

**PUBLIC HEARING**

**ON**

**The Matter of iGaming**

**And**

**Bill 19-474, the “Lottery Amendment Repeal Act of 2011”**

**Before the**

**Committee on Finance and Revenue**

**Council of the District of Columbia**

**The Honorable Jack Evans, Chairman**

**Thursday, January 26, 2012**

**10:00 a.m. until end or 1:00 p.m. recess, resuming at 6:00 p.m.**

**Room 412 - John A. Wilson Building**

**Council Chambers**



**Testimony of**

**Natwar M. Gandhi**

**Chief Financial Officer**

**Government of the District of Columbia**

Good morning, Chairman Evans and members of the Committee on Finance and Revenue. I am Natwar M. Gandhi, Chief Financial Officer of the District of Columbia. I am pleased to be here for the Committee's Public Hearing on the Matter of iGaming and Bill 19-474, the "Lottery Amendment Repeal Act of 2011." Buddy Roogow, Executive Director of the Lottery, and Ridgely Bennett, Associate General Counsel, are here with me to answer any questions you may have.

iGaming in the District refers to games offered solely by the District of Columbia Lottery on its website for adults aged 19 and over who access the website from within the jurisdictional boundaries of the District. Games may be offered on a free play or cash basis and may be based on chance or incorporate elements of skill.

### **Legislative History of iGaming**

The FY 2011 Supplemental Budget Support Act was introduced by Mayor Fenty on November 23, 2010. The Council added as a provision, the Lottery and Modernization Act of 2010, which it approved on December 21, 2010, and after a 30-day Congressional review period, the bill became law on April 8, 2011. The Lottery began the implementation of iGaming shortly thereafter. In June 2011, a Finance and Revenue Committee Roundtable was held to gain further public comment on iGaming. To address any concerns raised, the D.C. Lottery has held a

series of public meetings in order to receive community input about the proposed iGaming platform. Mr. Roogow will more fully explain the results of those community meetings.

Recently, the U.S. Department of Justice has opined on the legality of iGaming, and has determined that iGaming would not violate the Wire Act. My staff can provide you greater detail regarding this issue in their subsequent testimony.

### **Office of the Inspector General Report**

I must take time here to comment on the record regarding the Report of Investigation into the Office of the Chief Financial Officer's Lottery Contract Award issued by the Office of the Inspector General (OIG) on January 20, 2012.

We strongly disagree with the OIG's conclusion regarding the provision for internet gaming in the procurement process. The request for Offered Options was presented in the original RFP and each vendor had an opportunity to respond to the Offered Options sections. A form of "gaming over the internet" was presented by every vendor who responded to the RFP. It, therefore, would have been inappropriate to issue a separate solicitation for "gaming over the internet" as each vendor had already responded to the request. In stating that, "the District may not

have received the best price”, the IG’s report fails to recognize that the selection of the winning bidder was not solely based on price. When viewed in its totality, the DC Lottery required comprehensive and compatible systems to overcome previously experienced operational issues and provide the best overall value to the District.

The IG incorrectly asserts that the OCFO improperly added the online gambling provision after the bidding had closed. The OCFO’s procurement process was completely transparent and adhered to all District procurement laws and regulations. The report cites no laws or applicable regulations that were violated, ignored or evaded.

It would have been advisable for the Inspector General to provide a draft of the report and given the OCFO the opportunity to respond before the document was finalized. This would have given us the opportunity to discuss our differences and would have provided you and the public with a more accurate review of the matter. For this reason, I have attached our detailed comments to the IG Report as an appendix to my testimony.

Mr. Chairman, thank you for the opportunity to present testimony on the iGaming.

I'm happy to answer any questions you may have.

**OCFO COMMENTS ON THE INSPECTOR GENERAL'S REPORT ON I-GAMING**

**1. Inspector General Report Page 2, Issue One**

The first issue examined by the Inspector General was “[w]hether the lottery contract should have been returned to the contracting officer for further action when the Council became aware that Intralot was adding major players to the team, especially since the contracting officer had not been informed of the change in team composition, and had not had an opportunity to review the impact of the change on the evaluation and ranking of the offerors. . . .” The OCFO disagrees with how this issue was framed by the Inspector General because it is based upon an incorrect assertion. Intralot did not add major players to the team as the issue states. Intralot merely added a subcontractor to assist with providing goods and services under the contract. The subcontracting arrangement was reviewed and approved by the OCFO’s Contracting Officer and Intralot remains fully responsible for performance under the contract.

**2. Inspector General Report, Page 4, Chronology.**

The Chronology contained in the Inspector General’s Report contains two errors.

