

Pennsylvania Gaming

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The Pennsylvania Gaming Act: The World of Procurement

The Pennsylvania Race Horse Development and Gaming Act (“Gaming Act”) has been enacted to legalize and regulate an expanded gaming industry in Pennsylvania. The expected goals of the statute are characteristically broad, and they include the enhancement of horseracing and horse breeding programs in Pennsylvania, the promotion of tourism and entertainment for the consuming public, the improvement of working conditions and wages of employees who support the entertainment, hotel and horseracing industries, and, importantly, the introduction of regulated slot machines, manufacturers, distributors, and licensees to the Commonwealth. All of these goals will be achieved against a backdrop of tightly disciplined anti-corruption controls, which are to be administered by the State Horseracing Commission and by the newly created Pennsylvania Gaming Control Board and other law enforcement bodies.

CENTRAL CONTROL COMPUTER PROCUREMENT

Business opportunities created by the advancement of this industry are being seriously studied by a variety of interests. It is fully anticipated that business entrepreneurs will seize upon the real estate and promotional opportunities that growth will engender in every region of the Commonwealth and in every sector of business which these industries will touch. Standing at the very center of the heavily regulated gaming industry is the Commonwealth’s technology procurement of systems critical to the integrity of efficient slot machine gaming in

Pennsylvania. Section 1323 of the Gaming Act provides that the Pennsylvania Department of Revenue shall have overall control of slot machines and that all slot machine terminals shall be linked to a Central Control Computer System. Consistent with the concept of checks and balances that distributes power among state officials and oversight of the gaming industry, the Gaming Act provides that the Central Control Computer System shall:

1. Be under the control of the Department of Revenue, and
2. Be accessible by the Gaming Control Board to provide auditing program capacity and individual terminal information.

To enhance policing and regulatory controls, the Legislature prescribed that the Central Control Computer System shall include real-time information retrieval and terminal activation and disabling programs. Beyond these ambitious regulatory demands, the Legislature specified what the Central Control Computer System was going to look like. The system must:

1. Be capable of supporting the maximum number of slot machines permitted by law,
2. Create a gaming industry protocol to maximize communications between State regulators and licensees,
3. Support in-house and wide area progressive slot machines,

4. Provide for “independent player tracking systems” and “cashless technology,”
5. Prevent technologies and software which permit the alteration of statistical awards of slot machine games,
6. Provide a design for “network redundancies.”
This will enable the Department of Revenue to operate the system independently in the event of network failure and a will guard the integrity of all transactional data during downtime, and
7. Report and control according to the regulations of both the Gaming Board and the Department of Revenue.

Even though it has stated legislative goals in clear and unmistakable terms, the Gaming Act has nevertheless left the industry much to consider. As a practical matter, the Department, the Gaming Board and the Horseracing Commission will be drafting and issuing these regulations for the foreseeable future that will add flesh to the skeleton of the massive industry that is about to take life.

WHEN AND HOW TO MAKE A LEGAL PROTEST

As a legal matter, the Gaming Act has taken a bold step to address the procurement of the Central Control Computer System only in the broadest of terms. This step has unpredictable consequences because the Department of Revenue has been directed to enter this world of technology procurement without the conventional guidelines that are provided for in the procurement statutes. Foremost, Section 1323(c) of the Gaming Act provides that the initial contracts entered into by the Department of Revenue for the procurement of a Central Control Computer System shall **not** be subject to the Commonwealth Procurement Code. This mandated exemption from the provisions of the Procurement Code shall exist for a five-year period, and it exempts from the Code’s coverage the Department’s procurement of any necessary computer hardware, software, licenses or related services.

This legislative policy of exemption should be approached cautiously by those vendors who deal with the Department because there is no clarity as to its meaning, and past procurement models will not be mandated by law to govern current procurement practices. First, those provisions of public procurement practice and law that have been codified by statute are not applicable to contracts with the Department for central computer purchases for a period of at least five years. What will be applicable? The Department will likely give substance to its vision of “good procurement practices” in a policy statement. The comprehensive nature and clarity of that policy will determine how easy it will be to do business with the Department.

