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September 16, 2011

***By First-Class Mail
and Email: rhowells@msla.state.md.us***
Video Lottery Facility Location Commission
c/o Maryland State Lottery Agency
ATTN: Robert W. Howells
Montgomery Park Business Center
1800 Washington Boulevard - Suite 330
Baltimore, Maryland 21230

Re: Notice of Intent to File Appeal
RFP #2012-0101

Dear Mr. Howells:

BCEG takes exception to the following terms and conditions of RFP #2012-0101. Pursuant to the decision in *Benton & Associates*, MSBCA 2196 & 2201, BCEG is electing to not file a proposal in response to RFP 2012-0101 at this time. Pursuant to VLT Law § 9-1A-36 and the Court of Appeals' decision in *Laurel Racing*, BCEG reserves the right to file an appeal regarding these exceptions when the Location Commission has made its final award decision with respect to RFP #2012-0101.

1. In the original RFP, § 4.3.6.3 provides that submission of a proposal by BCEG would be a waiver of BCEG's rights with regard to the litigation noted in RFP §§ 4.3.6.1 and 4.3.6.2. Section 4.3.6.3 unfairly discriminates against BCEG. The VLT Law gives BCEG the right to pursue its appeal of the 2009 decision, and BCEG has a right to pursue its other litigation. Under the clear and unambiguous terms of RFP § 4.3.6.3, however, BCEG would not have been free to pursue its statutory appellate rights in connection with RFP #2009-0101, and also respond to RFP 2012-0101. The VLT Law and Procurement Law do not authorize the Location Commission to restrict BCEG's appellate rights in that manner. On May 27, 2011, the Court of Special Appeals issued a reported decision in *Salisbury University v. Joseph M. Zimmer, Inc.*, No. 462, in which it

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struck down administrative regulations issued by the Board of Public Works, which restricted the right to file a protest, on the ground that "[t]he statutory provisions trump the regulation." Thus, RFP §4.3.6.3 is *ultra vires*, unnecessarily restrictive, and not reasonably calculated to meet the State's minimum needs. RFP Addendum #3, issued on August 19, 2011, deleted the original version of § 4.3.6.3. By that date, however, other prospective applicants had had almost four months to prepare proposals and negotiate a supplement to the Memorandum of Understanding with the City of Baltimore pursuant to RFP § 4.2.3.3, while BCEG was effectively precluded from bidding, and therefore had no reason to prepare a proposal.

2. RFP #2012-0101, § 2.10.1.3 and § 2.30 restrict the right to file an appeal to the Maryland State Board of Contract Appeals, in a manner that is not authorized by the VLT Law or the Procurement Law. The VLT Law, §9-1A-36(o), grants unsuccessful bidders the right to file appeals to the Board of Contract Appeals. The VLT Law does not require litigation/protest bonds or forfeiture of initial license fees as a condition of such appeals, and does not authorize the Location Commission to impose such restrictions. *See Salisbury University v. Joseph M. Zimmer, Inc.*, No. 462 (Md. App., May 27, 2011). If the General Assembly had wanted to legislate such restrictions, it could have done so, but the Location Commission does not have discretion to do so. Thus, RFP §§ 2.10.1.3 and 2.30 are *ultra vires*, unnecessarily restrictive, and not reasonably calculated to meet the State's minimum needs.

3. RFP §4.2.3 effectively imposes a requirement that bidders must apply for the maximum allotment of 3,750 VLTs. The VLT law does not require bidders for the Baltimore City operation license to request the maximum allotment of 3,750 VLTs. Moreover, it was established in the BCEG appeal that the Location Commission has done no research or market analysis regarding the optimum number of VLTs in Baltimore to support that requirement. BCEG has performed such a market analysis. With the completion schedule for the Arundel Mills facility now well ahead of the Baltimore City location, the maximum allotment of 3,750 is more than can be supported by the market. Increasing the number of VLTs beyond the number that can be supported by the market will increase capital and operating expenses, without increasing revenues. Thus, the requirement that bidders seek the maximum allotment of 3,750 VLTs is *ultra vires*, unnecessarily restrictive, and not reasonably calculated to meet the State's minimum needs.

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4. RFP § 5.4 provides:

"When it is deemed in the best interest of the State, the Location Commission may permit a qualified Applicant to submit a revised Proposal that reflects discussions and negotiations. As a result of discussions and negotiations, in the sole discretion of the Location Commission, a revised Proposal deemed in the best interest of the State may be requested of the Applicant."

That procedure for unilateral discussions and revised proposals violates Md. Code Ann., State Fin. & Proc. § 13-104 and COMAR § 21.05.03.03, which require that discussions and requests for revised proposals must include all qualified applicants.

Sincerely,



John F. Dougherty

JFD/to

cc: Baltimore City Entertainment Group, LP