First, the Chronology states that the OCFO added the Be-On system as an offered option to the Intralot contract sometime between December 1, 2009 and March 30, 2010. The Be-On system was included as an Offered Option in Intralot’s proposal. The option to implement the Be-On system was incorporated into and made a part of the contract, however the final Be-On system has not been accepted and incorporated into the contract as an implemented option. As with all options contained in the Intralot contract, there is no obligation on the part of the OCFO to implement the option.

Second, under the March 30, 2010 bullet, the Inspector General’s chronology states the “OCFO executes Intralot lottery contract, which includes Be-on system and implementation contingent upon determination that the games offered under the Be-on platform are legal, or after legislation is enacted to legalize online gaming in the District.” While this statement is correct, it is not complete. As with all options contained in the Intralot contract, there is no obligation on the part of the OCFO to implement the option.

**3. Inspector General Report, Page 11, Last Paragraph**

The Inspector General Report states “VSC is the local partner in the joint venture created with Intralot (the contractor) to perform under the contract.” The OCFO disagrees with this statement. Intralot is responsible for performing the contract. It has subcontracted certain

portions of the contract to DC09. However, Intralot remains fully responsible for performance under the contract.

**4. Inspector General Report, Page 11, Last Paragraph**

The inspector General's Report states that [a]s the contractor, Intralot was responsible for ensuring that VSC and the joint venture subcontractor (DC09) met responsibility criteria under cites D.C. Code § 2-353.01. This section relates to the government certifying the responsibility of prospective contractors. It has nothing to do with a prime contractor being responsible for ensuring that its subcontractor meets the responsibility criteria under § 2-353.01.

**5. Inspector General Report, Page 13, Second Full Paragraph**

The Inspector General Reports states that "OCFO hired an independent consultant during the second attempt to review the vendor proposals and the OCFO's contract award process for compliance and sufficiency." This OCFO disagrees with this statement. The independent consultant was only hired to review proposals and make recommendations to the contracting officer. The independent contractor did not review the OCFO's contract award process.

**6. Inspector General Report, Page 14, Second Full Paragraph**

In its Report, the Inspector General cites the following comment attributed to a former OCP Chief Procurement Officer: "[T]o have, as in this case, the prime contractor create a separate entity and give this entity, which had not been introduced either in the bid proposal or during the bid evaluation process, a "material responsibility" in the performance of the contract, is an "anomaly" in government contracting. The OCFO disagrees with the statement attributed to the former OCP Chief Procurement Officer. Subcontracting is routine in government contracting. In this case, the subcontracting agreement was reviewed and approved by the OCFO's contracting officer. Moreover, Intralot remains fully responsible for executing the terms of the terms of the contract as well as the terms of the subcontracting agreement with DC09

**7. Inspector General Report, Pages 14-15**

The Inspector General Report States the following: "Between the time the time Council approved the lottery contract in December 2009 and the OCFO executed the contract in March 2010, OCFO added to the contract a couple of Intralot's Offered Options, including the B-On system (a gaming system that allows games of skill and games of chance to be played over the Internet.)" This OCFO disagrees with this statement. The Be-On system was included as an Offered Option in Intralot's proposal. The option was incorporated into and made a part of the

contract. As with all options contained in the Intralot contract, there is no obligation on the part of the OCFO to implement the option.

The Inspector General Report further states “[h]owever, RFP-2 had not identified (as a requirement) a gaming system capable of implementing games of skill and games of chance over the Internet, either as part of the Base System or an Option.” The OCFO disagrees with this statement. While the RFP did not specifically mention games of skill and games of chance over the Internet, the RFP was clear in its requirement that the gaming system be flexible, able to grow, and support non-traditional lottery games not currently offered by the DCLB. These requirements were set forth in RFP §§ C.6.1, C.6.5 and C.6.11, which read as follows.

**RFP § C.6.1 (b). Flexibility of the System.** The System shall be flexible, able to grow, and customized to suit the business needs and rules of the DCLB. Flexibility and adaptability are critical as the gaming environment can be expected to evolve over the course of the Contract. (Response Note: Only an overview is required here.) These capabilities should be supported by responses to other RFP items to follow.

**RFP § C.6.5. Games Menu:**

The Contractor shall support the current set of DCLB game offerings and provide flexibility for growth into new games, game features, and play types.

(a) *Current Games and Play Types.* The Contractor shall include all games currently being offered by the DCLB, at the time the new Lottery Gaming System is to take over.

