

205 CMR 222: CAPITAL INVESTMENT AND MONITORING OF PROJECT CONSTRUCTION

Section

- 222.01: Definitions
- 222.02: Project Plans and Reporting
- 222.03: Design Review Process
- 222.04: Inspection of Construction and Related Records
- 222.05: Certification that Licensee Has Met Expenditure Requirement
- 222.06: Grounds for Discipline
- 222.07: Capital Investment

222.01: Definitions

Minority Business Enterprise (MBE). A minority owned business that has been certified by either the Massachusetts Supplier Diversity Office, the Greater New England Minority Supplier Development Council, or both.

Project. Construction of or on the Category 2 Sports Wagering Facility in order to meet the required capital investment. For purposes of 205 CMR 222.00, Project may also include construction of on or off-site infrastructure required by a permitting or licensing authority (including the Commission) for the construction of the Sports Wagering Facility.

Small Business. An entity, including all of its affiliates combined that:

- (a) Has its principal place of business in Massachusetts;
- (b) Employs a combined total at all locations of 50 or fewer full-time employees;
- (c) Has been in business at least one year; and
- (d) Has gross revenues of \$40 million or less based on a three-year average, and meets all legal obligations for tax status and required registration in the Commonwealth.

Veteran's Business Enterprise (VBE). A Veteran Business Enterprise shall be any entity certified as a "Veteran-owned small business concern" by the U.S. Department of Veterans Affairs, or certified as such by the Massachusetts Supplier Diversity Office; provided, that vendors, registrants, or subcontractors verified by the Licensing Division will continue to be recognized as such until the end of their existing contract.

Women's Business Enterprise (WBE). A women-owned business that has been certified by either the Massachusetts Supplier Diversity Office, the Women's Business Enterprise National Council or both.

222.02: Project Plans and Reporting

- (1) The Commission may create guidelines under 205 CMR 222.00 to aid the Commission in its review and monitoring of each project. Any such guidelines will be shared with the Category 2 Sports Wagering Licensees and may be amended as necessary by the Commission.
- (2) The Commission shall approve for each Category 2 Sports Wagering Licensee a project plan for the Licensee's capital investment in its Sports Wagering Facility and related infrastructure. The Commission shall not unreasonably withhold approval of elements of the Licensee's project plan that are consistent with information disclosed to and approved by the Commission during the Commission's licensing proceedings. The project plan shall include:
 - (a) A detailed project schedule, consistent with any representations or commitments made to the Commission while the licensee was applying for a Sports Wagering License or in accordance with 205 CMR 222.03, which includes all major stages of design and construction; and
 - (b) An affirmative action program of equal opportunity whereby the licensee establishes specific goals for the utilization of minorities, women and veterans on construction jobs and for contracting with minority, women or veteran owned businesses during either design or construction; provided, however that unless the licensee demonstrates that there is good cause otherwise, such goals shall be equal to or greater than the goals contained in Executive Office of Administration and Finance Administrative Bulletin Number 14, and consistent with or greater than any representations made to the Commission while the licensee was applying for a Sports Wagering License.
 - (c) A narrative describing the project, and including both a pictorial representation of the project design concept and a narrative description of the project.
- (3) If unforeseen or changed circumstances necessitate a change to an approved project plan which will affect the date when the Sports Wagering Licensee expects to meet the minimum capital investment required by 205 CMR 222.07(1), or would make the project inconsistent with a representation or commitments made to the Commission during the licensing process or in accordance with 205 CMR 222.03, the Sports Wagering Licensee may submit to the Commission for its approval a revised project plan, with a detailed statement of the unforeseen changed circumstances which justify the revised project plan. If the Commission approves such revised project plan, it shall substitute and supersede the previously approved project plan.

