

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

August 11, 2011

The Honorable Thomas V. Mike Miller, Jr.
President of the Senate
H-7 State House
Annapolis, Maryland 21401

The Honorable Michael E. Busch
Speaker of the House
H-101 State House
Annapolis, Maryland 21401

Dear President Miller and Speaker Busch:

In your capacities as co-chairs of the Legislative Policy Committee, you are in receipt of a letter from the Secretary of the Maryland Department of Transportation ("MDOT") dated August 9, 2011 and a letter from Jon Wainwright, Ph.D., Vice President of NERA Economic Consulting ("NERA"), dated August 5, 2011 concerning the implementation of the MBE requirements of State Government Article ("SG"), § 9-1A-10(a), the Video Lottery Terminal Law ("VLT Law"). Prior advice from this office has cautioned against implementation of an MBE program in the context of VLT facilities. For the reasons stated below, it is our view that an MBE program may now be implemented in compliance with law. The recently issued Requests for Proposals ("RFPs") for Video Lottery Operations licenses for Rocky Gap (RFP # 2012-0102 issued on June 24, 2011) and the City of Baltimore (RFP # 2012-0101 issued on April 29, 2011) (collectively, the "RFPs") issued by the Maryland Video Lottery Facility Location Commission ("Location Commission") should, however, be amended to reflect the manner in which the program will actually be implemented.

Section 9-1A-10(a) was enacted as part of the original Video Lottery Terminal ("VLT") authorization, in Chapter 4 of the Special Session of 2007, which took effect upon the November 2008 ratification of Chapter 5 of the Special Session of 2007. The section requires that an applicant or licensee meet the same requirements as a designated unit for minority business participation under State Finance and Procurement Article ("SF"), Title 14, Subtitle 3 with respect to construction and procurement for the operation

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of VLT facilities. SG § 9-1A-10(a)(1). An applicant or licensee is also subject, to the extent possible, to any higher MBE requirements imposed by the county where the facility is located. SG § 9-1A-10(a)(2). The State Lottery Commission is required to ensure that a VLT operation licensee complies with the MBE requirements as a condition of holding the VLT operation license, SG § 9-1A-10(b)(1), based on reports from the Governor's Office of Minority Affairs, which is required to monitor compliance. SG § 9-1A-10(b)(2) and (3). The MBE requirements in § 9-1A-10(a)(1) and (2) were initially set to sunset July 1, 2011. SG § 9-1A-10(c).

Based on the established law regarding the use of race-conscious remedies to address past or ongoing discrimination against minority- and women-owned businesses, the bill review letter on Chapter 4 (Senate Bill 3 of the Special Session of 2007) advised that there should be a study on procurement practices in the industry and consideration of race neutral alternatives before such a program could be implemented. The bill review letter also stated that the goals for the program "should be based on minority business availability in the markets used by the VLT licensee, which may be different than those used for State or county contracting."

Section 4 of Chapter 4 called for just such a study. This section required the Maryland Department of Transportation ("MDOT") to initiate two studies of the requirements of § 9-1A-10 "that evaluate the continued compliance of the requirement with any federal and constitutional requirements." Section 4 also required that the study evaluate race neutral programs or other methods that can be used to address the needs of minority businesses.

The General Assembly enacted Chapter 507 (Senate Bill 638 of 2011), which extended the sunset date on SG § 9-1A-10(a)(1) and (2) and (b) to July 1, 2018. During the 2011 session, the General Assembly also enacted a one-year extension of the statewide MBE program. Chapters 252 and 253 (House Bill 456 and Senate Bill 120, respectively). These identical bills were based on the evidence of discrimination in the study by NERA entitled "'The State Minority- and Women-Owned Business Enterprise: Evidence from Maryland,' published on February 17, 2011 ["State study"] and other evidence generally available to the General Assembly." Section 2 of Chapters 252 and 253. Chapters 252 and 253 were form approved by the Office of the Attorney General. The bill review letter on Chapter 507 notes that the law had not changed since the bill review letter on Chapter 4 of the Special Session of 2007, and that "[i]t is our understanding that no study has been performed nor is there anything in the bill file to support the need for the program or for the goals that have been adopted requiring

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compliance with State and local plans.” As a result, the bill review letter concluded that the bill “should not be implemented unless and until a study validates the need for such a remedy and a program narrowly tailored to reflect the results of that study is enacted.”

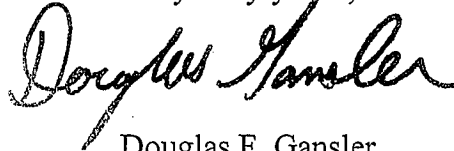
Since the bill review letter was written, MDOT has turned its attention to the requirement of Section 4 of Chapter 4. In a report dated August 5, 2011, Jon Wainwright, Ph.D., Vice President of NERA, stated that he has reviewed the construction work and procurement for the operation of VLT facilities that are now in operation and has determined that over 99% of the work performed fits within NAICS codes included in the State study. As a result, the findings of “large, adverse, and statistically significant” race- and gender-based disparities in both public and private contracting in the markets in which the State procures goods and services in that study also apply to the construction and operation of VLT facilities. The State study makes clear that there is a “strong basis in evidence ... that would support race- and gender-based programs to correct for discrimination” in the very markets in which video lottery awardees operate. Moreover, the study contains voluminous qualitative or “anecdotal” evidence of discrimination against minority- and women- owned businesses in both the public and private sector. The State study also presents both quantitative and qualitative evidence to suggest that disparities are even greater for minority- and women-owned businesses seeking to obtain contracts as prime contractors. Finally, the report contains an extensive discussion of the various race-neutral programs that the State has employed to assist minority and women business owners in overcoming discrimination. Notwithstanding these efforts, there remains strong evidence of race and gender discrimination in both public and private contracting, including the sectors involved in the construction and operation of VLT facilities. As a result, Dr. Wainwright’s report makes clear that the State study supports the implementation of the MBE provisions of SG § 9-1A-10(a) with respect to the RFPs.

To implement this program, the Lottery Commission should set separate goals for each VLT facility and, where appropriate, for separate contracts of significant duration, scope and size entered into by awardees and licensees. These goals should be based on the work proposed by a successful applicant and the availability of MBEs to perform that work, as is done for State contracts. Waivers must be available for instances in which the applicant or licensee is unable to meet the goals after making good faith efforts. SF § 14-302(a)(6). It will be necessary for the Location Commission to amend the RFPs to accurately reflect this method of implementation. If this process is followed, the State can constitutionally implement the MBE program created by SG § 9-1A-10.

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Therefore, we advise you to forward the Wainwright letter, the letter from Secretary Swaim-Staley, and this letter to the Location and Lottery Commissions with instructions for them to take the necessary actions to ensure constitutional compliance with the MBE provisions of the VLT Law.

Very truly yours,

A handwritten signature in cursive script that reads "Douglas F. Gansler". The signature is written in black ink and is positioned above the typed name.

Douglas F. Gansler
Attorney General

cc: Mr. Donald Fry
Mr. Kirby Fowler
Mr. Steven Martino
Ms. Luwanda Jenkins