(b) *Additional Games and Play Types from the Successful Offer.* The DCLB reserves the right to add games, game features, or play types for start-up, or at any time later in the Contract. The Bidder’s Proposal shall address the depth and breadth of the games library and the ability to expand beyond traditional games and play options. The system supplied by the Contractor shall be capable of supporting all games it currently offers to any other North American lottery jurisdiction or provides to any other North American lottery jurisdiction during the term of the Contract

(c) *Association-Based Games.* The Contractor shall support games from any multi-jurisdiction associations with which the DCLB may become affiliated.



- (d) *Third Party or External Games.* The DCLB may identify games or game concepts not from the Contractor's library that the DCLB may determine would be productive if made available in the District of Columbia. As the DCLB may direct in such a case, the Contractor is obligated to put forth a good faith effort to implement a version or variation of such a game, or if need be to acquire rights and/or software and any other mechanisms on behalf of the DCLB to put up such a game.

**RFP § C.6.11. Additional Gaming and Non-Gaming Capabilities:**

- (a) Although the DCLB does not currently offer non-traditional games other than KENO, the System shall be able, through hardware and software upgrades, as needed, to support additional games not currently offered. Specific non-traditional capabilities offered by the Bidder may be described and/or may appear as Offered Options.
  
- (b) Similarly, the DCLB does not conduct non-lottery transactions through its retailer terminals, network, or host systems. If the System proposed can support non-lottery functions, then the Bidder may describe the support available. Specific features or items offered by the Bidder may appear as Offered Options.

Moreover, each of the responding proposers understood these sections to allow for internet based games because each proposer submitted internet base games as Offered Options in response to these requirements.

The Inspector General Report further states that the contracting officer violated the DCLB's procurement regulations because the contracting officer did not issue a written amendment to the RFP incorporating a gaming system capable of implementing games of skill and games of chance as a requirement. The OCFO disagrees with this statement for two reasons. First, the OCFO's contracting officer is not subject to the DCLB's procurement regulations. Congress transferred all functions of the DCLB to the OCFO and procurements for the DCLB are handled by the OCFO's Office of Contracts. The DCLB's procurement regulations are merely a legacy from when the DCLB had independent procurement authority. They ceased to be effective when procurement authority was transferred to the OCFO.

Second, assuming *arguendo* that the procurement regulation remained effective, the contracting officer did not violate the referenced provision because there was no material change made to the requirements of the RFP. The RFP specifically required a gaming system that is flexible, able to

grow and able to support non-traditional lottery games that were not currently offered by the DCLB.

The Inspector General further states “[c]onsequently, it appears that the OCFO executed the contract without adhering to procurement regulations and as a result, may not have received the best price for the District.” The OCFO disagrees with this statement because the procurement and contracting process was conducted in full compliance with the District of Columbia Procurement Practices Act, Title 27 of the District of Columbia Municipal Regulations and designed to provide the best value to the District of Columbia

**8. Inspector General Report Page 17, First Full Paragraph**

The Inspector General Report states “[h]owever, from the OIG’s standpoint, the relevant authorities appear to indicate that when the B-On system was added to the contract after Council approval, its inclusion, in effect, changed the contract requirements in a material fashion. Therefore the OCFO should have amended the RFP and allowed the three bidders to resubmit a best and final offer. . . .” The OCFO disagrees with these statements. While the RFP did not specifically mention games of skill and games of chance over the Internet, the RFP was clear in its requirement that the gaming system be flexible, able to grow, and support non-traditional lottery games not currently offered by the DCLB. Each of the responding proposers understood these sections to allow for internet based games because each proposer submitted internet base games as Offered Options in response to these requirements.

**9. Inspector General Report, Recommendation 5, Page 18**

The Inspector General makes the following recommendations relating to the OCFO: “OCFO should develop clear guidelines and regulations, among other things, that require submission to the Council for review and approval, any modifications or adjustments to contracts that the OCFO is processing and that the Council is required to approve, prior to effectuation of the contract. Further, OCFO should refrain from including an Offered Option in a contract award unless the Request for Proposals was amended to reflect the change in requirements produced by the inclusion of such an option and distributed to all bidders in accordance with existing regulations.” The OCFO disagrees with these recommendations for the following reasons:

First, no additional guidelines or regulations promulgated by the OCFO are necessary because the OCFO is already subject to the provisions of the District of Columbia Procurement Practices Act (PPA) and conducts its procurements in conformance with the PPA and Title 27 of the District of Columbia Municipal Regulations. Second, no change in requirements was made to the RFP. The RFP was clear in its requirement that the gaming system be flexible, able to grow, and

support non-traditional lottery games not currently offered by the DCLB. Each of the responding proposers understood these sections to allow for internet based games because each proposer submitted internet base games as Offered Options in response to these requirements.