

## **APPENDIX B**

Contract Form-Agreement for Hearing Officer Services (incorporates Appendix A)

**HEARING OFFICER SERVICES**  
**C150006 – C150012**

This AGREEMENT made this \_\_\_\_\_ day of \_\_\_\_\_, 2015 by and between the NEW YORK STATE GAMING COMMISSION, an executive agency of the State of New York having an office at One Broadway Center, Post Office Box 7500, Schenectady, New York 12301-7500 (the “Commission”) and [ \_\_\_\_\_ ] having an office at \_\_\_\_\_ (the “Hearing Officer”);

WHEREAS, the Commission, pursuant to Section 104 of the Racing, Pari-Mutuel Wagering and Breeding Law, conducts hearings pertaining to violations of such Law, including without limitation with respect to disciplinary actions upon license holders;

WHEREAS, the Commission issued a Request for Qualifications (“RFQual”) on March 6, 2015 to solicit responses from qualified individuals to provide hearing officer and related services; and

WHEREAS, the Hearing Officer submitted a response (the “Response”) and was deemed, by reason of his or her competence, work ethic, legal experience and integrity, to be well qualified to act as a hearing officer at such hearings; and

WHEREAS, the Commission is desirous of retaining the Hearing Officer in accordance with the provisions of this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions herein set forth, the parties agree as follows:

## **ARTICLE 1: SCOPE OF SERVICES**

The Hearing Officer agrees to provide the Commission with services, as more fully set forth in the RFP and the Response. Both the RFQual and the Response are hereby incorporated into this Agreement with the same force and effect as if they were fully set forth herein.

## **ARTICLE 2: TERM**

The term of this Agreement shall be April 1, 2015 through March 31, 2018. The term shall be effective and binding upon the signatures of both parties. Any amendment to the provisions of this Agreement must be in writing and agreed to by signature of both parties.

## **ARTICLE 3: RESPONSIBILITY**

The Contractor shall at all times during the Contract term remain responsible within the meaning of the State Finance Law. The Contractor agrees, if requested by the Executive Director of the Commission or his or her designee, to present evidence of his or her continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.

The Executive Director of the Commission or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, the Contractor will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the Executive Director of the Commission or his or her designee issues a written notice authorizing a resumption of performance under the Contract.

#### **ARTICLE 4: COMPENSATION**

Compensation shall be payable for services rendered at the rates specified below. Total compensation for services provided under this Agreement, including reimbursement for travel expenses, shall in no event exceed the sum of \$47,000. No minimum amount is guaranteed by this Agreement and the Hearing Officer shall not have any right to make a claim therefor.

(1) The Commission shall pay the Hearing Officer the sum of \$150 per half day (up to three hours) or \$300 per day (more than three hours) for time reasonably spent in performing the duties of administrative hearing officer, as may be assigned by the Commission from time to time. More than one hearing may be held on a scheduled hearing day.

(2) The Hearing Officer shall be paid the sum of \$150 for each half day (up to three hours) or \$300 per day (more than three hours) for time reasonably spent to prepare a written decision including Findings of Fact and Conclusions of Law in each case decided by the Hearing Officer.

(3) The Hearing Officer shall be paid the sum of \$400 per day (more than three hours) for time reasonably spent to prepare a written decision including Findings of Fact and Conclusions of Law in each case in which the Hearing Officer has been assigned to a case which has been previously presided over by another hearing officer, and for which the record has been closed by another hearing officer.

(4) If practicable, the Hearing Officer shall be provided with written notice (either electronically or by hard copy) or telephone notice of the adjournment of a scheduled hearing at least 24 hours prior to the scheduled hearing. In the event that all of the hearings on a scheduled hearing day have been adjourned, and the Commission has not provided the Hearing Officer with at least 24 hours' notice of the adjournment of all of the hearings scheduled for that day, the

Hearing Officer may be compensated \$200 in lieu of any other fees, at the sole discretion of the Commission.

(5) Subject to the rules, regulations and policies of the Commission, the Hearing Officer shall be reimbursed for actual and necessary expenses incurred by the Hearing Officer while presiding at scheduled hearings and/or attending conferences sponsored by the Commission, at the approved rates that are in effect for New York State Management/Confidential Employees at the time of the hearing(s) or conference(s), as such rates may be amended from time to time. A list of such rates can be currently found at <http://www.gsa.gov/portal/category/100120>, and such rates are subject to amendment from time to time without notice.

The Hearing Officer, while in travel status, shall be reimbursed for all actual and necessary transportation expenses incurred while using a common carrier. If the Commission gives authorization for use of a personally-owned vehicle for reimbursed travel, reimbursement will be based on proper, supported receipts and in accordance with the prevailing allowances established by the State of New York for Management/Confidential Employees. For more information please refer to the New York State Travel Manual at: <http://www.osc.state.ny.us/agencies/travel/manual.pdf>. For current mileage reimbursement rates please visit: <http://www.gsa.gov/portal/content/104877>.

