

**VIDEO LOTTERY TERMINALS AND RELATED SERVICES
(#2009-12)**

**RESPONSES TO WRITTEN QUESTIONS
November 20, 2009**

This list of questions and responses #3 (**Q&A#3**) is being issued to clarify certain information contained in the above named Request for Proposals (RFP). The statements and interpretations of Contract requirements, which are stated in the following questions are not binding on the State, unless the State expressly amends the RFP. Nothing in the State's responses to these questions is to be construed as agreement to or acceptance by the State of any statement or interpretation on the part of the entity asking the question as to what the Contract does or does not require. Some questions have been edited for brevity and clarity, and duplicate questions may have been combined or eliminated.

The following are questions submitted pursuant to the RFP and the Lottery Commission's responses to those questions:

147. QUESTION: Can a successful bidder provide equipment from a company that does not bid or is not a successful bidder and the equipment was not a part of the successful bidders original submission, during the contract period?

ANSWER: As indicated in Section 4.57.2 - Addition of the RFP, Master Contractors may add new items of equipment to the Master Contract by submitting the specifications and pricing to the Commission for review and approval. However, no new Master Contractors may be added to the Master Contract after the initial contract award. If the Master Contractor is a distributor, it may add new products for any Manufacturer that was approved at the time of Master Contract award, but it may not add products supplied by new Manufacturers that were not approved at the time of Master Contract award.

148. QUESTION: Section 1.4 Glossary; Key Personnel ("Key Person") is not defined in detail. Can you provide a criteria listing of what level of employee trips this? Can the Commission provide clarification of which positions meet the definition of "Key Personnel" with regard to licensing and background investigation requirements?

ANSWER: Refer to the definition of "Key Employee" that appears in the licensing Applications.

149. **QUESTION:** Do MBE subcontractors have to be bonded?

ANSWER: No, not typically, however the Commission reserves the right to require that an MBE be bonded if deemed necessary by extraordinary circumstances.

150. **QUESTION:** Section 3.21 - MBE Requirements: The RFP establishes an MBE goal of 25% of the total contract dollar amount. By far, the majority of the contract dollar amount reflects the vendor's internal costs of the out-of-state manufacturing of the Video Lottery Terminals. The MBE goal should more appropriately be 25% of the in-state casino services, such as installation, repair and maintenance, etc. because these are the only services which, as a practical matter, are amenable to subcontracting. Would the Commission amend the VLT procurement to establish an MBE goal to 25% of those services that are carried out in Maryland?

ANSWER: Although the MBE goal for the Master Contract will be 25%, the MBE goal for each individual NTP will be established at the time an RFQ is issued. The Contractor must make an independent evaluation of all opportunities available for MBE subcontracting and must demonstrate its best efforts to meet the goal in the most meaningful and creative ways possible while still providing competitive costs to the State. If the Contractor believes a waiver of some or all of the MBE goal is necessary then it may request a waiver as described in RFP Section 3.21.4. A Contractor requesting a waiver must demonstrate that reasonable good faith efforts have been made to meet the goal and such request will be thoroughly evaluated by the Commission prior to approval.

151. **QUESTION:** Section 4.1.1 and 4.41: The Commission has the unilateral right to make changes to the work. Will the Commission consider a Proposal non-responsive if the contractor's proposal provides that all changes to the work shall only be made upon mutual consent of both the contractor and the Commission and only with a modification to the price of the VLT, if so required? Since the contractor is indemnifying the Commission for all intellectual property claims, the fear is that changes made to the work without input from the contractor could result in violating a third party's intellectual property.

ANSWER: The Commission would consider such a provision to be an Exception to the State's requirements. See RFP Section 7.3.4 (4.).

152. **QUESTION:** Section 4.3.2 - There is a 90 day trial period before payment is due; might there be some exception to this term for vendors under a certain

size (since without such an exception, large companies which can afford to provide generous terms may have an unfair advantage over small businesses).

ANSWER: No, there will be no exception to the Acceptance Period which will apply to all Contractors equally.

153. QUESTION: Section 4.3.2 - Can the trial period be shortened since waiting 120 days from installation for payment is a hardship on smaller suppliers?

ANSWER: No, the Acceptance Period will not be shortened.

