

Development and Operation of a Video Lottery
Facility at Aqueduct Racetrack
Mandatory Bidders Conference – June 8, 2010
Questions & Answers
Issued June 11, 2010

NOTE: Questions 1 – 120 and the Answers were published at www.nylottery.org on May 25, 2010.

Q121 Please provide clarification of the anti-collusion rules. What level of discussion can be held between groups prior to determining the bidding group? (RFP §1.13)

A121 Collusion very much relates to the cost or in this case the licensing fee; generally aside from that potential group members have some freedom in discussion until they are certain of the make-up of their group. We recommend that while going through the process of determining a bidding group, companies stop short of discussing an actual offer.

Q122 Will the mechanism for the \$2 million/month loan to NYRA be spelled out in the agreement? (MOU Article 5.6)

A122 Yes, NYRA will specify what it thinks it needs, which will be subject to the approval of the State Budget Director, and the amount will be capped at \$2 million/month. The outer limit of this loan amount will be determined by the opening date of the facility, which is under the control of the selected bidder.

Q123 The Lottery has given every indication that the \$300 million licensing fee is non-refundable under any circumstances. Making the mandatory \$300 million licensing fee non-refundable imposes great risk to the bidders. The possibility of delays and the numerous issues that could occur at closing provides the winning bidder little ability to negotiate in good faith and move the process along. Has the Lottery given any consideration to the risks to the bidder? (RFP §1.2)

A123 The Lottery acknowledges that the winning bidder will be assuming a substantial level of business risk; however, numerous incentives are in place to keep the process moving. The process is designed to eliminate delays or lengthy negotiations. The Lottery and other state agencies will be working as hard as the bidder to keep the process moving. All parties will be aligned. No embedded party will seek to delay the process.

The Governor and the legislature directed the \$300 million licensing fee to assure both sides are committed to move forward quickly. Once the licensing fee is paid, the winning bidder will be the video lottery agent at Aqueduct unless something outside the control of the vendor or the state occurs and then ordinary rules of contract law will apply.

Q124 Soft costs can't be applied to capital construction costs. Why? (RFP §1.2, MOU Articles 1.3.2 & 5.3)

A124 **NOTE: This answer is a change from the answer the Lottery published in the May 25, 2010 Questions and Answers and the answer given at the June 8, 2010 Mandatory Bidders Conference. It reflects the May 25, 2010 enactment of Chapter 90 of the Laws of 2010 and ESDC's reconsideration of the previous answers.**

ESDC's \$250 million capital construction grant will be funded with tax advantaged bond proceeds. The uses for such proceeds are subject to limitations established by State and federal law and regulations. Bidders should not rely solely on the information provided here, but should also consult their own tax advisors with respect to the eligibility of costs to be funded with these bond proceeds.

Subject to the federal limitations, New York State law generally allows for the ESDC bond proceeds to be used for "capital works or purposes," including, but not limited to, costs for the design, acquisition, construction and equipment for such structures as may be necessary to properly house video lottery terminal gaming at Aqueduct racetrack, including, but not limited to, the costs of studies, appraisals, surveys, testing, environmental impact statements, infrastructure, facility design, construction and equipment, cost of leasing space, professional fees and costs and issuance of insurance (Chapter 90 of the Laws of 2010). Within that authorized scope, New York law may allow proceeds to be used for (i) the acquisition, construction, demolition, or replacement of a fixed asset or assets; (ii) the major repair or renovation of a fixed asset, or assets which materially extends its useful life or materially improves or increases its capacity; or (iii) the planning or design of the acquisition, construction, demolition replacement, major repair or renovation of a fixed asset or assets, including the preparation and review of plans and specifications including engineering and other services, field surveys and sub-surface investigation incidental thereto (State Finance Law sections 67-a and 93[2]). State law defines "fixed assets" as assets of a long-term, tangible character which are intended to continue to be held or used, such as land, buildings, improvements, machinery and equipment (State Finance Law section 2[6-a]). In determining "capital works or purposes," amounts paid for items having a useful life of one year or less are generally not capital expenditures. Subject to the foregoing generally described State requirements, federal law may also allow reimbursement for soft costs for the acquisition or creation of related intangible assets such as trademarks, copyrights, and franchises.

Q125 Will costs resulting from enhancements to the train station be eligible under the capital construction grant? (RFP §1.2, MOU Article 1.3.2 & 5.3)

A125 MTA is responsible for all improvements to the train station. The developer is responsible for the covered walkway only. However, if a bidder suggests renovation plans of the station we would look favorably upon that.