Second, there **will** be vendors who will be “disappointed” or “aggrieved” by determinations made by the Department. The Gaming Law has granted only the following **limited** appeal rights by a disappointed vendor from a procurement decision or award by the Department. The Gaming Act provides that a vendor will have a right of protest to the Secretary of Revenue from the Department’s decision on who will be the successful awardee of a state contract. This protest right is available under the only part of the Commonwealth Procurement Code that was expressly incorporated into the Gaming Act (the so-called “pre-litigation resolution of controversy” section of the Procurement Code). This remedy extends to the vendor the right to file its protest within seven (7) days after the aggrieved vendor “knew or should have known” of the facts which gave rise to the protest. The protest itself must not only be timely, but it must also be theoretically well-grounded and supported by documentation that will show, on its face, what kind of error was committed by the Department in its procurement decision. This is not an easy task, as the “discovery” of critical documents regarding the Department’s decision will be difficult. As to the timeliness of the protest, the protest must be filed, at the latest, within seven (7) days following the contract award to another successful vendor.

A timely filed protest of a disappointed vendor must be evaluated by the Secretary of Revenue, and the Secretary is obligated to dispose of the protest by a “determination.” The determination of the Secretary must be issued within 60 days of the receipt of the protest. A judicial review of the Secretary’s adverse determination is the vendor’s final remedy.

Appellate judicial review of the Secretary’s determination is narrow and limited solely to the record of the protest which is certified by the Department. [This underscores the importance of the detailed and fully documented nature of the originally filed protest with the Department.] The appeal is to be filed with the Commonwealth Court. Under the law, the Court is required to affirm the determination of the Secretary unless it finds from the record that the Secretary’s determination was arbitrary and capricious or was an abuse of discretion or contrary to law. When the protestant is successful on appeal, the Commonwealth Court may grant a single remedy, that is, the cancellation of the Department’s solicitation or award and the declaring of any resulting contract to be void. A protesting vendor should not expect the remedy of damages that it sustained in the process. The single greatest value of a successful appeal is that it grants to the protesting vendor a new and level playing field for renewed competitive bidding. For a confident competitive bidder, while that may be all that is granted, that may be enough. Squarely facing the competition is a victory.

In a related legal matter, the Gaming Act did **not** provide expressly for the resolution of contract controversies between the Department and the successful vendor before the Pennsylvania Board of Claims. The Pennsylvania Board of Claims ordinarily provides judicial review for breach of contract controversies between the Commonwealth and its suppliers, but it does not appear to have jurisdiction under the Gaming Act to entertain claims between a successful vendor and the Department of Revenue for the first five years of Pennsylvania’s gaming industry. Future judicial review will focus

on this question when it is presented, and resort to common law logic may be a vendor’s only hope to remedy a breach. The Commonwealth’s sovereign immunity defense to claims for breach of contract also remains a legal question that has to be resolved to clarify uncertainty regarding vendors’ rights under state contracts.

The apparent rationale for the special (and undefined) procurement practices under the Gaming Act is that this is an industry in its “start-up” phase. The principal player is the Commonwealth, and it has deliberately chosen to exercise the strength and control of the sovereign during the first five years of the industry’s birth. This should not really surprise any entity engaged in this business with the State, but it does warrant caution. State officials will justify their imposing procurement practices with the rationale that their practices “are in the best interest of the public.” *Common Sense Adoption Services v. Department of Public Welfare*, 799 A.2d, 225 (Pa. Cmwlth. Ct. 2002). However, the potential for arbitrary official behavior is real. The most sensible protection from official arbitrary behavior is:

1. Maintaining well disciplined practices in the documentation and submission process of proposals to be considered by the Department;
2. Paying healthy attention regarding the proposals of your competitors; and
3. Executing good, businesslike contracts with the Commonwealth, with sufficient protections to guard against potential official arbitrary behavior, and with meaningful remedies for any breach.

Those vendors who act in the most straightforward manner with the Commonwealth during this five-year period stand to gain the most when the procurement of the Central Control Computer System is offered to the new industry, and they will be well positioned to submit a justifiable protest, if and when it becomes necessary.

C. GRAINGER BOWMAN

717.231.5817
gbowman@kl.com

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FOR MORE INFORMATION, please consult one of the lawyers listed below:

Linda J. Shorey	Harrisburg	717.231.4510	lshorey@kl.com
C. Grainger Bowman	Harrisburg	717.231.5817	gbowman@kl.com
Sandy B. Ferguson	Pittsburgh	412.355.6494	sferguson@kl.com



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