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CIRCUIT COURT FOR
BALTIMORE CITY

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CIVIL DIVISION

IN THE MATTER OF THE
PETITION OF HARBORWEST
PARTNERS, LLC
FOR JUDICIAL REVIEW OF THE
DECISION OF THE
MARYLAND STATE BOARD OF
CONTRACT APPEALS

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY

MSBCA Docket No. 2820

* Case No. 24-C-12-006221/AA

* * * * *

RESPONDENT'S PRELIMINARY MOTION TO DISMISS
THE PETITION FOR JUDICIAL REVIEW

The Maryland Video Lottery Facility Location Commission ("Location Commission"), by its undersigned counsel, pursuant to Maryland Rule 7-204(b), submits this Preliminary Motion to Dismiss the Petition for Judicial Review filed by HarborWest Partners, LLC ("HarborWest").

INTRODUCTION

This appeal arises from the Location Commission's decision to award CBAC Gaming, LLC ("CBAC") a license to operate a video lottery terminal ("VLT") facility in Baltimore City. Although HarborWest did not submit a proposal for the Baltimore City video lottery operation license (the "License"), it nevertheless appealed the Location Commission's award to the Maryland State Board of Contract Appeals ("MSBCA" or "Board"). The Location Commission moved to dismiss HarborWest's appeal for lack of standing. HarborWest failed to respond to the Location Commission's motion. The MSBCA dismissed HarborWest's appeal with prejudice on the grounds that HarborWest lacked standing to appeal to the MSBCA. This Petition for Judicial Review followed.

FACTUAL SUMMARY

1. On April 29, 2011, the Location Commission issued the RFP for the award of a license to operate a VLT facility in Baltimore City. <http://cdn.mdlottery.com.s3.amazonaws.com/Slots/Video%20Lottery%20License%20In%20Baltimore%20City%20RFP.pdf>.
2. On September 23, 2011, CBAC and RMD Holdings, LLC/Century Casinos, Inc. submitted proposals in response to the RFP. *See* Register of Proposals, attached as Exhibit 1, downloaded from <http://slots.mdlottery.com/wp-content/uploads/2010/09/Baltimore-City-Register-of-Proposals-9-23-11.pdf>.
3. HarborWest did not submit a proposal in response to the RFP. *See* Notice of Appeal at 3, 4, attached as Exhibit 2.
4. On September 28, 2011, the Location Commission rejected the proposal filed by applicant RMD Holdings, LLC/Century Casinos, Inc. due to that applicant's failure to submit an Initial License Fee of \$22,500,000. *See* October 6, 2011 letter from Location Commission Chairman Donald C. Fry to Baltimore City Casino, LLC, attached as Exhibit 3. *See also* <http://thedailyrecord.com/2011/09/28/slots-panel-rejects-two-gaming-license-bids>.
5. On June 22, 2012, nearly nine months after proposals were due, counsel for HarborWest sent a letter to the Location Commission "to make clear that HarborWest reserves the right to file an appeal or take any other action appropriate legal action [sic] regarding the terms and conditions of any license grant, and underlying terms thereto, should they deviate in any material way from the terms set forth in RFP 2012-0101." *See* June 22, 2012 letter, attached as Exhibit 4.
6. On July 31, 2012, the Location Commission awarded the License to CBAC.
7. Ten days later, on August 10, 2012, HarborWest filed a notice of appeal with the MSBCA arguing that the RFP contained unnecessarily restrictive terms.
8. On August 22, 2012, the Location Commission filed a Motion to Dismiss Appeal. Attached as Exhibit 5.
9. On August 27, 2012, CBAC joined in the Location Commission's Motion to Dismiss Appeal. Attached as Exhibit 6.

