



**REQUEST FOR APPLICATIONS
TO DEVELOP AND OPERATE
A GAMING FACILITY IN NEW YORK STATE**

June 16, 2014

ADDITIONAL QUESTIONS AND ANSWERS

Q.413. RFA §III.F specifies that “An Addendum Acknowledgement Form, a form of which is incorporated into this RFA only for informational purposes as Attachment 2, will be provided with each addendum.” The RFA Addendum published on May 12, 2014, however, did not include an Addendum Acknowledgement Form.

a. Will the Commission be publishing an Addendum Acknowledgement Form for the May 12, 2014 Addendum, or for any subsequent Addendums?

b. If not, should Applicants utilize RFA Attachment 2 as the Addendum Acknowledgement Form in their RFA Response for all Addendums?

A.413. The Acknowledgement Forms will be posted in stages.

Q.414. Question and Answer 176 provided that “An Applicant who proposes to develop a gaming facility to be located in the Region 1 Impacted Counties or Region 5 Impacted Counties is permitted to make an Application in the alternative whereby two scenarios would be presented as to the scope, scale and Minimum Capital Investment of the proposed gaming facility dependent on whether a License is awarded for a gaming facility located in the corresponding Region 1 Dominant Counties or Region 5 Dominant Counties.”

Question and Answer 409, however, provided that “Every Application must include a proposal for a Gaming Facility, either as its sole proposal or as one of its binding alternative proposals, that satisfies the Minimum Capital Investment requirement if no License is awarded for another Gaming Facility in the same Region. In addition, if an Application includes binding alternative proposals, the Application must include a proposal that commits to develop a Gaming Facility in accordance with the N.Y. Racing, Pari-Mutuel Wagering and Breeding Law and the RFA that

satisfies the Minimum Capital Investment requirement if a License for another Gaming Facility is awarded in the same Region.”).

Question and Answer 176 suggests that only two proposals are permitted by an Applicant who proposes to develop a Gaming Facility to be located in a Region 1 Impacted County or Region 5 Impacted County: one proposal addressing no License awarded for a Gaming Facility located in the corresponding Region 1 Dominant County or Region 5 Dominant County, and a second proposal addressing the award of a License for a Gaming Facility located in the corresponding Region 1 Dominant County or Region 5 Dominant County.

Question and Answer 409, however, suggests that an Applicant is permitted to have one proposal addressing the scenario where no License is awarded for a Gaming Facility in the same Region, and also multiple other binding alternative proposals (rather than only one binding alternative proposal) addressing the award of a License for another Gaming Facility in the same Region.

If an Applicant has one proposal for a Gaming Facility that satisfies the Minimum Capital Investment requirement if no License is awarded for another Gaming Facility in the same Region:

- a. May the Applicant propose more than one binding alternative proposal, each of which satisfies the Minimum Capital Investment requirement if a License is awarded for another Gaming Facility in the same Region; or
- b. May the Applicant only propose one binding alternative proposal, which satisfies the Minimum Capital Investment requirement if a License is awarded for another Gaming Facility in the same Region.

If an Applicant that proposes to develop a Gaming Facility to be located in a Region 1 Impacted County or Region 5 Impacted County has one proposal for a Gaming Facility that satisfies the Minimum Capital Investment requirement if no License is awarded for a Gaming Facility located in the corresponding Region 1 Dominant County or Region 5 Dominant County:

- c. May the Applicant propose more than one binding alternative proposal, each of which satisfies the Minimum Capital Investment requirement if a License is awarded for a Gaming Facility located in the corresponding Region 1 Dominant County or Region 5 Dominant County; or
- d. May the Applicant only propose one binding alternative proposal, which satisfies the Minimum Capital Investment requirement if a License is awarded for a Gaming Facility located in the corresponding Region 1 Dominant County or Region 5 Dominant County.

A.414.

a. The answer to Question 409 requires that every Application must include a binding proposal. Given that the issuance of more than one License in a Region is specifically contemplated by the Act, an Application may not condition its proposal on being the only licensed Gaming Facility in the Region.

b. If an Applicant presents only one proposal, the Applicant will be required to develop such proposal even if a license is issued for another Gaming Facility in the same Region.

c. If an Applicant presents binding alternative proposals, the Applicant must include one proposal for if a license is not issued for another Gaming Facility in the same Region and other proposals for if a license is issued for another Gaming Facility in the same Region.

d. All binding alternative proposals must, collectively, address the universe of possible facility siting outcomes permitted under the Act. There should be no ambiguity in an Application about which binding alternative proposals apply in each of the possible facility siting outcomes.