154. QUESTION: Section 4.8 requires us to include a non-discrimination provision in subcontracts, but excepts contracts for “standard commercial supplies or raw materials.” Could the Commission verify that the exception would cover most of a slot machine assembler’s contractors?

ANSWER: Yes.

155. QUESTION: Section 4.16 contains more provisions with revenue recognition implications. Our auditors likely would require us to satisfy all the listed criteria in order to recognize the revenue. This would include getting written statements from Maryland stating, e.g., that “the invoice is not in dispute.” Will the Commission provide such documentation as required?

ANSWER: If such as statement is required the Commission will provide it upon request.

156. QUESTION: Section 4.29: The Contractor develops numerous trademarks, copyrights, patentable material and other related intellectual property for its products and services in the normal course of its business, some of which may be used for the Contract.

- a. If the Commission terminates the Contract without cause or through no fault of the Contractor, does Commission seek an ongoing license to Contractors intellectual property?
- b. Under what circumstances would the Commission or its agents alter or improve Contractors products or services provided under the Contract?
- c. Would the Commission have any need for Contractors copyrights or trademarks beyond advertising?

ANSWER: a) The Commission has no operational experience with items covered by this RFP. Some provisions of Section 4.29 are included to cover unforeseen eventualities. The last paragraph of Section 4.29

addresses the situation where Contractor ceases to perform the Contract other than because of the natural expiration of the Contract term. In that case, the Contractor will be in breach and the Commission will obtain an ongoing license to Contractor's intellectual property.

b) Currently, the Commission does not anticipate it or its agents altering or improving Contractor's products or services provided under the Contract except if Contractor terminates the Contract other than at the natural expiration of the Contract term, then possibly for changes necessary to make the Contractor's products and/or services function with the Central System or if corruption or errors occur; however, other situations may arise that the Commission does not now anticipate.

c) The Commission anticipates that it will need rights to Contractor's copyrights and trademarks to be able to use them on and in the VLTs, to be able to offer games, to use game names, game styles and images, and to be able to use them or refer to them in any reports the Commission must make, as well as in advertising. Further, the Commission needs to be able to authorize its operators to use the copyrights and trademarks to operate the Facilities, to be able to offer games, to use game names, game styles and images, and to be able to use them or refer to them in any reports the operator must make, as well as in advertising.

157. **QUESTION:** Section 4.29: Would the Commission be agreeable to a non-exclusive license only to the extent it is necessary to operate Contractors games and systems in the event Contractor terminates the Agreement without cause?

ANSWER: The Contractor has no contractual right to terminate the Contract, with or without cause, and if the Contractor did so the Contractor would be in breach of the Contract. If the equipment is purchased, the Commission will have paid for the equipment up front and shall be authorized to keep the equipment and licenses on a non-exclusive basis for all purposes. If the equipment is leased, the Commission shall be authorized to keep the equipment and licenses on a non-exclusive basis for all purposes until such time as suitable replacement equipment can be procured by the Commission. Please be advised that if Contractor does breach, the answer to this question does not limit the remedies under the contract.

158. **QUESTION:** Section 4.29: In order to avoid any confusion as to what technology might constitute a "New Intellectual Property Rights", would the Commission agree that any work falling under this classification first be designated so in writing between the parties?

ANSWER: The term New Intellectual Property Rights is first used in Section 4.30 it is presumed that this question relates to that Section, not Section 4.29. No, the Commission will not agree to first designating in writing any work falling under this classification; however, it only applies to ideas, concepts, etc. *exclusively made or conceived for the Commission*. It is possible that Contractor would not make improvements *exclusively* for or *conceived* for the Commission, in which case this provision would not apply. The Commission does not foresee this situation arising, but the Commission cannot fully anticipate any possible events they may occur.

159. QUESTION: Section 4.30 Rights in Products. This provision and 4.32 appear to say that if we develop a game for the Maryland market, the game concept would belong to Maryland and we could not market it in other jurisdictions. I don't believe we can agree to this. Please clarify.

ANSWER: Section 4.30.3 and 4.32 provide that all New Intellectual Property Rights are owned solely and exclusively by the Commission. Contractor may use them only upon written agreement with the Commission. Note that, as amended, this provision relates only to intellectual property rights designed *exclusively* for and made or conceived jointly with the Commission. The Commission does not anticipate Contractor developing a new game, idea, concept, know-how or technique for the Commission; however, if Contractor does so, then the New Intellectual Property Rights relating to it/them belong to the Commission.

