A Report to the Maryland General Assembly

Video Lottery Terminals – Minority Business Participation Goals – Enforcement and Reporting

SB 421/Ch. 281, 2019 and HB 685/Ch. 280, 2019

The Maryland Department of Transportation

MSAR# 12096

February 2020

NERA Economic Consulting

December 2, 2019

Mr. R. Earl Lewis, Jr.
Deputy Secretary
Maryland Department of Transportation
7201 Corporate Center Drive
Hanover, MD 21076

Dear Deputy Secretary Lewis:

This letter responds to your question regarding whether NERA's disparity study, entitled *The Business Disparities in the Maryland Market Area*, issued February 8, 2017 ("the 2017 Disparity Study"), also applies to the type of work being performed by the licensees in Maryland's Video Lottery Terminal ("VLT") program. As is explained in more detail below, our analysis finds that the 2017 study does provide a strong basis in evidence for the application of the Maryland Minority Business Enterprise ("MBE") Program to the types of work involved in Maryland's VLT Program.

I. Background

The 2017 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 IX of the Study, entitled "Suggested Best Practices for Race- and Gender-Conscious Contracting Programs," (p. 322), we wrote:

> Maryland has a strong basis in evidence to implement a race- and gender-based program for contracting and procurement based upon the findings in this Study. 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 in those factors necessary for business success. Further, the anecdotal evidence provides vivid individual accounts of the discriminatory barriers, both overt and covert, to their full and fair participation in both State and private sector procurement and contracting expenditures. The statistical and anecdotal evidence

> presented in this Study is strong evidence that establishes Maryland's compelling interest in remedying race and gender discrimination. The evidence supports the conclusion that affirmative intervention is still needed to dismantle the exclusion of racial and gender groups from the private sector market. Maryland will likely be a passive participant in a discriminatory marketplace if it fails to continue to address the issue. Moreover, as found in Chapter VI, there remain large and statistically significant disparities between the availability of M/WBEs and their utilization on State contracts despite the State's aggressive current efforts. These results support the need for continued remedial action.

NERA submitted the study to the Maryland Department of Transportation (MDOT) which then provided the study to the Maryland General Assembly and posted it on MDOT's website.

II. Methods for the Current Inquiry

The State provided NERA with data files describing line item contract, subcontract, and purchasing expenditures related to VLT facility operations and construction for each of the six VLT licensees: Hollywood Casino Perryville (Cecil County), Casino at Ocean Downs (Worcester County), Live! Casino & Hotel (Anne Arundel County), Rocky Gap Casino Resort (Allegany County), Horseshoe Casino Baltimore (Baltimore City), and MGM National Harbor (Prince George's County). This expenditure data, collectively, spanned the time period from 2013-2017. [1]

NERA was asked to assign North American Industry Classification System (NAICS) codes to the various expenditures for each casino and to determine the extent to which these industry codes were also captured in the State's 2017 Disparity Study, in order to establish whether that Study provides an evidentiary basis for the State's VLT Program.

For each casino's data files, the general approach we took was as follows:

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[1] Exceptions were for Rocky Gap, which covered 2015-2016, and for Horseshoe, which covered 2013-2016.

1. Delete line item records that were flagged by the State as "exempt" or "excluded" from consideration for purposes of the MBE Program.[2]

2. Consolidate line item dollar amounts records according to business name.

3. To facilitate data processing and reduce costs, delete records with less than $10,000 expended.[3]

4. Assign six-digit NAICS codes to the remaining records.[4]

5. Delete records for additional exempt payments not initially flagged by the State.

The final file contains 2,339 records across the six casinos and 359 distinct six-digit NAICS codes, with total expenditures of almost $2.369 billion.

We then compared the 359 six-digit NAICS codes in our final file to a list of six-digit NAICS codes contained in the 2017 Disparity Study.

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[2] Exempt expenditures include: (1) payments to federal, state or local governments; (2) payments to professional sports teams for sponsorships or membership fees; (3) payments to public utilities for groundwater, water, sewage, electricity, telephone, and natural gas; (4) payments for employee wages, benefits, and expense reimbursement; (5) payments for professional association fees; (6) payments for banking services (loan fees, principal and interest); (7) individual engagement fees for professional sports figures, musicians, bands, and all types of artists of any medium; (8) donations to charities and nonprofits; (9) political contributions; (10) payments for legal settlements, claims and judgments; (11) construction contingency funds; (12) payments for purchases and leases of real estate; and (13) brand licensing fees.

[3] For the Hollywood casino, this step eliminated 53% of the records but only 1.9% of the expenditures. For the Ocean casino, this step eliminated 65% of the records but only 2.5% of the expenditures. For the Live! casino, this step eliminated 48% of the records but only 0.5% of the expenditures. For the Rocky Gap casino, this step eliminated 71% of the records but only 1.4% of the expenditures. For the Horseshoe casino, this step eliminated 38% of the records but only 1.1% of the expenditures. For the MGM casino, this step eliminated 45% of the records but only 0.1% of the expenditures.

