Research Associates, Inc.
Barton Creek Plaza Building II, Suite 330
Austin, Texas 78704
+1 512 371 8995 Fax +1 512 371 9612
Direct dial: +1 512 371 8995
jon.wainwright@nera.com
www.nera.com

August 5, 2011

Secretary Beverley Swaim-Staley
Maryland Department of Transportation
7201 Corporate Center Drive
Hanover, MD 21076

Dear Secretary Swaim-Staley:

This letter responds to your question regarding whether NERA's disparity study, entitled *The State of Minority- and Women-Owned Business Enterprise: Evidence from Maryland*, issued February 17, 2011 (the 2011 Disparity Study), also applies to the type of work being performed by the awardees and licensees in Maryland's Video Lottery Terminal (VLT) program. As is explained in more detail below, our analysis finds that the 2011 study does provide a strong basis in evidence for the application of the Maryland MBE program to the types of work involved in Maryland's VLT program.

Background:

The 2011 Disparity Study provides a comprehensive analysis of the participation of minority- and women-owned businesses in state contracting and in the geographic and product markets within which the State conducts its contracting. In our recommendations to the State, presented in Chapter X of the study (p. 558), we wrote:

Based upon this Study, Maryland has a strong basis in evidence to implement a race- and gender-based program. This record establishes that minorities and women in the Maryland market area continue to experience statistically significant disparities in their access to State and private sector contracts and to those factors necessary for business success, leading to the inference that discrimination may be the cause of those disparities. Further, individuals recounted their experiences with discriminatory barriers to their full and fair participation in the State's contracting activities as well as economy-wide. The Study provides the statistical and anecdotal evidence to answer in the affirmative the question whether there is strong qualitative evidence that

establishes Maryland's compelling interest in remedying race and gender discrimination. There is ample evidence that affirmative intervention is needed to dismantle the vestiges of the private sector system of racial and gender exclusion. It is clear that continuing the use of MBE goals would clearly not be motivated by the illegitimate racial stereotypes or bias, or blatant racial politics that strict constitutional scrutiny seeks to "smoke out." Unless it continues to take action, Maryland will likely be a passive participant in a discriminatory marketplace. Moreover, as found in Chapter VII, there remain large and often statistically significant disparities between the availability of MBEs and their utilization on State contracts, in most procurement categories for most types of MBEs, despite the State's aggressive current efforts. These results support the need for continued remedial action.

NERA presented the study to the Maryland Department of Transportation (MDOT) which then distributed the study to the General Assembly and to state government officials and posted the study on its website. In addition, as principal investigator for the study, I testified about the development and results of the study before the committees of the General Assembly responsible for the MBE program. I presented the results of our study to the Health and Government Operations Committee of the Maryland House of Delegates on March 2, 2011, and to the Education, Health & Environmental Affairs Committee of the Maryland Senate on March 3, 2011.

Methods for the Current Inquiry:

At the end of May 2011, I was contacted by MDOT and was told that there was a legislative requirement for a study to determine whether or not there was a constitutional basis for Maryland's VLT statute. MDOT explained that the VLT statute applies the Maryland MBE program to the State's VLT program. In that context, we discussed whether or not the results of the 2011 study would cover the work performed by VLT awardees and licensees, or whether a separate study would be required. MDOT explained that the video lottery terminals themselves and the corresponding software are not owned by the VLT awardees and licensees but instead are owned and controlled by the state and obtained through a separate procurement or lease agreement. MDOT further conveyed that the bulk of the work that was currently being performed by the VLT awardees and licensees appeared to be for construction, services, and equipment related to the building and outfitting of casino facilities. I agreed to examine data about the types of work contracted for by VLT awardees and licensees and make a determination as to whether the industry codes relevant to that work were different in any consequential way from the industry codes examined in our analysis of state contracting for the 2011 Disparity Study, such that it might call for a different study.

NERA received data files from the State detailing contract and subcontract expenditures related to VLT facility construction by two VLT licensees--Ocean Enterprise 589, LLC, for its VLT facility in Berlin, Maryland, and Penn Cecil Maryland, Inc., for its VLT facility in Perryville, Maryland.