10. HarborWest filed no response to the Location Commission's Motion to Dismiss.
11. On September 20, 2012 the MSBCA entered an Order of Dismissal of HarborWest's appeal, with prejudice, based on HarborWest's lack of standing. Order of Dismissal is attached as Exhibit 7.
12. In its Order of Dismissal of HarborWest's appeal, the MSBCA stated, *inter alia*, that:
 - a. MSBCA is authorized under "COMAR 21.10.05.06(C) to dismiss an initial pleading that fails to state a claim upon which relief may be granted";
 - b. HarborWest "failed to file an answer to the Location Commission's motion [to dismiss] as required by COMAR 21.10.05.06B(4)(a)";
 - c. "The Court of Appeals. . . [has] emphasized that Subtitle 1A of Title 9 of the State Government Article is '*exclusive in its effect.*' *Laurel Racing Assoc., Inc. v. Video Lottery Facility Location Commission*, et al., 409 Md. 445, 459 (2009) (citing to Md. Code Ann., State Gov't § 9-1A-02(a), emphasis in original)";
 - d. "HarborWest, having failed to file a proposal in response to the subject Request for Proposals ("RFP"), cannot be deemed to be an 'unsuccessful applicant for a video lottery operation license' and therefore does not have the right to review by the Board under Md. Code Ann., State Gov't § 9-1A-36(p)"; and
 - e. "HarborWest, having failed to file a proposal in response to the subject RFP, cannot be considered to be an 'interested party' under the Board's procedural regulations and therefore lacks standing to pursue this appeal."
13. HarborWest filed this Petition for Judicial Review on October 22, 2012, and this Court's Notice to Administrative Agency was issued October 25, 2012.
14. On October 31, 2012, the Certificate of Compliance was filed.

ARGUMENT

Any person who is entitled by law to be a party and who wishes to participate as a party in a petition for judicial review shall file a response to the petition, stating the intent

to participate. Md. Rule 7-204(a). On November 20, 2012, the Location Commission filed the proper response under Rule 7-204(a).

In addition to the response to a petition, a “person may file with the response a preliminary motion addressed to standing. . . or any other matter that would defeat a petitioner’s right to judicial review.” Md. Rule 7-204(b).

It is undisputed that HarborWest did not become an applicant for the License. Under Subtitle 1A of Title 9 of the State Government Article (the “VLT Law”), only an unsuccessful applicant may appeal the award of the License. HarborWest was therefore not permitted to appeal the award of the License to CBAC. Moreover, under the Board’s procedural regulations, because HarborWest did not file a proposal in response to the RFP, HarborWest could not have been considered to be an interested party, and therefore lacked standing to pursue its appeal to the Board.

HarborWest was never an unsuccessful applicant for the Baltimore City License and it lacked standing to appeal the Location Commission’s award. These defects defeat HarborWest’s legal entitlement to pursue judicial review of the Location Commission’s decision in this Court. Accordingly, the petition must be dismissed as a matter of law.

1. HarborWest is not an “Unsuccessful Applicant.”

HarborWest’s Petition for Judicial Review must be dismissed because HarborWest is not an “unsuccessful applicant for a video lottery operation license” and had no right to review by the MSBCA and, therefore, also has no right to review by this Court. Section 9-1A-36(p) of Md. Code Ann., State Gov’t (“SG”) expressly provides:

An unsuccessful applicant for a video lottery operation license under this section may seek, under Title 15 of the State Finance and Procurement Article, review by the State Board of Contract Appeals of the awarding of the video

lottery operation license by the Video Lottery Facility
Location Commission.

(emphasis added).¹

The term “applicant” is defined in the VLT Law as “a person who applies for any license required under this subtitle.” SG § 9-1A-01(b). To be considered an “unsuccessful applicant” under SG § 9-1A-36(p), one must first be an “applicant” under § 9-1A-01(b). By its own admission, HarborWest does not meet this definition.²

As restricted by SG § 9-1A-36(p), only a person who has applied unsuccessfully for a video lottery operation license has the right to seek review by the MSBCA. The Court of Appeals has explained that the special statutory remedy set forth in SG § 9-1A-36(p) “is the only remedy set forth in the Video Lottery Terminals subtitle...for an unsuccessful applicant.” *Laurel Racing Ass’n v. Video Lottery Facility Location Comm’n, et al.*, 409 Md. 445, 459 (2009). Furthermore, the Court of Appeals has emphasized that “the General Assembly stated, without qualification, that ‘[the VLT Law] is...*exclusive in its effect.*’” *Id.* (citing to Md. Code Ann., State Gov’t § 9-1A-02(a)), emphasis in original).