- (4) To ensure adherence to the approved project plan, the Sports Wagering Licensee shall submit to the Commission in a media, format and level of detail acceptable to the Commission, biannually a status report including:
- (a) If the Commission has not yet approved in accordance with 205 CMR 222.05(3) a certification that the licensee has met the minimum capital investment requirement:
 - 1. a report regarding expenditures made in accordance with the approved project plan and 205 CMR 222.07 in the prior six months and the licensee's progress towards the minimum capital investment required by 205 CMR 222.07(1); and
 - 2. a copy of all design and construction contracts executed within the prior six months that are to be included in the required capital investment.
 - (b) A status report reflecting the progress of construction. In the event that the progress of construction does not comply with the approved project plan, the Licensee shall submit a detailed plan to bring the progress of construction into compliance with the approved project plan or submit a request for a revised project plan pursuant to 205 CMR 222.02(3).
 - (c) A statistical report on the number, gender and race, and veteran status of individuals by job classifications hired to perform labor as part of the construction of the Sports Wagering Facility and related infrastructure, and a comparison of this report with the goals established by the Sports Wagering Licensee and Commission pursuant to 205 CMR 222.02(b). In the event the hiring of the aforementioned persons does not comply with the goals established, the Licensee shall submit within 20 days of a request by the Commission a response as to why the goals have not been achieved, identify any good faith efforts that have been undertaken to achieve those goals, and provide a plan to bring the hiring into compliance with the goals.
 - (d) A report describing the number of contracts, total dollar amounts contracted with and actually paid to minority business enterprises, women business enterprises and veteran business enterprises for design and construction of the Sports Wagering Facility and related infrastructure, and the total number and value of all subcontracts awarded to a minority, women and veteran owned business, and a comparison of these reports with the goals established by the Sports Wagering Licensee and Commission pursuant to 205 CMR 222.02(b). In the event the Licensee's hiring of the aforementioned entities does not comply with the goals established the Licensee shall submit within 20 days of a request by the Commission a response as to why the goals have not been achieved,

identify any good faith efforts that have been undertaken to achieve those goals, and provide a plan to bring the dollar amount contracted and spent into compliance with the goals.

- (5) The Licensee shall have a continuing obligation to timely provide to the Commission all documents and information listed in 205 CMR 120.01(1), as applicable, such that the Commission is continuously apprised of all material developments with respect to all permits and approvals required for the project.
- (6) In furtherance of specific goals for the utilization of minorities, women and veterans on construction jobs, the Licensee shall send and provide a copy to the Commission, and to each labor union or representative of workers with which the Licensee has a collective bargaining agreement or other contract or understanding, a notice advising the labor union or workers' representative of the Licensee's commitments pursuant to its Sports Wagering License and 205 CMR 222.02(2)(b).

222.03: Design Review Process

- (1) The Commission or its representative may participate in any design review process for the design of the project as follows:
 - (a) When the licensee has completed the schematic design phase, the Commission or its representative may request that the licensee submit the schematic design for review. Such schematic design may include descriptions of the external facade of any structures that are part of the project, all the major systems, a floor plan and any off site infrastructure improvements planned by licensee.
 - (b) The Commission or its representative may request for review the final site plan and architectural design package. Such final design package shall be in the form ready for licensee's use in creating construction bid packages.
 - (c) The Commission or its representative may request construction packages for review prior to putting such construction packages out for bid.

222.04: Inspection of Construction and Related Records

- (1) At all times the Commission or its representative may physically inspect the progress of construction, subject to reasonable construction site safety rules, to determine the Sports Wagering Licensee's compliance with the approved project plan, the terms and conditions of the license, M.G.L. c. 23N, or 205 CMR.
- (2) The Commission or its representative may request or have access to, at any time, plans, specifications, submittals, contracts, financing documents or other records concerning the construction of the project or related infrastructure. The licensee shall provide the requested materials to the Commission or its representative within ten days of the Commission's request for such documents.

- (3) Following an inspection of construction pursuant to 205 CMR 222.04(1) or review of records pursuant to 205 CMR 222.04(2), the Commission or its representative may notify the Sports Wagering Licensee of any non-compliance with the terms of the license or with an approved project plan. Upon receipt of such notification, the Sports Wagering Licensee shall present a plan to the Commission to address such non-compliance to the satisfaction of the Commission.

222.05: Certification that Licensee Has Met Expenditure Requirement

- (1) The Sports Wagering Licensee shall certify to the Commission that it has made a capital investment in its project of at least \$7,500,000, and in accordance with an approved project plan.
- (2) Upon receipt of such certification, the Commission or its representative may inspect the construction pursuant to 205 CMR 222.04(1), and request relevant plans, contracts, financing documents or additional records pursuant to 205 CMR 222.04(2).
- (3) The Commission may either approve or disapprove the Sports Wagering Licensee's certification pursuant to 205 CMR 222.05(1). If the Commission disapproves the Licensee's certification, the Commission will notify the Licensee of the reasons for such disapproval.