Q126 The RFP limits the build out of the lobby and *porte cochere* and encourages a phased approach; however, the limitation of one entry point causes difficulty of staging and may

pose safety issues to guests. The answer provided by the Lottery in the first round of Q & As indicates that no additional build out is permitted outside of the RFP specifications. Is there an opportunity to change this answer? (RFP §4.5, MOU Article 1.3.1)

- A126 The developer is generally required to keep within the existing SEQR footprint. There is some flexibility in the build out and there will be no prohibition on the number of entrances during the construction of the video lottery facility, including any phased opening of parts of the facility that may be approved. However, two expanded entry ways with *portes cochere* would require additional SEQR work and delay the construction. Use of existing entry ways will be permissible subject to discussion with NYRA.
- Q127 The RFP requires that the designs be of the standard of the Saratoga and Yonkers racetracks. Please confirm that the previously submitted designs mirror the fit and finish required. (RFP §4.5)
- A127 The Lottery cannot pre-judge a submission. As provided in the RFP, the Saratoga and Yonkers video lottery facilities are the minimum standard, but the RFP allows for flexibility of approaches.
- Q128 Can the second round of questions, due on June 15, include black-lined versions of the MOU and transaction documents? (RFP §2.15)
- A128 Yes, this is the opportunity to wordsmith. We will review all recommended revisions and accommodate or respond otherwise.
- Q129 What if a bidder cannot agree to the terms and conditions of the MOU, but would still like to submit a proposal with a marked up version of the MOU? (RFP §2.15)
- A129 The bidder will be taking a great risk of immediate disqualification for submitting a non-conforming Proposal. Theoretically, it's possible the bidder could remain under consideration if no other bids are submitted, but we think among the group of bidders we will get a few who will agree to the terms.
- Q130 The first round of Q & As (Q/A 76) indicates that an Evaluation Instrument has been developed. Can this be shared with the potential bidders? (RFP §5.5.A)
- A130 No, we don't intend to publish any further details. A broad outline of the scoring methodology has been shared today and the RFP provides details of the components of the technical evaluation. It is the Lottery's intent to provide balance, but not to be directive. We want to stop short of structuring the responses; we are expecting to see creativity in the proposals. However, we will tell you that the subcategories under the main criterion are not rigidly defined.

- Q131 The PILOT payment north of \$10 million is well above previous PILOT payments at facilities such as Yonkers. How was this figure arrived at? Has any commitment been made to NYC or NYRA that will be binding? (MOU Articles 10.11.1, 10.11.2 & 10.11.3)
- A131 The amount is not yet definite. This is not meant as a promise to NYC; the amount could be as high as \$10 million but there is no final agreement yet. We set the figure high so that there would be no surprises; the final requirement may be lower.
- Q132 More information is required relative to sharing space with NYRA. As we move forward to develop 30% complete plans there will be some guessing relative to customer areas, back house space, etc. Will there be any opportunity, before submission of the proposal, to get clarity from NYRA? What is the plan to deal with the power issue at the facility as the current power source will only run about 1,200 VLTs? (RFP §4.5)
- A132 After the conference, potential bidders will have an opportunity to meet with NYRA to view the facility more thoroughly and discuss shared space. NYRA has expressed a great desire to work with each bidder to bring everyone up to speed. The Lottery will schedule the meetings and thereafter, Ken Cook, Vice President and Director of Security of NYRA, will be the designated contact for all inquiries related to the Aqueduct facility. Ken's contact information is: email: kcook@nyrainc.com; phone: 718-659-2388 (office), 516-322-1392 (cell).
- Previously it was Con Edison's intent to bring additional power to the facility, and we believe Con Edison still intends to do so. The developer will be expected to work with Con Ed to make arrangements and work out the details.
- Q133 A master plan is no longer part of the development. Is it correct to assume that we will work with the Lottery and other state agencies for future development? Will there be additional fees due to future development?
- A133 Eventual additional development will be a separate process. There will be no right of first refusal for the winning bidder. There will be no prohibition on who will develop the other parts of the property. Be careful to stay within the original SEQR when developing your proposal. Future development will likely be handled through the ESDC not the Lottery.
- Q134 Is the \$2 million/month repayment under the same withholding terms? (MOU Article 5.6)
- A134 Yes, the same terms will apply; the amounts will be lumped together and paid out of NYRA's share of video lottery revenues.
- Q135 Relative to the 2008 SEQR is there any guidance or comfort of the proposed plans for the 2,000 parking spaces being completed? Can the submission of proposals be delayed until the completion of the SEQR? (RFP §4.5)

A135 We see no impediments to the completion as proposed. The submission of proposals cannot be delayed until the completion of a new SEQR.

Q136 Does the SEQR limit the developer to one entry location? (RFP §4.5)

A136 No, the SEQR does not restrict the developer to one entry location. Changes on a grand scale, such as two 20,000 square foot *portes cochere* may be an issue, but multiple entrances are not necessarily in conflict to the SEQR.