The General Assembly did not grant anyone but an unsuccessful *applicant* a remedy to appeal a decision of the Location Commission. Because only “unsuccessful *applicants*” have the right to file an appeal with the Board and HarborWest is not one, HarborWest’s Petition for Judicial Review must be dismissed.

¹ SG § 9-1A-36(p) has been redesignated as SG § 9-1A-36(q) as the result of Section 1, ch. 1, 2012 2d Special Session, effective October 1, 2012.

² The General Assembly clarified this particular paragraph in 2010 when it substituted the word “applicant” for “bidder” here, necessarily incorporating into this paragraph the definition of “applicant” found in §9-1A-01(b). Chap 624, Acts 2010.

2. HarborWest lacks standing to appeal the Location Commission's award of the Baltimore VLT operation license.

Although the award of a VLT facility operation license does not qualify as a procurement, the MSBCA is directed by legislative mandate to ensure that this unique process take place in a fashion that is fair to all interested parties and *consistent* with the normal procurement process, 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. *Baltimore City Entertainment Group, LP*, MSBCA 2690 (2009), p. 37, http://www.msbc.state.md.us/decisions/2009/pdf/baltimore_ent_group2690.pdf (emphasis in original); see SG § 9-1A-36(f).

Thus, to the extent permissible within the VLT Law and common sense, the rules that the MSBCA applies in ordinary procurement cases may be utilized here. Under those procurement regulations, HarborWest's appeal must be dismissed because it lacks standing.

It is well-settled that only an "interested party" may file a protest against the award of a contract. COMAR 21.10.02.02A. An interested party is defined as "any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract." COMAR 21.10.02.01B(1).

In contrast to ordinary procurement law, the VLT Law does not allow for the filing of protest prior to the award of a facility operation license. As the Court of Appeals noted in *Laurel Racing*, "it is quite reasonable for the Legislature to provide that the Location Commission's award of a license should be the triggering event authorizing an appeal to the Board of Contract Appeals by an unsuccessful applicant." *Laurel Racing*, 409 Md. at 469. To the extent that the ordinary regulatory definition of an "interested

party” includes a “prospective bidder, offeror, or contractor” and, to the extent that this ordinary definition would authorize a non-applicant to submit an appeal from a video lottery operation license award, those concepts cannot be made to apply within the context of SG § 9-1A-36(p). As the Court of Special Appeals has held, statutory provisions trump a regulation, and a procurement regulation may not be adopted that would be inconsistent with the procurement statute or the legislative intent behind it. *Salisbury University v. Joseph M. Zimmer, Inc.*, 199 Md.App. 163, 173 (2011), citing *Univ. of Md. v. MFE*, 345 Md. 86, 104 (1997).

Under the MSBCA’s procedural regulations for ordinary procurement, a “prospective bidder, offeror, or contractor” may file a protest before the due date for the submission of responses to a solicitation. *See* COMAR 10.02.03. In marked contrast, under the VLT Law no appeal is permitted until after the license award is made and, by then, the only “prospective” licensee is an entity that *actually submitted* a license proposal. Therefore, under the unique situation of a video lottery operation license award, the General Assembly has limited the entities who may appeal the license award to those entities who *actually applied* for the operation license -- i.e., to “unsuccessful applicants” under the statute.

This concept is consistent with recent decisions of the MSBCA in procurement cases after a contract award has been made. The MSBCA has held that an appellant’s failure to respond to a solicitation excludes it as a bidder, and the appellant therefore lacks standing to file a protest. *See Micrographic Equip. Design, Inc.*, MSBCA 2456, 6 MSBCA ¶558 (2005) <http://www.msbc.state.md.us/decisions/2005/pdf/2456micro.pdf>

(dismissing appeal with prejudice and holding, *inter alia*, that appellant lacked standing to file the protest because it failed to respond to the solicitation).