222.06: Grounds for Discipline

- (1) Pursuant to M.G.L. c. 23N, § 3, a Category 2 Sports Wagering Licensee who fails to make a capital investment in its project of at least \$7,500,000, and in accordance with an approved project plan, within three years after receiving a Sports Wagering License shall be subject to discipline in accordance with 205 CMR 232.00, unless the Licensee shows that its failure resulted from extraordinary circumstances. Disciplinary action in accordance with 205 CMR 222.06(1) shall be presumed to include the suspension or revocation of the License, but the Commission may impose other or lesser discipline as it deems appropriate.
- (2) The Commission or Bureau may discipline a Category 2 Sports Wagering Licensee in accordance with 205 CMR 232.00 for other violations of or failing with respect to this 205 CMR 222.05.

222.07: Capital Investment

- (1) Pursuant to M.G.L. c. 23N, § 3, the minimum capital investment for a Category 2 Sports Wagering Licensee to make on a project in accordance with an approved project plan shall be \$7,500,000. The capital investment shall be calculated in accordance with 205 CMR 222.07(2) and 205 CMR 222.07(3).

- (2) For purposes of calculating the capital investment for a Category 2 Sports Wagering License, the following costs shall be included:
- (a) Costs related to the actual construction of the Sports Wagering Facility and site including any amenities, and including overhead and indirect costs attributable to the construction activities.
 - (b) Costs related to preparation of the site including, clearing, demolition and abatement.
 - (c) Costs related to the design of the project, including building design, interior design, and exterior site design.
 - (d) Costs associated with consulting and due-diligence necessary to fund studies and devise engineering solutions including traffic studies, environmental studies, and other associated mitigation studies.
 - (e) Costs associated with minimizing the environmental impact of the project including upfront costs aimed at minimizing a carbon footprint or implementing sustainable elements and/or smart growth practices.
 - (f) Costs associated with designing, improving or constructing the infrastructure inside the property boundaries of the site of the Sports Wagering Facility including those related to drainage, utility support, roadways, interchanges, fill and soil or groundwater or surface water contamination issues, sewer, storm water, landscaping, and public transportation.
 - (g) Costs associated with the pre-opening purchase of fixtures; equipment; Sports Wagering Equipment including self-service kiosks; simulcasting equipment, provided that the costs associated with simulcasting equipment included in calculating the capital investment shall not exceed one-half of the costs associated with Sports Wagering Equipment included in calculating the capital investment; information technology equipment; safety, surveillance, and security equipment; software; and personal property to be used within the Sports Wagering Facility and site including those within hotels, restaurants, retail and other service businesses associated with the establishment.
 - (h) Costs associated with applying for federal, state, or municipal permits.
 - (i) Professional and management fees including for engineers, architects, developers, contractors, or operators to the extent that they represent indirect and overhead costs related to the development of the project, and do not represent profits or payout as part of partnership agreements or “home office” overhead (i.e., out of state).

- (j) Costs associated with the safety, training, quality assurance, or testing incurred during the construction of the Sports Wagering Facility and site.
- (3) For purposes of calculating the capital investment for a Category 2 Sports Wagering License, the following costs may not be included:
- (a) Any expenditures that a Sports Wagering Licensee makes before receiving its Sports Wagering License and applying for the approval of an initial project plan in accordance with 205 CMR 222.02(2).
 - (b) Any expenditures that a Sports Wagering Licensee makes that are not consistent with an approved project plan.
 - (c) Costs associated with the purchase or lease or optioning of land where the Sports Wagering Facility will be located including costs relative to registering, appraising, transferring title, or obtaining title insurance for the land.
 - (d) Carried interest costs and other associated financing costs.
 - (e) Costs associated with mitigating impacts on nearby communities, whether directly attributable to a specific impact or not.
 - (f) Costs associated with designing, improving or constructing the infrastructure outside the property boundaries of the site of the Sports Wagering Facility including those related to drainage, utility support, roadways, interchanges, fill and soil or groundwater or surface water contamination issues, sewer, storm water, landscaping, and public transportation whether or not such costs are required by any regulatory body or as part of the permitting process.
 - (g) Any and all legal fees.
 - (h) Fees and costs paid to the commission in accordance M.G.L. c. 23N, and/or 205 CMR 214.00 or 221.00, and other similar fees and costs paid to municipalities.
 - (i) Licensing costs including any costs payable to the Commission to obtain pre-opening licensing of individuals or vendors.
 - (j) Costs associated with marketing, advertising and promotions.
 - (k) Upfront costs designed to implement workforce development plans.
 - (l) Upfront costs designed to implement efforts to combat problem gambling and/or support the efforts of the commission's research agenda.