[4] Most NAICS assignments were made by searching for the business name in some combination of Dun & Bradstreet, Google, the Maryland Lottery Approved Vendor List, and the Maryland Lottery Prohibited Vendor List. In some cases, NAICS assignments were made based on expenditure descriptions in the underlying files.

III. Findings

The results of this comparison at the six-digit NAICS level are as follows:

- For the Hollywood Casino Perryville (Cecil County), of 111 distinct six-digit NAICS codes, 108, or 97.3 percent, were also included in the 2017 Disparity Study. Of $36.03 million in expenditures for Hollywood, 99.9 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the Casino at Ocean Downs (Worcester County), of 120 distinct six-digit NAICS codes, 107, or 89.2 percent, were also included in the 2017 Disparity Study. Of $45.59 million in expenditures for Ocean, 77.7 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the Live! Casino & Hotel (Anne Arundel County), of 217 distinct six-digit NAICS codes, 194, or 89.4 percent, were also included in the 2017 Disparity Study. Of $364.03 million in expenditures for Live!, 98.7 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the Rocky Gap Casino Resort (Allegany County), of 109 distinct six-digit NAICS codes, 102, or 93.6 percent, were also included in the 2017 Disparity Study. Of $21.4 million in expenditures for Rocky Gap, 95.5 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the Horseshoe Casino Baltimore (Baltimore City), of 185 distinct six-digit NAICS codes, 175, or 94.6 percent, were also included in the 2017 Disparity Study. Of $732.78 million in expenditures for Horseshoe, 96.2 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the MGM National Harbor (Prince George's County), of 177 distinct six-digit NAICS codes, 162, or 91.5 percent, were also included in the 2017 Disparity Study. Of $1.169 billion in expenditures for MGM, 99.7 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

For all six casinos combined, of 359 distinct six-digit NAICS codes, 314, or 87.5 percent, were also included in the 2017 Disparity Study. Of $2.369 billion in expenditures for all six casinos, 98.0 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

Some six-digit NAICS codes are similar in activities or products. As such, some businesses may sometimes be classified under multiple or incorrect, although similar, codes. For this reason, it may also be helpful to examine the overlap in industry coverage between the VLT licensees and the 2017 Disparity Study at the four-digit NAICS level as well as the six-digit level.

The results of the comparison at the four-digit NAICS level are as follows:

- For the Hollywood Casino Perryville (Cecil County), of 72 distinct six-digit NAICS codes, 72, or 100.0 percent, were also included in the 2017 Disparity Study. Of $36.03 million in expenditures for Hollywood, 100.0 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the Casino at Ocean Downs (Worcester County), of 84 distinct six-digit NAICS codes, 79, or 94.1 percent, were also included in the 2017 Disparity Study. Of $45.59 million in expenditures for Ocean, 99.2 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the Live! Casino & Hotel (Anne Arundel County), of 118 distinct six-digit NAICS codes, 110, or 93.2 percent, were also included in the 2017 Disparity Study. Of $364.03 million in expenditures for Live!, 99.4 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the Rocky Gap Casino Resort (Allegany County), of 77 distinct six-digit NAICS codes, 74, or 96.1 percent, were also included in the 2017 Disparity Study. Of $21.4 million in expenditures for Rocky Gap, 99.4 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the Horseshoe Casino Baltimore (Baltimore City), of 112 distinct six-digit NAICS codes, 108, or 96.4 percent, were also included in the 2017 Disparity Study. Of $732.78 million in expenditures for Horseshoe, 99.8 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

- For the MGM National Harbor (Prince George’s County), of 102 distinct six-digit NAICS codes, 98, or 96.1 percent, were also included in the 2017 Disparity Study. Of $1.169 billion in expenditures for MGM, 99.9 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

For all six casinos combined, of 176 distinct six-digit NAICS codes, 160, or 90.9 percent, were also included in the 2017 Disparity Study. Of $2.369 billion in expenditures for all six casinos, 99.8 percent occurred in NAICS codes that also appeared in the 2017 Disparity Study.

IV. Conclusions

The 2017 Disparity Study provides a strong basis in evidence that supports 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 expending funds for operations and construction. Moreover, the report details a range of race- and gender-neutral activities that the State has already undertaken to address existing disparities. The 2017 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 licensees are currently operating. These disparities are for the most part large, adverse and statistically significant. In addition, the 2017 Disparity Study 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. Such programs tend to reduce, though they have 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 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 hold a doctorate in economics and I am well qualified to review the economic and statistical data presented to me and to opine on its significance. I recently retired as a Managing Director for NERA, the chair of its national affirmative action consulting practice, a member of its labor and employment practice, and the head of its Austin, Texas office. I have conducted numerous disparity and availability studies in my career as well as many 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, Texas, and Wyoming, in

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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 2017 Disparity Study, it is important 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

Jon Wainwright
Managing Director (Retired)
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