Where an appellant never submitted a bid, it cannot be an “interested party” as defined by COMAR 21.10.02.01B(1) and, as a result, that appellant does not have standing to appeal to the Board. See *DESCO Assocs.*, MSBCA 2680 (2010). http://www.msbc.state.md.us/decisions/2009/pdf/desco_2680.pdf. As the MSBCA has explained, “[o]nly actual or prospective contractors to the State have standing before the Board because they are the only proper parties with potential privity of contract with the State in the event of contract award.” *U.K. Construction & Mgmt., LLC*, MSBCA 2773 (2011), http://www.msbc.state.md.us/decisions/2011/pdf/uk_construction2773.pdf.

Here, it is undisputed that HarborWest did not submit a proposal in response to the RFP. See the attached Register of Proposals (Exhibit 1) and HarborWest’s Notice of Appeal (Exhibit 2) (noting various factors in HarborWest’s “decision not to bid”).

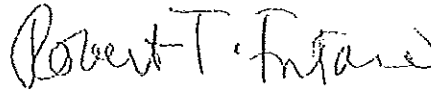
Consequently, HarborWest simply does not qualify as an “interested party” under COMAR 21.10.02.01B(1). Under the well-established precedent of the MSBCA, a non-applicant such as HarborWest has no standing to protest an award. Because HarborWest lacks standing, dismissal of HarborWest’s Petition for Judicial Review is required.

CONCLUSION

For the foregoing reasons, the Maryland Video Lottery Facility Location Commission respectfully requests that this Court dismiss the Petition for Judicial Review of HarborWest. A proposed order is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

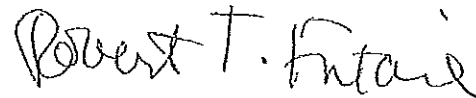
I HEREBY CERTIFY that on this 20th day of November, 2012, a copy of the foregoing Preliminary Motion to Dismiss HarborWest's Petition for Judicial Review was mailed, postage prepaid, to:

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Certificate of Points and Authorities

Maryland Rules 7-204(b) and 7-207

Courts and Judicial Proceedings Article, § 12-309(b)

State Government Article, §§ 9-1A-01(b), 9-1A-02(a), 9-1A-36(f), (p) and (q),

COMAR 10.02.03, 21.10.02.01B(1), 21.10.02.02A

Board of Education for Dorchester County v. Hubbard, 305 Md. 774 (1986)

County Council of Prince George's County v. Billings, 420 Md. 84 (2010)

Laurel Racing Ass'n v. Video Lottery Facility Location Comm'n, et al., 409 Md. 445 (2009)

Salisbury University v. Joseph M. Zimmer, Inc., 199 Md.App. 163 (2011)

Sec., Dep't of Human Res. v. Wilson, 286 Md. 639 (1979)

Univ. of Md. v. MFE, 345 Md. 86, 104 (1997)

Baltimore City Entertainment Group, LP, MSBCA 2690 (2009),
http://www.msbc.state.md.us/decisions/2009/pdf/baltimore_ent_group2690.pdf

DESCO Assocs., MSBCA 2680 (2010),
http://www.msbc.state.md.us/decisions/2009/pdf/desco_2680.pdf

Micrographic Equip. Design, Inc., MSBCA 2456, 6 MSBCA ¶558 (2005),
<http://www.msbc.state.md.us/decisions/2005/pdf/2456micro.pdf>

U.K. Construction & Mgmt., LLC, MSBCA 2773 (2011),
http://www.msbc.state.md.us/decisions/2011/pdf/uk_construction2773.pdf

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* * * * *

ORDER

Upon consideration of the Maryland Video Lottery Facility Location Commission's Preliminary Motion to Dismiss the Petition for Judicial Review filed by HarborWest Partners, LLC, any opposition filed thereto, and any argument held thereon, it is hereby ORDERED that the Preliminary Motion to Dismiss of the Maryland Video Lottery Facility Location Commission is GRANTED, and the Petition for Judicial Review of HarborWest is and shall be DISMISSED.

It is so ORDERED this ____ day of _____, 2012.

BY THE COURT,

JUDGE