Ocean Enterprise 589, LLC construction in Berlin, MD

There were 389 records in file we received. Of these, we assigned North American Industrial Classification System (NAICS) codes to 353 records (90.7%).¹ NAICS codes were not assigned in cases where the payee was identified in the file as an "Exclusion." There were 35 such records, primarily involving sales tax payments and other expenditures with public entities. Just as in the 2011 Study, such expenditures were excluded from the analysis.²

Of the 353 records with an assigned NAICS code, 339 (96.0%) had codes that were explicitly included in the 2011 Disparity Study. These 353 records accounted for 127 unique NAICS codes. Of these 127 codes, 114 (89.8%) were explicitly included in the 2011 Disparity Study.

The total dollars of work ordered for which NAICS codes were assigned was \$27,321,537,52. For codes that were explicitly included in the 2011 Disparity Study, the total dollars of work ordered was \$27,195,528.99, or 99.5% of all dollars of work ordered.

The total dollars of work paid for which NAICS codes were assigned was \$24,943,771.18. For codes that were explicitly included in the 2011 Disparity Study, the total dollars of work ordered was \$24,823,679.47, or 99.5% of all dollars of work paid.

Penn Cecil Maryland, Inc. construction in Perryville, MD

There were 199 records in file we received. Of these, we assigned North American Industrial Classification System (NAICS) codes to 163 records (81.9%). NAICS codes were not assigned in cases where the payee was not identified and the work description provided could not be tied to one of the other contractors or vendors in the file. There were 36 such records, primarily

¹ NAICS is the standard system for classifying industry-based data in the U.S. It superseded the Standard Industrial Classification (SIC) System in 1997. NAICS was the system used for classifying all industry-based data in the 2011 Disparity Study.

² One additional record was excluded by NERA. This was a \$2,700 payment to Delmarva Communications Inc for an "FCC License."

involving sales tax payments, escrow amounts, and expenditures with public entities. Again, just as in the 2011 Study, these expenditures were excluded from the analysis.

Of the 163 records with an assigned NAICS code, 149 (91.4%) had codes that were explicitly included in the 2011 Disparity Study. These 163 records accounted for 74 unique NAICS codes. Of these 74 codes, 67 (90.5%) were explicitly included in the 2011 Disparity Study.

The total dollars distributed for which NAICS codes were assigned was \$57,843,330.58. For codes that were explicitly included in the 2011 Disparity Study, the total dollars of work distributed was \$57,352,763.69, or 99.2% of all dollars of work ordered.

Conclusion:

After reviewing and analyzing the data received from the State, I conclude that an additional study is neither required nor would it be useful because the 2011 Disparity Study provides a strong basis in evidence, consisting of both quantitative and qualitative evidence, that would support race- and gender-based programs to correct for discrimination against minority- and women-owned businesses in the types of industries in which VLT licensees are currently contracting for construction and other goods and services. The study also contains evidence suggesting that minority- and women-owned businesses are even more disadvantaged in the context of competing for prime contracts. Moreover, the report details a range of race- and gender-neutral activities that the State has already undertaken to address existing disparities. The 2011 Disparity Study found that, notwithstanding these race- and gender-neutral activities, many of which have been in place for a number of years, disparities continue to exist in both public and private contracting in the same geographic and industry markets in which VLT awardees and licensees are currently operating. These disparities are for the most part large, adverse and statistically significant. In addition, our report contains both qualitative and quantitative evidence to suggest that economy-wide contracting disparities in the relevant markets are even greater than disparities in the public sector. This difference may be due to the fact that the State has, for a number of years, operated an assertive MBE program in an attempt to remedy discrimination which would tend to reduce, though it has not yet eliminated, the effects of discrimination in public procurement. Absent such affirmative remedial efforts by the State, I would expect to see evidence in the relevant markets in which the State's VLT awardees and licensees operate that is consistent with the continued presence of business discrimination.

In closing I would note that I am an economist, but not a lawyer. I am well qualified to review the economic and statistical data presented to me and opine on its significance. I am a Senior Vice President with NERA and the head of its Austin office, the chair of NERA's national affirmative action consulting practice, and a member of its labor and employment practice.