For example, an Applicant desiring to bid in the alternative with two binding alternative proposals may present in its Application one proposal that applies if a License is issued for another Gaming Facility in the same Region and one proposal that applies if a License is not issued for another Gaming Facility in the same Region.

An Applicant may also include a more complicated set of conditions for its binding alternative proposals. However, for every possible facility siting outcome, the Application must include only one proposal for consideration.

For instance, in the answer to Question 176, an Application for a Project Site in the Region 1 Impacted Counties could offer three binding alternative proposals:

- a. one proposal that applies if a license is not issued for another Gaming Facility located in Region 1;**
- b. one proposal that applies if a license is issued for another Gaming Facility located in the Region 1 Dominant Counties; and**

- c. **one proposal that applies if a license is issued for another Gaming Facility that also is located in the Region 1 Impacted Counties.**

To be consistent with the answer to Question 409. b. 3., an Application presenting binding alternative proposals must unambiguously describe under what circumstances each of the proposals presented would apply.

Q.415. Will the Board and/or the Commission be deliberating on its ultimate recommendations publicly, and will any part of the deliberations be in executive session or otherwise non-public?

A.415. The Board and Commission will follow the requirements of the Open Meetings Law, Article 7 of the N.Y. Public Officers Law.

Q.416. Does the Board interpret N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1306 to allow it to select replacements to the four entities it is empowered to select in the event any selected Applicant is determined unsuitable by the Commission, withdraws, or is otherwise unable to fulfill conditions precedent to or subsequent to its license award?

A.416. Yes. The Act demonstrates a legislative intent that there will be up to “four destination resort casinos in upstate New York.” N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 1300.4, 1300.5, 1300.6 and 1300.14. If an Applicant selected by the Board is determined unsuitable by the Commission, withdraws or is otherwise unable to fulfill conditions precedent to or subsequent to its license award, the Board may select a replacement for consideration by the Commission.

Q.417. As noted in Answer to Question 409. c., “The Board anticipates that Applicants’ financing plans, arrangements and agreements will be subject to conditions that are usual and customary for significant projects similar in size and scope to the proposed gaming facilities.”

a. If, consistent with a lender or investor’s usual and customary practice, it requires more certainty with respect to intra-regional competition than is available at the time the upfront license payment is due, may an Applicant condition its payment of the upfront license fee and/or acceptance of a license award on the absence of intra-regional competition from one or more counties within its Region?

b. If the Applicant includes customary financing conditions unrelated to competition in its Application, may the Applicant also condition the payment of the upfront license fee on the satisfaction of those customary financing conditions?

A.417.

a. The answer to Question 409. c. states the extent to which an Application will be non-conforming due to conditions relating to intra-regional competition. A non-conforming Application will be rejected by the Board and will not be considered for a license award.

b. The answer to Question 409. c. also states that the Board expects that the financing conditions for a proposed Gaming Facility will be a material consideration in evaluating an Application. Conditioning payment of the upfront license fee on the satisfaction of financing conditions will not receive favorable consideration by the Board.

Q.418. May an Applicant selected by the Board withdraw at any time prior to the award of the license by the Commission? Are there any restrictions on such a withdrawal?

A.418. An Applicant may withdraw at any time prior to the award of a Commission license. Once a license has been awarded, however, any licensee failing to begin gaming operations within twenty-four (24) months following license award shall be subject to suspension or revocation of the license and may, after being found by the Commission after notice and opportunity for a hearing, to have acted in bad faith in its Application, be assessed a fine of up to \$50 million. N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1315.3.

Q.419. May an Applicant selected by the Board withdraw at any time following the award of the license but prior to the time the upfront license fee is due? Are there any restrictions on such a withdrawal?

A.419. See answer to Question 418.

Q.420. May an Applicant awarded a license by the Commission with a financing contingency be allowed to defer payment of the upfront license fee if third-party financing is not completed?

A.420. See answer to Questions 409. c. and 417. b.

Q.421. May an Applicant, instead of two binding alternative proposals, submit one binding and conforming proposal representing its best offer for a viable and sustainable casino resort which includes financing conditions related to the award of a second license in a portion of the same region?

A.421. See answer to Question 409. c.

