



MONTANA DEPARTMENT OF ADMINISTRATION

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MEMORANDUM

To: Members of the Montana State Lottery and Sports Wagering Commission

From: Don Harris, Department of Administration Chief Legal Counsel

Date: March 3, 2025

Re: Status Update on Intralot Offer and RFP

BACKGROUND

The purpose of this memorandum is to provide updates regarding activities of the Montana Lottery (Lottery) and the Department of Administration (DOA) staff since the December 5, 2024, meeting of the Commission. During the last meeting, Lottery and DOA staff advised the Commission they would be conducting due diligence inquiries and discussions with the incumbent Lottery operations contractor, Intralot. In addition, the Lottery and DOA have continued work to prepare for a request for proposals (RFP).

The ultimate goal of these efforts was to bring to the Commission as much information as possible to aid the Commission in making a decision in the best interests of the State of Montana and to fulfill the Lottery's mission to "maximize the transfer of its net revenue to the state's General Fund and to the Montana STEM Scholarship program by providing products that meet the expectations of consumers and the State of Montana while adhering to the highest standards of security and integrity, which is critical to maintaining public confidence in the agency and its products."

For reference, in a memorandum previously presented to the Commission dated July 18, 2024, DOA advised Lottery Director Brown that due to changes made in 2023 Senate Bill 51 (2023 Mont. Laws ch. 489), the Lottery was not bound to procurement under the Montana Procurement Act to procure or renew a Lottery operations contract. The memorandum noted further that, notwithstanding the statutory changes made by SB 51, nothing precluded the Lottery from conducting an RFP.

For the sake of moving forward expeditiously, given the March 2026 expiration of the current contract, the Lottery staff has taken appropriate steps to deliver on the Commission's determination, no matter which direction the Commission chooses. The Lottery staff has

worked with procurement and legal personnel at DOA to refine the draft contract and RFP to ensure it will be available for release before the end of this month (March 2025) should the Commission favor that approach. To protect the integrity of a potential RFP, the Lottery and DOA have not shared information about the RFP with Intralot or any other interested party. On the other hand, to provide the Commission with more information than was available in Intralot's 2024 offer to renew the operations contract, the Lottery staff has engaged in discussions with Intralot to create an unexecuted, non-binding letter of intent (LOI) that the Lottery and Intralot could use to direct negotiations with the intention of executing an agreement before the end of this month. The LOI is in final form as to both scope and legal terms. It has been executed by Intralot. The Lottery leadership has elected to forego execution of the LOI at this time and is seeking direction from the Commission.

To preserve the integrity of the process and be fully transparent with the Commission, Lottery leadership has asked that I make the LOI and RFP documents available to any Lottery Commissioner to review in my office, in person, prior to the meeting on March 6. If that is not feasible for any Commissioner, subject to measures necessary to maintain the confidentiality of trade secrets and the RFP process, I am also willing to review the documents with Commissioners electronically. In either case, to the extent there is interest in such a review, I recommend it occur on an individual basis so that there is no opportunity for an accidental discussion between Commissioners outside the context of a public meeting.

LOI

The LOI process is a commercially reasonable approach to negotiating something as complex as the Lottery system replacement/extension contract. It is nonbinding on the parties. If the Commission approves of the Lottery moving forward, the parties will immediately begin negotiating and drafting an agreement. It is important to note that the Commission retains all final approval authority consistent with state law. If the parties reach an agreement, it will be made available to the Commission for its review and final action. In the event the Commission directs the Lottery leadership to either not execute some version of the current LOI or does not approve a resulting definitive agreement, the Lottery would then be obligated to go out for an RFP.

DOA officials, including myself, were not involved in negotiating the functional system scope items. Those negotiations were exclusively between Lottery staff and Intralot. Further, as noted above, the starting point for LOI negotiations was Intralot's offer from 2024. Lottery staff made counterproposals, which the parties discussed until reaching the tentative agreement framework described in the LOI.

LOI Statement of Work

As described in the LOI, conversion to an upgraded system product and related services includes the following list of highlighted features and functions:

- Lottery game engine
- New terminal software and content management platform, and opportunities to expand terminal numbers based on need
- Security module
- Third party integration module
- Retailer management system
- Sports wagering platform
- New retail equipment consistent with Lottery's long-term needs
- Communications upgrade
- Player account management platform
- Integrated customer relationship management platform
- Game development and support
- Market research
- Offered options

LOI Cost Proposal

Without publicly stating the specific LOI cost proposal, based on information from staff and other jurisdictions that have recently entered into operations contracts, given the equipment and other offerings described in the LOI statement of work, Intralot's cost proposal is competitive and favorable in comparison to the market.

LOI Legal Matters

- As stated above, the LOI is not binding on the parties, meaning neither the Lottery nor Intralot is being legally obligated to do anything by virtue of its execution.
- Under the LOI, Intralot agrees to update the contract terms and conditions to reflect current state policies, procedures, and contractual terms, along with more robust liquidated damages provisions in the event of performance issues.
- Once the LOI is signed, the Lottery will be able to examine the specific details required within a detailed statement of work to determine that both the cost and products and service meet the requirements of the Lottery.

RFP

RFP Statement of Work

The Lottery's RFP is a document provided to potential vendors, inviting them to submit a detailed proposal outlining how they would fulfill specific Lottery requirements, typically including their proposed approach, cost, and timeline, allowing the Lottery to compare options and select the best Contractor for its needs.