160. QUESTION: Section 4.30.2: As with most other software developers and technology companies, Contractor retains ownership to its software for its systems and games. In this case, Contractor may modify its existing software or hardware in order to meet the requirements of the Commission. Would derivative works to a Contractor's Pre-existing Party Innovations made by the Contractor to comply with the Contract remain owned by the Contractor?

ANSWER: Section 4.30.2 provides that Contractor retains ownership of all preexisting ideas, concepts, know-how and techniques and each invention, discovery and improvement thereof previously made or conceived of by either the Contractor or the Commission. Therefore, it seems that this question addresses not Section 4.30.2 but Section 4.30.3.

Section 4.30.3 will be amended by a subsequent Amendment #2 to the RFP to remove "separately or" in the first paragraph. Section 4.30.3 provides that all ideas, concepts, know-how and techniques and each invention, discovery and improvement thereof, exclusively made or conceived for the Commission by Contractor or its employees jointly with Commission personnel will be owned by the Commission.

The Commission currently anticipates that it will not request Contractor to provide ideas, concepts, know-how and techniques exclusively made or conceived for the Commission by Contractor or its employees. The Commission agrees that for this RFP and Contract only, this provision does not apply to normal adjustments that Contractor may make to its equipment to provide basic payout amounts the Commission may request, or that are simply necessary to function with the Central System, or that are necessary to comply with the Maryland statute or regulations.

161. QUESTION: Section 4.30.3: Under what circumstances would Commission be responsible to any ideas, concepts, know-how techniques or inventions in furtherance of the Contract?

ANSWER: If the question is when the Commission might request or conceive of new ideas, etc., the Commission is interested in the success of Maryland's VLTs and VLT facilities. The Commission may have ideas it wants the Contractor to try, including but not limited to ideas for games, as well as suggestions for improvement. If this situation does not arise, then this provision will not be applicable.

162. QUESTION: Section 4.30.3: What does the Commission consider "work product" under the Contract?

ANSWER: It is the Commission's understanding that "work product" is a term of art. The potential Offeror should consult with its attorneys to answer this question.

163. QUESTION: Section 4.32: What are some examples of "New Intellectual Property Rights" the Commission anticipates being developed under the Contract?

ANSWER: The Commission has no operational experience with items covered by this RFP, so is not able to fully anticipate situations which may arise. The Commission does not currently anticipate New Intellectual Property Rights arising under the Contract; however, if, for example, the Commission requests Contractor to improve the way a game is offered or played, other than normal adjustments that Contractor may make to its equipment to provide basic payout amounts the Commission may request, or that are simply necessary to function with the Central System, or that are necessary to comply with the Maryland statute or regulations, then the new Intellectual Property Rights relating to that change would be New Intellectual Property Rights and would belong to the Commission.

164. **QUESTION:** Section 4.32: Is the Commission aware of any potential third party intellectual property claims for any services to be performed or products to be provided under the Contract?

ANSWER: The Commission cannot anticipate what may arise, but the Commission is not currently aware of any potential third party intellectual property claims for any services to be performed or products to be provided under the Contract. The Commission does not currently know what equipment and intellectual property it might purchase or lease. It is the Commission's understanding that the Contractor would be in the best position to know if any potential third party intellectual property claims exist for any services to be performed or products to be provided under the Contract.

165. **QUESTION:** Section 4.32: Are the State of Maryland, Commission, Lottery and their agents looking to be held harmless for all their actions, even if they are grossly negligent, intentionally engage in wrongful activities or are negligent?

ANSWER: No.

166. **QUESTION:** Section 4.32: Does the Commission ever agree to caps on requirements for hold harmless?

ANSWER: No.

167. **QUESTION:** Section 4.32 provides that a Contractor cannot place any markings on a VLT that is any larger than $\frac{1}{4}$ the size of any Lottery Commission markings. Please provide the size of all Lottery Commission markings.

ANSWER: The VLTs and associated equipment are excluded from this requirement but any restrictive markings on any software are not excluded. At this time the Commission does not know the anticipated size of its markings.