Q.422. In connection with Q&A 344 (copied below for reference) could the Siting Board and Gaming Commission please release their list of consultants so applicants can be sure our conflicts check is complete?

A.422. See answer to Question 98. a. Consultants retained by the Gaming Facility Location Board, through the Commission, are:

- a. Taft, Stettinius & Hollister LLP
- b. Christiansen Capital Advisors, LLC
- c. Houlihan Lokey Capital, Inc.
- d. Macomber International, Inc.

Q.423. Can you please advise whether applicants are required to submit 20 hard copies and 10 electronic copies (and 2 redacted hard copies and 2 redacted electronic copies) of the Multi-Jurisdictional Personal History Disclosure Form and New York Supplements that are being submitted with the RFA response? Is there some lesser requirement or alternative submission for this personal background information.

A.423. Applicants, including organizational entities and appropriate and necessary individuals who are a party to the organizational entity, are required to submit twenty (20) hard copies and ten (10) electronic copies and redacted hard and electronic copies of the Multi-Jurisdictional Personal History Disclosure Form, New York Supplemental Form and Gaming Facility License Application Form with the Application as set forth in RFA Article IV § B.

Q.424. I wanted to confirm that individuals submitted license Applications in connection with the Request for Applications must submit only one original license form with the NY supplement (and not 20 as is required for the Applicant).

A.424. See answer to Question 423.

Q.425. Section 1330 of the Upstate NY gaming economic development act requires labor organizations "seeking to represent employees who are employed in a gaming facility by a gaming facility licensee" to register with the commission.

If a construction union anticipates that some of its members will help build the facility, does that union need to register even though the individual union members would be employed by a contractor hired by the gaming facility/developer as opposed to being employed directly by the facility/developer?

A.425. No. Under N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1330, only labor organizations representing “employees who are employed in a gaming facility by a gaming facility licensee shall register with the commission.”

Q.426. We have a question regarding the submission of Personal History Disclosure Forms. If an Applicant files applications for more than one proposed site, are the principals of that Applicant required to submit Personal History Disclosure Forms and New York Supplements with both applications or will one set of forms suffice?

A.426. No. One set of forms will suffice. Please clearly note in the Application that the form applies to an additional Application.

Q.427. We have a question regarding the submission of internal controls and security systems as is required in Exhibit VIII.D.1.a. As the Commission is undoubtedly aware, internal controls, surveillance systems and security systems are among the most sensitive documents that a casino operator maintains. If these documents were to be made available to the public, the security of the casino cash handling and other highly sensitive operations would be put at risk. Can the Commission assure the Applicants prior to the submission of the response to the RFA that Exhibit VIII.D.1.a will be exempt from public disclosure under the Freedom of Information Law?

A.427. As a general matter, the N.Y. Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in N.Y. Public Officers Law § 87(2)(a) through (2)(l).

N.Y. Public Officers Law § 89(5) permits a commercial enterprise required to submit records to a state agency to identify those portions of records considered to be deniable under § 87(2)(d) at the time of their submission. Section 87(2)(d) authorizes an agency to withhold records submitted by a commercial enterprise to the extent that the records

“are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise...”

If the agency accepts the claim made by that entity, it essentially would agree to keep the records confidential. If a request is later made under the Freedom of Information Law, or if a state agency, on its own initiative, seeks to disclose records that had been accorded protection, it would be

required to inform the entity claiming the exemption from disclosure and offer the entity an opportunity to explain why disclosure would "cause substantial injury" to its competitive position. If a judicial proceeding is commenced following the exhaustion of administrative remedies by either a person seeking records claimed to be exempt or by the entity claiming the exemption, it would have to be proven that the records would cause substantial injury to the entity's competitive position if disclosed.

The N.Y. Committee on Open Government has opined that the nature of the record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above are key factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and effect of disclosure upon the competitive position of the entity to which the records relate.

Given this, it is incumbent upon an Applicant to review the N.Y. Freedom of Information Law and the manner it has been applied to ensure a requested exemption is likely to be honored and upheld.

Q.428. Although the RFA calls for the use of USB flash drives or sets of flash drives, we would inquire whether external hard drives with USB ports would be acceptable? Our concern is that the amount of material contemplated may be of larger size than normal USB flash drives may not be sufficient for the renderings.

A.428. We will accept an external solid state hard drive as an alternative to a USB flash drive.

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