- The RFP describes both mandatory requirements and “nice to have” features the Lottery believes will deliver the best value to the State. There is no guarantee, however, that the offerors who respond to the RFP will want to or be able to fulfill all of the Lottery’s needs in the manner the Lottery is accustomed to.
- While the proposal described in the LOI appears beneficial in terms of having sufficient terminals to meet needs at launch, conditions must be met in order to take advantage of the proposal for future growth. The RFP defines the number of terminals the Lottery believes is needed for the life of the next contract.
- While the proposal described in the LOI appears to be competitive and favorable in comparison to the market, the costs offered by potential contractors through the RFP process are yet to be determined and could also be just as competitive and favorable.

RFP Cost Proposal

- Lottery and DOA procurement staff have tightened up the cost scoring section to promote comparison of offerors’ cost scores and emphasize the importance of economy.

RFP Legal Matters

- The contract issued with the RFP has been updated to incorporate current state policies, procedures, and contractual terms, along with performance standards and liquidated damages provisions.
- Contract terms are subject to negotiation; however, generally speaking, agencies do not agree to material changes in state terms.

RISK FACTORS

There are numerous risks associated with either renewing the contract with the current vendor or letting it out for bid. A brief recitation of risks on both ends is set forth below to inform the Commission’s deliberations.

- Cost
 - There is a risk that going out for an RFP will result in higher vendor costs than the current contract. Lottery staff have shared their previous opinions on this

topic with the Commission. As a historical reference, when the last Lottery system replacement RFP was issued in 2016, the winning bid cost proposal was for 8.49% of Instant and System Sales (reduced to 8% in FY 2020 through the amendment process when the sports betting scope was added to the contract); the other competing bid in 2016 was 9.6574% of Instant and System Sales, which would have equated to a 20% increase when factored against the current 8% rate.

- It is likely that a phased conversion of equipment as contemplated by the LOI will be less costly than swapping all of the existing terminals for new ones.
- While the RFP documents are nearly finalized, the Lottery will incur additional costs to go through the RFP process. Further, lottery operations RFPs in other jurisdictions have resulted in bid protests, which could delay implementation and increase costs.
- It is also possible that if the Lottery renews the contract with Intralot, third parties may bring legal actions challenging that decision. The procedures involved in such a challenge are uncertain, given the aforementioned exemption from the Montana Procurement Act.
- Scope
 - A competitive procurement does not necessarily mean the Lottery will get all the equipment, system functionality or service offerings that it wants. That is dependent on the offerings of each vendor that is competitively scored with little opportunity to negotiate those items.
 - A competitive solicitation process under the Procurement Act encourages innovation and may result in ideas and approaches that are beneficial to the state in ways that are not envisioned in the current contract.
 - Alternately, the parties' familiarity with each other and the operating environment in Montana may reduce uncertainty and risk.
- Operations – There are significant Lottery operations factors the Commission should consider in making its decision, including:
 - With a mixture of devices, equipment and systems, conversion from one vendor to another, especially in the lottery marketplace, is challenging because of the sheer volume of equipment involved.
 - Because Sports Bet Montana is offered exclusively through the Lottery and only available in licensed gaming locations, it is unique in the country (and the world). Procuring something that has not been implemented in other jurisdictions increases risk.
 - Implementation over a short timeframe adds risk versus the phased approach available with a renewed contract as contemplated by the LOI.
- Timing – The current contract is set to expire in March 2026. A competitive procurement and the fast turnover required to be completed by then will be highly

challenging with significant risk, especially when considering the accompanying sports wagering platform needs of Lottery. The timing is further problematic when considering the high likelihood of a bid protest associated with a competitive procurement and/or lawsuit; however, as mentioned previously, a legal challenge is also possible with a contract renewal. In the past, such lawsuits have cost the state tens and hundreds of thousands of dollars and resulted in project delays. Such costs are currently not contemplated or otherwise covered in Lottery's budget requests to the Legislature.

- 2025 Session Activities – During the 2025 General Legislative Session, several bills have been introduced that will impact Lottery operations, decision-making, and procurement activities. None have yet become law. It is difficult to predict what the Legislature will do less than halfway through session, and enactment of any bill is far from certain. Given constitutional prohibitions on impairment of contracts and the uncertain nature of the road ahead, it is difficult to provide guidance on this legislation. It is likely for the best if the Commission makes a decision primarily on the merits of the LOI and the RFP. The Commission should certainly be cognizant of pending legislation, but must be careful to avoid drawing conclusions based on unenacted bills.
- Other Considerations – Montana Council on Problem Gaming. During testimony on bills this session, an issue has been raised with respect to participation in the Montana Council on Problem Gaming by the Lottery and Intralot. Despite representations to the contrary, neither Intralot nor Lottery are contractually or legally obligated to contribute to or otherwise make annual payments to the Montana Council on Problem Gaming. In its unsolicited bid, Intralot did offer to contractually commit to contributing monies towards the Council on an annual basis. Lottery has traditionally believed that any such commitment should stand outside of a formal contract between Lottery and any vendor.

CONCLUSION

The Lottery, subject to the direction of the Commission, must continue to ensure its procurement processes and outcomes are in the best interests of the State, regardless of whether the contract is procured by entering into an LOI and contract with the current vendor or the Lottery pursues opportunities through an RFP. The Lottery and DOA staff will support the Commission's decision, regardless of the outcome. For those Commission Members who choose to review the LOI and related documents in advance of the meeting, it is important that no substantive portions of the LOI are discussed in the open meeting to preserve the integrity of any subsequent competitive bidding process. If the decision is made to pursue a competitive RFP, DOA and the Lottery will conduct the procurement with integrity and expediency.