Reimbursement shall be based upon the rates that are in effect at the time expenses are incurred. The Hearing Officer shall submit a request for reimbursement of such expenses in such form as the Commission may require.

(6) The Hearing Officer shall attend and participate in all Hearing Officer trainings and conferences, which may be live or via an electronic format (such as a webcast), to be held at

the discretion of the Commission. The Hearing Officer shall be reimbursed for actual and necessary expenses incurred to attend and participate in any Hearing Officer training or conference.

(7) The Hearing Officer shall maintain adequate records to substantiate all claims for payment and, at the Commission's request, shall make such records available at the Commission's offices in Schenectady, New York for examination and copying.

## **ARTICLE 5: INVOICING AND PAYMENT**

Payment for services under this agreement will be in accordance with New York State Prompt Payment Law (Article 11-A of the New York State Finance Law). Payment will be made upon submission by the Contractor of monthly, itemized invoices. All invoices must be directed by the Contractor to the Commission's Finance Office at the address provided in this Agreement. The Commission shall promptly process all payments due to the contractor that conform to the provisions of this Agreement and are approved by Commission staff. Invoices shall be submitted following completion of the report and include the following information:

(a) Hearing Officer's taxpayer identification number and New York State Vendor Identification Number;

(b) Detailed description of services provided by date(s) of service, including the hearing case number;

(c) Itemized documentation of travel, overnight lodging and meal expenses sufficient to demonstrate conformance with applicable State reimbursement rates;

(d) Total amount billed for services and expenses for the invoice period and the beginning and ending dates of the billing period included in the invoice.

## **ARTICLE 6: RELATIONSHIP**

The relationship of the Hearing Officer to the Commission arising out of this Agreement shall be that of an independent contractor.

(1) The Hearing Officer, in accordance with its status as an independent contractor, agrees that he or she will conduct himself or herself in a manner consistent with such status, that he or she will neither hold himself or herself out as, nor claim to be, an employee of the Commission or the State by reason of this Agreement or Hearing Officer's designation as an administrative hearing officer in any matter, and that he or she will not by reason of this Agreement or Hearing Officer's designation as an administrative hearing officer in any matter, make any claim, demand or application for any right or privilege applicable to an employee of the Commission or the State, including without limitation, workers' compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit. All personnel the Hearing Officer may engage shall be within the employ of the Hearing Officer only, who alone shall be responsible for their work, the direction thereof, and their compensation. Nothing in this Agreement shall impose any liability or duty on the Commission or the State, on account of any acts, omissions, liabilities or obligations of the Hearing Officer or any person, firm, company, agency, association, corporation, or organization engaged by the Hearing Officer as expert, consultant, independent contractor, researcher, specialist, trainee, employee, servant or agent, for taxes of any nature, including, but not limited to, unemployment insurance and workers' compensation, and the Hearing Officer hereby agrees to indemnify and hold harmless the Commission and the State against any such liabilities.

(2) The Commission makes no commitment that the Hearing Officer will be assigned any particular matter or any matters at all. The Commission will inquire as to availability in

regard to a particular matter and if the Hearing Officer confirms availability and is assigned a matter, the Hearing Officer shall commence and complete the matter.

(3) The Hearing Officer agrees that any material, whether written, audio, visual or otherwise, that the Hearing Officer creates in performing services for the Commission pursuant to this agreement shall be a "work made for hire" in which the Commission shall own all right, title and interest, including all patent, copyright and other proprietary rights that may be secured.

(4) The Hearing Officer further agrees that in any matter assigned pursuant to this agreement, the Hearing Officer will not make statements, comments, public appearances, participate in radio or television programs or on-line computer forums or any public conferences of any sort in relation to any Commission matter, except as permitted in writing by the Commission's Public Information Officer.

(5) The Hearing Officer represents that the Hearing Officer is not a party to, and will not enter into, any contract or any contractual obligation that conflicts with any of the Hearing Officer's obligations under this Agreement or limits (as determined by the Commission in the sole exercise of the Commission's discretion) the rights granted to the Commission under this Agreement or that impairs the Commission's ability to fully exercise such rights.

(6) The Hearing Officer shall refer to the Hearing Officer's relationship with the Commission as "hearing officer."