NERA

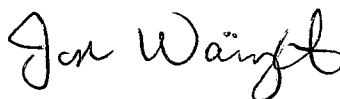
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I have conducted more than 50 disparity or availability studies in my career and directed numerous other studies concerning various aspects of business markets and labor markets. These studies are often done in the context of litigation involving business enterprise or employment discrimination. I have acted as an expert witness in MBE program and other discrimination-related litigation on several occasions. I have testified and been accepted as an expert economist and statistician in federal district courts in California, Florida, Georgia, Illinois, Minnesota, and Texas, in the U.S. Court of Federal Claims, in state courts in Illinois and Texas, and before both chambers of the U.S. Congress.

As an expert in disparity studies and the economics of business discrimination, I have a high level of expertise concerning how economic data relates to the law that has been applied to MBE and related programs by courts and legislatures. I have not been asked to review the specific details of the Maryland VLT statute and I do not offer any opinion about the specifics of that statute. I would note, however, that even where a strong basis in evidence exists to support a race- or gender-based program, that fact alone should not end the analysis. As we stated in the 2011 Disparity Study, it is imperative that any race- or gender-conscious goals or other mechanisms applied to specific projects be carefully established, on a contract-by-contract or project-by-project basis, taking into consideration the specific mix of work involved in that project and the relative availability of MBE firms to perform that work.

Sincerely,



Jon Wainwright
Senior Vice President
NERA Economic Consulting

ATTACHMENT 2

The State of Minority- and Women-Owned Business Enterprise: Evidence from Maryland (the 2011 Disparity Study)

Website for the Disparity Study is:

http://www.mdot.maryland.gov/MBE_Program/Documents/NERA_MD_Disparity_Study_Final_20110218.pdf

ATTACHMENT 3

Letter dated February 22, 2011 from Secretary Beverley K. Swaim-Staley and
Special Secretary Luwanda Jenkins to the Honorable Thomas V. Mike Miller, Jr.
and The Honorable Michael E. Busch



Maryland Department of Transportation
The Secretary's Office

February 22, 2011

Martin O'Malley
Governor

Anthony G. Brown
Lt. Governor

Beverley K. Swaim-Staley
Secretary

Darrell B. Mobley
Deputy Secretary

The Honorable Thomas V. "Mike" Miller, Jr.
Co-chair, Legislative Policy Committee
President of the Senate
H-107 State House
Annapolis MD 21401-1991

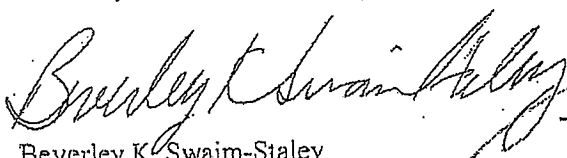
The Honorable Michael E. Busch
Co-chair, Legislative Policy Committee
Speaker of the Maryland House of Delegates
101 State House
Annapolis MD 21401


Dear President Miller and Speaker Busch:

The Maryland Department of Transportation (MDOT) respectfully submits the results of the State's Minority Business Enterprise (MBE) Disparity Study. In accordance with House Bill 869, Chapter 359, Acts 2006, MDOT was required to initiate a study evaluating the continued compliance of the MBE Program with the requirements of the *Croson* decision¹ and any subsequent federal or constitutional requirements. The results of this study are hereby submitted to the Legislative Policy Committee of the General Assembly.

Should you have any questions concerning this report, please contact Zenita Wickham Hurley, Director, Office of Minority Business Enterprise at (410) 865-1240.

Sincerely,


Beverley K. Swaim-Staley
Secretary
Maryland Department of Transportation


Luwanda Jenkins
Special Secretary
Gov.'s Office of Minority Affairs

¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Honorable Thomas V. "Mike" Miller, Jr.
The Honorable Michael E. Busch
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cc: Members of the Legislative Policy Committee, Maryland General Assembly
Ms. Zenita Wickham Hurley, Director, Office of Minority Business Enterprise,
Maryland Department of Transportation