Q137 Due to the limited time between a recommendation for award and payment due date, why is the bidder's offer required to be valid for 180 days? (RFP §1.15.D)

A137 The Lottery has no control over the time that may elapse from recommending an award to the Governor, the Temporary President of the Senate and the Speaker of the Assembly and the signing of the MOU; therefore, the Lottery imposed our standard time period of 180 days. Also, the 180 days begins upon submission of the proposal, but our recommendation is scheduled five weeks thereafter.

Q138 Did the Lottery give any thought to the competing structure of Belmont or any consideration to a future tribal pact? The 50-mile non-competing restriction appears unfair to the bidders. If a tribal compact opens, how is the operator expected to compete? (MOU Article 3.4)

A138 Yes, the Lottery has considered these factors and acknowledges the business risk to the bidders but no contingency for additional casinos will be included in this agreement. The New York Lottery's objective is to prevent someone from getting the franchise and steering business to other facilities or jurisdictions operating at a lower cost, less labor involvement, etc. The point is that we want the bidder to maximize this facility not their portfolio of casinos.

Additionally, there is no current law in New York State that would allow for another casino in this market. There is no tribal-state compact and to have one would require the approval of the Governor and the legislature. There is no law allowing a video lottery casino or any other kind of casino at Belmont. If this were to become an issue, the Aqueduct video lottery agent would have the same access to the legislature as anyone else to participate in and influence the debate. This currently is not on the legislative agenda. The State wants to protect its own cash flow stream.

Q139 Should the 30% drawings be schematic or construction drawings? (RFP §4.5)

A139 The 30% plan should be relevant to construction drawings – more detailed than schematic. Single line drawings only give indications of the structure; we're looking for more than that.

Q140 Is pre-launch advertising reimbursable under the marketing expense? (RFP §1.2; MOU Articles 1.3.2 & 5.3)

A140 Yes, the Lottery views advertising as important to a successful opening and will look favorably upon that.

Q141 The initial round of questions did not identify the questioner; will subsequent rounds follow that same process?

A141 Yes.

Q142 Can we begin negotiating the transaction documents between now and the submission of the proposal? Will there be an opportunity to discuss black lined versions? (RFP §2.15)

A142 There will be no line by line negotiating. Prior to issuing answers to the second round of questions on June 22, we will review black lined documents and consider any proposed modifications. The black lined documents submitted by each bidder will be addressed like any other question, and published without attribution on our website.

The MOU and transaction documents submitted with each Proposal must be signed by each bidder.

Q143 Will the final transaction documents be released with the answers to the next round of questions on June 22?

A143 Yes.

Q144 An upfront fee of \$300 million or more would be the highest licensing fee in U.S. history, and New York already imposes a higher tax rate on video lottery facilities than anywhere else. Why are the financial requirements so high? (RFP §1.2)

A144 The last two rounds of bidding for the Aqueduct video lottery facility produced offers of \$370 million and \$300 million, respectively. We believe the marketplace has already priced the opportunity, and the state has set its expectations accordingly.

There is no tax on video lottery revenues, which belong to the State of New York. The Aqueduct video lottery facility operator will be entitled to a statutory vendor fee equal to 22% to 23.5% of net machine income, plus a marketing allowance equal to 8% of net machine income; and only normal corporate and business income taxes will apply.

Unlike casino operators in other states, the Aqueduct video lottery facility operator will not be responsible for acquiring or maintaining video lottery gaming equipment, which is supplied by the Lottery at no cost, except that the operator will be permitted to acquire approved premium games, such as electronic table games, by paying additional fees to suppliers approved by the Lottery.

Q145 **NOTE: This is a change to Q50 & A50 published on May 25, 2010, based on additional information from the Office of General Services.**

Will the Vendor be required to bear the expense of bringing all portions of the Aqueduct Racetrack grandstand and clubhouse building which are not planned for development as a

part of the gaming facility (but instead are intended to be used by NYRA or left as unimproved vacant space) into compliance with applicable life safety codes and regulations, and the provisions of Section 1617-a of the New York Tax Law? Will the Vendor be required to make any other capital improvements to the NYRA space or the vacant spaces?

- A145. The Office of General Services, as the Authority Having Jurisdiction, will be issuing the Construction Permit(s), conducting code mandated inspections, and issuing the Code Compliance Certificate (of Occupancy) for this project on behalf of the Lottery. The building alterations to develop a Video Lottery Facility at Aqueduct Racetrack shall comply with the New York State building code and all State and local fire and safety codes. For example, a specific requirement of this design will be that the building will be in compliance with NYC Local Law 26/04, which requires the entire building to be covered by a sprinkler system when the project is complete.

Any areas of the facility required to provide support to the video lottery program, including, but not limited to means of egress through non-gaming program areas, as well as areas identified as the "Construction Premises" and "Renovation Premises" shall comply with the New York State building code and all state and local fire and safety codes.

The Vendor will not be required to make capital improvements, beyond these permitting requirements, to areas outside those identified in the MOU.