



RFP: Certified Public Accounting Services

VENDOR ACKNOWLEDGEMENT OF ADDENDUM

Amendment Number: Three (includes Q & A Summary)

Date Issued: June 30, 2015

Summary:

A revised Appendix B: Contract Form (incorporates Appendix A) – LOT 2, C15004 for Observation of Drawings, Ball Weight Certifications and Other Engagements is also included in this amendment along with Second Bidders' Questions and Answers.

By signing below, the bidder attests to receiving and responding to the amendment number indicated above.

FIRM NAME: _____

REPRESENTATIVE SIGNATURE: _____

REQUEST FOR PROPOSALS
FOR CERTIFIED PUBLIC ACCOUNTING SERVICES

Questions & Answers – Round 2

June 30, 2015

- Q.9:** In section 2.3 of the RFP, *Contract Elements*, please consider adding “the Contractor’s annual audit engagement letter” into the list of items that will become part of the contract, preferably as part of the third bullet as follows: “Contract, including the Contractor’s annual audit engagement letter.” As indicated in the RFP, Part 3 of Lot 1, the selected firm is required to “provide an audit engagement letter stating the terms and conditions of the engagement.” As such, we would like this to be included as part of the Contract.
- A.9: The Annual Audit Engagement Letter is part of the Scope of Services under the RFP. Section 2.3 of the RFP will remain unchanged.**
- Q.10:** Section 2.11 of the RFP, *Auditor Independence*, discusses an annual confirmation of independence from the NYS Gaming Commission. Please confirm whether this section would apply if the bidder was only awarded Lot 2, the services for which are currently provided as non-audit services, and therefore, would not otherwise be subject to professional independence standards.
- A.10: Section 2.11 of the RFP applies only to Lot 1.**
- Q.11:** Please consider replacing the language in Section 2.12, *Transition*, with the following to alleviate any ambiguity with terms such as “fullest extent” or “smooth and orderly”: “The Contractor shall comply with applicable professional standards relating to communications between predecessor and successor auditors.”
- A.11: The Commission declines to make this change.**
- Q.12:** In section 2.14, *Insurer Qualifications*, please consider the following changes:
- (a) In the first sentence, after “admitted” replace “and” with “or” to allow for companies that are authorized but not admitted in New York State.
 - (b) In the third sentence replace “copies of each required insurance Contract” with “Certificates of Insurance”. We do not provide copies of our insurance policies as they are confidential.
 - (c) In the fourth sentence, replace “insurance policies” with “the Contractor” and delete “termination or failure to renew”.

A.12: a) RFP, Section 2.14 – INSURER QUALIFICATIONS is hereby deleted in its entirety and replaced with the following:

All required insurance must be written by company rating of “A-” or better rated by A.M. Best & Co., have a record of successful continuous operation, are licensed, admitted (If coverage is provided by a non-admitted carrier, an ELANY Affidavit must accompany the certificate), and authorized to do business in the State of New York, and are approved by the Commission. Required coverage and limits must be put into effect as of the effective date of the Contract and must remain in effect throughout the term of the Contract, as determined by the Commission. The successful bidder must submit proof of required insurance coverage, and any renewals thereof, to the Commission upon the Commission’s request. The Contractor shall notify the Commission of any material changes to the policy, or any cancellations prior to the expiration date. The carrier shall also send notification of cancellation, termination, or failure to renew any policy in accordance with the policy provisions when practicable.

b) If requested by the Commission, the Contractor shall deliver to the Commission a copy of such policies, certified by the insurance carrier as being true and complete.

c) See response to 12.a.

Q.13: In section 2.15, *Insurance Requirements*, please consider the following changes:

In the first paragraph:

- (a) In first sentence, delete “Admitted Carriers” to allow for insurance companies that are authorized but not admitted in New York State.
- (b) In the third sentence, replace “evidence of such policies in a form acceptable to the Commission” with “Certificates of Insurance.”