168. **QUESTION:** Section 4.36 states that the State can set off amounts it claims against a supplier against amounts it owes a supplier. This creates more revenue recognition problems. Suppliers may have to get a letter from the Lottery each quarter stating that they don't have any set offs. Would the Lottery provide such documents?

ANSWER: If such a document is required the Commission will

provide it upon request.

169. QUESTION: Section 4.39 Do we understand correctly that this provision would prohibit any of the Contractor's employees from buying a Mega Millions jackpot ticket in, for example, California, despite the fact we have nothing to do with the drawings? This is not really workable. What are the consequences if an employee buys one and wins?

ANSWER: This Section will be revised in a subsequent Amendment #2 to the RFP to eliminate the restriction on playing the Lottery and Mega Millions. The restriction on playing VLTs within the State will remain.

170. QUESTION: Section 4.43.10: The manufacturers do have ultimate control over the acceptance of counterfeit items by the note acceptor. Will the Commission allow for VLT manufacturer agreements that generally assign this responsibility to the manufacturers of the note acceptor, who develop those programs?

ANSWER: The Contractor may enter into such an agreement with the manufacturer of the bill acceptor, but the Contractor would still be responsible to the Commission under its Contract with the Commission.

171. QUESTION: Section 4.44.4 Performance Bond. It is a requirement of the Surety industry not to have forfeiture language included in the RFP or contract. Will the Lottery please delete the first sentence in Section 4.44.4 Performance bond:

“The Performance bond is forfeited to the Commission, in whole or in part, if the Contractor defaults in the performance of its contractual obligations or if the Commission incurs damages due to the willful or negligent performance of the Contractor or its subcontractors.”

ANSWER: The next two sentences in this Section state that "However, the surety shall have the option within thirty (30) days of notice of default to cure the default or tender funds sufficient to pay the cost of completion up to an amount not to exceed the penal sum of the bond. With the concurrence of the Commission, the surety may assume the remainder of the Contract to perform or sublet." It is the Commission's understanding that this Section is acceptable to a surety provided that this option to cure is included.

172. QUESTION: Section 4.45 – Insurance: a) As the Contractor is required to indemnify the Commission and to have insurance to respond to personal injury

and property damage claims, will the Commission consider limiting the withholding of payments to the Contractor to those amounts claimed which are in excess of contractor's insurance limits?

b) If the Lottery decides to actively participate in any litigation involving a claim for which contractor indemnifies the Commission, please confirm that the Commission will engage and pay for their own counsel.

ANSWER: a) No.

b) The Commission will engage its own attorneys and pay its own legal fees.

173. QUESTION: Section 4.57 - Product Substitution and Addition: In the VLT industry, the number and variety of features and technologies included in terminals has increased progressively. Games have progressed from spinning reels to CRT screens to LCD; from a single speaker to full surround sound, and the game software has more and more features, continually adding to players' entertainment value. It is not possible to predict the cost of a VLT in five years, let alone in ten. Would the Commission please consider amending Section 4.57 to enable manufacturers to propose new and innovative products as they are developed, enabling the Maryland Facilities to remain competitive in the region?

ANSWER: Section 4.57 as written already allows Master Contractors to propose new and innovative products as they are developed. As indicated in Section 4.57.2, Master Contractors may add new items of equipment to the Master Contract by submitting the specifications and pricing to the Commission for review and approval.

174. QUESTION: Section 5.3.3.3 requires the VLT to provide a port for Server Based Downloadable Gaming "if the VLT can be adapted for such purpose and the Commission requires such use. " The term "Server Based Downloadable Gaming" is a vague and vendor-dependent term. Can the requirements of this section be clarified or deleted? To the extent they remain, are we correct in assuming that any such upgrade requests will be subject to the process, including pricing, defined in section 4.43.14.1?

ANSWER: This Section will not be deleted. An Offeror should know the specifications and configuration of its own products. Additional information will be provided at the time of a RFQ.

175. QUESTION: Section 5.7.9; We understand that the Commission is in the process of selecting a testing agency, however, it would be helpful to know which standard VLT regulations you are planning on adopting (i.e. GLI 11 & 12,

Nevada, etc.). Also it is indicated that Maryland specific software regulations will be issued. Is there a date or timeframe that these regulations will be issued prior to the proposed delivery schedule starting?