#### **ARTICLE 7: LIABILITY AND INDEMNIFICATION**

The Hearing Officer shall be responsible for all damages to life and property due to activities of the Hearing Officer, as well as agents or employees of the Hearing Officer in connection with performance of services pursuant to this Agreement. The Hearing Officer shall indemnify, defend and save harmless the Commission, the State of New York, and their officers,

employees, agents, assigns and retailers from and against any and all third-party claims, liabilities, losses, damages, costs, or expenses, including reasonable attorney fees, that may be incurred, suffered, or required in whole or in part by an actual or alleged act or omission of the Hearing Officer, his or her employees, agents, successors and assigns.

#### **ARTICLE 8: CONFLICTS OF INTEREST**

(1) If the Hearing Officer has a conflict of interest based upon his or her other business or personal relationships that would render the Hearing Officer unable to legally and ethically perform the services required under this Agreement, the Commission may terminate this Agreement immediately upon written notice. The Hearing Officer shall notify the Commission of any such conflict upon becoming aware of such conflict.

(2) Hearing Officer will make all reasonable efforts to avoid having the provision of services under this Agreement by the Hearing Officer, or his/her employees or agents, result in such a conflict of interest, or in the appearance of such a conflict of interest.

(3) Hearing Officer has an on-going responsibility to inform the Commission of any real or apparent conflict of interest.

#### **ARTICLE 9: SECURITY AND CONFIDENTIALITY**

(1) The Hearing Officer shall comply with all applicable facility and information security policies and procedures of the Commission and the State in performing services under this Agreement.

(2) The Hearing Officer may not connect (either through hardwired or wireless means) any non-Commission computer or telecommunications equipment to the Commission

network without prior written approval. Personal and corporate laptop computers are included in this prohibition.

(3) The Hearing Officer shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208). The Hearing Officer shall be liable for the costs associated with such breach if caused by the Hearing Officer's negligent or willful acts or omissions, or the negligent or willful act or omission of the Hearing Officer's agents and employees.

(4) The Hearing Officer understands that in the performance of services under this Agreement, the Hearing Officer and his/her agents and employees may receive or have access to "Personal Information." For purposes of this Agreement, the term "Personal Information" shall include (but not necessarily be limited to) an individual's Social Security number, driver's license number, or non-driver identification card number; an individual's account number, credit card number, or passwords which would permit access to an individual's financial information; evidentiary exhibits; medical records; and hearing transcripts.

(5) The Hearing Officer agrees that the Hearing Officer and his/her employees and agents are: (i) required to take all appropriate action to protect the confidentiality of Personal Information supplied to, or received by, the Hearing Officer in the course of his/her performance of services under this Agreement; (ii) required to abide by all Commission policies and procedures related to the treatment of Personal Information; (iii) prohibited from copying, communicating or otherwise disclosing Personal Information unless specifically directed by the Commission, or as specifically required to provide services to the Commission under this Agreement; and (iv) required to immediately notify the Commission of any unauthorized disclosure, breach, or suspected breach, of such Personal Information. The Hearing Officer shall

be liable for the costs associated with any notification required if the unauthorized disclosure, breach, or suspected breach of such Personal Information is caused by the Hearing Officer's negligent or willful acts or omissions, or the negligent or willful acts or omissions of the Hearing Officer's agents or employees.

(6) Upon the Commission's written request, the Hearing Officer shall return to the Commission all Personal Information; all tangible and intangible Commission property; all hearing transcripts, exhibits, reports, briefs, correspondence and other hearing-related documents; and all records thereof.

(7) As soon as the items described in the foregoing subdivision (6) of this Article are no longer necessary for the Hearing Officer's performance of his/her obligations hereunder, (but in all events no later than 30 days after such time), the Hearing Officer shall cause to be shredded all hard copies of such items, and shall permanently delete or otherwise destroy all such information that is stored electronically.

(8) The provisions of this section shall survive the termination or expiration of this Agreement.

#### **ARTICLE 10: TERMINATION**

1. The Commission shall have the right to terminate this Agreement for convenience or for any of the following causes:

(a) A material breach by the Hearing Officer of any of the provisions of this Agreement;

(b) A determination by a court of competent jurisdiction that the Hearing Officer is bankrupt or insolvent;

(c) A good faith determination by the Commission that continuation of the Agreement could place the integrity of the Commission or the Commission in jeopardy;

(d) A conviction of the Hearing Officer or any of its directors, officers, or employees of any criminal offense connected to the Hearing Officer's business that, in the sole reasonable opinion of the Commission, would be prejudicial to public confidence in the Commission or the Commission; or

(e) It is found that the certification filed by the Hearing Officer in accordance with New York State Finance Law § 139-k was intentionally false or intentionally incomplete. Upon such finding, the Commission may exercise its termination right by providing written notice to the Hearing Officer in accordance with the written notice terms of this Agreement.

In the event that the Commission decides to exercise the right to terminate this Agreement for cause, the Commission shall give the Hearing Officer advance written Notice of Intention to Terminate for Cause ("Notice"). Such Notice shall state clearly and specifically the cause for which termination is sought, and the Hearing Officer shall be entitled to a period of 30 days from receipt of such Notice to correct or cure the cause so described to the reasonable satisfaction of the Commission in which case such Notice shall be deemed withdrawn and a nullity. If termination is sought because of a criminal conviction as described in subparagraph (d) of Paragraph (1) of this Article, the cause for termination shall be deemed to be cured if the Hearing Officer causes or obtains the dismissal, resignation, retirement, or other removal of the person convicted of such offense during such 30-day period.

2. Upon written notice to the Hearing Officer, and a reasonable opportunity to be heard with appropriate Commission officials or staff, the Contract may be terminated by the Executive Director or his or her designee at the Hearing Officer's expense where the Hearing Officer is determined by the Executive Director or his or her designee to be non-responsible. In such event, the Executive Director or his or her designee may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.

3. The Hearing Officer shall have the right to terminate this Agreement without cause, effective 30 days after written notice of the exercise of such right has been provided to the Commission.

4. Whether termination is for cause or convenience, the Commission's sole obligation shall be to pay the Hearing Officer's fees and disbursements for services rendered prior to the effective date of termination. In the event of termination, the Hearing Officer shall immediately deliver to the Secretary all materials in the possession of the Hearing Officer relating to any hearing assigned to Hearing Officer, organized in a manner that the Secretary may direct to assist the Commission in maintaining an accurate record of the proceedings and, if necessary, transfer a hearing to another Hearing Officer.

#### **ARTICLE 11: RECORDS RETENTION**

Records required by this Agreement to be retained by the Hearing Officer shall be retained for the periods specified in Appendix A, attached hereto. Such records may be retained in their original form or in any other reliable and readily retrievable format, at the option of the Hearing Officer.

## ARTICLE 12: NOTICES

1. Except as otherwise provided in this Agreement, any notice or other communication given pursuant to this Agreement shall be in writing and shall be effective upon the first to occur of (a) personal delivery to the party for whom intended, or (b) five days following deposit of the notice into the United States Postal Service mail (certified mail, return receipt requested, or first class postage prepaid), or (c) actual receipt by the intended party, if the notice is sent by overnight mail service or by electronic means.

2. Any notice given by the Hearing Officer to the Commission in direct relation to the provisions of this Agreement (including a change of contact information, and excluding invoices) under this Agreement shall be sent by mail, addressed to:

General Counsel  
New York State Gaming Commission  
P.O. Box 7500  
One Broadway Center  
Schenectady, NY 12301

With a copy to:

Supervisor of Contract Administration  
New York State Gaming Commission  
P.O. Box 7500  
One Broadway Center  
Schenectady, NY 12301

Any notice given by the Commission to the Hearing Officer shall be sent by mail, addressed to:

(Hearing Officer)  
(Mailing Address)

Either party may designate different contact information by giving written notice to the other in accordance herewith.

### **ARTICLE 13: DOCUMENTS INCORPORATED**

Appendix A, Standard Clauses for New York State Contracts, dated January 2014; the RFQual; and the Response are hereby incorporated herein to the same force and effect as if set forth at length hereat.

### **ARTICLE 14: ORDER OF PRECEDENCE**

In the event of a conflict in any of the provisions of this Agreement and the documents incorporated herein, such conflict shall be resolved by giving precedence in interpretation to the document listed before another in the list of documents contained below in this Article:

- (a) Appendix A;
- (b) Any amendments to the Agreement;
- (c) Agreement;
- (d) Request for Qualification and any clarifying responses by the Commission;
- (e) Hearing Office Response and any clarifying responses by the vendor.

### **ARTICLE 15: MISCELLANEOUS**

1. A waiver of enforcement of any provision of this Agreement shall not constitute a waiver of any other provision of this Agreement, nor shall it preclude the affected party from subsequently enforcing such provision.

2. This instrument and the documents incorporated herein represent the entire agreement between the Commission and the Hearing Officer, and no modification thereof shall be binding unless the same is in writing and signed by the respective parties.

3. The headings contained in this Agreement are intended for ease of reference only and shall not be interpreted to limit or modify any of the provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the latter day and year written below.

[HEARING OFFICER]

NEW YORK STATE  
GAMING COMMISSION

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
 ) ss.:  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 2015, before me personally came \_\_\_\_\_, to me known, who being duly sworn, did depose and say that he or she resides in \_\_\_\_\_ (if the place of residence is in a city, include the house and street number), that he or she is the \_\_\_\_\_ of [company name], the corporation which executed this contract, and that he or she was authorized to execute this contract on behalf of said corporation.

\_\_\_\_\_  
Notary Public