Under General Conditions:

- (c) Subsection A.3 (Certificates of Insurance/Notices), in the second paragraph delete “be written so as to include a provision that the policy will”; delete “, materially changed, or not renewed”; and delete item “b.”
- (d) Delete subsection A.4 (Primary Coverage).
- (e) In subsection A.5 (Policy Renewal/Expiration), delete the first sentence and delete the first instance of “and/or” and everything after such instance in the last sentence.
- (f) In subsection A.6 (Self-Insured Retention/ Deductibles), delete the first sentence because this information is generally considered confidential.

- (g) In subsection A.7 (Subcontractors), after “impose the” insert “same or similar” to allow for subcontractors that may be from other countries and would carry similar insurance but not the same.
- (h) In subsection B.1 (General Liability), at the beginning of the fourth paragraph insert “Except for the Professional Liability policy,” because we generally cannot add an additional insured to this policy.

A.13: a) Section 2.15 of the RFP states, “The Commission may, at its sole discretion, accept policies of insurance written by a non-authorized carrier or carriers when Certificates and/or other policy documentation is accompanied by a completed Excess Lines Association of New York (ELANY) Affidavit...”

b) The Commission declines to make this change. See response A.13.a.

c) The Commission declines to make this change.

d) The Commission declines to make this change.

e) The Commission declines to make this change.

f) This provision applies to Self-Insured policies and will remain unchanged.

g) The provision indicates “as applicable” which would cover instances such as provided by your example of foreign subcontractors. Otherwise, when available, the same insurance requirements apply to the sub as to the Contractor.

h) Section 2.15 B.1, paragraph four is hereby amended to read:

“Policies, except for the Professional Liability policy, shall name the Commission as Additional Insureds, and such coverage shall be extended to afford the Additional Insured status to those entities during the Products/Completed Operations term.”

Q.14: In section 2.18, *Approval of Staffing*, please consider the following change: In the beginning of the first paragraph, insert “For LOT 2” and then add the following: “For LOT 1, the Commission reserves the right to review, and, if perceived necessary, disapprove any employee of the successful bidder who is assigned to the Commission Contract at contract inception, or may request such removal during the term or any extension thereof. The Contractor will consider such requests in light of the impact, if any, on the independence and validity of the audit process.” Requiring removal of a professional during the performance of the audit could result in a violation of professional independence standards.

A.14: The Commission declines to make this change.

Q.15: In section 2.22, *Code of Conduct for Bidder*, please consider the following changes:

- In Subsection A. replace “only of the highest standards” with “that conform to the requirements of the Contract”.
- In Subsection B. replace “best” with “commercially reasonable”.

A.15: The Commission declines to make these changes.

Q.16: In Part 3 for Lot 1, subsection C, the RFP discusses “Other Engagements”. Are the “Other Engagements” contemplated for Lot 1 limited to audit and attestation services (i.e. excluding advisory or non-audit engagements)? If it does contemplate potential advisory or non-audit engagements, please confirm that such services will only be executed upon agreement on mutually acceptable terms that may be different from the terms agreed to for the audit and attestation services described in LOT 1 and clearance of independence and any other potential conflict of interest matters. Not doing so could inadvertently jeopardize the independence of the audit firm. To that end, please add the following to this section: “Contractor and the Commission will negotiate mutually acceptable terms to cover these types of services”, and at the end of the second bullet, add “and appropriate terms.”

A.16: It is impossible to define exactly what type of engagement will be required. However, the engagement letter and Statement of Work process contemplated in the RFP will define the exact terms. It is not the Commission’s intention to jeopardize auditor independence nor would the CPA firm have to accept such an engagement.

Q.17: In Part 3 for Lot 2, subsection A, *Observation of Studio Drawing and Ball Weight Certifications*, please consider the following changes:

- (a) In the tenth bullet under *Duties and Responsibilities of Auditing Firm Representative*, replace “certify” with “document”.
- (b) In third sentence of the paragraph below the three bullets under *Duties and Responsibilities of Auditor*, replace “attest” with “document their observation of the weights per ball”.
- (c) In the second bullet under “The CPA firm’s representative in charge of staff scheduling will:”, replace “provide a copy to the Lottery Drawings Manager on a weekly basis” with “provide a copy to the Lottery Drawings Manager upon request.”
- (d) In the third bullet under “The CPA firm’s representative in charge of staff scheduling will:”, delete “immediately” and add “as soon as practical” at the end of the sentence.

(e) At the end of subsection A, please insert “In completing the observation procedures described in this subsection, the Firm’s staff sign or initial several forms and documents that are used by the Lottery to document the conduct of the drawings. It is understood that the Firm’s staff signatures and/or initials noted on the forms and documents, regardless of any language included in the forms and documents, simply denote the performance of certain procedures as agreed to and listed in the reports and do not expand the Firm’s responsibilities beyond those established and agreed to in the contract with the Lottery.”

A.17: (a) The language is revised as requested. This response amends this clause in the RFP as follows:

Observe and record results of the pre-test drawings on firm’s independent drawing form. Once the ball sets have cleared the pre-test criteria, review the Program Manager’s pre-test form to confirm drawing results. Review playback of pre-test drawings to reconfirm results. Observe and document whether the drawing equipment is under the direct observation and supervision of a Program Manager at all times.

(b) The language is revised as requested. This response amends this clause in the RFP as follows:

Copies of the Ball weighing procedures, for each game are included as Exhibit 5. A sample Ball Weight Report is included as Exhibit 6. The CPA firm will be required to document, through signature, the test performed by the Bureau of Weights and Measures.

(c) The language is revised as requested. This response amends this clause in the RFP as follows:

Review and sign the firm representative’s report on each drawing and provide a copy to the Lottery Drawings Manager on a monthly basis.

(d) The Commission declines to make this change.

(e) The Commission declines to make this change.

Q.18: Is the travel from the Broadcast Facility to the NYS Department of Agriculture and Markets described under *Duties and Responsibilities of Auditor* in Part 3 for Lot 2, Subsection A, *Observation of Studio Drawing and Ball Weight Certifications*, to be paid at only half rate of full rate?

A.18: Section 2.6 – Compensation outlines the reimbursement provisions under the contract. Contractor will not be reimbursed for travel performed under

the defined scope of work in the RFP. Reimbursement for travel does apply in the following situations for each Lot:

- **Lot 1: travel for work performed under the Statement of Work process (“other engagements”).**
- **Lot 2:**
 - **(1) travel while providing services related to observation of drawings that are held at a location other than the Lottery Headquarters in Schenectady, NY.**
 - **(2) travel for work performed under the Statement of Work process (“other engagements”)**

Travel Reimbursement under these circumstances will be paid as provided in Section 2.6 of the RFP: (a) per allowances established for New York State Management/Confidential employees; (b) travel portion to be paid at 50% of the applicable hourly rate.

Q.19: In Part 3 for Lot 2, subsection B, the RFP discusses “Other Engagements”. Are the “Other Engagements” contemplated for Lot 2 limited to advisory services (i.e. excluding audit and attestation engagements)? If it does contemplate potential audit and attestation engagements, please confirm that such services will only be executed upon agreement on mutually acceptable terms that may be different from the terms agreed to for the advisory services described in LOT 2 and clearance of independence and any other potential conflict of interest matters that may arise from such audit or attestation services. Not doing so could inadvertently jeopardize the independence of the audit firm. To that end, please add the following to this section: “Contractor and the Commission will negotiate mutually acceptable terms to cover these types of services”, and at the end of the second bullet, add “and appropriate terms.”

A.19: See response A.16.

Q.20: Appendix B, Lot 1, section 7, *Confidentiality and Nondisclosure*, please consider making the following changes:

- (a) In subsection (b) (ix), add the following to the end: “or where required to disclose pursuant to the applicable professional standards” to allow the Contractor to disclose information in situations where required.
- (b) In subsection (c), in the second sentence between “information” and “without”, insert “except as necessary to perform the services required by this Agreement,” to allow the contractor to perform the services contemplated in this contract.
- (c) Throughout this section, replace “written” with “tangible” to further define the items required to be returned.

A.20: (a) subsection (b) (iv) [not “(ix)”] will now read:

(iv) is required to be disclosed by the Contractor pursuant to law or applicable professional standards, so long as the Contractor provides the Commission with notice of such disclosure requirement and opportunity to defend prior to any such disclosure.

(b) subsection (c) will now read:

The Contractor may use Confidential Information solely for the purposes of providing services to the Commission pursuant to this Agreement. The Contractor shall not make copies of any written Confidential Information except as necessary to perform the services required by this Agreement,” without the express written permission of the Commission. ...

(c) The Commission declines to make this change.

Q.21: In Appendix B, Lot 1, section 10, *Liability and Indemnification*, please consider the following changes:

(a) In the second sentence, replace “which may be” with “for death, bodily injury, or damage to tangible property, to the extent” and delete “in whole or in part” and “actual or alleged”.

(b) After subsection (b), insert “Contractor shall have no obligation under this section where doing so would violate the Contractor’s independence or violate any other applicable professional standard.”

A.21: (a) & (b) The Commission declines to make this change.

Q.22: In Appendix B, Lot 1, section 11, *Relationship*, please consider inserting at the end of the last sentence, “to the extent such action does not violate independence or other applicable professional standards.”

A.22: The Commission declines to make this change.

Q.23: In Appendix B, Lot 1, section 13, *Documents Incorporated*, please consider inserting “the Contractor’s annual engagement letter” between “Contracts” and “the RFP”. See related item 1 above.

A.23: See response A.1.

Q.24: In Appendix B, Lot 1, section 14, *Order of Precedence*, please consider inserting in item (c), “including the Contractor’s annual engagement letter.” See related item 1 above.

A.24: See response to A.1.

Q.25: In Appendix B, Lot 1, section 15, *Miscellaneous Provisions*, please consider adding the following clauses:

(a) The Commission acknowledges that in connection with the performance of services under the Contract, Contractor may use the services of [name removed] controlled entities and/or member firms of [name removed] International to complete the services required by this Contract. The Commission also acknowledges that in connection with the performance of services under the Contract, Contractor uses vendors within and without the United States to provide at Contractor's direction administrative and clerical services to Contractor. These [name removed] entities, member firms of [name removed] International, and vendors ("Third Parties") may in the performance of such services have limited access to information, including but not limited to confidential information, received by Contractor from or at the request or direction of the Commission. Contractor will have full responsibility to cause these Third Parties to comply with such conditions of confidentiality and Contractor shall be responsible for any consequences of their failure to comply. Accordingly, the Commission consents to Contractor's disclosure to such Third Parties, and the use by such Third Parties of data and information, including but not limited to confidential information, received from or at the request or direction of the Commission for the purposes set forth herein.

(b) Where Contractor is reimbursed for expenses, Contractor's policy is to bill clients the amount incurred at the time the good or service is purchased. If Contractor subsequently receives a volume rebate or other incentive payment from a vendor relating to such expenses, Contractor does not credit such payment to its clients. Instead, Contractor applies such payments to reduce its overhead costs, which costs are taken into account in determining Contractor's standard billing rates and certain transaction charges that may be charged to clients.

A.25: The Commission declines to make these changes.

Q.26: In Appendix B, Lot 2, in the introduction to the contract, in the first "Whereas", please insert "Observation of Studio Drawings and Ball Weight Certifications and Review of Draw Procedures" after "from qualified firms to provide". Its omission appears to be a typographical error.

A.26: See revised Appendix B, Lot 2. This revised document replaces Appendix B, Lot 2 of the RFP.

Q.27: In Appendix B, Lot 2, section 5, *Mutual Cooperation*, please delete "CPA" as these services are delivered as advisory services.

A.27: See revised Appendix B, Lot 2. This revised document replaces Appendix B, Lot 2 of the RFP.

Q.28: Appendix B, Lot 2, section 7, *Confidentiality and Nondisclosure*, please consider making the following changes:

- (a) In subsection (c), between “information” and “without”, insert “except as necessary to perform the services required by this Agreement,” to allow the contractor to perform the services contemplated in this contract.
- (b) Throughout this section, replace “written” with “tangible” to further define the items required to be returned.

A.28: (a) Subsection (c) will now read:

The Contractor may use Confidential Information solely for the purposes of providing services to the Commission pursuant to this Agreement. The Contractor shall not make copies of any written Confidential Information except as necessary to perform the services required by this Agreement,” without the express written permission of the Commission. ...

(b) Commission declines to make this change.

Q.29: In Appendix B, Lot 2, section 10, *Liability and Indemnification*, please consider the following changes:

- (a) In the second sentence, replace “which may be” with “for death, bodily injury, or damage to tangible property, to the extent” and delete “in whole or in part” and “actual or alleged”.
- (b) Add the following clause: (f) Limitation of Liability –Notwithstanding anything else herein to the contrary, the liability of the Contractor on account of any actions, damages, claims, liabilities, costs, expenses or losses in any way arising out of or relating to the services performed under the Contract shall be limited to the amount of fees paid or owing to Contractor under the task issued pursuant to this Contract. In no event shall Contractor be liable for consequential, special, indirect, incidental, punitive or exemplary damages, costs, expenses, or losses (including, without limitation, lost profits and opportunity costs). This section shall apply regardless of the form of action, damage, claim, liability, cost, expense, or loss asserted, whether in contract, statute, tort (including but not limited to negligence) or otherwise and shall survive termination or expiration.

A.29: (a) & (b) The Commission declines to make these changes.

Q.30: In Appendix B, Lot 1, section 15, *Miscellaneous Provisions*, please consider adding the following clauses:

- (a) Management Decisions – The Commission acknowledges and agrees that Contractor’s services may include advice and recommendations; but all decisions in connection with the implementation of such advice and recommendations shall

be the responsibility of, and made by, the Commission. The Contractor will not perform management functions or make management decisions for the Commission.

(b) Third Party Usage - Any advice, recommendations, information, deliverables or other work product provided to the Commission under this Contract is for the sole use of the Commission, and is not intended to be, and may not be, relied upon by any third party, and all advice, recommendations, information, deliverables, or other work product may be marked to so indicate. Except for disclosures that are required by law or that are expressly permitted by this Contract, the Commission will not disclose or permit access to such advice, recommendations, information, deliverables, or other work product to any third party without the Contractor's prior written consent.

(c) Electronic Communications – Contractor may communicate with the Commission by electronic mail or otherwise transmit documents in electronic form during the course of this engagement. The Commission accepts the inherent risks of these forms of communication (including the security risks of interception of or unauthorized access to such communications, the risks of corruption of such communications and the risks of viruses or other harmful devices). The Commission agrees that the final hardcopy version of a document, including a deliverable, or other written communication that Contractor transmits to the Commission shall supersede any previous versions transmitted electronically by Contractor to the Commission unless no such hard copy is transmitted.

(d) Use of Vendors – The Commission acknowledges that in connection with the performance of services under the Contract, Contractor may use the services of KPMG-controlled entities and/or member firms of KPMG International to complete the services required by this Contract. The Commission also acknowledges that in connection with the performance of services under the Contract, Contractor uses vendors within and without the United States to provide at Contractor's direction administrative and clerical services to Contractor. These KPMG-controlled entities, member firms of KPMG International, and vendors ("Third Parties") may in the performance of such services have limited access to information, including but not limited to confidential information, received by Contractor from or at the request or direction of the Commission. Contractor will have full responsibility to cause these Third Parties to comply with such conditions of confidentiality and Contractor shall be responsible for any consequences of their failure to comply. Accordingly, the Commission consents to Contractor's disclosure to such Third Parties, and the use by such Third Parties of data and information, including but not limited to confidential information, received from or at the request or direction of the Commission for the purposes set forth herein.

(e) Volume Rebates – Where Contractor is reimbursed for expenses, Contractor's policy is to bill clients the amount incurred at the time the good or

service is purchased. If Contractor subsequently receives a volume rebate or other incentive payment from a vendor relating to such expenses, Contractor does not credit such payment to its clients. Instead, Contractor applies such payments to reduce its overhead costs, which costs are taken into account in determining Contractor's standard billing rates and certain transaction charges that may be charged to clients.

(f) Commission Vendors and Conflicts – The Commission is aware that Contractor may be providing assurance, tax and/or advisory services to other actual or potential vendors of the Commission. Contractor will perform an internal search for any potential client conflicts relating to any of the Commission's vendors identified by the Commission as having a role in connection with Contractor's performance of this Contract. The Commission hereby agrees that a vendor's status as a Contractor client does not impact Contractor's engagement to perform this Contract. Contractor will advise the Commission of any conflicts of interest that could prevent it from performing the Contract. However, Contractor is a large firm that is engaged by new clients on a daily basis and as a result it cannot guarantee that, following its conflict search, an engagement for any other related party will not be accepted somewhere else in Contractor's firm. Should any new information come to Contractor's attention, Contractor will promptly inform the Commission. Contractor shall perform this Contract in accordance with applicable professional standards.

(g) Ownership of Materials - The Contractor retains all ownership rights in any proprietary methodologies, methods, processes, or procedures of the Contractor that pre-exist or were developed outside the scope of this Contract. If any such property of Contractor is contained in any of the deliverables hereunder, the Contractor grants to the Commission a royalty-free, paid-up, non-exclusive, perpetual license to use such Contractor intellectual property in connection with the Commission's use of the deliverables.

- A.30: (a) The services to be performed under any contract resulting from this RFP do not include management functions or decisions. Appendix B will not be revised to include this clause.**
- (b) The Commission declines to make this change. This clause conflicts with Article 78 of Public Officers Law.**
- (c) The Commission declines to make this change.**
- (d) This language is specific to the bidder posing the language. This is a competitive solicitation; therefore, clauses relevant to specific bidder organizations will not be considered. Appendix B will not be revised to include this clause.**
- (e) The Commission declines to make this change.**

- (f) The Commission declines to make this change. See RFP, Section 1.21 for Conflicts of Interest provision.**
- (g) Section 2.23 of the RFP – Licensed Intellectual Property – is revised to include this language. Section 2.23 of the RFP is deleted and replaced with the following subsections (a) and (b):**
 - (a) Ownership of Materials - The Contractor retains all ownership rights in any proprietary methodologies, methods, processes, or procedures of the Contractor that pre-exist or were developed outside the scope of this Contract. If any such property of Contractor is contained in any of the deliverables hereunder, the Contractor grants to the Commission a royalty-free, paid-up, non-exclusive, perpetual license to use such Contractor intellectual property in connection with the Commission’s use of the deliverables.**
 - (b) To the extent that the bidder utilizes or relies upon the intellectual property rights of a third party in fulfilling its obligations under the Contract, the bidder will provide the Commission with whatever assurance the Commission deems necessary that the use of such third party intellectual property is permissible. In addition, in the event of failure to perform or breach of Contract the bidder must ensure continued right of use of licensed intellectual property by the Commission. The Commission will not pay a fee for rights already held by the bidder; however, if fees are incurred for the licensing of intellectual property owned by any third party relevant to the fulfillment of the services under this RFP, any fees to be paid by the Commission for use of a third party’s intellectual property will be negotiated on a case by case basis. As part of its Proposal, the bidder must provide a list of any third party’s intellectual property relevant to this procurement that the bidder is currently licensed to use.**

CERTIFIED PUBLIC ACCOUNTING SERVICES
Observation of Drawings, Ball Weight Certifications
and Other Engagements

C150004

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 [name of company] having an office at [address of company] (the "Contractor").

WHEREAS the Commission issued a Request for Proposals ("RFP") on May 26, 2015 soliciting proposals from qualified firms to provide Certified Public Accounting (CPA) services to include Observation of Studio Drawings, Ball Weight Certifications, and Other Engagements, and clarified the requirements of the RFP with Addendums, including Questions and Answers, dated June 11, 2015, June 19, 2015 and June 30, 2015 (collectively, the "RFP"); and

WHEREAS the Contractor submitted a Technical Proposal and a Pricing Proposal dated [_____] (collectively, the "Proposal"), which received the highest total combined score from among competing proposals by the Commission's evaluation team;

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises hereinafter set forth, the parties hereto agree as follows:

1. Scope of Services. The Contractor agrees to provide the Commission services, as more fully set forth in the RFP and the Proposal. Both the RFP and the Proposal are hereby incorporated into this Agreement with the same force and effect as if they were fully set forth herein.

2. Term. This Agreement shall be effective from October 1, 2015 through October 31, 2020.

3. Compensation. In full consideration for all goods and services specified in the RFP and the Proposal, the Commission agrees to pay, and the Contractor agrees to accept, compensation in accordance with the prices set forth in the Proposal. No minimum amount is guaranteed by this Agreement and the Contractor shall not have any right to make a claim therefor. Expenditures under this contract shall not exceed [XXXXXX].

4. Approvals Required. This Agreement, and any extension of the term of this Agreement or any amendment of the provisions of this Agreement, shall not be effective and binding upon the Commission, the State of New York, or the Contractor unless and until approved by the New York State Attorney General and the State Comptroller. The Commission agrees to exercise its best efforts to obtain such approval.

5. Mutual Cooperation. The objective of this Agreement is to provide services to the Commission as set forth in this Agreement. The parties agree to cooperate fully in good faith

and to assist each other, to the extent reasonably practicable, in order to accomplish that objective.

6. Termination.

(a) The Commission shall have the right to terminate this Agreement for convenience or for any of the following causes:

- (i) a material breach by the Contractor of any of the provisions of this Agreement;
- (ii) a determination by a court of competent jurisdiction that the Contractor is bankrupt or insolvent;
- (iii) a good faith determination by the Commission that continuation of the contract could place the integrity of the Commission in jeopardy; or
- (iv) a conviction of the Contractor or any of its directors, officers, or employees of any criminal offense connected to the Contractor's business which, in the sole reasonable opinion of the Executive Director of the Commission, would be prejudicial to public confidence in the Lottery or the Commission.

(b) In the event that the Commission decides to exercise the right to terminate this Agreement for cause, the Commission shall give the Contractor 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 Contractor shall be entitled to a period of thirty (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 (iv) of Paragraph (a) of this section 6, the cause for termination shall be deemed to be cured if the

Contractor causes or obtains the dismissal, resignation, retirement, or other removal of the person convicted of such offense during such thirty (30) day period.

(c) The Commission reserves the right to terminate this Agreement in the event it is found that the certification filed by the Contractor 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 Contractor in accordance with the written notice terms of this Agreement.

(d) Upon written notice to the Contractor, 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 Contractor's expense where the Contractor 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.

7. Confidentiality and Non-Disclosure.

(a) For the purposes of this section, "Confidential Information" means any information not generally known to the public, whether oral or written, that the Commission identifies as confidential and discloses to the Contractor so that the Contractor can provide services to the Commission pursuant to this Agreement. Confidential Information may include, but is not limited to, operational and infrastructure information relating to: bid documents, plans, drawings, specifications, reports, product information; business and security processes and procedures; personnel and organizational data, and financial statements; information system IP addresses, passwords, security controls, architectures and designs; and such other data,

information and images that the Commission deems confidential. The Commission will identify written Confidential Information by marking it with the word “Confidential” and will identify oral Confidential Information as confidential at the time of disclosure to the Contractor.

(b) Confidential Information does not include information that, at the time of Commission disclosure to the Contractor:

(i) is already in the public domain or becomes publicly known through no act of the Contractor;

(ii) is already known by the Contractor free of any confidentially obligations;

(iii) is information that the Commission has approved in writing for disclosure; or

(iv) is required to be disclosed by the Contractor pursuant to law so long as the Contractor provides the Commission with notice of such disclosure requirement and opportunity to defend prior to any such disclosure.

(c) The Contractor may use Confidential Information solely for the purposes of providing services to the Commission pursuant to this Agreement. The Contractor shall not make copies of any written Confidential Information without the express written permission of the Commission. The Commission’s disclosure of Confidential Information to the Contractor shall not convey to the Contractor any right to or interest in such Confidential Information and the Commission shall retain all right and title to such Confidential Information at all times.

(d) The Contractor shall hold Confidential Information confidential to the maximum extent permitted by law. The Contractor shall safeguard Confidential Information with at least the same level of care and security, using all reasonable and necessary security measures, devices and procedures that the Contractor uses to maintain its own confidential information.

(e) Upon written request by the Commission, the Contractor shall return all written Confidential Information to the Commission.

8. Records Retention. Records required by this Agreement to be retained by the Contractor 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 Contractor.

9. Notices. All notices required by this Agreement shall be sufficient if in writing and sent by certified mail return receipt requested and all other communications shall be sufficient if communicated in writing to the following addresses or to such other addresses as may be designated from time to time by the parties in writing:

(a) As to the Commission:

Executive Director of the Commission
One Broadway Center
Post Office Box 7500
Schenectady NY 12301-7500

(b) As to the Contractor:

[Name and Address]

10. Liability and Indemnification. The Contractor shall be responsible for all damages to life and property due to activities of the Contractor, as well as the subcontractors (if any), agents or employees of the Contractor in connection with performance of services under this agreement. The Contractor shall indemnify, defend, and save harmless the Commission and 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 attorneys' fees, which may be incurred, suffered, or required in whole or in part by an actual or alleged act or omission of:

- (a) The Contractor, its officers, employees, agents, successors and assigns,
and/or
- (b) A Subcontractor, its officers, employees, agents, successors and assigns.

11. Relationship. The relationship of the Contractor to the Commission arising out of this Agreement shall be that of an independent contractor. The Contractor, in accordance with its status as an independent contractor, agrees that it will conduct itself consistent with such status, that it will neither hold itself out as, nor claim to be, an officer or employee of the Commission or the State by reason hereof, and that it will not by reason hereof, make any claim, demand or application for any right or privilege applicable to an officer or employee of the Commission or the State, including, but not limited to, workers' compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit. All personnel of the Contractor shall be within the employ of the Contractor only or shall be duly contracted subcontractors of the Contractor, which 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 Contractor or any person, firm, company, agency, association, corporation, or organization engaged by the Contractor as expert, consultant, independent contractor, specialist, trainee, employee, servant or agent, for taxes of any nature, including, but not limited to,

unemployment insurance and workers' compensation, and the Contractor hereby agrees to indemnify and hold harmless the Commission and the State against any such liabilities.

12. Force Majeure. A Force Majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled. As herein used, Force Majeure means fire, explosion, action of the elements, governmental interference, rationing or any other cause which is beyond the control of the party affected and which, by the exercise of reasonable diligence, said party is unable to prevent.

Neither the Contractor nor the Commission shall be liable to the other for any delay in or failure of performance under the contract resulting from this RFP due to a Force Majeure occurrence. Any such delay in or failure of performance shall not constitute a default or give rise to any liability for damages. The existence of such causes of such delay or failure shall extend the period for performance to such extent as determined by the Contracting Officer to be necessary to enable complete performance by the Contractor if reasonable diligence is exercised after the cause of delay or failure has been removed.

13. Documents Incorporated. Appendix A, Standard Clauses for New York State Contracts, the RFP, and the Proposal are hereby incorporated herein to the same force and effect as if set forth at length hereat.

14. Order of Precedence. Any conflict between the provisions of this Agreement and the documents incorporated herein shall be resolved according to the following order of precedence, from the highest to the lowest:

- (a) Appendix A – Standard Clauses for New York State Contracts;
- (b) Any amendments to the Agreement;
- (c) Agreement;
- (d) Request for Proposal and any clarifying responses by the Commission;
- (e) Vendor Proposal and any clarifying responses by the vendor.

15. Miscellaneous Provisions.

(a) 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.

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

(c) 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.

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

(e) 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.

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

[CONTRACTOR]

NEW YORK STATE
GAMING COMMISSION

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

ATTORNEY GENERAL

COMPTROLLER
Thomas P. DiNapoli

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