ANSWER: The requirements for VLT Testing are being revised and will be revised/clarified in a subsequent Amendment #2 to the RFP.

176. **QUESTION:** Section 5.8.4.2 – Conversions, Upgrades and Expansions: What is the definition of “authorized personnel?”

ANSWER: On-site State security personnel.

177. **QUESTION:** Section 5.9.1 Performance Reports, states that Contractors must provide the Commission with monthly performance data for comparable VLTs from other geographical jurisdictions within a 500 mile radius. This is not practical because Contractors do not have access to gaming device reports in most markets. In those that they do, the information is confidential. Is this section meant to be limited to state “Lottery” VLT’s? Due to confidentiality provisions, can the Commission work with the other Lotteries in getting this information, which we don’t have the authorization to provide?

ANSWER: This requirement for Performance Reports will be deleted in a subsequent Amendment #2 to the RFP.

178. **QUESTION:** Section 5.9.4 addresses Performance Replacement. What is the initial Benchmark period?

ANSWER: The initial benchmark period for each Facility will be the six (6) month period commencing upon the opening of the Facility.

179. **QUESTION:** Section 6.2.1 addresses Proposed Prices. Do we include cost for potential bill validator or printer upgrades? (example: every time a new bill is introduced the bill validator needs to be upgraded with the new firmware)

ANSWER: Yes, upgrades for bill validators and printers should be included in the proposed prices.

180. **QUESTION:** Successful completion of Appendix F is problematic when the quantities of VLTs are unknown and the pricing is to be fixed for a ten year term. These factors make it particularly difficult to provide the Commission with estimated maintenance costs.

By only allowing for a single set fee per unit, the methodology creates several issues. The administrative and response expectations contained in the RFP require a high level of staffing and attendant overhead costs. With no minimum or guaranteed number of units, and no commitment on the number of facility operational dates, Offerors are put into a position of assuming unnecessary risk in being able to meet their commitment. Conversely, Offerors may be placed in the position of providing the Commission with unrealistically high proposals.

- a. Given that the pricing proposals are not evaluated and that the outlined process calls for subsequent issuance of RFQs when the quantities and timing are known, would the Commission consider forgoing pricing proposals with the submission of the RFP response?
- b. Would the Commission amend the form in Appendix F to allow for better allocation of general and administrative costs by providing a tiered maximum cost per unit based on quantity?
- c. Not all manufacturers offer all their products to be acquired by all three compensation methods provided on the form in Appendix F. To ensure Maryland has access to all the machines that are available in surrounding states, will the Commission allow an Offeror to submit their pricing for any combination of the three methods?
- d. If an Offeror wants to submit an alternative method of pricing (i.e. 4th method) can they do so, and how?
- e. If an Offeror submits their fixed maximum pricing and it exceeds the maximum price the Commission is prepared to pay, will the Offeror's price submission be rejected, or is there a process that will be followed should this occur?
- f. Please clarify the Commission working with the Operators to define the "mix" of VLTs. Does the Commission envision that the Operators will be providing the Commission with the type of games, denominations, line configurations, cabinet types, game titles and device manufacturer, and that the Commission will seek to obtain the desired games from the manufacturers, or will the Commission also be making some judgment or decision on what games the Operators should have?

ANSWER: a) No, Financial proposals are required with the Offeror's Proposal submission.

b) Offerors may submit pricing based on a tiered maximum cost per unit based on quantity. The prices established by the RFP will be the maximum prices that the Commission will pay. Master Contractors will also have the opportunity to offer prices which reflect quantity discounts or are more

advantageous to the State at the time of the RFQ process, and are encouraged to do so.

c) Yes.

d) Yes, that would be considered. A fourth column for any other pricing options that an Offeror would like to propose will be added to the Financial Proposal Sheet in a subsequent Amendment #2 to the RFP.

e) There a process that will be followed should this occur, including discussions and Best and Final Offers.

f) The Facilities in a collaborative process with the Commission will select the VLTs and determine the floor mix. The Commission has the responsibility to maximize revenue to the State and will maintain active oversight in the selection and monitoring of performance of the VLTs

THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK