

NO. 18-0159

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IN THE SUPREME COURT OF TEXAS

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GTECH CORPORATION,

*Petitioner,*

V.

JAMES STEELE, et al.,

*Respondents*

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RESPONDENTS' BRIEF ON THE MERITS

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## RESPONSE TO GTECH’S STATEMENT OF THE CASE

Plaintiffs disagree with GTECH’s statement in the “*Nature of the Case*” paragraph that it is being held liable only for following rather than second guessing Texas Lottery Commission’s (“TLC”) “directions” regarding the parameters of the Fun 5’s game (“the Game”).<sup>1</sup> GTECH ignores the fact that the court of appeals held that GTECH exercised “wide discretion” and “broad creative leeway” in fashioning instant games for TLC. *GTECH Corp. v. Steele*, 549 S.W.3d 768, 800 (Tex. App.—Austin, 2018, pet. filed) ([Tab A](#)).<sup>2</sup> It similarly ignores GTECH’s obligation, as a hired expert with industry experience in the development of instant games, to “deliver error free working papers,” and to provide “guidance” to TLC when TLC’s suggested parameter changes exposed misleading discrepancies that already existed in GTECH’s original instructions and game parameters. (CR 284, 424, 438-39, 446-47, 466, RFP at 4)<sup>3</sup>. Thus the parties disagree as to the role GTECH’s discretion played in the fraud alleged here, and the court of appeals

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<sup>1</sup> GTECH uses the word “direction” and its cognates 63 times in its brief. It eschews using the word “order.” But the word “direction” has multiple connotations. Direction can mean “guidance or supervision of action or conduct: management”—which would leave room for discretion—but it can also mean “an explicit instruction: order,” which would minimize any discretion. Merriam –Webster’s Collegiate Dictionary 353 (11th ed.)

<sup>2</sup> Text in [blue and underlined](#) is hyperlinked to the Appendix. After following a hyperlink, strike “Alt” and “left arrow” keys simultaneously to return to your location in the brief.

<sup>3</sup> RFP refers to TLC’s Request for Proposals. The RFP is not part of the record, but it is available from TLC’s website, and the parties and court of appeals have cited the RFP and considered it as a component to the Contract. GTECH Br. at 2 n.3. Plaintiffs have included the RFP in their appendix under [Tab B](#), and will cite the RFP by citing to [Tab B](#).

adjudicated that disagreement by carefully considering the evidence, including the parties' contract.

### **RESPONSE TO GTECH'S STATEMENT OF JURISDICTION**

In its jurisdictional statement GTECH argues that the court of appeals decision "creates an exception to derivative immunity that threatens to swallow the doctrine entirely" and that the court of appeals opinion "set the stage for artfully pleaded 'failure to question' claims that will compromise sovereign decisions and destabilize government contracting."<sup>4</sup> As explained in more detail below, these arguments about an "artful pleading" are at odds with "plea to the jurisdiction" practice principles which allow defendants to contravene jurisdictional allegations with evidence. And GTECH's worries about destabilizing government contracting constitute unsupported speculation similar to that rejected in *Brown & Gay*.

### **ISSUES PRESENTED**

Can a private contractor working for the government share in the government's immunity from suit for harm which arises from the contractor's actions when:

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<sup>4</sup> Under TEX. R. APP. P. 55.2(e), jurisdictional statements are to be presented without argument. Plaintiffs respond to GTECH's jurisdictional statement in order to rebut the arguments in GTECH's jurisdictional statement.

1) the record shows the government hired the contractor for its expert “guidance” and that contractor was exercising discretion in carrying out the actions that resulted in the harm; and

2) there is no evidence that imposing liability on the contractor will result in unforeseen expenditures from the public fisc?

## **STATEMENT OF FACTS**

This case involves the Texas Lottery's Fun 5's instant ticket game and, on its merits, presents the issue of whether the game instructions correctly informed consumers of the requirements for determining a winning ticket.

### **I. TLC CONTRACTS WITH GTECH.**

Pursuant to TEX. GOV'T CODE §466.014(b), the Texas Lottery Commission ("TLC") contracted with GTECH to provide Instant Game Manufacturing and Services for the Texas Lottery. (CR 279-290). The Instant Game Manufacturing Contract ("Contract", [Tab C](#)) was executed in August of 2012 and resulted from a Request for Proposals ("RFP") issued by TLC on November 7, 2011. ([Tab B](#)).

The RFP required Contractors to provide "Game Planning Services." Specifically, it required contractors to (1) "provide suggested game designs for inclusion in the plan," and (2) supply "[r]ecommendations for each price point and theme, including the game name and play style together with an album of representative tickets." ([Tab B](#) at 60, ¶ 7.2.1). Contractors were required to choose the "industry best" for submission to TLC and to back their recommendations with "trend and data analysis." (*Id.*) To that end, the RFP required contractors to identify and assign qualified and experienced personnel to TLC's work. ([Tab B](#) at 48-49). GTECH was required to demonstrate that its team members had

knowledge and experience in prize structure design, game design elements, graphic design, industry trends, and quality control and assurance. (*Id.*)

The RFP also obligated the Contractor to protect TLC's fisc by providing indemnity for claims arising from its services, (Tab B at 28-29 ¶ 3.32) and purchasing General and Professional Liability Insurance. (*Id.* at 30-31 ¶¶ 3.36 & 3.37). The professional liability insurance coverage was required to indemnify TLC for direct loss due to GTECH's errors or omissions. (*Id.* at 30-31 ¶ 3.37).

These provisions which granted contractors discretion over game design and provided express protections to TLC's fisc were incorporated into the Contract. (Tab C at 280, 281, 282-85).<sup>5</sup> The Contract required GTECH to prepare "complete and error free" working papers and to perform its responsibilities in accord with "the highest professional and technical guidelines and standards." (Tab C at 284, 288). It also stated that GTECH was an independent contractor and disclaimed any employment, agency, or any other relationship between TLC and GTECH. (Tab C at 280).

## **II. GTECH PROPOSES AND DEVELOPS THE FUN 5'S GAME FOR TLC.**

As required by the Contract, GTECH proposed the Fun 5's game, which GTECH had developed and previously used in four other jurisdictions. (CR 413-416). GTECH then provided TLC with draft artwork and prize structure for the

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<sup>5</sup> Citations to the Contract under Tab C in the Appendix will be to its page in the Clerk's Record, which is shown on the pages included in the Appendix.

Game. (Tab C at 283). It exercised discretion in deciding which games to suggest for TLC and recommending game design, play style, graphic design, and artwork. (Tab A at 794.) In preparing the draft working papers required by the Contract, GTECH had discretion to formulate detailed versions of the Game's parameters and specifications as well as color proofs of the ticket image for TLC's approval. (*Id.* at 795) (Tab C at 284-85) (listing requirements for working papers).

GTECH proposed the Game to TLC on March 13, 2013. (CR 275). After selecting the Game, TLC requested the Game's working papers from GTECH, which Penelope Whyte of GTECH prepared. (CR 430-32, 445, 456, 481). As originally proposed by GTECH, the fifth game on the card was a tic-tac-toe game which contained the following instructions:

Reveal three Dollar Bill (icon) symbols in any one row, column or diagonal line, win PRIZE in PRIZE box. Reveal a "5" symbol in the 5X BOX, win 5 times that PRIZE. (CR 616).

As worded, these instructions offer two alternative ways of winning: First, by uncovering a tic-tac-toe combination, and second, by revealing a "5" symbol in the 5X box. (CR 183-84). While these instructions offered two different ways of winning, the proposed game "parameters" that were to be programmed into the computers that validated tickets as winners or losers made only one way possible. The parameters stated that "5s" in the 5X box would appear only on tickets with a winning tic-tac-toe game. (CR 329). Thus, the parameters provided that no player

could win by uncovering the “5” symbol in the 5X box unless he had also won at tic-tac-toe.

### **III. TLC SUGGESTS MODIFICATIONS TO THE FUN 5’S GAME AND TRIGGERS ANOTHER REVIEW BY GTECH.**

TLC reviewed the draft working papers and requested that GTECH make minor modifications to the instructions. TLC requested that GTECH 1) change the Dollar Bill icon to a “5” symbol, 2) change the “5” symbol to a Money Bag symbol, and 3) remove the word “line” after the word “diagonal” in the game 5 instructions. (CR 176, 316-17, 325-26, 417). TLC later requested that GTECH change the game parameters so as to print the Money Bag symbol in the “5X” box on tickets with both winning and non-winning tic-tac-toe combinations. (CR 331, 334, 418-19). TLC made this request because of concerns that the tickets, as originally proposed by GTECH, would be easy targets for micro-scratching. (CR 331, 419).

GTECH and TLC personnel agreed in their testimony that when TLC suggested changes, GTECH should, as part of its contractual obligation to provide “guidance,” review the changes in the context of the entire game to ascertain whether they created other difficulties with the Game. Testimony from both TLC and GTECH personnel explained the existence of this GTECH obligation.

TLC'S DALE BOWERSOCK (CR 446-47):

Q. Do you expect that GTECH has a responsibility to make sure that the instruction in one of their games is not misleading?

A. If they saw concerns with the game they would report it to us.

Q. You would expect them to do that?

A. Yes.

GTECH'S JOSEPH LAPINSKI (CR 424):

A. If our—if our folks saw a change come through from the Lottery anticipated or believed that it was—it would harm the game or the Lottery, I would expect that they would either say something to the Lottery or bring it to someone's attention.

GTECH'S PENELOPE WHYTE (CR 438-39):

Q. And certainly, if a change in the parameters requested by the lottery commission was going to make the existing instructions misleading or deceptive, your company should have said to the lottery commission, hold on, we may need to change these instructions, correct?

A. As part of a CSR job that's –we take our job seriously, and we would let them know if there should be a change.

GTECH'S LAURA THURSTON (CR 466):

A. We don't have a role dedicated specifically to reading play instructions, but when changes are requested by the lottery and they are verified with our teams, we are reviewing the game comprehensively.

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Q. When you say it's reviewed comprehensively, is it the software department, and the –which other department, graphics department?

A. It would be any department that a change is affected by. But when I say comprehensively I mean each aspect of the game is reviewed.



Testimony also established that GTECH personnel reviewed the Game after the suggested TLC parameter changes and that the GTECH reviewers decided that the Fun 5's instruction did not need to be changed:

GTECH'S LAURA THURSTON (CR 467-68):

Q. All right. And I guess, just to make the question more clear, did you do an examination of the instructions after this change was made to determine if the language was fine as is, or did you not do that examination.

A. I did the examination.

Q. And you felt that the language that had previously been used on these tickets was just fine to be used with this change in the parameters?

A. You say "these tickets," do you mean the first couple of versions of working papers?

Q. Yes.

A. Yes, I reviewed it and felt that it was clear.

GTECH'S PENELOPE WHYTE (CR 436):

Q. ...Now, after you returned and you read the changes by Laura Thurston, and you read the executed working papers, you made the decision, there no need to change the instructions in Game 5, correct?

A. Correct.

After the changes and reviews were completed, the Fun 5's fifth game bore the following instruction:

Reveal three "5" symbols in any one row, column or diagonal, win PRIZE in PRIZE box. Reveal a "Money Bag" (icon) symbol in the 5X Box, win 5 times that PRIZE. (CR 493).

#### **IV. TLC BEGINS SELLING FUN 5'S GAME BUT THEN CANCELS THE GAME IN LIGHT OF CONSUMER COMPLAINTS.**

TLC began selling the Fun 5's game on September 2, 2014. (CR 183). Almost immediately, TLC began receiving complaints from purchasers. Internal TLC documents recognized that "the way the instructions read in the second sentence gives the impression that matching the '5' symbols is not necessary to win the bonus portion, that you only have to get the Money Bag symbol." (CR 183). Ms. Angelica Tagle of TLC reported that on September 4, 2014, she received 83 calls from Fun 5's players who felt that the wording was misleading. (CR 184). And on September 5 she noted that players were complaining that "this is misleading" and that "the other games have two ways to win and why would game 5 be any different." (*Id.*). On October 21, 2014, TLC announced that it was closing the Fun 5's game early due to player confusion. (CR 187-188).

#### **V. LITIGATION ENSUES.**

Plaintiffs purchased Fun 5's tickets that revealed Money Bag symbols, but the tickets were declared to be non-winners under the game's parameters. (CR 190). They filed this suit in late 2014, and other purchasers subsequently joined. (Second Supp. CR 10-20). The trial court denied GTECH's plea to the jurisdiction. The Third Court of Appeals affirmed the trial court's denial of the plea with respect to Plaintiffs' fraud claims and reversed the trial court's denial of the plea with respect to Plaintiffs' claims for aiding and abetting fraud, tortious

interference with existing contracts, and conspiracy. (Tab A at 804). GTECH now challenges the denial of its plea as it relates to Plaintiffs' fraud claims.

### **SUMMARY OF THE ARGUMENT**

Courts have offered many reasons for sovereign immunity, but its primary purpose is to protect taxpayers from having to bear the burden of incurring expense because of the government's mistake or misconduct. Taxpayer protection provides fundamental and foundational support for sovereign immunity.

Derivative sovereign immunity is the immunity that courts grant to a third party contractor when acting as the sovereign. This immunity is said to "derive" from the sovereign's immunity because derivative immunity belongs to the sovereign and is extended to other persons in order to serve the sovereign's interests. Governments at all levels frequently use private contractors to provide public services or aid government in providing those services. The list of contractors hired by governmental entities is as long as the type of services provided by government; it includes architects, engineers, attorneys,<sup>6</sup> construction companies, and public works companies.<sup>7</sup> All those entities would benefit from a

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<sup>6</sup> *Gonzalez v. Heard, Goggan, Blair and Williams*, 923 S.W.2d 764, 765 (Tex. App.—Corpus Christi 1996, writ denied) (op. on reh'g) (holding law firm hired as independent contractor to collect taxes for local government is not entitled to immunity).

<sup>7</sup> *City of Alton v. Sharyland Water Supply Corporation*, 145 S.W.3d 673, 682 (Tex.App.—Corpus Christi 2004, no pet.) (holding that sewer companies hired by City were independent contractors and were not entitled to immunity for injuries caused by negligent performance of contractual duties).

broad rule that enabled them to obtain the benefits of derivative immunity. In turn, a broad rule would cause those injured by such entities to lose their rights to fair compensation.

GTECH should not be granted the benefit of derivative sovereign immunity for two primary reasons. First, GTECH is not an agent of TLC, did not act as TLC, and was not merely “following orders” in the professional guidance it provided to TLC. Instead, GTECH was acting with discretion. Second, the benefits of derivative sovereign immunity should not be extended to third parties when its fundamental purpose—protecting taxpayers— is inapplicable. GTECH’s potential liability will not be, if Plaintiffs prevail, taxpayer-funded. Derivative sovereign immunity exists as an exception to general rules governing contractor liability because on some occasions, a private contractor may act as the government or a contractor’s liability may directly threaten the public fisc. Texas courts may have differed as to whether a private contractor claiming sovereign immunity has to satisfy one or both of these reasons for protection.<sup>8</sup> But GTECH has satisfied neither. It is therefore not allowed to derive immunity from the sovereign to protect its private assets from its own misdeeds.

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<sup>8</sup> See GTECH Br. at 24-26.

The question here is whether sovereign immunity, which is a judicially created common law defense,<sup>9</sup> should be extended to a private contractor who is sued not merely for following the directives of a governmental entity (TLC) but also for its own wrongdoing. Immunity serves a proper function when a public contractor performs its work strictly in accordance with government plans, specifications, or orders. But it should not apply when a contractor and government work closely together on a project, and an injury occurs through the combination of both parties' actions.

In this case, the Austin court of appeals got it right. Adhering to *Texas Dept. of Parks & Wildlife v. Miranda*, the court parsed through the evidence and held that GTECH exercised discretion in originating and then recommending games for use by TLC. The court also concluded that GTECH's advisory role of reviewing TLC parameter changes in the context of the entire Fun 5's game to ascertain whether the changes engendered new discrepancies in the game's function was discretionary in nature.

Seeking to escape this holding, GTECH wrongly contends that the court of appeals misapplied the law and created a universally applicable "exception" which will overcome the rule of derivative immunity. But derivative immunity is the exception to the rule of liability for private contractors. And the court of appeals

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<sup>9</sup> *City of Galveston v. State*, 217 S.W.3d 466, 471 (Tex. 2007).

properly applied this Court's precedent (*Brown & Gay, K.D.F, Strakos and Allen Keller*) to reject derivative immunity here. The court also properly applied the *Miranda* evidentiary standard by carefully analyzing the case-specific facts to reach its conclusion rather than adopting a new rule of universal application. In sum, the court of appeals' holding conforms with *Brown & Gay's* holding that contractors exercising discretion are not entitled to derivative sovereign immunity.

The court of appeals also correctly rejected GTECH's claim that its liability poses a threat to the public fisc. (Tab A at 803-04). *Brown & Gay* makes clear that sovereign immunity's purpose is not to prevent all increases in government expenditure but only unforeseen expenditures associated with the government's defense of lawsuits and payment of judgments. GTECH has offered no evidence of an increase in such expenses here. TLC is not a defendant in this case, and therefore will not owe any money to Plaintiffs. Moreover, GTECH has contracted to protect against both its own potential liability as well as TLC's through its indemnity obligations and through the purchase of insurance, including errors and omissions insurance designed to cover GTECH's exercise of discretion. This errors and omission coverage not only insulates the government from unforeseen litigation-related expenditures, it also recognizes the parties' understanding that GTECH would be exercising professional judgment (*i.e.*, discretion) in the performance of the Contract.

In sum, using this Court’s formula from *Brown & Gay*, the court of appeals correctly determined that GTECH’s exercise of discretion precluded its claim of immunity and likewise found no cognizable danger to the public fisc. Sovereign immunity offers protection to the government or to a party acting as the government. Since GTECH is not the government, and its discretion precludes it from acting as the government, the Court should not extend immunity to GTECH and should affirm the court of appeals’ judgment.

## **ARGUMENT**

### **I. DERIVATIVE SOVEREIGN IMMUNITY IS A HARSH DOCTRINE.**

Derivative sovereign immunity was first recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), where the federal government’s immunity was extended to a construction company working for it. The Court called the contractor an agent and held that it was immune because it had acted within its authority. *Id.* at 20-21. A number of subsequent decisions limited derivative immunity to agents. *See, e.g., McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) (stating that under *Yearsley* derivative sovereign immunity exist only if the contractor “at a bare minimum” was “a common law agent of the government at the time of the conduct underlying the lawsuit”). That limitation, however, was subsequently rejected in favor of a test that focuses on whether the contractor was following a sovereign’s orders. *See, e.g., Ackerson v.*

*Bean Dredging LLC*, 589 F.3d 196, 205-06 (5th Cir. 2009); *In re: Katrina Canal Breaches Lit.*, 620 F.3d 455, 465 (5th Cir. 2010) (stating that the *Yearsley* derivative immunity defense, “[s]tripped to its essentials, is fundamentally a claim that the Government made me do it.”) (internal citations and brackets deleted).<sup>10</sup>

When a government contractor lacks discretion, its actions are the actions of the governmental unit; if it has discretion, then it may be sued like any other private actor for its wrongful exercise of that discretion. *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 86 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

This Court first embraced this defense in *Glade v. Dietert*, 156 Tex. 382, 295 S.W.2d 642 (Tex. 1956) (citing *Yearsley* and holding that public works contractor was not liable “for the result of the work performed according to the contract”). In its most recent discussion of this defense, the Court in *Brown & Gay Engineering v. Olivares*, 461 S.W.3d 117 (Tex. 2015) made clear that there are two requirements for a derivative sovereign immunity defense. First, the contractor must have had no discretion because it was merely “following orders” or carrying out the sovereign’s will. *Id.* at 124-25. Second, the plaintiff’s claims must be based on that non-discretionary act. In other words, immunity is available only if

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<sup>10</sup> Some Texas intermediate appellate courts have held that an agency relationship is a necessary element of the derivative immunity defense. *See, e.g., Gonzalez v. Heard, Goggan, Blair and Williams*, 923 S.W.2d 764, 765 (Tex. App.—Corpus Christi 1996, writ denied) (op. on reh’g); *City of Alton v. Sharyland Water Supply Corporation*, 145 S.W.3d 673, 682 (Tex.App.—Corpus Christi 2004, no pet.); *Zuniga v. Navarro & Assocs., P.C.*, 158 S.W.3d 663 (Tex.App.—Corpus Christi 2005, pet. denied).



the plaintiffs' claim implicates government orders. *See Id.* at 125-26 (whether a private contractor is entitled to immunity turns on whether it exercised discretion over the "complained-of conduct.").

In *Brown & Gay*, this Court rejected a highway contractor's bid for derivative immunity. The Court identified two reasons for its holding. First, imposing liability on the contractor would not saddle the government with unforeseen expenditures and therefore extending immunity to the contractor would not comport with the legitimate purposes justifying the "otherwise harsh doctrine" of immunity. *Id.* at 123-24; *cf. Westfall v. Erwin*, 484 U.S. 292, 297-300 (1988) (stating that official immunity comes at a great cost because an injured party "is denied compensation simply because he had the misfortune to be injured by" a government official and "immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct."). Second, the plaintiffs' claims arose from the contractor's discretionary decisions in building the highway. The Court thus concluded the contractor's actions were not the actions of the government and held that a defendant sued for its own decisions could not derive immunity from the government entity with whom it was contracting. *Id.* at 124-127.

Chief Justice Hecht, joined by Justices Willet and Guzman, wrote a concurring opinion which reached the same conclusion but used different

reasoning. The concurring justices began with a syllogism: immunity protects the government; an independent contractor is not the government; and therefore a contractor should have no immunity. *Id.* at 129. (Hecht, C.J., concurring). An independent contractor can derive immunity when it acts *as* the government but “an independent contractor acting only in the service of the government is not a government actor” and is not therefore entitled to immunity. *Id.* An independent contractor can thus derive immunity only when it “is simply implementing the government’s decision” or when it “is actually authorized by the government to act in its place.” *Id.* at 130. (“[T] the ultimate issue is whether the independent contractor is actually authorized by the government to act in its place”).

The court of appeals here, following *Brown & Gay*, observed that a defendant could obtain immunity either by showing that its liability would cause unforeseen expenditures from the public fisc or by showing that a defendant had no discretion with respect to its actions and was acting *as* the government. (Tab A at 781-82). The court concluded that GTECH exercised no discretion with respect to three of Plaintiffs’ causes of action. But because GTECH acted with broad leeway and creative discretion in formulating the Fun 5’s game, Plaintiffs’ fraud claims

against GTECH implicated GTECH's discretion, and GTECH was not entitled to the benefit of immunity for those claims. *Id.* at 796-803.<sup>11</sup>

GTECH disagrees. It challenges the court of appeals' determination that GTECH exercised its discretion in 1) formulating the Fun 5's game, 2) choosing to submit it to TLC, and 3) determining that instructions for the game did not need to be changed after the game parameters were changed. GTECH likewise contends that its autonomy in creating the Fun 5's game and finely tuning its parameters, artwork, and detail are essentially meaningless in the face of TLC's statutory authority over lottery games in Texas. To support this conclusion, GTECH selectively elucidates contractual provisions emphasizing TLC's ultimate authority while ignoring those that require or allow GTECH to use its creative discretion or that recognize GTECH's legal responsibility for its agreed services.

Because the court of appeals correctly determined that GTECH exercised discretion in creating and producing the Fun 5's game, as well as in deciding whether and how to advise the TLC regarding the parameters and instructions for that game, and because this case poses no danger to the public fisc, this Court should either deny GTECH's petition for review or affirm the judgment of the courts of appeals.

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<sup>11</sup> The Court also determined that GTECH failed to show that Plaintiffs' fraud claims would impose unforeseen expenditures on the State, thus rejecting what it considered to be an alternative basis for immunity. *Id.* at 803-04.

## **II. THE COURT OF APPEALS CORRECTLY REVIEWED THE EVIDENCE TO DETERMINE THAT GTECH EXERCISED DISCRETION.**

### **A. The Record is Replete with Evidence of GTECH's Discretion.**

The court of appeals properly concluded that the evidence showed Plaintiffs' fraud claims arose from GTECH's exercise of discretion. (Tab A at 794-95, 798-803). In reaching this conclusion, the court correctly employed the standard of review established in *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004), taking Plaintiffs' evidence as true and resolving all inferences in Plaintiffs' favor. (Tab A at 773-774 nn. 8-11). Viewed through this *Miranda* lens, the evidence showed GTECH exercised its discretion in initially proposing the Game for use by TLC and by originating detailed draft working papers which delineated the Game's artwork, graphics, style of play, and parameters. (Tab C at 283-285, CR 292-313, 424, 430-32, 445, 456, 481). And, after TLC requested changes to the game parameters, GTECH completed a second review of the game designed to ensure that TLC's proposed changes did not cause the game to be misleading or confusing. (CR 433-36, 466-68). Based on that review, GTECH decided not to recommend further changes. (*Id.*).

The Contract granted GTECH considerable discretion. It established a five-step team approach that required GTECH and TLC to "work closely" together for designing game tickets. (Tab B at 60-61; Tab C at 283). While GTECH argues that the contract required it to "follow[], rather than second-guess[] the

commission’s directives,” that reading fails to account for the entirety of the Contract. It is true that the Contract gave TLC the right to “make all final decisions regarding the selection and inclusion of instant ticket games in the plan.” Likewise the Contract required GTECH to submit its work to TLC for its approval. But, read in its entirety, the Contract demonstrates that TLC looked to GTECH for its expert “guidance” for their mutual development of lottery games and tickets. (Tab B at 4, 60; Tab C at 282-285). The Contract required GTECH to

1. provide game planning services support, which includes “work[ing] closely with the [TLC] to identify instant ticket games” for potential inclusion in the TLC’s “plan” or “plans” of new instant games to be developed and sold and “provid[ing] suggested game designs for inclusion in the plan,” including making recommendations on graphic and game design, play style, and price, (Tab B at 60);
2. provide draft artwork and prize structure to the TLC, (Tab C at 282);
3. upon receiving TLC’s approval of artwork and prize structure, provide draft working papers to TLC—essentially a detailed version of the game’s parameters and specifications, as well as color proofs of the ticket image, (Tab C at 283-286);
4. upon receipt of TLC’s “requested changes” provide final working papers to TLC, (Tab C at 283);
5. upon receipt of written authorization from the TLC Executive Director, request additional changes if the “[e]xecuted working papers are not “complete and free of any errors” recognizing that such changes “must be approved through the execution of a post executed change and signed by the [TLC] Executive Director or designee.” (Tab C at 284)<sup>12</sup>

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<sup>12</sup> As noted by the Austin court of appeals, “the Contract contemplated that GTECH could propose further changes to working papers not only at that pre-approval juncture, but even for a period afterward, explicitly permitting ‘changes made after the execution of working

Each step of this process required GTECH and TLC to work together to ensure that the best games would be available to the public. As the contract stated, GTECH was hired for the purpose of providing TLC with “guidance . . . in all matters related to instant game development and manufacturing services.” (Tab B at 4).

The Contract provisions granting TLC the authority to make all final decisions is itself a recognition that there are a series of decisions leading up to the final decision. When a team contributes to the creation of a project, there must be a final decision-maker, and here it was TLC. But that does not mean that the rest of the team had no discretion, just as Brown & Gay had discretion even though the Toll Authority had final approval authority. *Brown & Gay*, S.W.3d at 119.

The Contract also provides that the TLC retains “the same scrutiny and oversight” over GTECH “that would apply if all operations were performed by [the Commission’s] employees.” (Tab B at 4). Scrutiny and discretion are not mutually exclusive; employees often have discretion in performing their duties. *See Wells v. Sierra & Assocs., Inc.*, No. 07-97-0378-CV, 1998 WL 244578, at \*4 (Tex. App.—Amarillo May 13, 1998, pet. denied); *Merchant v. State*, 379 S.W.2d 924, 926 (Tex. App.—Austin 1964, writ denied). While the buck has to stop with one person who makes the “final decision” and whose decision must be “accept[ed]

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papers ... through the execution of a post executed change and signed by the [TLC] Executive Director or designee.” (Tab A at 801).

and support[ed],” (Tab B at 4), that decision does not erase all the previous discretion exercised by other team members and does not eliminate GTECH’s contractual obligation to advise TLC if its game is not “complete and free of any errors.” (Tab C at 284).

The parties’ course of conduct was consistent with this team approach. Both GTECH and TLC personnel testified that they expected GTECH to conduct a review of the game after TLC suggested parameter changes and to advise TLC if additional modifications were needed. (CR 424, 438-39, 446-67, 466). After all, GTECH had used this game in other jurisdictions and was considered the expert. (CR 438, 456). In conducting this second review of the game, GTECH personnel were using their own deliberation and judgment to evaluate the game and thus were exercising discretion. *See, City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994) (discretionary acts are those which involve personal deliberation or judgment); *see also Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 425 (Tex.2004) (stating that whether an act is discretionary or ministerial depends on whether it involves personal deliberation or simple adherence to an order. “Ministerial acts are those for which ‘the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.’”); *Gagne v. Galveston*, 805 F.2d 558, 560 (5th Cir. 1986) (“if an official is required to exercise his judgment, even if rarely or to a small

degree, the [United States Supreme] Court would apparently not find the official's duty to be ministerial in nature.”). GTECH exercised its own judgment in developing and recommending the Game. It used additional discretion in deciding not to recommend changes to its instructions after TLC suggested parameter changes. Its acts were discretionary.

**B. GTECH's Discretion Precludes Its Immunity Claims.**

GTECH's discretion is sufficient to defeat immunity under the standards set forth in the *Brown & Gay* opinions. GTECH correctly observes that *Brown & Gay* leaves open the degree of government control that is necessary before a contractor will be considered to be acting as the government rather than for the government. GTECH Br. at 15. But one thing is clear: control exercised through a final approval is tantamount to no control and is insufficient to negate a contractor's exercise of discretion. *Brown & Gay*, 461 S.W.3d at 119; *see also id.* at 126 (“the government's right to control . . . is utterly absent here.”).

Similarly, *Brown & Gay* suggests that total control by the contractor is not required before the existence of discretion will preclude derivative immunity. Thus, the *Brown & Gay* majority reasoned from *K.D.F. v. Rex*, 872 S.W.2d 589 (Tex. 1994) that “private parties exercising independent discretion are not entitled to sovereign immunity.” *Brown & Gay*, 461 S.W.2d at 124. In *K.D.F.*, a contractor, who was retained by a government agency to provide financial advice



was found not to be entitled to derivative immunity. *K.D.F.*, 878 S.W.2d at 597. Here, GTECH also acted in the role of advisor. It had discretion to choose which games to recommend to TLC; to create the Game and formulate its instructions; and to advise TLC regarding the confusing effects of TLC-suggested parameter changes. This is the same kind of discretion employed by the advisor in *K.D.F.* And *Brown & Gay* cited *K.D.F.* to determine the existence of immunity-defeating contractor discretion. Both cases support the same conclusion here—that GTECH’s discretion and advisory role should defeat its claim to derivative immunity.

*Brown & Gay* also quoted from *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1242 (D. Or. 2010), where the court explained that a government contractor who is given discretion to determine how its work is to be performed is not entitled to immunity if the manner of performance causes harm to a third party. *Brown & Gay*, 461 S.W.3d at 125 n.9. GTECH was tasked with proposing games to the TLC, developing game designs, making recommendations for price points and themes, and providing draft artwork and prize structures. (CR 275 [¶¶23, 26], [Tab C](#) at 283-85, [Tab B](#) at 60-61). GTECH’s choices about game design and structure were choices about how GTECH would fulfill its contract with TLC. Since GTECH determined the “how” of its performance, it had discretion under *Bixby* and *Brown & Gay*, and it should not be immune from any fraud it committed.

GTECH's discretion also defeats immunity under the standards set forth in Chief Justice Hecht's concurring opinion. Under Chief Justice Hecht's formulation, an independent contractor can obtain immunity for its torts when it "is simply implementing the government's decisions." *Brown & Gay*, 461 S.W.3d at 130. (Hecht, C. J. concurring). The "ultimate issue," according to Chief Justice Hecht, is "whether the independent contractor is actually authorized by the government to act in its place." *Id.* GTECH was doing far more than "simply implementing government decisions." It was deciding which games to propose and then providing its own designs, graphics and artwork for those games. (CR 275 [¶¶23, 26]; [Tab C at 283, 285](#); [Tab B at 60-61](#)). It did not act as the government; it never interacted with the public nor was its name on the lottery ticket. Indeed, the lottery purchasers had no reason to even be aware of GTECH's existence. GTECH acted as "an independent contractor acting only in the service of the government" and because it was not a government actor, it is not entitled to immunity. *See Id.* at 129. And there is no evidence that TLC authorized GTECH to act in its place. To the contrary, GTECH emphasized in the courts below that it could not act in the place of TLC in communicating with retailers or customers or in selling the Fun 5's ticket. (CR 273-74 at ¶¶ 8-14). Since GTECH was doing far more than merely implementing TLC instructions, and since there is no evidence

that TLC authorized it to act in its place, GTECH cannot derive immunity from TLC under the analysis employed by the *Brown & Gay* concurring justices.

**C. GTECH Mischaracterizes Plaintiffs' Claims.**

GTECH contends that a denial of GTECH's derivative sovereign immunity defense will "effectively eviscerate[] the doctrine by denying derivative sovereign immunity solely because GTECH did not second-guess the government's decision" and "'discretion' to second guess directions is inherent in the government-contracting relationship." GTECH Br. at xi, xii, 16. This "loophole . . . threatens to swallow the doctrine of derivative immunity" because contractors always have the ability to "question the government and alert it that its decisions might be mistaken." GTECH Br. at 18; *see also id.* at 24. This, GTECH claims, is a "bad outcome." *Id.* at 18.

But this "bad outcome" is based on a mischaracterization of Plaintiffs' claims, as a careful review of those claims and their underlying factual basis will show—the kind of review that the Austin court of appeals meticulously conducted.<sup>13</sup> That meticulous review demonstrates that Plaintiffs' fraud claims address wrongdoing by GTECH, and not TLC's approval of GTECH's design. In

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<sup>13</sup> Plaintiffs do not challenge the Austin court's conclusion that its non-fraud claims are barred by derivative immunity.

*Brown & Gay*, this Court likewise repeatedly limited its inquiry to the plaintiff's claims in concluding that derivative sovereign immunity did not apply.<sup>14</sup>

Plaintiffs do not claim that GTECH is liable “merely because [it] implemented government decisions over which [it] had no control.” GTECH Br. at xi; *see also id.* at 16. Nor do they claim that liability attached because GTECH could have “question[ed] the government’s decision.” GTECH Br. at xii; *see also id.* at xi.<sup>15</sup> Finally, Plaintiffs do not claim that immunity is unavailable based on the mere fact that a contractor can always ask questions of its clients about “potential problems with government-directed actions.” GTECH Br. at 34.

Rather, Plaintiffs’ claim is that, under these circumstances, GTECH was obligated to inform TLC of the problems created by the merging of their two work products. In other words, Plaintiffs’ claim is that, given the close working relationship between GTECH and TLC, GTECH’s obligation to provide guidance to TLC, and GTECH’s choice of the words used in the Game’s instructions, GTECH “should have alerted” TLC that the merging of their joint work on the

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<sup>14</sup> 461 S.W.3d at 119 (stating that contractor was sued for negligence “in carrying out its responsibilities”); 123 (referring to issue presented in terms of “holding a private party liable for its own improvident actions in performing a government contract”); 125-26 (*Brown & Gay* was independently negligent in designing the signs and traffic layouts for the Tollway. *Brown & Gay*’s decisions in designing the Tollway’s safeguards are its own.”); 126 (“[T]he Olivareses do not assert that *Brown & Gay* is liable for the Authority’s actions; they assert that *Brown & Gay* is liable for its own actions.”)

<sup>15</sup> Neither Plaintiffs’ live petition nor the Austin court used the phrase “failure to question,” “did not question,” or similar phrases to describe Plaintiffs’ claims.

Game had created a misstatement that would deceive potential customers about the likelihood of their winning. (Tab A at 798, 800). As summarized by the Austin court of appeals, Plaintiffs claim “is based on the combination of the money icon” —which was added by TLC—“*plus* the accompanying instruction written by GTECH.” (*Id.*). The Austin court of appeals explained that the final approved ticket

incorporated (1) the new Game 5 parameters, originating with TLC, specifying that the moneybag-prize-multiplier icon would appear on both winning tickets and 25 percent of the non-winning tickets, in combination with (2) the preexisting Game 5 instructions, whose substance had originated with GTECH and had accompanied GTECH’s previously proposed game parameters in which the moneybag icon could appear only on winning tickets. This version of the working papers was approved by the TLC’s executive director, executed, and made the basis for the Fun 5’s ticket sold at retail.

(Tab A at 797). Thus, contrary to GTECH’s contentions, Plaintiffs do not “substantively” attack TLC’s decisions. GTECH Br. at 20, 30. Plaintiffs’ claims are directed at GTECH’s original instructions and its failure to advise TLC the effect of combining those instructions with TLC’s new game parameters.

In other words, Plaintiffs’ claims are directed at a professional hired to give “guidance” that the professional knows will be relied on by a government-client. When the government seeks such advice and the parties’ agreement specifies that the parties combined work product should be “complete and free of any errors,” it would indeed be a “bad outcome” to immunize the professional from liability. If

governmental immunity is a “harsh doctrine” that should not be lightly extended because it burdens injured individuals who must shoulder its consequences, even more so should derivative governmental immunity be narrow because it “shields” the private contractor’s “improvident acts—however improvident, harsh, unjust, or infuriatingly boneheaded these acts may seem.” *Brown & Gay*, 461 S.W.3d at 122. (citing *Bacon v. Tex. Historical Comm’n*, 411 S.W.3d 161, 172 (Tex. App. — Austin 2013, no pet). Derivative immunity should apply only when the contractor acts *as* the government—meaning it takes complete control of a project—not *for* the government.

When the government gives final approval to work that originated with a contractor, the contractor has not acted as the government. Indeed, the public may not even realize the government used a third party contractor. The contractor in that situation has acted *for* and *with* the government, but not *as* the government. Similarly, when the government gives final approval to a project that results from a combination of work that originated in part with the contractor, the contractor has not acted *as* the government, it has acted *for* the government. And when a claim is based on the combination of acts by both the contractor and the government, the contractor should be liable for its own actions. Proportionate responsibility will ensure that that contractor’s liability is assessed separately from the government’s. TEX. CIV. PRAC. & REM. CODE §33.002(a)(1)(2019) (proportionate responsibility

statute applies “to any cause of action based on tort”); §33.003(a) (requiring jury to assess proportionate responsibility among all potentially responsible parties).

**D. GTECH’s Attempt to Divorce Its Discretion in Formulating the Misleading Game Instruction from Plaintiffs’ Fraud Claims is Unpersuasive.**

Despite the abundance of evidence connecting GTECH’s discretion to the misleading instructions for the Fun 5’s game, GTECH insists that TLC bears sole responsibility. Specifically, it claims that the game’s instructions were misleading “only because TLC directed GTECH to include the ‘money bag’ symbols on some tickets without a winning tic-tac-toe game.” GTECH Br. at 31. That argument is incorrect for two reasons.

*First*, GTECH’s instructions were fraudulent even before the parameters were changed. As originally proposed by GTECH, the instructions for the fifth game represented to players that they could win a prize in two alternative ways: *either* by getting a tic-tac-toe combination *or* by uncovering an appropriate icon in the 5X box. (CR 295). That was a misrepresentation. The original Game parameters required a tic-tac-toe combination for a winning ticket regardless of whether the ticket had an appropriate icon in the 5X box. (CR 310). Thus, there was only one way to win a prize. And that way was to win at tic-tac-toe. If a winning ticket *also* revealed an appropriate icon in the 5X box, the amount in the prize box would be multiplied by five. GTECH’s representation in its original

instructions that there were two independent ways to win a prize was false. Under GTECH's original parameters, this falsehood would never be discovered. Every ticket that revealed an appropriate icon in the 5X box would have also revealed the winning tic-tac-toe combination. Players who were led to believe they could win in one of two ways would never know they had been misled because they would never uncover an appropriate icon in the 5X box unless they had *also* won at tic-tac-toe.

TLC's requested change in Game parameters did not make GTECH's original instructions any more or any less fraudulent. Instead, the changes created a class of players who would be able to discover that they had been misled by the instructions. This class would consist of persons who had lost at tic-tac-toe but then uncovered an appropriate icon in the 5X box on their non-winning ticket. When they presented that ticket for payment, they would be told that their ticket was not a winner even though their ticket contained an appropriate icon in the 5X box. GTECH could have avoided this deception by recommending corrections on the ticket after receiving TLC's suggested parameter changes. GTECH's conscious decision not to do so, (CR 436, 467-68), helped create a class of plaintiffs, but it did not make the original instructions any more or less fraudulent than they were already. Thus, the Fun 5's game had a misleading instruction before TLC required "money bag" symbols to be placed in the 5X box



for some non-winning tickets, and this instruction was never materially changed during TLC's approval process.<sup>16</sup>

*Second*, as the court of appeals recognized and as shown by the evidence, TLC's parameter change was not the only causative factor in the fraud. Instead, it was TLC's parameter change *in combination with* the pre-existing instructions that led to the misleading ticket. (Tab A at 798, 800). Since the instructions were created by and were within GTECH's discretion, and since those instructions were a cause of the fraud, which could have been avoided if the instructions had been formulated differently, the court of appeals correctly connected GTECH's discretion with Plaintiffs' fraud claim.<sup>17</sup>

**E. GTECH's Discretion to Advise of Game Discrepancies Also Defeats Immunity.**

GTECH not only ignores the role its discretion in formulating the Game's original instructions played in the fraud, it also improperly discounts its discretion

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<sup>16</sup> The Court of Appeals did not deem GTECH's discretion in originating the Game 5 instructions to be material to GTECH's claim of derivative immunity. (Tab A at 800). Plaintiffs respectfully disagree with this conclusion since the instructions were misleading even without the parameter change. The parameter change merely disclosed the deception.

<sup>17</sup> GTECH seeks to avoid evidence that its use of discretion caused harm to Plaintiffs by inappropriately delving into the merits. First, GTECH attempts to tilt the scale in its favor by complaining that the more than 1200 purchasers seek "massive" damages of "hundreds of millions of dollars" amounting to "more than \$500 million." GTECH Br. at ix, xi, 18-19, 30 n. 9. Second, it invokes a TLC regulation which limits TLC's liability for disputed tickets. GTECH Br. at 30 n.9 citing 16 TEX. ADMIN. CODE §401.302(i). As this Court has explained, whenever possible, courts should avoid delving into the merits of a case in order to resolve a plea to the jurisdiction. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 453 (Tex. 2016.). See also (Tab A at 802-03). Plaintiffs decline, therefore, to address why the regulation is inapplicable here.

to advise TLC of the problems created by TLC's parameter change. As noted by the court of appeals, GTECH specialists had an obligation to reevaluate the game in light of TLC parameter changes in order to advise TLC as to whether the revisions created any new problems with the game. (Tab A at 800-02). GTECH's account-development manager, Joseph Lapinski, stated, "if our folks saw a change come through from the Lottery anticipated or believed that it was—it would harm the game or the Lottery, I would expect that they would either say something to the Lottery or bring it to someone's attention." (CR 424). TLC's instant-game coordinator confirmed, stating that "if they saw concerns with the game, they would report it to us," and that he expected such reporting by GTECH. (CR 447). Such services were part of GTECH's "guidance" to TLC.

The GTECH employees who worked on the Fun 5's game confirmed that this was their approach. Laura Thurston, the GTECH customer service representative who prepared the final rounds of revised working papers, stated that TLC's requested changes "triggered a comprehensive [ ] internal review by the teams who were impacted by the change to determine if further changes to the game—including the instructions were warranted." (Tab A at 801, CR 466). She further stated that after the parameter change, she actually reviewed the instructions, found them clear, and did not consider changing them. (Tab A at 801, CR 466-68). Another GTECH customer service representative, Penelope Whyte,

agreed. Ms. Whyte testified that if a TLC-suggested change in parameters would make instructions misleading or deceptive, that it would be her job to let TLC know. (Tab A at 801-02, CR 438-39). Based on this testimony, the Court determined that the contracts between TLC and GTECH “plainly afforded” GTECH discretion to choose to alert TLC of new discrepancies with the game’s instructions. (Tab A at 802). *See also, Chambers*, 883 S.W.2d at 654 (discretionary acts involve personal deliberation, decision and judgment).

Citing to footnote 153 of the court of appeals’ opinion, GTECH argues that the court of appeals rejected Plaintiffs’ reliance on testimony about the parties’ practices and expectations under the Contract. GTECH Br. at 32-33. But that is incorrect. In fact, the court relied on such testimony to conclude that GTECH had discretion to suggest modifications to game instructions in light of TLC-directed parameter changes. (Tab A at 801) (“Joseph Lapinski, GTECH’s account-development manager regarding the Texas Lottery, acknowledged that if GTECH personnel ‘saw a change come through from [TLC] [that they] anticipated or believed ... would harm the game or [TLC],’ GTECH would *expect* them to ‘either say something to [TLC]’ or ‘let someone know so ... we can discuss or address it with [TLC].’”). (emphasis added). Plaintiffs’ reliance on testimony regarding the parties’ actions and expectations is consistent with the court of appeals’ reliance on the same testimony. (Tab A at 801-02). Such testimony is also admissible because

the Contract obligated GTECH to perform its responsibilities in accord with “the highest professional and technical guidelines and standards.” (CR 284, 288). Testimony about the parties’ practices and expectations was relevant to establish these “standards” and the guidance GTECH was to provide. *Mediacomp, Inc. v. Capital Cities Commc’n, Inc.*, 698 S.W.2d 207, 212 (Tex. App.—Houston [1st Dist.] 1985, no writ) (“contracts may be construed in the light of the customs of the business to which such contracts relate. . . . The copy of the [] standard contract was relevant as evidence of custom and industry practices and was circumstantial evidence regarding the intent of the parties.”); *Yucca Supply Co. v. Cont’l Operating Co.*, No. 14-02-00085-CV, 2003 WL 297557, at \*3 (Tex. App.—Houston [14th Dist.] Feb. 13, 2003, no pet.) (“Testimony regarding custom and usage in an industry is admissible when a contract’s terms are ambiguous.”).

Rather than address this evidence of discretion, GTECH seeks to avoid it with two legal arguments. Both are wrong. First, GTECH contends that the court of appeals’ reasoning finds no support in this Court’s case law. Second, it argues that the court of appeals’ holding will invite a “talismanic pleading” loophole, which will destabilize government contracting. Neither of these arguments justifies GTECH’s argument that this Court should ignore record evidence in order to expand governmental immunity.

**1. This Court’s precedent supports the Court of Appeals’ reasoning.**

GTECH first criticizes the court of appeals’ determination that GTECH’s role was most closely analogous to the investment advisor in *K.D.F. supra*. (See [Tab A](#) at 802 and n. 154). In *K.D.F.*, this Court held that an investment advisor, PacHolder, who was an independent contractor and whose role was in the nature of advising the governmental agency how to proceed, exercised sufficient discretion to separate it from the legal protections applicable to the government agency. 878 S.W.2d at 589. GTECH claims its role was not analogous to the investment advisor’s role in *K.D.F.* because every aspect of its work was purportedly controlled by TLC, supposedly placing GTECH in sharp contrast with the *K.D.F.* advisor “whose activity necessarily involved considerable discretion.” *Id.*

But GTECH’s obligation to provide guidance to TLC is analogous to PacHolder’s obligation to provide investment advice to the Kansas retirement system. Both contracting parties were contractually designated as independent contractors. The “guidance” (GTECH) or advice (PacHolder) of both could ultimately be rejected by the government-client. Their guidance and advice was independent—not controlled—but once the government reached a final decision the contractor was obligated to implement it. GTECH’s role in (1) originating and designing the Fun 5’s game, (CR 275 [¶¶ 23, 26 and 27] 436, 458), and (2) conducting a comprehensive review of the game after receiving TLC’s parameter

changes confirms GTECH's role as an advisor exercising discretion. (CR 466). While GTECH could not overrule TLC (CR 436, 458, 466), it could and did provide TLC with advice and know-how. And GTECH could have avoided the conduct now alleged to be fraud (Tab A at 799), either by drafting correct game instructions in the first place or by advising TLC of the deception that TLC's parameter changes would reveal. (CR 424, 438, 447, 466-68). GTECH was not TLC's minion. It was TLC's advisor, and the court of appeals' comparison with *K.D.F.* was apt.

The court of appeals also found GTECH's discretion comparable to the contractor's discretion in *Brown & Gay* who, like GTECH, designed a product that had to be approved by the requisite government authority before it could be built or sold. (Tab A at 799). GTECH takes issue with the comparison, contending that *Brown & Gay* was being sued for decisions regarding construction of the highway that were "its own" while GTECH's decisions were not GTECH's own because TLC had ultimate control. GTECH Br. at 35. But that misreads both the facts in *Brown & Gay* and here. In *Brown & Gay*, the government did not do the initial work; its contractually-retained engineer performed the original design work. The Toll Authority had final approval authority; the construction could not begin until it approved the engineer's plans and specifications. *Brown & Gay*, 461 S.W.3d at 119. The same is true here: TLC had no role in GTECH's original design of the

Game. Nor did TLC have any role in GTECH's decision to suggest the Game to TLC in the first place. (CR 275 [¶¶ 23, 26 and 27], 283-85, 412-416); (Tab A at 799-800). Likewise, TLC did not have any input in GTECH's decision that it would not recommend any changes to the Game's instructions after receiving TLC's suggested parameter changes. These were acts of GTECH discretion that caused the game to be misleading and for which GTECH is now being called to account.

GTECH also challenges the court of appeals' analysis of *Strakos v. Gehring*, 360 S.W.2d 787, 803 (Tex. 1962). In *Strakos*, this Court found that a contractor whose contract did not reference the contractor's responsibility to fix the danger that caused the plaintiff's injury nevertheless had a duty under tort law to remedy that danger. *Id.* at 803. GTECH attempts to distinguish *Strakos* by arguing that this case is not one of contractual silence but instead involves a contract which requires GTECH to implement TLC directives. GTECH Br. at 36-37. But that view of the facts and the parties' contractual relationship is too narrow. GTECH's job was not simply to "follow orders." The Contract gave GTECH wide discretion to choose and develop games for use by TLC. As the court of appeals stated:

While reserving to TLC ultimate control and final approval over the design and form of instant games, the Instant-Game Contract inescapably granted wide discretion to GTECH in determining such details in the work it submitted for TLC's approval. The TLC-GTECH relationship, as the Steele Plaintiffs observe, was not one "where TLC set out specific parameters dictating the type of game it

want[s] and the language, artwork, and design to be selected for the game.” Instead, the contract contemplated that GTECH would have broad creative leeway in fashioning *for* TLC approval, as opposed to acting “*as* TLC” in effectuating agency decisions already made, the myriad details of “Game Development Services” (which “include but [are] not ... limited to graphic design, game design, artwork, prize structures, and play style”), “draft artwork and prize structures,” and “draft working papers.” And the Steele Plaintiffs presented evidence, presumed true in the posture of this appeal, confirming that this was how TLC and GTECH operated in practice in regard to the game instructions printed on tickets.

(Tab A at 799-800). Since the Contract left room for GTECH to provide recommendations and advice regarding game selection and structure, the court of appeals correctly compared GTECH to the *Strakos* contractor who also had discretion over his work details.

GTECH further claims that *Strakos* supports immunity here. In the language cited by GTECH, the Court proposed a hypothetical involving a “builder [who] merely follows plans and specifications which have been handed to him by the other party with the instruction that same be literally followed.” GTECH Br. at 37, *citing Strakos*, 360 S.W.2d at 803. But, as recognized by the court of appeals, GTECH was not charged with merely implementing TLC parameters. (Tab A at 799-800). Its discretion to formulate and advise TLC regarding instant-ticket games distinguishes GTECH from the hypothetical contractor in *Strakos*.

GTECH next argues that its immunity claim finds support in *Allen Keller v. Foreman*, 343 S.W.3d 420, 426 (Tex. 2011). But GTECH’s “wide discretion” and



“broad creative leeway,” (Tab A at 799-800), distinguish this case from *Allen Keller*. In *Allen Keller*, this Court absolved the contractor of liability, but it did so based on contract language that expressly precluded any contractor discretion. The contract there required the excavation of an embankment next to a one-lane bridge in accordance with a design and specifications already prepared by a third-party engineering firm. *Id.* at 422. Allen Keller’s obligation to complete the work in accordance with the Contract Documents was “absolute,” and the summary judgment evidence demonstrated that any deviation from the specifications could have jeopardized the project’s federal funding and would have altered the contract’s terms. *Id.* at 425. Since GTECH exercised discretion in initially formulating the Game and in deciding not to recommend modification to its instructions in response to the TLC’s parameter change, it cannot obtain the same protection as the contractor without discretion in *Allen Keller*.

**2. GTECH’s “loophole” and “destabilizing government contracting” arguments are unpersuasive.**

GTECH also contends that the court of appeals’ opinion will create a loophole to allow injured and defrauded plaintiffs to stymie the prerogative of governmental agencies and their private contractors. GTECH Br. at 38. These arguments ignore the procedural steps attending the resolution of a plea to the jurisdiction and this case’s procedural history. They are also unsupported by evidence.

GTECH speculates that contractor discretion to advise governmental agencies regarding potential problems exists in every case. Citing *Mission Indep. School Dist. v. Garcia*, 372 S.W.2d 627, 635 (Tex. 2012), it argues that the court of appeals' holding will invite plaintiffs to use "talismanic allegations" to plead around immunity so that they can seek compensation for harm caused by private contractors. GTECH Br. at 38-39. GTECH's argument is wrong because it fails to recognize that pleas to the jurisdiction can be decided based on evidence and because the court used evidence to decide the plea in this case. GTECH's "talismanic allegations" argument treats pleas to the jurisdiction as if they are decided solely on the pleadings without review of the submitted evidence. But according to this Court's precedent, a defendant can challenge "talismanic allegations" of jurisdictional facts by submitting evidence contravening the existence of those facts. *Mission Indep. School Dist.*, 372 S.W.3d at 635; *Miranda*, 133 S.W.3d at 227.

And that is what happened here: both parties submitted and the trial court considered evidence relating to the jurisdictional question. The court of appeals recognized that "contractor immunity in a given case turns on the particular contracts and facts involved." (Tab A at 800). Here, the case-specific facts included the provisions of the Contract (including the RFP) and the order of performance under the Contract—which required GTECH to originate and design

the games, but also provided for TLC's ultimate authority to order changes while considering GTECH's "guidance" regarding those changes. Case-specific factors requiring evidentiary support also included the relative expertise of both GTECH and TLC, which allowed them to work collaboratively in developing the games and accorded GTECH extensive discretion regarding game design and artwork. The court of appeals properly resolved these jurisdictional issues by reviewing this evidence to decide the derivative immunity question. (Tab A at 799-803).

GTECH's warning against "talismanic allegations" in reality seeks to short-circuit judicial decision-making based on evidence and analysis and replace it with a rule that a contractor's discretion to advise a government agency can never defeat derivative immunity. GTECH Br. at 38-39. The better practice, and the one that will lead to just and factually-based results, is for courts to decide issues of discretion based on evidence and to thus eschew pleading rules that elevate legal fiction to the place of evidence-based fact. The courts below considered the case-specific evidence here and reached the correct result.

GTECH next argues that the court of appeals' reasoning "threatens to destabilize government contracting" and requires expensive and impractical extra work by contractors. GTECH Br. at 39-40. But GTECH fails to support these arguments with evidence. Indeed, GTECH's arguments are very similar to the contractor's arguments in *Brown & Gay* that allowing immunity will "save the

government money in the long term.” *Brown & Gay*, 461 S.W.3d at 123. This Court rejected those arguments because they were not supported by evidence and failed to take into account “the highly competitive world of government contract bidding,” as well as “the countervailing considerations that make contracting with the government attractive, not the least of which is the lack of concern about the government’s ability to pay.” *Id.* at 123, 129. The same is true for GTECH’s unsupported arguments here. This Court should not broadly extend derivative sovereign immunity based on speculative arguments asserted by an independent contractor seeking the benefits of this “harsh doctrine.” *Id.* at 123. The same thing could be said regarding GTECH’s fear that contractors would be “encouraged to negotiate for contractual disclaimers that deprive them of discretion.” GTECH Br. at 39. There is no evidence of this, and indeed GTECH admits that the State would likely not agree to such disclaimers. (*Id.*). Speculation about unfruitful negotiations for contract disclaimers is no substitute for evidence in deciding derivative immunity questions. Sovereign immunity should be imposed or refused based on evidence, rather than the parties’ self-interested speculation about possible effects on government contracting.

**F. TLC’s Statutory Authority over Lotteries Does not Negate GTECH’s Discretion in the Guidance it Provided to TLC.**

GTECH asserts that it did not have any discretion because the Legislature granted TLC’s statutory authority over lottery games. GTECH Br. at 27-29. But

that ultimate or final control does not mean that the legislature does not allow TLC to hire contractors to give it professional “guidance” in developing games or to delegate its authority to third parties to design lottery games, subject to TLC’s final approval. Otherwise, *Brown & Gay* would have been a short per curiam opinion that extended sovereign immunity to the contractor, not one that refused to apply the doctrine. *See Brown & Gay*, 461 S.W.3d at 119 (observing that Toll Authority “delegated the responsibility of designing road signs and traffic layouts to Brown & Gay, subject to approval by the Authority's Board of Directors” but nevertheless refusing to “extend[] sovereign immunity to the engineering firm”).<sup>18</sup>

The lottery statutes expressly grant TLC the power to contract with third parties for the provision of lottery functions and services. TEX. GOV’T CODE § 466.014(b)&(c) (2015). Thus, TLC’s statutory authority does not negate the contractually bestowed discretion GTECH actually exercised in designing the Fun 5’s game. The Contract designates GTECH as an independent contractor, (CR 280), a term “denoting TLC control only as to the end product of the work.” (Tab A at 798). GTECH claims that the Contract leaves it no discretion over the form or content of lottery tickets, but in fact the Contract and its preceding RFP expressly require GTECH to provide game designs and draft artwork for tickets for the

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<sup>18</sup> *Brown & Gay* does not cite any evidence that the Toll Authority’s board merely rubber stamped the contractor’s work nor does it discuss the composition or experience of the board.

games it was proposing. (Tab B at 60 ¶7.2.1; CR 282-83). How does GTECH provide game designs and create artwork for lottery tickets without using discretion? Indeed, discretion is inherent in creativity and decision-making. *See Chambers*, 883 S.W.2d at 654.

**G. Conclusion: This Case Arises from GTECH's discretion.**

In conclusion, as detailed by the court of appeals, the evidence showed that GTECH exercised discretion. Because Plaintiffs have sued GTECH for its own independent discretionary wrongdoing and not because it followed a government order, derivative immunity is inapplicable.

Under GTECH's formulation of the discretion test, a private contractor is immune when (1) a governmental entity hires an independent contractor for its professional guidance on a project, (2) the two entities work closely together on the project, with the first draft or design prepared by the private contractor and then reviewed by the governmental entity, (3) the governmental entity offers comments and eventually makes the final decisions about the project, and (4) the contractor engages in fraud by withholding information about the draft or design that causes the project to be unworkable or otherwise acts with intentional or grossly negligent conduct.

An example shows why the derivative immunity GTECH seeks is too broad. In *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000), a case cited in

*Brown & Gay*, a private security company was held to be immune on a female employee's sexual discrimination claim. The adverse employment action was contrary to the contractor's favorable recommendation but was required by the Saudi Arabian military. *Butters*, 225 F.3d at 464. Because the contractor was simply following orders, it was entitled to immunity. *Id.* at 466. But suppose the contractor had recommended an adverse employment decision based on sexual discrimination and the Saudi military implemented that recommendation. Immunity should not protect the private contractor in that instance. *Id.* While the government actor might be immune, the claim against the contractor is for its own independent wrongdoing. Immunity should be reserved for claims that "substantively attack underlying governmental decisions and directives made within delegated powers rather than the contractor's own independent discretionary acts." (Tab A at 786). In this case the attack is against GTECH's discretionary actions. GTECH is responsible for these actions and is not entitled to the shield of TLC's immunity.

### **III. EXTENDING IMMUNITY TO GTECH DOES NOT COMPORT WITH FISCAL JUSTIFICATIONS FOR IMMUNITY.**

GTECH contends that an extension of immunity here vindicates fiscal justifications underlying the doctrine. GTECH Br. at 40. The Court should reject this argument for four reasons. First, the alleged harm to the public fisc of which GTECH complains is entirely unproven and hypothetical. Second, even if the

effect were certain, it would only be tangential. And tangential, ancillary effects upon the public fisc do not justify the extension of immunity to private contractors. *See Brown & Gay*, 461 S.W.3d at 123; (Tab A at 803). Third, the underlying suit against GTECH does not burden the government with unforeseen expenditures. To the contrary, TLC specifically safeguarded the public fisc at the outset of its relationship with GTECH through indemnity provisions. Finally, immunizing a private company that exercised independent discretion would effectively expand the “harsh” doctrine of derivative immunity well beyond *Brown & Gay*’s limitations. *See, Brown & Gay*, 461 S.W.3d at 123 (characterizing doctrine as “harsh”), 129 (declining to extend sovereign immunity to private contractors when the rationale for the doctrine does not support it).

**A. The Underlying Lawsuit Against GTECH Does Not Impose Unforeseen Expenditures that Warrant the Protections of Sovereign Immunity.**

Although the reasons for sovereign immunity have evolved over time, “safeguarding the treasury is one of sovereign immunity’s primary justifications in the modern era.” *Nazari v. State*, 561 S.W.3d 495, 508 (Tex. 2018). And extending sovereign immunity to private contractors like GTECH does not further that rationale. *Brown & Gay*, 461 S.W.3d at 123–24. In limiting the reach of derivative immunity for private contractors, *Brown & Gay* emphasized that “[s]overeign immunity has never been defended as a mechanism to avoid any and



all increases in public expenditures.” *Id.* at 123. Yet this is precisely the premise of GTECH’s argument. GTECH contends that the present lawsuit threatens the public fisc because it might cause a potential decline in lottery sales that could, in turn, force the state to divert public funds from other resources. GTECH Br. at 47. GTECH cites to no evidence to support its premise. Further, a hypothetical and speculative loss of ticket sales is certainly not the type of “unforeseen expenditures” that implicate the protections of sovereign immunity. *See Brown & Gay*, 461 S.W.3d at 124. Instead, the doctrine intends to protect *public funds* by preventing unexpected and substantial *lawsuits and judgments against the government*. *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853–54 (Tex. 2002) (plurality op.). “Immunizing a private contractor in no way furthers this rationale.” *Brown & Gay*, 461 S.W.3d at 123.

The court of appeals correctly observed that the allegedly threatened decline in lottery revenues is merely a secondary or tertiary effect on the government and its functions. (Tab A at 803). *Brown & Gay* established that this type of effect—one that may affect the public fisc in some tangential way—does not justify extending immunity to private contractors because the doctrine is not “strictly a cost-saving measure.” *See, Brown & Gay*, 461 S.W.3d at 122–23.

Moreover, GTECH’s purported fear of a decline in lottery sales if immunity is denied is illogical. In fact, the opposite position appears to be more sound.

Extending immunity to GTECH would insulate it from consumer claims arising from lottery-related misconduct. Given that the lottery-playing public will likely not comprehend the labyrinthine intricacies of governmental immunity, this across-the-board liability shield could well diminish the public's trust in the Texas Lottery and accordingly cause sales to decline. Whatever indirect fiscal impact the present lawsuit may have, it is not sufficient to justify extending the immunity defense.

Further, Plaintiffs' claims do not burden the government with unanticipated expenditures because TLC is not a defendant. Moreover, GTECH expressly contracted with TLC to assume liability arising from its conduct.<sup>19</sup> The Contract was structured to ensure that only GTECH's finances would be affected by a potential lawsuit, not the government's. The public fisc is in no danger of unexpected or substantial expenditures from this litigation.

Moreover, sovereign immunity addresses expenditures that "cannot be anticipated at the project's outset" because those kinds of costs "disrupt[] the government's allocation of funds on the back end, when the only option may be to divert money previously earmarked for another purpose." *Brown & Gay*, 461 S.W.3d at 123–24. Potential liability for any wrongful conduct by GTECH was considered by both GTECH and TLC before the project commenced. GTECH was

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<sup>19</sup> See Contract (CR 587–98), incorporating by reference the provisions of Request for Proposals for Instant Ticket Manufacturing and Services § 3.32.1, ("The Successful Proposer shall indemnify, defend, and hold the Texas lottery . . . harmless from any and all claims . . ."). (Tab B at 28-29).

free to negotiate the cost of its services with TLC to reflect the undertaken risk. *See id.* at 123 (acknowledging that there are “many factors at play within the highly competitive world of government-contract bidding”). In addition, as a private contractor, GTECH had access to means of protection from costly litigation, such as insurance. *See id.* at 123, 124 n.7. As Justice Johnson recently noted:

[P]rivate entities assume the risks of defending against, and potential liability for, tort claims on a daily basis. That is so whether they are performing governmental functions under contracts with the government or performing nongovernmental functions under contracts with private parties: it is part of doing business. Indeed, those risks are part of every nongovernmental entity’s daily existence.

*Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 856 (Tex. 2018) (Johnson, J., dissenting, joined by Lehrmann and Boyd, JJ.). GTECH undoubtedly took into consideration the cost of its contractually-required insurance when it bid on the project.

In summary, considering GTECH’s agreement to indemnify TLC, there is no substantial and unanticipated threat to the public fisc in this case. In the event that the public fisc is indirectly affected in the future by holding GTECH accountable for its misconduct in the underlying suit, that effect is insufficient to justify the extension of immunity. *Brown & Gay*, 461 S.W.3d at 122-23.

**B. GTECH Suggests an Improper, Unlimited Expansion of the Doctrine of Derivative Immunity.**

GTECH asks this Court to apply derivative immunity whenever a suit attacks a sovereign decision, whether that decision is carried out by the government or a private party. GTECH Br. at 40. Thus, GTECH claims protection even when the actionable conduct is a result of the private contractor's discretion. As the court of appeals recognized, GTECH's bid to immunize the discretionary actions of private government contractors from lawsuits that may only tangentially affect the public fisc represents an unlimited and unwarranted expansion of the doctrine of derivative immunity. (See [Tab A](#) at 803–04). This novel expansion conflicts with this Court's precedent that limits immunity when its underlying rationale is not served. *See, e.g., Brown & Gay*, 461 S.W.3d at 123–24; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (limiting immunity for government officials when the purpose underlying the doctrine is not served); *see also Westfall*, 484 U.S. at 300 (stating that because “immunity comes at a great cost” it “is justified only when ‘the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.’”). Immunizing GTECH despite its exercise of discretion would have sweeping implications and contravene the purpose underlying our tort system.

This Court has repeatedly restricted the protections of sovereign immunity when the pragmatic justifications supporting immunity were not furthered, and should likewise do so here. Most notably, in *Brown & Gay* the Court determined that extending immunity to a private contractor did not further the fiscal rationale underlying the doctrine. 461 S.W.3d at 123–24. In other contexts, the Court has similarly limited the protections of immunity where the actions of government actors did not further the doctrine’s pragmatic purpose. *See, e.g., Heinrich*, 284 S.W.3d at 372 (“extending immunity to officials using state resources in violation of the law would not be an efficient way of ensuring those resources are spent as intended”); *Wasson Interests v. City of Jacksonville*, 489 S.W.3d 427, 436 (Tex. 2016)(“While *ultra vires* acts are distinct from a city acting in its proprietary function, the rationale for not extending immunity is similar: because a city’s proprietary functions are not done pursuant to the will of ‘the people,’ protecting them via the state’s immunity is not an efficient way to ensure efficient allocation of state resources.”). Because immunizing GTECH would not protect the public or prevent the diversion of taxpayer money to injured third parties, the Court should not extend immunity.

Further, extending immunity to GTECH despite its exercise of discretion would significantly magnify the breadth of derivative immunity with respect to private parties who perform work for the government. Such an expansion of the

doctrine threatens to create “a privileged class free from liability for wrongs inflicted or injuries threatened.”<sup>20</sup>

It is one thing to protect governmental entities and the public fisc from judgments. It is another to limit the liability of a private party and thereby shift the burden of injury from the tortfeasor to the injured person just because the tortfeasor was performing a governmental function when it caused the injury.

*Fort Worth Transp. Auth.*, 547 S.W.3d at 856 (Johnson, J., dissenting). Indeed, the doctrine’s “persistent threat to the impartial administration of justice has been repeatedly acknowledged and recognized.” *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 43 (1992) (Stevens, J., dissenting). While sovereign immunity protects taxpayers from the costs and consequences of the government’s improvident actions, it forces injured individuals to bear those costs by foreclosing judicial remedies. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006); *Brown & Gay*, 461 S.W.3d at 121. Thus, sovereign immunity should not be used to protect the assets of private contractors (or their insurers) from the injurious consequences of their tortious exercise of discretion, nor should it deprive Texas citizens of historically available judicial remedies against non-government actors.<sup>21</sup> Given the

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<sup>20</sup> See Marilyn Phelan, *A Synopsis of Texas and Federal Sovereign Immunity Principles: Are Recent Sovereign Immunity Decisions Protecting Wrongful Governmental Conduct?*, 42 ST. MARY’S L. J. 725, 763 (2011) (quoting *Hopkins v. Clemson Agric. Coll.*, 221 U.S. 636, 643 (1911)).

<sup>21</sup> See *Bacon*, 411 S.W.3d at 172 (“Simply described, sovereign immunity generally shields our state government’s “improvident acts”—however improvident, harsh, unjust, or infuriatingly

doctrine's harsh implications, courts must carefully consider the rationale supporting immunity in defining its limitations.<sup>22</sup> And when, as here, the justifications underlying the doctrine are not vindicated, the cost of sovereign immunity far outweighs its benefit.

### **PRAYER**

Plaintiffs request that the Court deny GTECH's Petition for Review, or, alternatively that the Court affirm the judgment of the court of appeals and remand this case to the trial court for further proceedings.

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boneheaded these acts may seem—**against the litigation and judicial remedies that would be available if the same acts were committed by private persons.**") (emphasis added).

<sup>22</sup> See *Brown & Gay*, 461 S.W.3d at 123 (“Guiding our analysis of whether to extend sovereign immunity . . . is whether doing so comports with and furthers the legitimate purposes that justify this otherwise harsh doctrine.”); *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 157 (Tex. 2016) (“Yet the pragmatic rationale supporting this immunity also helps to delineate its limits.”); *Nazari v. State*, 561 S.W.3d 495, 513 (Tex. 2018) (“In analyzing the reach of sovereign immunity, we must engage in a careful weighing analysis and consider the policy issues at hand.”) (Lehrmann, J., concurring in part and dissenting in part, joined by Johnson, J.).

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 9.4**

This brief complies with the type-volume limitation of TEX. R. APP. P 9.4(i)(2)(B) because this response contains 12,753 words, excluding the parts of the brief exempted by TEX. R. APP. P 9.4(i)(1).

*/s/ Kevin P. Parker*

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Dated: February 19, 2019

**CERTIFICATE OF SERVICE**

This is to certify that on the 19th day of February, 2019, a true and correct copy of the foregoing instrument was served in accordance with Rule 9.5, Texas Rules of Appellate Procedure to Petitioner's counsel of record, as follows:

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NO. 18-0159

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IN THE SUPREME COURT OF TEXAS

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GTECH CORPORATION,

*Petitioner,*

V.

JAMES STEELE, et al.

*Respondents*

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RESPONDENTS' APPENDIX

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Tab A	—	<i>GTECH Corp. v. Steele</i> , 549 S.W.3d 768 (Tex. App.—Austin, 2018, pet. filed)
Tab B	—	TLC's Request for Proposals, issued 11/7/11
Tab C	—	Instant Game Manufacturing Contract, executed August 2012

**TAB A**

cordingly, we conditionally grant John's and Gena's petition for writ of mandamus. A writ will issue only if Respondent fails to vacate its "Order to Immunize Foster Child over Parental Objection" issued on October 2, 2017, and to notify this Court in writing that it has done so within seven days from the date of this opinion.



**GTECH CORPORATION, Appellant**

v.

**James STEELE, et al., Appellees**

**NO. 03-16-00172-CV**

Court of Appeals of Texas,  
Austin.

Filed: January 11, 2018

**Background:** Lottery participants brought action against business that participated in the development, printing, and distribution of lottery game under contract with Texas Lottery Commission, alleging a discrepancy between the game's instructions and its actual parameters, and asserting claims for aiding and abetting fraud, conspiracy, tortious interference with contract, and fraud by misrepresentation and nondisclosure. Business filed a plea to the jurisdiction. The District Court, Travis County, 201st Judicial District, Amy Clark Meachum, J., denied the plea. Business appealed.

**Holdings:** The Court of Appeals, Bob Pemberton, J., held that:

- (1) business only had to prove lack of discretion to implicate Commission's sovereign immunity;
- (2) business lacked discretion with respect to conduct underlying claims for aiding

and abetting, conspiracy, and tortious interference;

- (3) business had discretion to alert Commission to discrepancy, as relevant to the fraud claims; and
- (4) fiscal justifications for sovereign immunity did not warrant extension of immunity as to the fraud claims.

Affirmed in part and reversed and rendered in part.

**1. Appeal and Error**  $\S$ 3211

Because subject-matter jurisdiction is a question of law, the Court of Appeals reviews de novo a trial court's ultimate ruling on a plea to the jurisdiction.

**2. Pleading**  $\S$ 34(1)

Courts construe pleadings liberally in favor of jurisdiction, taking their factual allegations as true except to the extent negated by evidence.

**3. Evidence**  $\S$ 597

Evidence is conclusive only if reasonable people could not differ in their conclusions, a matter that depends on the facts of each case.

**4. Pleading**  $\S$ 104(1)

**States**  $\S$ 191.4(1)

Sovereign immunity, which provides that no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent, encompasses an immunity from suit that implicates a trial court's jurisdiction to decide pending claims, and to this extent can properly be asserted through a plea to the jurisdiction.

**5. States**  $\S$ 191.1

Sovereign immunity encompasses an immunity from liability that is an affirmative defense to the enforcement of a judgment.



**6. Pleading**  $\Leftrightarrow$ 104(1)

**States**  $\Leftrightarrow$ 191.10

On plea to the jurisdiction, business that participated in the development, printing, and distribution of lottery game under contract with Texas Lottery Commission was not required to make any showing regarding the underlying fiscal rationales of sovereign immunity to implicate the Commission's immunity, but was required to demonstrate only that its actions or decisions were attributable to Commission and not to business's own independent exercise of discretion, in lottery participants' action against business based on a discrepancy between game's instructions and its actual parameters; claims against a private entity that attacked underlying governmental decisions within delegated powers implicated sovereign immunity and its underlying fiscal justifications.

**7. States**  $\Leftrightarrow$ 191.2(1), 191.4(1)

State and its government's departments and agencies inherently possess sovereign immunity in the first instance, subject to waiver by the sovereign people through the constitution or acts of the legislature.

**8. States**  $\Leftrightarrow$ 191.10

A proper ultra vires claim, i.e., a suit to require state government to comply with its underlying delegation of power from the sovereign, does not implicate the sovereign's immunity because it attacks governmental actions lacking a nexus to the sovereign's will.

**9. States**  $\Leftrightarrow$ 191.10

An ultra vires claim must formally be asserted against an appropriate governmental official, as opposed to the governmental principal, even though it lies against the official in his or her official capacity, because the objective is to restrain the governmental principal; such

claim must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.

**10. States**  $\Leftrightarrow$ 191.10

Although the form of the pleadings may be relevant in determining whether a particular suit implicates the sovereign's immunity, such as whether a suit is alleged explicitly against a government official in his official capacity, it is the substance of the claims and relief sought that ultimately determine whether the sovereign is a real party in interest and its immunity thereby implicated.

**11. States**  $\Leftrightarrow$ 191.10

A sovereign may be the real party in interest, and its immunity correspondingly implicated, even in a suit that purports to name no defendant, governmental or otherwise, yet seeks relief that would control state action.

**12. Pleading**  $\Leftrightarrow$ 104(1)

**States**  $\Leftrightarrow$ 191.10

Business that participated in the development, printing, and distribution of lottery game under contract with Texas Lottery Commission lacked discretion with respect to its actions or decisions underlying lottery participants' claims for aiding and abetting fraud, conspiracy, and tortious interference with contract, and thus Commission's sovereign immunity applied with respect to those claims, in participants' action against business based on an asserted discrepancy between game's instructions and actual parameters in which business filed plea to the jurisdiction; business's conduct underlying the claims was its printing and distribution of the game and its programming of a computer system in accordance with the game parameters, which were tasks the business was contractually obligated to perform.

**13. Pleading** ⇨104(1)**States** ⇨191.10

Business that participated in the development, printing, and distribution of lottery game under contract with Texas Lottery Commission had discretion to alert Commission to potential discrepancy between game's instructions and actual parameters that resulted from a change to the game requested by the Commission, and thus Commission's sovereign immunity did not apply for purposes of plea to the jurisdiction with respect to fraud claims arising from the discrepancy in lottery participants' action against business; contract granted business wide discretion in determining the details of the game it submitted to Commission for ultimate approval, and evidence demonstrated that business and Commission expected that concerns would be communicated to Commission.

**14. Pleading** ⇨104(1), 111.37

The purpose of a plea to the jurisdiction is not to force a plaintiff to preview its case on the merits but to establish a reason why the merits of the plaintiff's claims should never be reached.

**15. Pleading** ⇨104(1)**States** ⇨191.10

Fiscal justifications for sovereign immunity did not warrant extension of Texas Lottery Commission's immunity, on plea to the jurisdiction, to business that participated in the development, printing, and distribution of lottery game with respect to lottery participants' fraud claims against business arising from business's alleged failure to independently exercise its discretion to alert Commission to potential discrepancy between game's instructions and actual parameters that resulted from a change to the game requested by the Commission; government contractors or employees could be held liable for conse-

quences of their independent exercise of discretion, despite the possibility of secondary or tertiary fiscal effects on a government agency.

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT, NO. D-1-GN-14-005114, HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING**

Mr. Kevin P. Parker, The Lanier Law Firm, P. O. Box 691448, Houston, TX 77269-1448, for Appellees.

Ms. Nina Cortell, Haynes and Boone, LLP, 2323 Victory Avenue, Suite 700, Dallas, TX 75219, for Appellant.

Before Justices Puryear, Pemberton, and Field

**OPINION**

Bob Pemberton, Justice

This appeal requires us to ascertain the nature and parameters of "derivative" sovereign immunity for government contractors as recognized under current Texas law—a matter going to the trial court's jurisdiction to adjudicate a lawsuit and not necessarily the merits of the lawsuit itself. Our conclusions and their application to the record in this case require us to affirm in part and reverse in part.

**BACKGROUND**

In September 2014, the Texas Lottery launched retail sales of a "scratch-off" or "instant" ticket product known as "Fun 5's." As the name alludes, Fun 5's combined five different instant games onto a single ticket and was sold for a retail price of \$5 each. A reduced-size image of the

Fun 5's ticket sold at retail is provided below<sup>1</sup>:



Our focus is the game situated in the lower right-hand corner of the Fun 5's ticket and featured in the inset, labeled as "Game 5." In Game 5, a contestant won a prize if three "5" symbols appeared in any one row of the tic-tac-toe grid when the latex coating was removed. The amount of that prize was revealed in the "PRIZE" box below the grid, and ranged between \$5 to \$100,000. However, if a "moneybag" icon appeared in the "5x BOX" below the grid, the prize amount would be increased five-fold, elevating the range to between \$25 and \$500,000.

Although the moneybag icon was a prize multiplier having effect only on tickets that won in tic-tac-toe, Game 5 was configured so that the moneybag multiplier would ap-

pear not only on a subset of the winning tickets, but also on roughly 25 percent of non-winning tickets, a security measure deemed advisable by the Texas Lottery Commission (TLC) to prevent advance discovery of winning tickets merely by "microscratching" the 5x BOX to find moneybag icons. But after Fun 5's sales began, a number of purchasers who had uncovered moneybag icons on non-winning tickets in Game 5 asserted that the game instructions printed on the ticket—

Reveal three "5" symbols in any one row, column, or diagonal, win PRIZE in PRIZE box. Reveal a Money Bag "[icon]" symbol in the 5X BOX, win 5 times that PRIZE.

1. The ticket's actual dimensions were 8

inches by 4 inches.

—meant or appeared to mean that the moneybag icon alone entitled them to a prize equaling five times the amount shown in the PRIZE box. In other words, these purchasers claimed to understand that the second sentence of the instructions, referencing the moneybag icon, promised an independent, alternative means of winning in Game 5 in addition to the tic-tac-toe game referenced in the first sentence, as opposed to describing what was actually a multiplier contingent upon a single method of winning a prize through tic-tac-toe. In some instances, including some that were reported in the media, this asserted discrepancy between Game 5's instructions versus actual parameters purportedly misled some Fun 5's purchasers to perceive themselves winners of large prizes when uncovering moneybag icons on their tickets, only to have their elation crushed when they attempted to collect. The TLC ultimately ended sales of Fun 5's earlier than it had planned, citing "feedback from some players expressing confusion regarding certain aspects of this popular game," and adding that "a few opportunistic individuals appear to be exploiting the situation."

2. To be precise, both GTECH and a former affiliate, GTECH Printing Corporation, were involved in the underlying events, but GTECH later succeeded to the interests of the affiliate. Furthermore, following the merger of its corporate parent with the International Game Technology company, GTECH has become known as "IGT Global Solutions Corporation." Because the parties have continued to identify the relevant entity simply as "GTECH," so have we.

3. See, e.g., *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009) ("The State and other state agencies . . . are immune from suit and liability in Texas unless the Legislature expressly waives sovereign immunity." (citing *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 641 (Tex. 2004))).

Ensuing lawsuits grew to include over 1,200 original or intervening plaintiffs who had allegedly purchased Fun 5's tickets and incurred injury from the asserted discrepancy between Game 5's instructions and actual parameters. While a single plaintiff (Nettles) filed suit in Dallas County, the others (the Steele Plaintiffs) joined in the cause giving rise to this appeal, filed in Travis County district court. Both suits targeted GTECH Corporation (GTECH), which participated, under contract with the TLC, in the development, printing, and distribution of the Fun 5's product and programming of the computer system used to verify winners.<sup>2</sup> The merits of these claims or of their underlying reading of the Game 5 instructions are not yet before us. Our present concern, rather, relates to the sovereign immunity that would unquestionably be implicated were the claims asserted instead against TLC, a state agency,<sup>3</sup> and whether GTECH can "derivatively" benefit from that immunity here.<sup>4</sup>

GTECH filed a plea to the jurisdiction asserting that the Steele Plaintiffs' claims were barred by sovereign immunity derived from TLC's immunity, thereby depriving the Travis County district court of subject-matter jurisdiction to adjudicate

4. The parties have referred to this concept in terms of "derivative governmental immunity," but such a derivation from TLC's immunity would more precisely be a form of the sovereign immunity that clothes the State of Texas and its agencies. See, e.g., *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429-30 (Tex. 2016) (explaining that "governmental immunity" is the derivative form of sovereign immunity that may extend to "[p]olitical subdivisions of the state[,] such as counties, municipalities, and school districts"). Although most of our observations would apply to both forms, we describe the parties' contentions in terms of sovereign immunity rather than governmental immunity, consistent with their substance, because the distinction ultimately has some conceptual significance in our analysis.

the claims. GTECH had also asserted a similar plea in the *Nettles* suit. The Dallas district court granted that plea, and this ruling was recently upheld in a memorandum opinion of the Fifth Court of Appeals.<sup>5</sup> But the Travis County district court denied GTECH's plea as to the Steele Plaintiffs' claims. In this cause, GTECH has appealed that order to this Court, urging that the district court erred in failing to grant the plea based on derivative sovereign immunity.<sup>6</sup>

### STANDARD OF REVIEW

[1–3] Because subject-matter jurisdiction is a question of law, we review de novo

5. See generally *Nettles v. GTECH Corp.*, No. 05-15-01559-CV, 2017 WL 3097627 (Tex. App.—Dallas July 21, 2017, no pet. h.) (mem. op.).
6. GTECH first filed a notice of appeal under color of Civil Practice and Remedies Code Section 51.014, Subsection (a)(8), the provision authorizing “[a] person [to] appeal from an interlocutory order of a district court . . . that . . . grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.” Tex. Civ. Prac. & Rem. Code § 51.014(a)(8); see also *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) (holding that government official sued in official capacity can appeal, via Section 51.014(a)(8), denial of official's plea to the jurisdiction, as “the official is invoking the sovereign immunity from suit held by the government itself”). Subsequently, the district court amended its order to add the predicates for a permissive appeal from its denial of GTECH's plea, with the requisite “controlling question of law” being “GTECH Corporation's entitlement to derivative [sovereign] immunity.” See Tex. Civ. Prac. & Rem. Code § 51.014(d) (“On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if: (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.”), (f) (authorizing

a trial court's ultimate ruling on a plea to the jurisdiction.<sup>7</sup> The Steele Plaintiffs had the burden in the first instance to plead or present evidence of facts that would affirmatively demonstrate the district court's jurisdiction to decide their claims.<sup>8</sup> We construe their pleadings liberally in favor of jurisdiction, taking their factual allegations as true except to the extent negated by evidence.<sup>9</sup> Both the Steele Plaintiffs and GTECH presented evidence each deemed material to the jurisdictional issue. In practical terms, this proof could negate jurisdictional facts alleged by the Steele Plaintiffs only to the extent it is conclusively in GTECH's favor.<sup>10</sup> We view the

court of appeals to “accept an appeal permitted by Subsection (d)” upon timely application. Upon GTECH's application, which the Steele Plaintiffs did not oppose, we accepted its appeal of the amended order. See *GTECH Corp. v. Steele*, No. 03-16-00172-CV, 2016 WL 1566886 (Tex. App.—Austin Apr. 15, 2016) (order). Because we possess jurisdiction through Subsection (f) to review the district court's order on the dispositive question of derivative sovereign immunity, we need not decide whether we also do so under Subsection (a)(8).

7. See, e.g., *Houston Belt & Term. Rwy Co. v. City of Hous.*, 487 S.W.3d 154, 160 (Tex. 2016).
8. See, e.g., *Texas Parks & Wildlife Dep't v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Ex parte Springsteen*, 506 S.W.3d 789, 798 n.50 (Tex. App.—Austin 2016, pet. denied) (citing *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010) (per curiam)); see also *Creedmoor—Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 515-16 & nn.7 & 8 (Tex. App.—Austin 2010, no pet.) (emphasizing that facts, not merely legal conclusions, are required).
9. See, e.g., *Miranda*, 133 S.W.3d at 226-27.
10. See *id.* at 227-28 (describing the jurisdictional analysis where jurisdictional facts overlap the merits, and noting that it “generally mirrors that of a summary judgment under

evidence in the light favorable to the Steele Plaintiffs.<sup>11</sup>

[4,5] Sovereign immunity—the age-old common-law doctrine holding that “no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent”<sup>12</sup>—encompasses an immunity from suit that implicates a trial court’s jurisdiction to decide pending claims,<sup>13</sup> and to this extent

Texas Rule of Civil Procedure 166a(c)”). To the extent the evidence pertains to any material jurisdictional facts that are not intertwined with the merits, we would infer that the district court found those in the Steele Plaintiffs’ favor. *See Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015) (per curiam) (“When a jurisdictional issue is not intertwined with the merits of the claims, which is the case here, [which involved a standing issue,] disputed fact issues are resolved by the court, not the jury.”); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (in absence of written findings of fact and conclusions of law, “[i]t is . . . implied that the trial court made all the findings necessary to support its judgment”). In that event, GTECH could overcome those implied findings and obtain an appellate judgment of dismissal only by establishing or negating the existence of contrary material jurisdictional facts as a matter of law through conclusive evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 815-17 (Tex. 2005) (explaining that conclusive evidence is the converse of no evidence and affirmatively establishes a fact as a matter of law); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (“When a party attacks the legal sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.”). “Evidence is conclusive only if reasonable people could not differ in their conclusions, a matter that depends on the facts of each case.” *City of Keller*, 168 S.W.3d at 816 (footnote omitted).

11. *See Keller*, 168 S.W.3d at 807; *Miranda*, 133 S.W.3d at 228.

12. *Wasson*, 489 S.W.3d at 431 (quoting *Hosner v. De Young*, 1 Tex. 764, 769 (1847)).

can properly be asserted through a plea to the jurisdiction.<sup>14</sup> But sovereign immunity would come into play here only if GTECH has met an initial burden of establishing that the Steele Plaintiffs’ claims against it actually implicate that immunity.<sup>15</sup> While the parties agree that it is theoretically possible for claims against a private government contractor like GTECH to implicate the government’s sovereign immunity, they differ regarding the conditions

13. *See, e.g., Brown & Gay Eng’g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015); *see also Engelman Irrigation Dist. v. Shields Bros. Inc.*, 514 S.W.3d 746, 750-53, 754-55 (Tex. 2017) (explaining nature of this jurisdictional impediment and that it operates prior to a judgment becoming final for appellate purposes). Sovereign immunity also encompasses an immunity from liability that is an affirmative defense to the enforcement of a judgment. *See, e.g., Brown & Gay*, 461 S.W.3d at 121. Consistent with the posture of this appeal, our subsequent references to “sovereign immunity” are intended to denote the immunity-from-suit aspect.

14. *See, e.g., Miranda*, 133 S.W.3d at 225-26 (citing *Texas Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999)).

15. *See Brown & Gay*, 461 S.W.3d at 120-29 (addressing whether private engineering firm had shown itself entitled to claim immunity derived from that of toll road authority, a governmental body); *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 77-90 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (op. on reh’g) (addressing whether clinic had shown itself entitled to claim sovereign immunity either as a governmental unit in itself or by virtue of immunity derived from a governmental entity); *cf. Lubbock Cty. Water Contr. & Imp. Dist. v. Church & Akin*, 442 S.W.3d 297, 305 (Tex. 2014) (“The Water District had the burden, in its plea to the jurisdiction, to establish that it is a governmental entity entitled to governmental immunity. Once it satisfied that burden, the burden shifted to [the claimant] to establish, or at least raise a fact issue on, a waiver of immunity.”).

under which this is so and, in turn, the showing that GTECH must make.

### THE IMPORT OF *BROWN & GAY*

GTECH argues that it is derivatively shielded by the TLC's sovereign immunity if it can show that it is being sued merely for complying with the TLC's decisions or directives—i.e., for what were ultimately actions of or attributable to TLC that GTECH merely carried out—on which GTECH exercised no “independent discretion.” While agreeing with GTECH to the extent that the contractor must have “exercised no discretion in activities giving rise to [their] claims,” the Steele Plaintiffs urge that GTECH was also required to make an additional, independent showing that “extending” TLC's immunity to GTECH under the particular circumstances of this case would actually advance the fiscal and policy rationales that underlie sovereign-immunity doctrine. The respective arguments are grounded in competing views of *Brown & Gay Engineering, Incorporated v. Olivares*,<sup>16</sup> the first case in which the Texas Supreme Court professed to “directly address[] the extension of immunity to private government contractors.”<sup>17</sup>

*Brown & Gay* arose from a fatal automobile accident that occurred on a tollway under the purview of the Fort Bend County Toll Road Authority, a local-government corporation possessing delegated power to design, build, and operate the tollway.<sup>18</sup> Through a statutorily authorized contract,

the Authority had delegated to Brown & Gay Engineering, an independent contractor, the responsibility of designing road signs and traffic layouts on the tollway, subject to the approval of the Authority's governing board.<sup>19</sup> The fatality occurred when, following construction, an intoxicated motorist drove onto the tollway through an exit ramp and continued for several miles in the wrong direction before colliding with a car driven by Pedro Olivares, killing both drivers.<sup>20</sup> Olivares' estate and his parents sued defendants that included Brown & Gay, alleging that the firm's negligent failure to design and install proper signs, warning flashers, and other traffic-control devices had proximately caused Olivares' death.<sup>21</sup>

Brown & Gay interposed a plea to the jurisdiction predicated on the same governmental immunity enjoyed by the Authority (whose immunity was ultimately uncontested).<sup>22</sup> Brown & Gay prevailed in the trial court, lost in the court of appeals, and sought review in the Texas Supreme Court.<sup>23</sup> As Brown & Gay's jurisdictional theories had evolved by that juncture, its material arguments were that its status as an independent contractor of the Authority (as opposed to an Authority employee acting in official capacity) did not singularly foreclose its reliance on the Authority's immunity; that courts in Texas and elsewhere had previously recognized that independent government contractors could be shielded by the immunity of the govern-

16. 461 S.W.3d 117.

17. *Id.* at 124.

18. *See id.* at 119.

19. *See id.* (citing Tex. Transp. Code § 431.066(b) (authorizing local government corporations to retain “engineering services required to develop a transportation facility or system’’)).

20. *See id.*

21. *See id.* at 120.

22. *See id.*

23. *See id.*

mental party to the contract; and that the underlying purposes of sovereign immunity are served by extending it to private entities performing authorized governmental functions for which the government itself would be immune, in a manner similar to the governmental immunity enjoyed by Texas's political subdivisions.<sup>24</sup>

In the context of the Olivareses' claims and Brown & Gay's arguments, the Texas Supreme Court identified the question presented as whether "a private company that performed allegedly negligent acts in carrying out a contract with a governmental unit [can] invoke the same immunity that the government itself enjoys,"<sup>25</sup> and more specifically, "whether, as a matter of common law, the boundaries of sovereign immunity encompass private government contractors exercising their independent discretion in performing government functions."<sup>26</sup> This framing of the issue, as further highlighted and confirmed by numerous similar subsequent references to Brown & Gay's "independent discretion," "independent negligence," "own negligence," and the like throughout the remainder of the opinion,<sup>27</sup> served to emphasize that the Olivareses were suing Brown & Gay for alleged conduct that neither party had attempted to attribute to the actions or directives of the Authority. That posture proves significant in understanding the analysis that followed.

To resolve the question it had identified, the *Brown & Gay* court looked to two sets of considerations that are material to the present case. First, in a section of the

opinion titled, "Extending Sovereign Immunity to Brown & Gay Does Not Further the Doctrine's Rationale and Purpose," the supreme court considered whether "extend[ing] sovereign immunity to private contractors like Brown & Gay . . . comports with and furthers the legitimate purposes that justify this otherwise harsh doctrine."<sup>28</sup> This analysis responded to arguments advanced by Brown & Gay and an amicus, who, in an attempt to evoke the fiscal justifications underlying contemporary sovereign-immunity doctrine, had urged that immunizing contractors in the circumstances presented would ultimately reduce costs to government, at least over the long term, because contractors would otherwise pass on the costs associated with litigation exposure through higher contract prices.<sup>29</sup> The supreme court disagreed that this asserted concern justified extending sovereign immunity to Brown & Gay.

The supreme court first questioned the premise that the contractors' litigation costs would necessarily be passed on to the government, noting the "highly competitive world of government contract-bidding" and "the fact that private companies can and do manage their risk exposure by obtaining insurance."<sup>30</sup> "But even assuming that holding private entities liable for their own negligence in fact makes contracting with those entities more expensive for the government," the court maintained, sovereign immunity was not "strictly a cost-saving measure" and "has

24. See *id.* at 120, 123-24, 126-27.

25. See *id.* at 122.

26. *Id.* at 122-23.

27. See *infra* note 68.

28. *Id.* at 123.

29. See *id.*

30. See *id.* In fact, as the court emphasized, Brown & Gay's contract had required it maintain insurance for the project, including workers' compensation, commercial general liability, automobile liability, umbrella excess liability, and professional liability. See *id.* at 119-20.



never been defended as a mechanism to avoid any and all increases in public expenditures.”<sup>31</sup> Rather, the court explained, sovereign immunity was more precisely “designed to guard against the ‘unforeseen expenditures’ associated with the government’s defending lawsuits and paying judgments ‘that could hamper government functions’ by diverting funds from their allocated purposes.”<sup>32</sup> “Even if holding a private party liable for its own improvident actions in performing a government contract indirectly leads to higher overall costs to government entities in engaging private contractors,” the court reasoned, “those costs will be reflected in the negotiated contract price,” thus enabling “the government to plan spending on the project with reasonable accuracy.”<sup>33</sup> “Accordingly,” the supreme court concluded, “the rationale underlying the doctrine of sovereign immunity does not support extending that immunity to *Brown & Gay*.”<sup>34</sup>

In the *Brown & Gay* court’s second set of considerations, preceded by the heading “Sovereign Immunity Does Not Extend to Private Contractors Exercising Independent Discretion,” it sought to identify material features of the claims addressed in prior cases from other courts in which independent government contractors had been held immune.<sup>35</sup> In part, the court emphasized the line of federal cases that had emanated from the United States Su-

preme Court’s decision in *Yearsley v. W.A. Ross Construction Company*.<sup>36</sup> In *Yearsley*, a private contractor had constructed dikes under a contract with the federal government and was later sued by a landowner who alleged that the dikes had caused erosion and loss of land.<sup>37</sup> It was undisputed that the contractor’s work “was all authorized and directed by the Government of the United States,” and that the government’s actions were authorized by congressional act.<sup>38</sup> The *Yearsley* court held that where the government’s “authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress,” there is “no liability on the part of the contractor” merely for performing as the government had directed.<sup>39</sup> That court contrasted this situation with cases in which liability had been imposed on government contractors, which it characterized as having turned on acts exceeding the contractor’s authority or authority that had not been validly conferred.<sup>40</sup>

Although the United States Supreme Court did not explicitly couch *Yearsley*’s analysis in terms of sovereign immunity, and that court would later indicate in the *Campbell-Ewald* case that the protection would instead be a type of common-law “immunity” that is not “the Government’s embracive immunity,”<sup>41</sup> a number of lower federal courts had deduced in the mean-

31. *Id.* at 123.

32. *Id.* (citing *Texas Dep’t of Transp. v. Seftik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam); *Texas Nat. Res. Conserv. Comm’n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002)).

33. *Id.*

34. *Id.* at 124.

35. *See id.* at 124-27.

36. 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940).

37. *See id.* at 20, 60 S.Ct. 413.

38. *Id.*

39. *Id.* at 20-21, 60 S.Ct. 413.

40. *See id.* at 21, 60 S.Ct. 413.

41. *See Campbell-Ewald Co. v. Gomez*, — U.S. —, 136 S.Ct. 663, 672-73, 193 L.Ed.2d 571 (2016).

time that *Yearsley* recognized a form of immunity for government contractors, deriving from the government's sovereign immunity, arising when a contractor is sued for alleged acts or decisions that are substantively the government's alone. But *Brown & Gay* predated *Campbell-Ewald*, and the Texas Supreme Court cited the earlier federal lower-court cases as material to the parameters of derivative sovereign immunity under Texas common law.<sup>42</sup> The *Brown & Gay* court further quoted the following excerpt as "aptly summarizing the framework governing the extension of derivative immunity to federal contractors" in those cases:

Where the government hires a contractor to perform a given task, and specifies the manner in which the task is to be performed, and the contractor is later haled into court to answer for a harm that was caused by the contractor's compliance with the government's specifications, the contractor is entitled to the same immunity the government would enjoy, because the contractor is, under those circumstances, effectively acting

as an organ of government, without independent discretion. Where, however, the contractor is hired to perform the same task, but is allowed to exercise discretion in determining how the task should be accomplished, if the manner of performing the task ultimately causes actionable harm to a third party the contractor is not entitled to derivative sovereign immunity, because the harm can be traced, not to the government's actions or decisions, but to the contractor's independent decision to perform the task in an unsafe manner. Similarly, where the contractor is hired to perform the task according to precise specifications but fails to comply with those specifications, and the contractor's deviation from the government specifications actionably harms a third party, the contractor is not entitled to immunity because, again, the harm was not caused by the government's insistence on a specified manner of performance but rather by the contractor's failure to act in accordance with the government's directives.<sup>43</sup>

42. See *Brown & Gay*, 461 S.W.3d at 124-25 & n.9 (discussing *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 464-66 (4th Cir. 2000); *Bixby v. KBR, Inc.*, 748 F.Supp.2d 1224, 1242 (D. Or. 2010)); see also *id.* at 125 & n.8 (discussing *Ackerson v. Bean Dredging Corp.*, 589 F.3d 196, 206-07 (5th Cir. 2009), while acknowledging that the Fifth Circuit had concluded that "the contractors' entitlement to dismissal was not jurisdictional").

In *Butters*, as the *Brown & Gay* court explained, a female employee of a private security firm hired by the Saudi Arabian government had sued the firm for discrimination after being declined a favorable assignment on orders of the Saudi government. See *id.* at 124 (citing *Butters*, 225 F.3d at 464-65). The Saudi government was held immune from suit under the Foreign Sovereign Immunities Act, and this immunity was held also to attach to the security firm, as the firm "was following Saudi Arabia's orders not to promote [the employee]." See *id.* at 124-25 (citing *Butters*, 225 F.3d at 465-66). The Fourth Circuit had

also acknowledged the converse proposition, as the *Brown & Gay* court pointed out—the firm would not have been entitled to this "derivative immunity" had the firm rather than the sovereign made the decision to decline the promotion. See *id.* at 125 (citing *Butters*, 225 F.3d at 466).

In *Ackerson*, as the *Brown & Gay* court explained, federal contractors were sued for damages caused by dredging in connection with a federal public works project. See *id.* (citing *Ackerson*, 589 F.3d at 206-10). Relying on *Yearsley*, the Fifth Circuit "held that the contractors were entitled to immunity," as the supreme court described it, where the plaintiffs' allegations had merely "'attack[ed] Congress's policy of creating and maintaining the [project], not any separate act of negligence by the Contractor Defendants.'" *Id.* (quoting *Ackerson*, 589 F.3d at 207 (emphasis added)).

43. *Id.* at 125 n.9 (quoting *Bixby*, 748 F.Supp.2d at 1242). The *Brown & Gay* court also distinguished these concepts from the

While acknowledging that it had not previously “directly addressed” whether these principles would apply to Texas government and its private contractors,<sup>44</sup> the *Brown & Gay* court observed that it had cited *Yearsley* favorably in an earlier case addressing the liability exposure of a government contractor for harm it inflicted due to a mistake by the government.<sup>45</sup> In that case, *Glade v. Dietert*, a city had contracted with Glade to construct a sewer line according to city-prepared plans and specifications.<sup>46</sup> The city was to furnish the right of way, and staked the area where Glade was to construct the line.<sup>47</sup> Part of the planned route traversed Dietert’s property, but the city, apparently by inadvertence, had acquired only a portion of the easement needed there.<sup>48</sup> This resulted in Glade bulldozing an area of Dietert’s property that the city had staked but that lay beyond the easement the city had secured.<sup>49</sup> Once the error was discovered, the city promptly commenced eminent domain proceedings and acquired the omitted right of way, but Dieter sued Glade seeking damages for the trespass that had occurred in the meantime.<sup>50</sup>

Dieter prevailed in the lower courts, and Glade urged the supreme court that a contractor like him could not, “in the absence

of any negligence or wanton or wilful conduct . . . be held liable for damages to the real property or the owner” for “perform[ing] his contract under the directions of the municipality and in strict compliance with plans and specifications furnished to him.”<sup>51</sup> Dietert countered by emphasizing the “general rule” that a servant could not avoid personal liability for torts he committed while obeying his master’s command by attributing the act to his master.<sup>52</sup> The supreme court agreed with Glade. It distinguished Dietert’s cases as “involv[ing] suits against private corporations and their agents” and held that the controlling rule was instead that a public-works contractor “is liable to third parties only for negligence in the performance of the work and not for the result of the work performed according to the contract.”<sup>53</sup> The *Glade* court cited *Yearsley* in support of that conclusion.<sup>54</sup>

*Glade* did not, strictly speaking, address immunity or jurisdiction—as the *Brown & Gay* court later observed, the city’s actions had effected a taking, giving rise to a claim for compensation for which the Texas Constitution would have waived immunity.<sup>55</sup> Yet the *Brown & Gay* court noted the following common thread running through

federal qualified-immunity doctrine and the Texas official-immunity doctrine, maintaining that these embodied underlying policies that “are simply irrelevant” to Texas sovereign-immunity doctrine. *See id.* at 127-29.

44. *Id.* at 124.

45. *See id.* at 125 (discussing *Glade v. Dietert*, 156 Tex. 382, 295 S.W.2d 642 (1956)).

46. *Glade*, 295 S.W.2d at 643.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *Id.*

52. *See id.*

53. *Id.* at 644.

54. *See id.*

55. *See Brown & Gay*, 461 S.W.3d at 125; *see also Steele v. City of Hous.*, 603 S.W.2d 786, 791 (Tex. 1980) (“The [Texas] Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.”).

*Glade* and the federal contractor-immunity cases:

In each of these cases, the complained-of conduct for which the contractor was immune was effectively attributed to the government. That is, the alleged cause of the injury was not the independent action of the contractor, but the action taken by the government *through* the contractor.<sup>56</sup>

The *Brown & Gay* court also deemed “instructive” its more recent decision in *K.D.F. v. Rex*.<sup>57</sup> The issue in *K.D.F.* was whether two private entities that had contracted with the Kansas Public Employees’ Retirement System, a Kansas governmental entity, could benefit from the System’s sovereign immunity and take advantage of a Kansas statute requiring all “actions ‘directly or indirectly’ against [the System]” to be brought in a particular Kansas county.<sup>58</sup> In answering that question, the supreme court had looked to features of the tort claims acts in both Texas and Kansas and determined that the controlling consideration was ultimately whether each company was performing ministerial functions under the control and direction of the System.<sup>59</sup> The court held that one of the entities, K.D.F., which held securities on the System’s behalf, met this standard because it “operates solely upon the direction of [the System] and exercises no discretion in its activities,” such that K.D.F. and the System were “not distinguishable from one another; a lawsuit against one is a lawsuit against the other.”<sup>60</sup> But the court held that the other company, Pacholder, an in-

dependent investment advisor to the System, did not meet that standard because “[i]ts activities necessarily involve considerable discretion . . . its role is more in the nature of advising [the System] how to proceed, rather than being subject to the direction and control of [the System].”<sup>61</sup> “This reasoning,” the *Brown & Gay* court maintained, “implies that private parties exercising independent discretion are not entitled to sovereign immunity,” adding that the proposition was “consistent with the reasoning federal courts have utilized in extending derivative immunity to federal contractors only in limited circumstances.”<sup>62</sup>

The *Brown & Gay* court contrasted the Olivareses’ claims, observing that:

the Olivareses do not complain of harm caused by Brown & Gay’s implementing the Authority’s specifications or following any specific government directions or orders. Under the contract at issue, Brown & Gay was responsible for preparing all “drawings, specifications, and details for all signs.” Further, the Olivareses do not complain about the decision to build the Tollway or the mere fact of its existence, but that Brown & Gay was independently negligent in designing the signs and traffic layouts for the Tollway. Brown & Gay’s decisions in designing the Tollway’s safeguards are its own.<sup>63</sup>

The court similarly distinguished various Texas lower court cases on which Brown & Gay had relied to support application of the government’s immunity to private contractors.<sup>64</sup> The gravamen of these deci-

56. *Brown & Gay*, 461 S.W.3d at 125.

57. 878 S.W.2d 589 (Tex. 1994).

58. *See id.* at 596.

59. *See id.* at 596-97.

60. *Id.* at 597; *see id.* at 591.

61. *Id.* at 597; *see id.* at 591.

62. *Brown & Gay*, 461 S.W.3d at 124.

63. *Id.*

64. *See id.* at 126-27 (discussing *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, 333 S.W.3d 736 (Tex. App.—Houston [1st Dist.]

sions, the supreme court suggested, was that the claimants were deemed in the circumstances of those cases to have sought relief against the government rather than the contractor individually.<sup>65</sup>

\* \* \*

[6] The parties' disagreement regarding GTECH's required showing distills ultimately to whether *Brown & Gay's* analyses regarding sovereign immunity's "Rationale and Purpose" and "Private Contractors Exercising Independent Discretion" imply a two-element test, both of which must be proven in order for a government contractor to enjoy the government's immunity (the Steele Plaintiffs' position), or reflect two alternative analyses, either of which could support derivation or extension of the government's immunity to the contractor (GTECH's position). We ultimately conclude that

2010, no pet.); *Foster v. Teacher Ret. Sys.*, 273 S.W.3d 883 (Tex. App.—Austin 2008, no pet.); *City of Hous. v. First City*, 827 S.W.2d 462 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

65. *Ross* and *First City* had involved suits against law firms arising from their tax-collection work on behalf of governmental entities. The firms were held entitled to the government's immunity under the premise that they had been sued in their official capacities as agents for the government. See *Ross*, 333 S.W.3d at 742-43; *First City*, 827 S.W.2d at 479-80. "Regardless of whether these cases were correctly decided," the *Brown & Gay* court reasoned,

the government's right to control that led these courts to extend immunity to a private government contractor is utterly absent here. The evidence shows that *Brown & Gay* was an independent contractor with discretion to design the Tollway's signage and road layouts. We need not establish today whether some degree of control by the government would extend its immunity protection to a private party; we hold only that no control is determinative.

*Brown & Gay*, 461 S.W.3d at 126. As for *Foster*, that case had involved a suit by a

GTECH is closer to the mark—to the extent GTECH can demonstrate that the Steele Plaintiffs complain substantively of actions, decisions, or directives attributable to TLC and not of GTECH's own independent exercise of discretion, (i.e., that would satisfy the considerations in *Brown & Gay's* "Sovereign Immunity Does Not Extend to Private Companies Exercising Independent Discretion" discussion), the claims would implicate TLC's sovereign immunity, and GTECH would not be required to make any separate or further showing to satisfy the fiscal considerations addressed in the opinion's "Rationale and Purposes" discussion.<sup>66</sup>

It is true that, as the Steele Plaintiffs emphasize, the *Brown & Gay* court repeatedly alluded to both analyses, seemingly conjunctively, in support of its holding that immunity did not extend to the

retired teacher against the Teacher Retirement System of Texas and Aetna, the administrator of TRS's health-insurance plan for retired teachers, complaining of a denial of coverage for a claim. The *Brown & Gay* court observed that Aetna's sole role had been to act "as an agent of and in a fiduciary capacity for" TRS in the administration of a state-funded health insurance plan and, further, had been indemnified by TRS for any actions arising from its good-faith performance. See *id.* at 127 (citing *Foster*, 273 S.W.3d at 889-90). By contrast, the supreme court observed, "no fiduciary relationship exists between *Brown & Gay* and the Authority," and "the Olivareses do not effectively seek to recover money from the government." *Id.*

66. And because we agree with GTECH's view of the governing standard, we need not decide whether, as GTECH insists, appellees waived reliance on their competing version of the standard by failing to argue it before the district court. *But cf. Rusk State Hosp. v. Black*, 392 S.W.3d 88, 94-95 (Tex. 2012) (clarifying that jurisdictional aspects of sovereign immunity include susceptibility to being addressed for the first time on appeal).

contractor there.<sup>67</sup> But these references must read alongside the supreme court's repeated emphases that the Olivareses' claims implicated only Brown & Gay's independent discretion rather than underlying governmental acts and decisions.<sup>68</sup> That is to say, the *Brown & Gay* court's analysis of "whether to extend sovereign immunity to private contractors like Brown & Gay" in light of "whether doing so comports with and furthers the [doctrine's] legitimate purposes" was speaking only to claims that also would not implicate the government's immunity under the rationale of the *Yearsley* line and other cases it cited in the "Private Contractors Exercising Independent Discretion"

67. The Steele Plaintiffs point out that at the conclusion of the *Brown & Gay* court's discussion of "Private Contractors Exercising Independent Discretion," it returned to an explicit emphasis on sovereign immunity's "Rationale and Purpose":

In sum, we cannot adopt Brown & Gay's contention that it is entitled to share in the Authority's sovereign immunity solely because the Authority was statutorily authorized to engage Brown & Gay's services and would have been immune had it performed those services itself. That is, we decline to extend to private entities the same immunity the government enjoys for reasons unrelated to the rationale that justifies such immunity in the first place. The Olivareses' suit does not threaten allocated government funds and does not seek to hold Brown & Gay merely for following the government's directions. Brown & Gay is responsible for its own negligence as a cost of doing business and may (and did) insure against that risk, just as it would had it contracted with a private owner.

*Brown & Gay*, 461 S.W.3d at 127. Similarly, the Steele Plaintiffs observe, the court went on to close its opinion by "declin[ing] to extend sovereign immunity to private contractors based solely on the nature of the contractor's work when the very rationale for the doctrine provides no support for doing so." *Id.* at 129.

68. See *id.* at 119 ("In this case, a private engineering firm lawfully contracted with a governmental unit to design and construct a

portion of the opinion. And claims within that category—those that substantively attack underlying governmental decisions and directives effected through a contractor rather than a contractor's own independent discretionary actions—would inherently implicate the underlying fiscal policies of sovereign immunity that are addressed in the "Rationale and Purpose" section. Although this relationship is admittedly not stated explicitly in *Brown & Gay*, it is evident from the broader body of Texas sovereign-immunity jurisprudence.

[7] As reflected in the doctrine's name, sovereign immunity is considered to

roadway, and a third party sued the firm for negligence in carrying out its responsibilities."), 122 ("In this case . . . a private company that performed allegedly negligent acts in carrying out a contract with a governmental unit seeks to invoke the same immunity that the government itself enjoys."), 122-23 (summarizing the issue presented as "whether, as a matter of common law, the boundaries of sovereign immunity encompass private governmental contractors exercising their independent discretion in performing governmental functions"), 123 (referring to issue presented in terms of "holding a private party liable for its own improvident actions in performing a government contract"), 125-26 ("In this case, the Olivareses do not complain of harm caused by Brown & Gay's implementing the Authority's specifications or following any specific government directions or orders. . . . Further, the Olivareses do not complain about the decision to build the Tollway or the mere fact of its existence, but that Brown & Gay was independently negligent in designing the signs and traffic layouts for the Tollway. Brown & Gay's decisions in designing the Tollway's safeguards are its own."), 126 ("[T]he Olivareses do not assert that Brown & Gay is liable for the Authority's actions; they assert that Brown & Gay is liable for its own actions."), 126 ("The evidence shows that Brown & Gay was an independent contractor with discretion to design the Tollway's signage and road layouts.").

be “inherent in the nature of sovereignty,”<sup>69</sup> which in the State of Texas is vested in its People.<sup>70</sup> The state government is said to embody the People’s sovereignty because it exists and functions legitimately by virtue of powers delegated through and under their Constitution and laws.<sup>71</sup> Accordingly, the State of Texas and its government’s departments and agencies, such as the TLC, inherently possess sovereign immunity in the first instance,<sup>72</sup> subject to waiver by the sovereign People through their Constitution or acts of their Legislature.<sup>73</sup>

Although rooted historically in a perceived conceptual incompatibility of allowing the sovereign—originally embodied in the English monarch—to be sued in its own courts without its consent,<sup>74</sup> the modern justifications for the sovereign-immunity doctrine in Texas have centered, as the *Brown & Gay* court recognized, on shielding our state government (and, ultimately, the sovereign People who delegate it power and fund it through taxes) from

the fiscal and policy disruptions that lawsuits and court judgments would otherwise cause to governmental functions.<sup>75</sup> Relatedly, sovereign immunity is said today to “preserve[] separation-of-powers principles by preventing the judiciary from interfering with the Legislature’s prerogative to allocate tax dollars” and “leav[ing] to the Legislature the determination of when to allow tax resources to be shifted away from their intended purposes toward defending lawsuits and paying judgments.”<sup>76</sup>

These concerns with protecting the state governmental functions deriving from the sovereign’s will have informed the Texas Supreme Court’s longstanding recognition that the sovereign’s immunity may be implicated by lawsuits that do not explicitly name the State or the State government as a defendant. Although Texas’s political subdivisions (e.g., counties, municipalities, or school districts) possess no inherent sovereignty of their own, they are said to

69. *Wasson*, 489 S.W.3d at 431.

70. *See id.* at 432.

71. *See id.* at 432-33.

72. *See, e.g., Lueck*, 290 S.W.3d at 880 (“The State and other state agencies like TxDOT are immune from suit and liability in Texas unless the Legislature expressly waives sovereign immunity.” (citing *City of Sunset Valley*, 146 S.W.3d at 641)); *Herring v. Houston Nat’l Exch. Bank*, 114 Tex. 394, 269 S.W. 1031, 1033-34 (1925) (observing that if Texas’s Board of Prison Commissioners “can be sued without legislative consent, it being purely a governmental agency or department, then the government, the sovereignty, can be so sued”).

73. *See Wasson*, 489 S.W.3d at 432 (“In Texas, the people’s will is expressed in the Constitution and laws of the State,” and thus ‘to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment.’” (quoting *Wichita*

*Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003))). But while the Legislature can thereby decide when or how to waive sovereign immunity once it is held to apply, the Judiciary is the arbiter of whether that immunity exists or applies in the first instance, as the doctrine has remained a creature of the common law. *See id.* (observing that sovereign immunity “has developed through the common law—and has remained there,” and that “as the arbiter of the common law, the judiciary has historically been, and is now, entrusted with ‘defin[ing] the boundaries of the common-law doctrine and . . . determin[ing] under what circumstances sovereign immunity exists in the first instance’”) (citing *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006)).

74. *See id.* at 431-32 & n.5.

75. *See id.* at 432; *Brown & Gay*, 461 S.W.3d at 121-22.

76. *Brown & Gay*, 461 S.W.3d at 121 (internal quotations omitted).

“derive governmental immunity from the state’s sovereign immunity” when performing “governmental” functions as a “branch” of the State.<sup>77</sup> But more critically here, the supreme court has long recognized that sovereign immunity can be implicated even by claims against defendants that are not themselves governmental entities. A suit against a governmental official, employee, or other agent in his or her official capacity (i.e., seeking relief that would lie against the governmental principal rather than the agent personally, such as compelling payment of funds from the public treasury<sup>78</sup>) is said to be “merely ‘another way of pleading an action against the entity of which [the official] is an agent,’” as the governmental principal is the real party in interest.<sup>79</sup> It follows that official-capacity suits generally implicate the same sovereign immunity that would shield the governmental principal,<sup>80</sup> and to this extent the agent is said to enjoy the sovereign’s immunity “derivatively.”<sup>81</sup>

[8,9] The exception to this general rule that an official-capacity claim implicates the governmental principal’s immuni-

ty, the *ultra vires* claim, is itself shaped by the underlying relationship to sovereign will in a manner that is instructive here. In concept, a proper *ultra vires* claim—i.e., a suit to require state government to comply with its underlying delegation of power from the sovereign<sup>82</sup>—does not implicate the sovereign’s immunity because it attacks governmental actions lacking a nexus to the sovereign’s will.<sup>83</sup> But consistent with this notion that *ultra vires* acts are not acts “of the State,” an *ultra vires* claim must formally be asserted against an appropriate governmental official, as opposed to the governmental principal, even though it lies against the official in his or her official capacity, because the objective is to restrain the governmental principal.<sup>84</sup> However, a proper *ultra vires* claim “must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.”<sup>85</sup> And if an ostensible *ultra vires* claim turns out not to meet this standard, it follows that the claim is actually seeking to judicially override the sovereign will embodied in the governmental acts and decisions made within delegated authority—to “control

77. See *Wasson*, 489 S.W.3d at 429-30, 433-34. These “governmental” functions stand in contrast to the “proprietary” functions that municipalities can perform, described generally as discretionary functions “not done as a branch of the state, but instead ‘for the private advantage and benefit of the locality and its inhabitants.’” See *id.* at 433-34 (quoting *City of Galveston v. Posnainsky*, 62 Tex. 118, 127 (1884)). Proprietary functions, the Texas Supreme Court has reasoned, are “[l]ike *ultra vires* acts” for sovereign-immunity purposes, in that “acts performed as part of a city’s proprietary function . . . are not performed under the authority, or for the benefit, of the sovereign.” *Id.* at 434.

78. See *City of El Paso v. Heinrich*, 284 S.W.3d 366, 377 (Tex. 2009).

79. See *id.* at 373 (quoting *Koseoglu*, 233 S.W.3d at 844 (quoting *Kentucky v. Graham*,

473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985))).

80. See *Franka v. Velasquez*, 332 S.W.3d 367, 382-83 (Tex. 2011).

81. *Id.*

82. See *Heinrich*, 284 S.W.3d at 372-73.

83. See *Wasson*, 489 S.W.3d at 433 (observing that governmental acts “done ‘without legal authority’ are not done as a branch of the state. By definition, they fail to derive that authority from the root of our state’s immunity—the sovereign will.”).

84. See *Heinrich*, 284 S.W.3d at 372-73.

85. *Id.* at 372.



state action”—and thereby implicates the sovereign’s immunity.<sup>86</sup> Further, an otherwise-proper *ultra vires* claim also independently implicates the sovereign’s immunity to the extent it seeks relief that either overtly or in effect goes beyond prospective injunctive or declaratory relief restraining the government’s *ultra vires* conduct, such as through claims that would establish a right to retrospective monetary relief from the governmental principal, impose liability upon or interfere with the

government’s rights under a contract, or otherwise control state action.<sup>87</sup>

[10, 11] Importantly, although the form of the pleadings may be relevant in determining whether a particular suit implicates the sovereign’s immunity, such as whether a suit is alleged explicitly against a government official in his “official capacity,” it is the substance of the claims and relief sought that ultimately determine whether the sovereign is a real party in interest and its immunity thereby implicated.<sup>88</sup> In fact, as recognized in a recent

86. See *id.*; *Director of Agric. & Env’t v. Printing Indus. Ass’n of Tex.*, 600 S.W.2d 264, 265-66 (Tex. 1980); see also *Bacon v. Texas Historical Comm’n*, 411 S.W.3d 161, 173 (Tex. App.—Austin 2013, no pet.) (observing that suit that complains of governmental actions within legal authority “implicates sovereign immunity because it seeks to ‘control state action,’ to dictate the manner in which officers exercise their delegated authority” (citing *Heinrich*, 284 S.W.3d at 372; *Creedmoor-Maha*, 307 S.W.3d at 515-16)).

87. See *Heinrich*, 284 S.W.3d at 373-76 (otherwise-proper *ultra vires* claims implicate immunity to extent remedy has effect of retrospective monetary relief); *IT-Davy*, 74 S.W.3d at 855-56 (contrasting permissible *ultra vires* claims with “suits against state officials seeking to establish a contract’s validity, to enforce performance under a contract, or to impose contractual liabilities,” which “are suits against the State . . . because [they] attempt to control state action by imposing liability on the State”); *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 840 (1958) (“There is a clear distinction between [permissible *ultra vires* claims] and suits brought against an officer to prevent exercise by the state through some officer of some act of sovereignty, or suits against an officer or agent of the state to enforce specific performance of a contract made for the state, or to enjoin the breach of such contract, or to recover damages for such breach, or to cancel or nullify a contract made for the benefit of the state.”) (quoting *Imperial Sugar Co. v. Cabell*, 179 S.W. 83, 89 (Tex. Civ. App.—Galveston 1915, no writ)); see also *Texas Dep’t of Transp. v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011) (observing that “sovereign immunity will bar an otherwise proper [*ultra*

*vires*] claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity”) (citing *City of Hous. v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam)).

88. See, e.g., *Sawyer Trust*, 354 S.W.3d at 389 (regarding *ultra vires* claims, observing that “[t]he central test for determining jurisdiction” looks to whether ‘the real substance’ of the plaintiff’s claims” is within the trial court’s jurisdiction (citing *Dallas Cty. Mental Health & Retardation v. Bossley*, 968 S.W.2d 339, 343-44 (Tex. 1998))); *Heinrich*, 284 S.W.3d at 377 (concluding that claims asserted against individual members of governing body, without specifying capacity in which they were sued, implicated their official capacities because the requested relief would compel payments from the public treasury and, as such, “would necessarily come from the Board, rather than the individual members”; further observing that capacity in which governmental agent is sued sometimes must be determined from “the nature of the liability sought to be imposed” as indicated in the “course of proceedings” (quoting *Graham*, 473 U.S. at 167 n.14, 105 S.Ct. 3099)); *Williams*, 216 S.W.3d at 828-29 (attempted *ultra vires* suit that would have effect of compelling payment of retrospective monetary relief from public treasury held barred by immunity); *City of Austin v. Utility Assocs., Inc.*, 517 S.W.3d 300, 311-13 (Tex. App.—Austin 2017, pet. denied) (otherwise-proper *ultra vires* claim would implicate governmental immunity to extent remedy would “undo” previously executed government contract); *Texas Logos, L.P. v. Texas Dep’t of Transp.*, 241 S.W.3d 105, 118-23 (Tex. App.—Austin 2007, no pet.) (same).

decision from this Court, the sovereign may be the real party in interest, and its immunity correspondingly implicated, even in a suit that purports to name no defendant, governmental or otherwise, yet seeks relief that would control state action.<sup>89</sup>

It follows from the same basic principles that the sovereign, as embodied in state governmental organs, may be the real party in interest, and its immunity implicated, by claims asserted against a private government contractor where those claims substantively attack underlying governmental decisions and directives made within delegated powers rather than the contractor's own independent discretionary acts—i.e., the sorts of claims that would implicate immunity under the “Private Contractors Exercising Independent Discretion” portion of *Brown & Gay*. This is so because the claims and any relief obtained would, through their effects on the contractor, impinge upon the *government's* exercise of its contract rights and underlying delegated authority. In these respects, such claims would be analogous to the

ostensible *ultra vires* claims that would actually control state action by overriding government contracts<sup>90</sup> and sovereign will.<sup>91</sup> And while the immunity belongs to the government rather than the contractor, per se, that is no barrier to the contractor raising the issue. Because such immunity would implicate the trial court's subject-matter jurisdiction, the trial court would be required to address that issue regardless of how or by whom it is raised.<sup>92</sup>

In turn, claims against contractors that would substantively override underlying governmental decisions and directives in this way would inherently cause the unanticipated diversion of appropriated funds from their intended purposes—which brings us to the basic policy concern addressed in *Brown and Gay's* “Rationale and Purpose” discussion. This is so because the underlying governmental decisions and directives made within delegated authority are fueled by appropriations made (and, ultimately, taxes collected) for that purpose.<sup>93</sup> And such disruptions of

89. See *Ex parte Springsteen*, 506 S.W.3d at 797, 802 (declaratory-judgment suit by former death-row inmate seeking determination of “actual innocence,” though styled as an “ex parte” proceeding, did not avoid implicating sovereign immunity because “the substantive effect of any claim seeking to determine his status under the criminal law would operate against the State of Texas, in whose name and by whose authority the criminal law is enforced”).

90. See, e.g., *Dodgen*, 308 S.W.2d at 840; *Utility Assocs., Inc.*, 517 S.W.3d at 311-13; *Texas Logos, L.P.*, 241 S.W.3d at 118-23.

91. See, e.g., *Heinrich*, 284 S.W.3d at 372; *Printing Indus. Ass'n of Tex.*, 600 S.W.2d at 265-66.

92. See *Utility Assocs., Inc.*, 517 S.W.3d at 307 (“This inquiry [regarding sovereign or governmental immunity as it bears on subject-matter jurisdiction] is not necessarily confined to the precise jurisdictional challenges presented by

the parties, because jurisdictional requirements may not be waived and ‘can be—and if in doubt, must be—raised by a court on its own at any time,’ including on appeal.”) (quoting *Finance Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013) (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993))).

93. See *Heinrich*, 284 S.W.3d at 372 (recognizing that distinction between governmental action that is within delegated authority versus *ultra vires* reflects uses of appropriated funds that are for intended versus unintended purposes, respectively); *Bacon*, 411 S.W.3d at 173 (observing that “principle of judicial deference embodied in sovereign immunity extends not only to the Legislature's choices as to whether state funds should be spent on litigation and court judgments versus other priorities, but equally to the policy judgments embodied in the constitutional or statutory delegations that define the parameters of an officer's discretionary authority and the deci-

governmental functions and finances are not merely the indirect or long-term economic effects on government from lawsuits against private government contractors for their own independent discretionary acts.<sup>94</sup> When government contractors are sued for their own independent discretionary acts, their position is analogous to that of government employees or agents who breach personal tort duties owed to third parties independently from duties owed by their governmental principals.<sup>95</sup> In such instances, the employees or agents “have always been individually liable for their own torts, even when committed in the course of employment,” and are not shielded by sovereign immunity against suit in their individual capacities.<sup>96</sup> Suits whose substance would control the government’s actions

within delegated powers, in contrast, implicate the government’s immunity and that immunity’s underlying fiscal justifications.<sup>97</sup>

Accordingly, to the extent GTECH can show that the Steele Plaintiffs are substantively attacking actions and underlying decisions or directives of TLC and not GTECH’s independent discretionary actions, the claims would implicate TLC’s immunity, and no additional showing regarding immunity’s underlying fiscal rationales is required. We note that the *Nettles* court reached the same ultimate conclusion, albeit while relying on somewhat different reasoning.<sup>98</sup> Other sister courts, while not directly addressing the issue, also appear to have read *Brown & Gay* the same way.<sup>99</sup>

sions the officer makes within the scope of that authority” (citing *Sefzik*, 355 S.W.3d at 621 (citing *Dodgen*, 308 S.W.2d at 839)); *Heinrich*, 284 S.W.3d at 372; *Printing Indus. Ass’n of Tex.*, 600 S.W.2d at 265).

injury occasioned by his own personal negligence or default in the discharge of his duties.” (internal quotation marks and citation omitted)).

94. See *Brown & Gay*, 461 S.W.3d at 123-24.

95. See *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996) (noting example of an agent who negligently causes an automobile accident while acting within the course and scope of employment—both the principal and agent may be held liable, the former through *respondeat superior*, the latter by virtue of “the duty of reasonable care to the general public” owed by the agent “regardless of whether the auto accident occurs while driving for the employer” (citing Restatement (Second) of Agency §§ 343, 350 (1958))).

96. *Franka*, 332 S.W.3d at 383 (“[P]ublic employees (like agents generally) have always been individually liable for their own torts, even when committed in the course of employment.” (footnotes omitted)); see *Heinrich*, 284 S.W.3d at 373 n.7 (“State officials may, of course, be sued in both their official and individual capacities.”); *House v. Houston Waterworks, Co.*, 88 Tex. 233, 31 S.W. 179, 181 (1895) (“It is well settled that a public officer or other person who takes upon himself a public employment is liable to third persons in an action on the case for any

97. This relationship also obviates any perceived potential tension between the *Brown & Gay* court’s discussion of sovereign immunity’s fiscal justification and the controlling-state-action line of cases. See *Brown & Gay*, 461 S.W.3d at 131 (Hecht, C.J., concurring) (citing *Sefzik* and urging that “[t]he Court’s restricted view of the purpose of immunity is not supported by authority”). In any event, the *Brown & Gay* court did not profess to overrule that age-old line of cases. See, e.g., *Sefzik*, 355 S.W.3d at 621; *Printing Indus. of Tex.*, 600 S.W.2d at 265; *Dodgen*, 308 S.W.2d at 839; *Short v. W.T. Carter & Bro.*, 133 Tex. 202, 126 S.W.2d 953, 962 (1939). Under the logic of the controlling-state-action line of cases, immunity would be implicated by the sorts of claims against contractors that the *Brown & Gay* court emphasized in the “Private Contractors Exercising Independent Discretion” portion of its opinion.

98. See *Nettles*, 2017 WL 3097627, at \*8-9.

99. See *Freeman v. American K-9 Detection Servs.*, 494 S.W.3d 393, 404 (Tex. App.—Corpus Christi 2015, pet. granted) (“[T]he Texas Supreme Court has held that a government

As a final observation, determining whether claims against government contractors implicate the government's immunity necessarily entails examination of the specific contracts that delineate the contractors' authority *vis a vis* the government. Such questions of contractual authority, relevant to immunity, may also have implications for, and thereby overlap or parallel, the merits-related analysis of whether the contractor owes tort duties to third parties with respect to alleged injuries arising during its performance of the contract. Consequently, precedents that analyze such questions of contractual authority as they bear upon duty may also be instructive regarding derivative immunity. Examples include, in addition to *Glade*, two pre-*Brown & Gay* decisions from the Texas Supreme Court that addressed the tort exposure of government contractors while performing their contracts.

The first of these cases, issued a few years after *Glade*, was *Strakos v. Gehring*.<sup>100</sup> Gehring had contracted with Harris County to relocate fences incident to a road-improvement project. After the county accepted this work as complete, Strakos fell into an uncovered and unmarked post hole that Gehring had left behind, causing injury.<sup>101</sup> Strakos sued Gehring in negligence, and a jury awarded Strakos damages.<sup>102</sup> The Court of Civil Appeals had

contractor 'is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of the [governmental entity], executed subject to the control of the [governmental entity]' ... [i]n other words, 'private parties exercising independent discretion are not entitled to sovereign immunity.'" (quoting *Brown & Gay*, 461 S.W.3d at 124; *K.D.F.*, 878 S.W.2d at 597); *Lenoir*, 491 S.W.3d at 82 ("The [*Brown & Gay*] Court held that a private entity contracting with the government may benefit from sovereign immunity if 'it can demonstrate that its actions were actions of the ... government' and that 'it exercise[d] no discretion in its activities.'"

reversed the trial-level judgment for Strakos, relying on the "accepted-work" doctrine, a privity-rooted concept that had relieved an independent contractor of any duty of care to the public with respect to dangerous conditions it creates on the sole basis that the work had been completed and accepted by the party hiring it.<sup>103</sup> On writ of error, the Texas Supreme Court rejected the accepted-work doctrine, which had the effect, as the court observed, of bringing contractors "within the general rules of tort litigation."<sup>104</sup> "Our rejection of the 'accepted work' doctrine is not an imposition of absolute liability on contractors," the *Gehring* court elaborated, but "simply reject[s] the notion that although a contractor is found to have performed negligent work or left premises in an unsafe condition and such action or negligence is found to be a proximate cause of injury, he must nevertheless be held immune from liability solely because his work has been completed and accepted in an unsafe condition."<sup>105</sup>

But an additional feature of *Gehring* is more critical here. The supreme court rejected an attempt by Gehring to claim as a defense that his contract with Harris County had imposed no affirmative requirement that he fill the holes in question.<sup>106</sup> While agreeing that Gehring's contract was "silent as to this matter," the

(quoting *Brown & Gay*, 461 S.W.3d at 124-25 (quoting *K.D.F.*, 878 S.W.2d at 597)).

100. 360 S.W.2d 787 (Tex. 1962).

101. *See id.* at 788-89.

102. *See id.* at 788-89, 793-94.

103. *See id.* at 789-90.

104. *See id.* at 790-91.

105. *Id.* at 790.

106. *See id.* at 794, 803 (supp. op. on reh'g).

court reasoned that the mere absence of any contractual requirement that he fill the holes did not obviate any duty he owed in tort.<sup>107</sup> However, the *Gehring* court contrasted this contractual structure, which left Gehring discretion to comply (or not) with a tort duty to remedy the condition, with a contract that afforded no such discretion:

[T]he contractual provisions . . . are not couched in directory wording of that certainty which would require a conclusion that the act of leaving the hole was at the time of its origin and thereafter the act of Harris County and not that of the contractor, as is sometimes the case where a builder merely follows plans and specifications which have been handed to him by the other contracting party with instructions that the same be literally followed.<sup>108</sup>

More recently, the Texas Supreme Court had occasion to distinguish both *Glade* and *Gehring* in *Allen Keller Company v. Foreman*.<sup>109</sup> Keller, a road-construction contractor, was hired by Gillespie County to work on projects that included excavating a drainage channel through an embankment near a bridge over the Pedernales River.<sup>110</sup> The project served to widen a preexisting gap between the end of a bridge guardrail and the embankment, creating a physical effect that one local resident compared to a boat ramp.<sup>111</sup> Several months after the work was completed by Keller and accepted by the county, an out-of-control automobile went off the roadway

through the gap and into the river below, where a passenger drowned.<sup>112</sup> Keller was subsequently named as a defendant in a wrongful-death action, with the plaintiffs relying on a premises-defect theory predicated on the gap being an unreasonably dangerous condition.<sup>113</sup> Keller moved for summary judgment on grounds that included the asserted absence of any duty owing to the victim even if one assumed that its work had created an unreasonably dangerous condition.<sup>114</sup>

Keller urged that it owed no such duty because its contract with Gillespie County had required it to construct the project precisely as it had.<sup>115</sup> Keller's contract with the county, as the supreme court later noted, required Keller to adhere to specifications provided by O'Malley Engineers, which had designed and engineered the project, and imposed an "absolute" obligation on Keller to perform and complete the work in accordance with the contract documents.<sup>116</sup> These specifications provided for excavation of the channel in the manner described, widening the gap between the guardrail and the embankment, and did not include extending the guardrail to cover the gap.<sup>117</sup> The contract further provided that any changes to the contract would be made by the county or O'Malley, not Keller; that the county (either directly or through O'Malley as its agent) would visit the work site to verify progress and adherence to the design; and that upon completion O'Malley would inspect the site and certify that Keller had

107. *Id.* at 794, 803 (supp. op. on reh'g).

108. *Id.* at 803 (supp. op. on reh'g).

109. 343 S.W.3d 420 (Tex. 2011).

110. *See id.* at 422-23.

111. *See id.* at 423.

112. *See id.*

113. *See id.*

114. *See id.* at 423-24 & n.5.

115. *See id.* at 423-26.

116. *Id.* at 422.

117. *See id.* at 422-23 & n.2.

completed the work according to specifications.<sup>118</sup>

Although the trial court granted Keller's motion, the court of appeals reversed, holding that the summary-judgment evidence raised a fact issue as to whether Keller's work had created a dangerous condition, thereby implicitly assuming that Keller would owe a duty in that event.<sup>119</sup> The court of appeals had derived this premise from its reading of *Gehring*.<sup>120</sup> The Texas Supreme Court held that this was error, explaining that the point of *Gehring* was merely to "reject[ ] the owners' acceptance of completed work as an affirmative defense," leaving contractors subject to "general negligence principles."<sup>121</sup> *Gehring*, the *Keller* court stressed, did not hold that a contractor would owe a duty of care "in all circumstances."<sup>122</sup>

On the other hand, the supreme court also rejected the view of Keller that *Glade* was controlling and compelled a holding that Keller owed no duty because its work had merely complied with its contract.<sup>123</sup> "While *Glade* is not inconsistent with our decision today," the court reasoned, "its facts differ significantly and it is not deter-

minative."<sup>124</sup> Instead, the supreme court maintained, it was necessary to address whether Keller owed such a duty in light of its particular circumstances. As pertinent to the present case, the court considered whether Keller owed a duty to rectify what was assumed to be the unreasonably dangerous condition of the open gap between the bridge guardrail and the embankment by physically altering that feature, such as by extending the guardrail.<sup>125</sup>

The Texas Supreme Court held that Keller owed no such duty because Keller's contract afforded it no discretion to rectify the condition.<sup>126</sup> The court observed that "Keller's contract with the County required absolute compliance with the contract specifications," such that "any decision that Keller would have made to rectify the dangerous condition would have had the effect of altering the terms of the contract."<sup>127</sup> These features of Keller's contract, the court added, distinguished it from the contract addressed in *Gehring*, which by "neither requir[ing] nor forb[id]ding" the contractor from filling in or marking holes that comprised the dangerous condition, . . . [had] left the choice to the contractor's discretion," leaving room

contract, a contractor is justified in assuming that the government entity has procured the necessary right-of-way." *Id.*

118. *See id.* at 422.

119. *See id.* at 424.

120. *See id.*

121. *Id.*

122. *Id.*

123. *See id.* at 424-25.

124. *Id.* at 424. The *Keller* court summarized *Glade*'s holding as "the contractor could not be held liable because it was the City's responsibility to obtain the necessary right-of-way, not the contractor's." *Id.* at 425. "Our holding in *Glade*," it added, "stands for the limited proposition that, to the extent it operates within the parameters of the governing

125. *See id.* at 425 & n.6.

126. *See id.* at 425-26. In terms of the duty analysis, the court emphasized "the consequences of placing the duty on the defendant," Keller, in light of the contract terms. *See id.* at 425; *see also id.* ("Any . . . determination [of duty] involves the balancing of a variety of factors, 'including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.'" (quoting *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010))).

127. *Id.* at 425-26.

for the application of the tort duty.<sup>128</sup> Keller’s contract, the court further suggested, was instead like the contrasting example cited by the *Gehring* court, having “directory wording of that certainty which would require a conclusion that the [dangerous condition] was . . . the act of [the government] and not that of the contractor.”<sup>129</sup>

*Keller* and *Gehring* were each addressed to the government contractor’s duty of care rather than the government’s immunity, per se, and the same is true of *Glade*. Yet the underlying distinctions between cases like *Keller* and *Glade* versus *Gehring* also inform the immunity inquiry, as the *Brown & Gay* concurrence, authored by Chief Justice Hecht, observed:

We recognized in [*Keller*] that a government contractor owes no duty of care to design a highway project safely where the contractor acts in strict compliance with the governmental entity’s specifications. We distinguished between “the duties that may be imposed upon a contractor that has some discretion in performing the contract and a contractor that is left none.” [Citing portion of *Keller* that distinguished *Gehring*]. That such a contractor acts as the government and may therefore be entitled to its immunity follows from the same principle.<sup>130</sup>

By the same logic, a contractor in the posture of *Gehring* would not be “acting as the government,” nor entitled to the government’s immunity. And the distinction is the same as that identified by the *Brown & Gay* majority in the “Private Contractors Exercising Independent Discretion” portion of its opinion.

128. *Id.* at 425 (citing *Gehring*, 360 S.W.2d at 794).

129. *Id.* (quoting *Gehring*, 360 S.W.2d at 803 (supp. op. on reh’g)).

With the foregoing understanding of *Brown & Gay* and other relevant Texas Supreme Court precedents in mind, we now turn to the record in this case.

### IS GTECH BEING SUED FOR ACTING “AS TLC”?

In their live petition, the Steele Plaintiffs seek to recover from GTECH, as “benefit-of-the-bargain” damages, the prize amounts corresponding to their reading of the Game 5 instructions as promising each, based on his or her discovery of a moneybag icon in the 5X BOX, but without need also to win in tic-tac-toe, five times the amount shown in the PRIZE box of the tickets—sums exceeding \$500 million in the aggregate—plus exemplary damages. The Steele Plaintiffs expressly “do not contend that their tickets are ‘winning tickets,’” and on the contrary concede “that their tickets are ‘non-winning’ tickets.” Instead, they rely on the following causes of action:

- **Fraud by misrepresentation and non-disclosure.** These causes of action rest upon the contention that GTECH is factually responsible, at least in part, for the wording of the Game 5 instructions. These actions by GTECH, in turn, are alleged to amount to fraud upon the Steele Plaintiffs, either affirmatively or through its silence.
- **Aiding and abetting TLC’s fraud.** This cause of action assumes that TLC is responsible for the Game 5 instructions and committed the asserted fraud through those instructions. The wrong alleged of GTECH is intentionally “assisting” TLC by printing and distributing the Fun 5’s tickets, activating the

130. *Brown & Gay*, 461 S.W.3d at 130 n.6 (Hecht, C.J., concurring).

tickets to make them available for sale, and operating the Texas Lottery computer system in a manner that declined to validate the Steele Plaintiffs' tickets as winners.

- ***Tortious interference with existing contracts.*** The premise of this cause of action is that a contract was formed between TLC and each of the Steele Plaintiffs when the latter "exchanged \$5 of their hard-earned cash for each of their Fun 5's tickets in return for the promise that they would be entitled to receive five times the amount in the Prize Box if their ticket revealed a Money Bag." GTECH "willfully and intentionally interfered" with these contracts, the Steele Plaintiffs maintain, "by using and continuing to use a non-conforming computer program" that omitted their tickets from the list of winning tickets.
- ***Conspiracy.*** This cause of action asserts that GTECH and TLC had a "meeting of the minds" to "print misleading and deceptive instructions on Fun 5's tickets, to distribute the misleading and deceptive tickets for sale to lottery players in Texas, and to use GTECH's computer system to validate tickets as non-winners when the clear language of the tickets represented that they should be validated as winning tickets."

The latter three causes of action are founded on alleged acts by GTECH that

would merely comply with TLC requirements and directives, and regarding which the relevant contracts left GTECH no discretion to do otherwise.

**TLC possesses delegated power to design and sell Texas Lottery tickets and decide winners**

As sovereign immunity must ultimately be rooted in the sovereign will, we first note that the design, sale, and distribution of the Fun 5's ticket was within the TLC's delegated powers, as was the determination of winning versus losing tickets. Through a 1991 constitutional amendment, the People of Texas empowered the Legislature by general law [to] authorize the State to operate lotteries,"<sup>131</sup> and to that end their Legislature enacted the State Lottery Act, currently codified as Chapter 466 of the Government Code.<sup>132</sup> The Lottery Act vests in the TLC and its executive director "broad authority" and the duty to "exercise strict control and close supervision over all lottery games conducted in this state to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery."<sup>133</sup> The TLC is further required to "adopt all rules necessary to administer [the Lottery Act]" and it "may adopt rules governing the establishment and operation of the lottery," including the type of games to be conducted, the price of each ticket, the number of winning tickets, and "any other matter necessary or desirable as deter-

131. Tex. Const. art. III, § 47(e); *cf. id.* § 47(a) ("The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b), (d), (d-1), and (e) of this section.").

132. *See generally* Tex. Gov't Code ch. 466.

133. *Id.* § 466.014(a); *see also id.* § 467.101(a) (TLC "has broad authority and shall exercise strict control and close supervision over all activities authorized and conducted in this

state under . . . Chapter 466 of this code."'). The Lottery Act defines "lottery" as "the procedures operated by the state under this chapter through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize." *Id.* § 466.002(5).

The TLC and the office of executive director are established under Chapter 467 of the Government Code. *See generally id.* ch. 467.



mined by the commission, to promote and ensure . . . the integrity, security, honesty, and fairness or the operation and administration of the lottery.”<sup>134</sup> The Act also specifically charges the executive director with “prescrib[ing] the form of tickets.”<sup>135</sup>

The TLC has promulgated rules creating and governing each of several different categories of “Texas Lottery” games. Among these are “instant” or “scratch-off” games, like Fun 5’s, which are distinguished by play entailing removal of a thin latex coating that conceals data used to determine eligibility for a prize.<sup>136</sup> The detailed procedures for each Texas Lottery instant game are published in the Texas Register and made available by request to the public.<sup>137</sup> However, the TLC’s rules provide globally that a player’s eligibility to win a prize in a given game is subject to ticket-validation requirements that include having a “validation number” on the ticket corresponding to the TLC’s “official list of validation numbers of winning tickets” for that game.<sup>138</sup>

TLC’s delegated power to determine winning versus losing tickets is further enhanced by Lottery Act provisions that

deem a player’s purchase of a ticket in a particular lottery game to be the player’s agreement “to abide by and be bound by the commission’s rules, including the rules applicable to the particular lottery game involved.”<sup>139</sup> The ticket purchase is similarly deemed to be the player’s agreement “that the determination of whether the player is a valid winner is subject to: (1) the [TLC’s] rules and claims procedures, including those developed for the particular lottery game involved; and (2) any validation tests established by the [TLC] for the particular lottery game involved.”<sup>140</sup> Similarly, the TLC’s instant-game rules specify that by ticket purchase, “the lottery player agrees to comply with and abide by Texas law, all rules, procedures, and final decisions of the [TLC], and all procedures and instructions established by the executive director for the conduct of the instant game.”<sup>141</sup> Ultimately, an aggrieved instant-game player’s recourse against the TLC is confined to the following rule: “If a dispute arises between the [TLC] and a ticket claimant concerning whether the ticket is a winning ticket and if the ticket prize has not been paid, the

**134.** See *id.* § 466.015; see also *id.* § 467.102 (“The commission may adopt rules for the enforcement and administration of this chapter and the laws under the commission’s jurisdiction.”).

**135.** *Id.* § 466.251(a).

**136.** See 16 Tex. Admin. Code § 401.302 (2007) (Tex. Lottery Comm’n, Instant Game Rules); see also *id.* § 401.301(20) (2007) (Tex. Lottery Comm’n, Definitions) (defining “Instant game” as “[a]n instant ticket lottery game, developed and offered for sale to the public in accordance with commission rules, that is played by removing the latex covered play area on an instant ticket to reveal the ticket play symbols”), (35) (defining “Play symbol” as “[i]he printed data under the latex on the front of an instant ticket that is used to determine eligibility for a prize”). The “instant” moniker apparently references that a

ticket’s status as a winner can be ascertained immediately upon validation, in contrast to lottery games (such as the familiar Lotto Texas game) in which such status is determined through subsequent drawings.

**137.** See *id.* §§ 401.301(35) (play symbols “for individual games will be specified in individual instant game procedures”), .302(b) (describing contents of game procedures for instant games, which “shall be published in the Texas Register and shall be made available upon request to the public”).

**138.** See *id.* § 401.302(c)(2), (d).

**139.** Tex. Gov’t Code § 466.252(a).

**140.** *Id.*

**141.** 16 Tex. Admin. Code § 401.302(k).

executive director may, exclusively at his/her determination, reimburse the claimant for the cost of the disputed ticket.”<sup>142</sup> “This shall be the claimant’s exclusive remedy,” the rule emphasizes.<sup>143</sup>

**TLC was authorized to contract, and has contracted, with GTECH to assist with these delegated functions**

The same constitutional amendment that allowed for State of Texas-run lottery games also empowered the Legislature to “authorize the State to enter into a contract with one or more legal entities that will operate lotteries on behalf of the State.”<sup>144</sup> Through the Lottery Act, the Legislature has authorized the TLC’s executive director, subject to certain limitations not material here, to “contract with or employ a person to perform a function, activity, or service in connection with the operation of the lottery as prescribed by the executive director.”<sup>145</sup> Two such contracts have governed TLC’s relationship with GTECH at relevant times: (1) a “Contract for Lottery Operations and Services,” dated December 2010, under which GTECH is made the exclusive vendor of what can be summarized as infrastructure and services for the overall operations of Texas Lottery games, including warehousing and distributing games and providing the computer system used to verify winners (the Operations Contract); and (2) a “Contract for Instant Ticket Manufactur-

ing,” dated August 7, 2012, under which GTECH, alongside two other vendors that executed similar contracts, is to provide certain goods and services related to development and production of instant games (the Instant-Ticket Contract).<sup>146</sup> The Instant-Ticket contract is ultimately of greater significance to this case.

Under the Instant-Ticket Contract, GTECH is required to provide the TLC “game planning services support” that entails “work[ing] closely with the [TLC] to identify instant ticket games” for potential inclusion in the TLC’s “plan” or “plans” of new instant games to be developed and sold. To that end, GTECH “shall provide suggested game designs for inclusion in the plan,” including, “at a minimum,” (1) “[r]ecommendations for each price point and theme, including the game design and play style, together with an album of representative tickets,” and (2) “Game Development Services to include but not be limited to graphic design, game design, artwork, prize structures, and play style.” But the TLC “shall make all final decisions regarding the selection and inclusion of instant ticket games in the plan.”

Assuming the TLC opts to include a GTECH-proposed game design in the plan, GTECH is to prepare “draft artwork and prize structures” for TLC approval in advance of the game’s scheduled launch

142. *Id.* § 401.302(i).

143. *Id.*

144. Tex. Const. art. III, § 47(e).

145. Tex. Gov’t Code § 466.014(b); *see also id.* §§ 466.014(c) (awardee must be eligible for sales agent license), .1005-.101 (procurement procedures).

146. Each of the two contracts consists of an executed “contract” document with incorporated (and much lengthier) exhibits that include a preceding request for proposal (RFP).

Although copies of the two “contract” documents are included in the appellate record, copies of the RFPs were not. However, appellees’ live pleadings cross-referenced the RFPs by citing to the TLC’s website, where the RFPs and other contract-related documents have been made available to the public. As there has been no objection to the district court’s consideration of the RFPs as components of the two contracts, we have taken account of their material terms in our discussion and analysis.

date, and “shall” provide such materials within five working days upon the TLC’s request. If the draft artwork and prize structure are approved by the TLC, GTECH then has five business days in which it “must provide draft working papers to the [TLC]”—essentially a detailed version of the game’s parameters and specifications—as well as color proofs of the ticket image, for TLC approval. “Upon review of the draft working papers, the [TLC] will provide requested changes to [GTECH],” following which GTECH “must provide final working papers to the [TLC] within two (2) business days of receipt of the requested changes.” “Production of any instant game will not proceed until the [TLC] Executive Director or designee gives written authorization.” The “[e]xecuted working papers must be complete and free of any errors.” “Any changes made after the execution of working papers must be approved through the execution of a post executed change and signed by the [TLC] Executive Director or designee.”

The Instant-Ticket Contract, as well as the Operations Contract, specify that GTECH is providing its services “as an independent contractor and not as an employee or agent of the [TLC]” and further disclaim the creation or implication of any “joint venture, partnership, employer/employee relationship, principal/agent relationship, or any other relationship between the parties.” Each contract also requires that GTECH indemnify and hold the TLC harmless against claims or losses arising for or on account of the “works,” goods, or services provided as a result of the contract, the former term being defined to include, *inter alia*, “lottery games, game names, game designs, ticket format and layout, manuals, instructions [and] printed material.” Yet both contracts also emphasize that the TLC wields supervisory power over GTECH’s work and ultimate control over lottery games and operations. In

addition to the TLC’s previously-described authority in the development of instant games, both contracts contain a provision stating that:

The Texas Lottery Commission is a part of the Executive Branch of Texas State Government. The [TLC] will not relinquish control over lottery operations. [GTECH] shall function under the supervision of the [TLC]. Its operations will be subject to the same scrutiny and oversight that would apply if all operations were performed by [TLC] employees.

The Instant-Game Contract further provides that “[f]inal decisions regarding the direction or control of the Lottery are always the prerogative of the [TLC] in its sole discretion as an agency of the State of Texas”; that “[a]lthough GTECH comes from the private sector, its operations will be subject to the same scrutiny and oversight that would exist if all operations were performed by [TLC] employees”; and that:

The [TLC] may rely upon the guidance of [GTECH] in all matters related to instant game development and manufacturing services, but reserves the sole right to reject that guidance for any reason. [GTECH], conversely, must accept and support the decision of the [TLC].

GTECH further “warrants and agrees” under the Instant-Ticket Contract “that its tickets, games, goods and services shall in all respects conform to, and function in accordance with, [TLC]-approved specifications and designs.”

**Most of the causes of actions complain substantively of underlying TLC decisions and directives and not GTECH’s exercise of independent discretion**

[12] As previously noted, the Steele Plaintiffs’ causes of action for aiding and

abetting fraud and conspiracy presume that TLC deliberately chose the allegedly misleading Game 5 instructions so as to mislead and harm them. If so, GTECH had no power under the Instant-Game Contract to countermand TLC's decision—rather, the contract expressly reserved to TLC “the sole right to reject [GTECH's] guidance for any reason” and obligated GTECH to “accept and support” TLC's decision. More critically, the gravamen of the alleged “aiding and abetting fraud” and participation in “conspiracy” by GTECH is that GTECH performed its contractual obligations to print and distribute Fun 5's and program game parameters into the Texas Lottery computer system once TLC had determined or approved the game design. GTECH had no discretion to do otherwise—instead, it was obligated to conform “its tickets, games, goods, and services” in accordance with TLC's specifications and designs. The same is true of the GTECH conduct made the basis of the Steele Plaintiffs' tortious-interference cause of action—GTECH's programming of the computer system in accordance with the game parameters, as GTECH was required to do under its contracts with TLC.

As such, the Steele Plaintiffs' causes of action for aiding and abetting fraud, tortious interference, and conspiracy each complain substantively of underlying decisions or directives of TLC, not any actions by GTECH within its independent discretion, thereby implicating sovereign immunity. But the analysis is more complicated with respect to the Steele Plaintiffs' remaining causes of action for fraud by misrepresentation or silence.

**But the “fraud” causes of action complain, in part, of alleged GTECH acts within its independent discretion**

The Steele Plaintiffs' fraud causes of action hinge on the assertion that GTECH

rather than TLC is to blame, at least in part, for the complained-of features of the Game 5 instructions. The parties largely agree, at least factually, regarding the sequence of events that yielded the Fun 5's game in the form sold at retail. The concept of the Fun 5's game originated with GTECH, which had previously sold similar games to several other state lotteries, with much financial success and apparently no consumer complaints. In March 2013, GTECH presented TLC staff with a prototype closely resembling a game that GTECH had sold to the Nebraska state lottery. The Commission had opted to include this game design in its plan for new instant games, initially anticipating sale during the 2014 fiscal year.

Subsequently, in April 2014, GTECH personnel emailed artwork and draft working papers for the Fun 5's game to TLC staff. At this stage, the physical appearance of the game ticket, including Game 5, already had many similarities to that of the finished product, with the differences consisting of an omitted apostrophe in the name (the working title was “Fun 5s” rather than the eventual “Fun 5's”), different icons used in Game 5,<sup>147</sup> and similar matters of form or style. Aside from references to the different icons being used at the time, the Game 5 instructions printed on the ticket—the eventual center of controversy—were substantively identical to those eventually appearing in the finished product. Within the month of April, TLC staff sent GTECH two rounds of comments, in the form of handwritten edits made to the artwork and working papers, making the changes that would yield the final version of the ticket image. The sole change made to the Game 5 instructions,

147. The initial version had used dollar-bill icons rather than “5s” in the tic-tac-toe grid,

while “5s” rather than moneybag icons were used in the PRIZE box.

aside from modifying the icons being referenced, was to delete a single word, “line,” that did not impact meaning. GTECH incorporated these changes into a revised version of the artwork and working papers and sent them to TLC.

A subsequent round of comments from TLC staff was addressed specifically to the game parameters GTECH had set forth in the working papers. From their inception, GTECH’s working papers had specified parameters for Game 5 that included—consistent with the product ultimately sold at retail—limiting prize eligibility solely to tickets having three play symbols in a row in tic-tac-toe, with the multiplier icon serving only to increase the size of a tic-tac-toe winner’s prize. However, GTECH had included additional parameters specifying that the prize-multiplier icon in Game 5 would appear only on the tickets having winning tic-tac-toe combinations. Had these parameters survived, they would have ensured that no Fun 5’s contestant could uncover a prize-multiplier icon on a non-winning ticket—or profess resultant confusion about his or her entitlement to a prize, as the Steele Plaintiffs now do.

But TLC staff objected through comments transmitted on May 12, stating that “Money Bag play symbol needs to appear on non-winning tickets also.” In a cover email, staff explained that having the moneybag symbol appear only on winning tickets in Game 5 would render that game “an easy target for micro-scratching” because a wrongdoer would need only look for the moneybag icon in the 5X BOX “to know that it is a winner.” In response, during the morning of May 14, GTECH transmitted a revised version of the working papers that simply deleted its prior parameters specifying that the moneybag icon would appear only on winning tickets, but did not state affirmatively that the icon would appear on non-winning tickets or

indicate how often this would occur. Later that morning, TLC staff (by now, Dale Bowersock, TLC’s Instant Product Coordinator) replied, “In Game 5 we need the parameter to state that the Moneybag 5x multiplier symbol will be used on non-winning tickets as well as winning tickets. I don’t see where this concern was addressed.” Bowersock later elaborated, “What we are looking for is a parameter that is very clearly defined, such as ‘The ‘MONEY BAG’ Play Symbol will appear in the 5X Box in approximately [redacted] of the tickets with non-winning combinations in GAME 5.”

Within the day, GTECH revised the working papers again, adding a new parameter tracking Bowersock’s language and specifying that the moneybag symbol “will appear in the 5X Box in approximately 25% of the tickets with non-winning combinations in GAME 5.” So revised, and with no further changes to any of the other features of the game, GTECH submitted the working papers to the TLC. Consequently, this revised version of the Fun 5’s working papers incorporated (1) the new Game 5 parameters, originating with TLC, specifying that the moneybag-prize-multiplier icon would appear on both winning tickets and 25 percent of the non-winning tickets, in combination with (2) the preexisting Game 5 instructions, whose substance had originated with GTECH and had accompanied GTECH’s previously proposed game parameters in which the moneybag icon could appear only on winning tickets. This version of the working papers was approved by the TLC’s executive director, executed, and made the basis for the Fun 5’s ticket sold at retail.

\* \* \*

The essence of GTECH’s immunity arguments, as they relate to the fraud causes of action, is that it is being sued merely for implementing TLC’s decision or directive

to change the Game 5 parameters to have moneybag icons appear on non-winning tickets. The Fifth Court of Appeals relied on this same basic rationale in affirming the dismissal in *Nettles*.<sup>148</sup> But as the Steele Plaintiffs urge, the posture of the case presented to this Court is not quite so straightforward.

[13] It is true, as GTECH urges, that the Steele Plaintiffs' fraud causes of action (and indeed all of their causes of action) are predicated factually on the presence of moneybag icons on non-winning tickets and that this feature was an alteration of Game 5's original proposed parameters that GTECH made at TLC's behest. To the extent the Steele Plaintiffs maintain that GTECH had discretion simply to refuse to make this parameter change, that view is contrary to the Instant-Game Contract, which required GTECH instead to conform to TLC's specifications and to support TLC's instant-game decisions. As if recognizing as much, the Steele Plaintiffs pleaded in their live petition that they "do not complain of the change in parameters requested by the TLC"—their focus, rather, is "the misleading and deceptive wording chosen for the Fun 5's tickets by GTECH in the exercise of its independent discretion." But while GTECH dismisses the distinction as mere "artful pleading," it remains that the Steele Plaintiffs are not complaining merely of the appearance of moneybag icons on non-winning tickets, but that this feature of Game 5 misled and injured the Steele Plaintiffs *when combined with* the accompanying instructions. Further, as the predicate for their fraud causes of action, the Steele Plaintiffs assert that the source of the instructions

part of the mix was GTECH decisions made within its independent discretion, not decisions or directives from TLC. Consequently, the fraud causes of action cannot fairly be characterized as complaining solely of GTECH's implementation of TLC's chosen parameters. Although the parameter change by TLC could potentially become relevant to causation, proportionate responsibility, or other issues going to the merits of the Steele Plaintiffs' fraud causes of action, they would not singularly negate *jurisdiction* to adjudicate those causes of action. Instead, we must proceed to consider the scope of GTECH's contractual discretion in regard to the Game 5 instructions.

GTECH asserts that the "undisputed" evidence demonstrates that it possessed no independent discretion regarding the wording of the Game 5 instructions. It emphasizes that the Instant-Ticket Contract reserved to the TLC ultimate control over the product's form and design and required GTECH to comply with TLC's specifications, "not the other way around." GTECH similarly observes, correctly, that it lacked power or discretion under its contracts to implement game instructions or features unilaterally and instead operated under TLC's supervision and subject to the agency's approval. But the relevant contracts also disclaimed any employment, agency, or "any other relationship between" TLC and GTECH—instead, GTECH was explicitly an "independent contractor" with respect to the goods and services it provided, a term denoting TLC control only as to the end product or result of GTECH's work.<sup>149</sup> And TLC's right of

148. See *Nettles*, 2017 WL 3097627, at \*9.

149. See, e.g., *City of Bellaire v. Johnson*, 400 S.W.3d 922, 923 (Tex. 2013) (explaining that employer does not possess "right to control the progress, details, and methods of opera-

tions of the work" of an independent contractor); *Industrial Indemnity Exch. v. Southard*, 138 Tex. 531, 160 S.W.2d 905, 907 (1942) ("A[n] [independent] contractor is any person who . . . undertakes to do a specific piece of work for other persons, using his own means

ultimate control or approval of GTECH's work cannot alone be the controlling determinant of immunity—Brown & Gay's work was also subject to the approval of its governmental principal,<sup>150</sup> yet the Texas Supreme Court held it to have independent discretion, and thus no immunity, regarding the traffic designs and layouts it had fashioned prior to that approval.<sup>151</sup> A contrary view would effectively resurrect the pre-*Gehring* “accepted work” doctrine in the guise of an immunity principle.<sup>152</sup>

Instead, we must proceed farther to examine the scope of GTECH's discretion in fashioning the Game 5 instructions prior to TLC's ultimate approval. In essence, we must inquire whether, on this record,

and methods, without submitting himself to their control in respect to all its details.” (citing *Shannon v. West Indem. Co.*, 257 S.W. 522, 524 (Tex. Comm'n App. 1924, judgment adopted)).

**150.** See *Brown & Gay*, 461 S.W.3d at 119 (observing that under the relevant contract, “the Authority delegated the responsibility of designing road signs and traffic layouts to Brown & Gay, subject to approval by the Authority's Board of Directors” (emphasis added)).

**151.** And this feature of *Brown & Gay* belies GTECH's view that the Texas Supreme Court there endorsed the “line of federal cases involving the federal government contractor defense” that emanate from *Boyle v. United Tech. Corp.*, 487 U.S. 500, 513, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), and hold that “immunity” extends to contractors who contribute an allegedly defective design “so long as the specification was reviewed by the government and included in the final specifications approved by the government.” The “federal case law” cited favorably by the *Brown & Gay* court instead emanates from *Yearsley*. See *Brown & Gay*, 461 S.W.3d at 124-26. While the concepts are sometimes confused or conflated by lower courts, *Boyle* actually recognized a federal common-law “government-contractor defense” or “military contractor defense,” distinct from the *Yearsley* concept, that is rooted in preemption con-

viewed through our standard of review, GTECH's role in developing the Game 5 instructions was analogous to (1) the contractor in *Keller*, merely complying with TLC specifications without discretion to do otherwise, such that it effectively acted “as TLC”; or was (2) more like the contractors in *Brown & Gay* and *Gehring*, or the investment advisor in *K.D.F.*, possessing discretion in fashioning Game 5 instructions for TLC that it could have exercised so as to refrain from its acts now alleged to constitute fraud.

While reserving to TLC ultimate control and final approval over the design and form of instant games, the Instant-Game Contract inescapably granted wide discre-

cepts. See *Campbell*, 136 S.Ct. at 583-84 (more recently applying *Yearsley* concept with no mention of *Boyle* or its contractor-immunity standard); see also Jason Malone, *Derivative Immunity: The Impact of Campbell-Ewald Co. v. Gomez*, 50 Creighton L. Rev. 87, 103-15 (2016) (distinguishing the *Yearsley* and *Boyle* lines of precedents and noting how courts have sometimes confused them). The Texas Supreme Court has elsewhere recognized the character of the *Boyle* concept, see *Torrington v. Stutzman*, 46 S.W.3d 829, 846-47 (Tex. 2000) (explaining that *Boyle* “government-contractor defense, also called the military contractor defense, is a federal-common law defense . . . based upon the premise that liability claims arising from government procurement contracts could create a significant conflict between state tort law and the federal interest in immunizing the federal government from liability for performing a ‘discretionary function,’ an act for which the government may not be sued under the Federal Tort Claims Act”), and this is not the concept it addressed in *Brown & Gay*. Cf. *Brown & Gay*, 461 S.W.3d at 124-26.

**152.** Cf. *Brown & Gay*, 461 S.W.3d at 129 (citing *Gehring* with approval as “holding, in the context of rejecting the ‘accepted work’ doctrine, that a county contractor hired to relocate fencing alongside widened roads was not insulated from tort liability for injuries that occurred after the county accepted the work but were caused by the condition in which the contractor left the premises”).

tion to GTECH in determining such details in the work it submitted for TLC's approval. The TLC-GTECH relationship, as the Steele Plaintiffs observe, was not one "where TLC set out specific parameters dictating the type of game it want[s] and the language, artwork, and design to be selected for the game." Instead, the contract contemplated that GTECH would have broad creative leeway in fashioning *for* TLC approval, as opposed to acting "*as* TLC" in effectuating agency decisions already made, the myriad details of "Game Development Services" (which "include but [are] not . . . limited to graphic design, game design, artwork, prize structures, and play style"), "draft artwork and prize structures," and "draft working papers." And the Steele Plaintiffs presented evidence, presumed true in the posture of this appeal, confirming that this was how TLC and GTECH operated in practice in regard to the game instructions printed on tickets. This evidence included the deposition testimony of the TLC's executive director, Gary Grief, who explained that the agency "do[es] rely" on GTECH and other instant-game vendors, "at least as a starting point, when we're looking at language that goes on tickets," as "[t]hey've got the experience in the industry."

GTECH counters that any discretion it could have possessed in originating the Fun 5's game and Game 5 instructions has no bearing on its immunity in this case. GTECH again emphasizes TLC's intervening parameter change to add moneybag icons to non-winning tickets, urging that the Steele Plaintiffs are in essence suing it over a different Game 5 than the Game 5 it had originally proposed. GTECH makes a valid point—had TLC approved GTECH's original version of Game 5, moneybag icons would have appeared only on winning tickets, and that is not the Game 5 of which the Steele Plaintiffs now complain. Consequently, we agree with GTECH that

its discretion in originating the Fun 5's game and Game 5 instructions is ultimately immaterial to its claim of derivative sovereign immunity against the fraud causes of action asserted by the Steele Plaintiffs. But GTECH's origination of the game and Game 5 instructions is not the Steele Plaintiffs' primary focus.

The Steele Plaintiffs' core focus, rather, is GTECH's acts or omissions once TLC directed the change in the Game 5 parameters to add moneybag icons to non-winning tickets. The primary root of GTECH's fraud liability, the Steele Plaintiffs reason, is GTECH's failure or refusal to alert TLC that the parameter change, *in combination with the preexisting wording of the Game 5 instructions*, would cause the instructions to be misleading to Fun 5's purchasers who uncovered moneybag icons on non-winning tickets. And GTECH had independent discretion to alert TLC to the potential problem, the Steele Plaintiffs continue, if not an affirmative duty to do so. Accordingly, the Steele Plaintiffs conclude, GTECH enjoys no sovereign immunity against their fraud causes of action.

GTECH insists that its contracts left it no discretion to alert TLC to any such perceived problem with the instructions, further portraying the Steele Plaintiffs' argument as confirming that their suit complains only of GTECH's compliance with TLC's directives. From the same premise, GTECH urges that the Steele Plaintiffs "would effectively bring[] contractor immunity in Texas to an end" by permitting suits founded on contractor "discretion" to disregard or "second-guess" the government's directives. But contractor immunity in a given case turns on the particular contracts and facts involved, and GTECH's premise is valid only if, upon receiving TLC's directive to add moneybag icons to non-winning Game 5 tickets, GTECH had



no discretion but to implement the change *without attempting to revisit with TLC* the potential need for conforming changes to the preexisting proposed Game 5 instructions.

In insisting this discretion was lacking, GTECH suggests that TLC had already finalized and approved the Game 5 instructions by the time TLC prescribed the change in game parameters. GTECH emphasizes that TLC staff had previously made edits to the Game 5 instructions and artwork that GTECH had already incorporated into the Fun 5's working papers. But GTECH overreaches in assuming that the Game 5 instructions, in that preexisting form, were already fixed and immutable when TLC directed the change in Game 5 parameters, amounting to TLC specifications and directives with which GTECH had no discretion but to comply without reservation or further comment. On the contrary, the controlling act of finalization under the Instant-Game Contract was approval and execution of the final working papers by TLC's executive director—and this event had not yet occurred when TLC directed the parameter change. Further, the Contract contemplated that GTECH could propose further changes to working papers not only at that pre-approval juncture, but even for a period afterward, explicitly permitting "changes made after the execution of working papers . . . through the execution of a post executed change and signed by the [TLC] Executive Director or designee."

And the Steele Plaintiffs presented evidence that GTECH and TLC actually operated in this manner under the Instant-Game Contract. Joseph Lapinski, GTECH's account-development manager regarding the Texas Lottery, acknowledged that if GTECH personnel "saw a change come through from [TLC] [that they] anticipated or believed . . . would

harm the game or [TLC]," GTECH would expect them to "either say something to [TLC]" or "let someone know so . . . we can discuss or address it with [TLC]." Lapinski termed this expectation of GTECH employees "professionalism" and "good customer service." Likewise, Bowersock, the TLC instant-game coordinator, echoed the expectation that "[i]f [GTECH] saw concerns with the game they would report it to us."

Furthermore, the GTECH personnel having primary responsibility over the Fun 5's working papers and their various revisions confirmed not only that GTECH had the opportunity to alert TLC to potential problems with the Game 5 instructions after the parameter change, but also *made a conscious decision to forego raising any such concerns* with TLC. Laura Thurston, a GTECH customer-service representative who prepared the final rounds of revised working papers, including those implementing the parameter change, testified that a parameter change from TLC triggered a "comprehensive[]" internal review by the GTECH "teams" who were impacted by the change to determine if further changes to the game—including the instructions—were warranted. Thurston recounted that following the parameter change, she "did the examination" of the Game 5 instructions and also "had this examined by software [personnel]." Thurston "felt that [the instruction language] was clear" and accordingly "did not consider changing the language." The second GTECH customer-service representative, Penelope Whyte, had drafted the original version of the Fun 5's working papers but had been away from the office when Thurston made the final changes. Whyte echoed Thurston's understanding of GTECH's prerogative to suggest further changes in light of an intervening parameter change, acknowledging that these were "part of my job" as a customer-service representative

and “also part of [GTECH’s] internal review.” She also recounted that upon her return to work, she had “looked at the instructions” and, like Thurston, “saw that they didn’t need to be changed.”

By deciding not to revisit the Game 5 instructions with TLC after the agency prescribed the parameter change, GTECH, the Steele Plaintiffs insist, violated their obligation under the Instant-Game Contract to provide TLC “[e]xecuted working papers” that are “complete and free of any errors.”<sup>153</sup> But we need not decide whether GTECH contracts affirmatively *required* it (i.e., deprived it of discretion not to act) to alert TLC to a perceived discrepancy with the Game 5 instructions at that juncture. Rather, the consideration controlling GTECH’s immunity is whether its contracts left it discretion to choose to so alert TLC. Consistent with the conduct and understanding of GTECH’s Thurston and Whyte, the contracts plainly afforded GTECH that discretion. While it remained TLC’s prerogative to reject GTECH’s guidance, GTECH possessed discretion to provide the guidance nonetheless. In this limited respect, GTECH’s position is that of the government contractors in *Brown & Gay* and *Gehring* rather than that of *Keller*, and perhaps most closely resembles the investment advisor in *K.D.F.*<sup>154</sup>

**153.** The Steele Plaintiffs also emphasize deposition testimony in which their counsel succeeded in extracting acknowledgments from various GTECH or TLC witnesses that GTECH owed TLC “reasonable care” in providing non-misleading game instructions. GTECH disputes the competence or materiality of this testimony, observing that the scope of its discretion or duties relevant to the immunity inquiry are controlled by the two contracts, whose meaning is initially a question of law. We agree with GTECH. Such testimony regarding the existence of extra-contractual duties, if material to any issue, could go only to the merits of the Steele Plaintiffs’ causes of action. And as we emphasize below, the merits are not properly before us.

[14] Beyond this, GTECH disputes whether or how this exercise of discretion not to revisit the Game 5 instructions with TLC could actually amount to fraud or otherwise breach any cognizable tort duty. Similarly, GTECH appears to question the extent of any legal injury or damage to the Steele Plaintiffs, pointing out the Lottery Act provisions and rules deeming ticket purchases to be the buyer’s agreement “to abide by and be bound by” the commission’s rules and validation processes, including rules limiting their remedy—at least against TLC—merely to a refund of the \$5 purchase price of each ticket.<sup>155</sup> Whatever the validity of GTECH’s concerns (and we intend no comment), they go beyond the limited jurisdictional inquiry currently before us. It is true that if a government contractor’s contract would leave it no discretion to comply with an asserted tort duty, that feature may both establish the existence of derivative immunity and negate the existence of the tort duty, as Chief Justice Hecht observed in the *Brown & Gay* concurrence.<sup>156</sup> To this extent, the jurisdictional inquiry may overlap the merits, and this would neither prevent nor excuse courts from addressing the scope of contractual discretion to the extent necessary to resolve the jurisdictional issue.<sup>157</sup> But if, as here, the court

**154.** See *K.D.F.*, 878 S.W.2d at 597 (advisor’s “activities necessarily involve considerable discretion . . . its role is more in the nature of advising [the government] how to proceed, rather than being subject to the direction and control of [the government]”).

**155.** See Tex. Gov’t Code § 466.252(a); 16 Tex. Admin. Code § 401.302(k), (i).

**156.** *Brown & Gay*, 461 S.W.3d at 130 n.6 (Hecht, C.J., concurring).

**157.** See, e.g., *Miranda*, 133 S.W.3d at 227-28 (recognizing that jurisdictional challenges based on sovereign immunity may overlap the merits).

determines that the relevant contracts would leave the government contractor discretion to comply with the asserted tort duty and avoid the conduct alleged to be wrongful, there is no derivative immunity and the jurisdictional inquiry is at end. Our own jurisdiction here extends no farther, as the purpose of the plea to the jurisdiction GTECH has asserted, and that is the sole focus of this appeal, “is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs’ claims should never be reached.”<sup>158</sup>

**DOES *BROWN & GAY*’S “RATIONALE AND PURPOSE” ANALYSIS OTHERWISE AID GTECH?**

[15] One additional contention by GTECH remains to be addressed, however. Although GTECH’s primary position is that it is being sued solely for complying with underlying TLC directives—i.e., acting “as TLC” and not within its own independent discretion—and need not make any further showing in order to enjoy TLC’s sovereign immunity, it argues in the alternative that the fiscal justifications addressed in the “Rationale and Purpose” portion of the *Brown & Gay* opinion<sup>159</sup> would independently justify the application or extension of that immunity to it here. We consider this argument with respect to the portion of the Steele Plaintiffs’ fraud cause of action that we have held to survive the jurisdictional analysis under GTECH’s primary rationale.

In support of this alternative argument, GTECH posits that “[i]n the unlikely event that Plaintiffs’ fraud claims were ultimately upheld,” “adverse publicity” from

the judgment would “tarnish the excellent reputation of the Texas Lottery, causing ticket sales to decline,” such that “the State will be forced to make unforeseen expenditures to cover the shortfall, largely in the area of education,” the chief beneficiary of Texas Lottery revenues. But a similar argument could have been made in *Brown & Gay*—a judgment against the contractor for negligently designing toll-road signs and traffic layouts, proximately causing a fatal wrong-way collision, would tend to fuel a perception of dangerousness dissuading toll-road use, potentially requiring unforeseen shifts in governmental expenditures to make up for the resultant drop in revenue. For that matter, such secondary or tertiary effects on government and its functions could often be expected to flow from a judgment against a government contractor, not to mention one against a government agent or employee, with the latter arguably tending to have the greater potential negative impact. Nevertheless, the Texas Supreme Court has never extended sovereign immunity to governmental employees or agents acting within their individual as opposed to official capacities—on the contrary, such persons “have always been individually liable for their own torts, even when committed in the course of employment.”<sup>160</sup> And *Brown & Gay*, as we have seen, stands for the parallel proposition that the “rationale and purpose” of sovereign immunity would support recognition of immunity for government contractors only to the extent the suit complains of what are substantively underlying acts, directives, or decisions of the government—i.e. in essence a species of suit seeking to control state action through the contractor—and not the con-

**158.** *Wheelabrator Air Pollution Ctr., Inc. v. City of San Antonio*, 489 S.W.3d 448, 453 (Tex. 2016) (quoting *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)).

**159.** See *Brown & Gay*, 461 S.W.3d at 123-24.

**160.** *Franka*, 332 S.W.3d at 383; see *Leitch*, 935 S.W.2d at 117.

tractor's exercise of independent discretion.

To the extent GTECH is advocating a novel expansion of sovereign immunity to its benefit, this intermediate appellate court must instead adhere to the existing parameters of Texas sovereign-immunity doctrine unless and until the Texas Supreme Court instructs us otherwise.<sup>161</sup> And in the absence of such developments, GTECH has not shown that the Steele Plaintiffs' fraud causes of action, to the extent they complain of GTECH's actions following the Game 5 parameter change, implicate TLC's sovereign immunity.

#### CONCLUSION

The district court did not err in denying GTECH's plea to the jurisdiction with respect to the Steele Plaintiffs' fraud causes of action to the extent they are predicated on GTECH's failure or refusal, following TLC's change in the Game 5 parameters to have moneybag icons appear on non-winning tickets, to raise with TLC the now-complained-of asserted discrepancy between the Game 5 instructions and actual parameters. We emphasize again that the merits of these causes of action are not before us in this appeal, which concerns only immunity and jurisdiction. However, in its other components, the Steele Plaintiffs' suit implicates sovereign immunity by substantively seeking to control the actions and decisions of TLC within its delegated authority. As the Steele Plaintiffs can point to no legislative waiver of this immunity, the district court lacks subject-matter jurisdiction to adjudicate these portions of their suit. To this extent, we reverse the district court's order and render judgment

dismissing the causes of action for want of subject-matter jurisdiction.



**PHI AIR MEDICAL, LLC, Appellant**

v.

**TEXAS MUTUAL INSURANCE COMPANY; Hartford Underwriters Insurance Company; TASB Risk Management Fund; Transportation Insurance Company; Truck Insurance Exchange; Twin City Fire Insurance Company; Valley Forge Insurance Company; Zenith Insurance Company; and Texas Department of Insurance, Division of Workers' Compensation, Appellees**

**NO. 03-17-00081-CV**

Court of Appeals of Texas,  
Austin.

Filed: January 31, 2018

**Background:** Air-ambulance company and workers' compensation insurers sought judicial review of decision of Office of Administrative hearings, which determined that certain provisions of Texas Workers' Compensation Act and related administrative rules were not preempted by the federal Airline Deregulation Act and that company should recover 149% of Medicare rate for its services. The 53rd Judicial District Court, Travis County, No. D-1-GN-15-004940, Jan Soifer, J., determined that the Airline Deregulation Act did not preempt the Workers' Compensation Act and that insurers could not be

**161.** See, e.g., *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 565(Tex. App.—

Austin 2004, no pet.).

**TAB B**



# **TEXAS LOTTERY COMMISSION**

## ***REQUEST FOR PROPOSALS***

***FOR***

## ***INSTANT TICKET MANUFACTURING AND SERVICES***

ISSUED November 7, 2011, 4:00 P.M. Central Time  
Request for Proposal No. 362-12-0001



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## GLOSSARY OF TERMS

This Glossary assigns definitions to the listed terms. The definition given to a term listed in this Glossary applies whenever the term appears in this Request for Proposals (RFP) and in any response, including a Proposal, to this Request for Proposals.

<b>Term</b>	<b>Definition</b>
<b>Apparent Successful Proposer</b>	The Proposer(s) recommended by the evaluation committee and approved by the Executive Director, subject to the execution of a completed contract.
<b>Base Proposal Price</b>	Includes any and all requirements, goods and services described in this RFP or included in a Proposer's Proposal that are not specified as an "option."
<b>Business Hours</b>	The Texas Lottery's business hours are 8:00 a.m. to 5:00 p.m. CST, Monday through Friday, except State holidays.
<b>Contract</b>	The agreement(s) entered into by the Texas Lottery and the Successful Proposer, which will incorporate the contents of this RFP and the Successful Proposer's Proposal, except as specifically provided to the contrary in the Contract and any amendments to the Contract.
<b>Contract Award</b>	The signing of a Contract between the Texas Lottery and the Successful Proposer.
<b>Customer Specifications Document</b>	Document prepared by the Successful Proposer and approved by the Texas Lottery that details standard production requirements for all Texas Lottery instant games. This document includes general information, standard printing specifications, data processing specifications, packaging specifications, validation information, deliverables, Texas Lottery contact information and additional requirements. The Successful Proposer is responsible for updating the Customer Specifications Document throughout the Contract term if production requirements change.
<b>CPA</b>	Texas Comptroller of Public Accounts.
<b>Day</b>	A calendar day.
<b>Electronic Coupons</b>	Web-based coupons that interact with the validation equipment used by the Texas Lottery.
<b>End of Validation Date</b>	The last date that players can redeem prizes for any instant ticket, which is 180 days after the announced closing date for that ticket.
<b>Executive Director</b>	The Executive Director of the Texas Lottery Commission or an employee of the Texas Lottery Commission authorized to act on behalf of the Executive Director.



<b>Term</b>	<b>Definition</b>
<b>Fiscal Year</b>	The Texas Lottery's fiscal year, which begins on September 1 and ends on August 31 of the following year.
<b>Historically Underutilized Business (HUB)</b>	A business based in the State of Texas and formed for the purpose of making a profit, which is at least 51 percent owned, operated, and controlled by one or more HUB group members (see Attachment C).
<b>HSP</b>	The Historically Underutilized Business Subcontracting Plan (HSP) required by Chapter 2161 of the Texas Government Code and by Texas Lottery Commission Rule, 16 Texas Administrative Code § 403.301 (see Attachment C).
<b>Instant Ticket</b>	An instant ticket lottery game, developed and offered for sale to the public in accordance with commission rules, that is played by removing the security coating which covers the play area on an instant ticket, revealing the ticket play symbols.
<b>Intellectual Property Rights</b>	The worldwide legal rights or interests evidenced by or embodied in: (i) any idea, design, concept, personality right, method, process, technique, apparatus, invention, discovery, or improvement, including any patents, trade secrets, and know-how; (ii) any work of authorship, including any copyrights, moral rights or neighboring rights; (iii) any trademark, service mark, trade dress, trade name, or other indicia of source or origin; (iv) domain name registrations; and (v) any other proprietary or similar rights. The Intellectual Property Rights of a party include all worldwide legal rights or interests that the party may have acquired by assignment or license with the right to grant sublicenses.
<b>Invited Option</b>	An Invited Option is identified as being of specific interest to the Texas Lottery; however, the Texas Lottery makes no commitment to any quantity or timing for acquisition. The Proposer is not obligated to include an Invited Option in the Proposal.
<b>Offered Option</b>	Offered Options are not identified in this RFP, but may be identified by the Proposer and included in the Proposal. This is an opportunity for Proposers to offer options that the Texas Lottery may not have been aware of at the time the RFP was written. The Texas Lottery makes no commitment to quantity or timing for acquisition of Offered Options. A Proposer is not obligated to include an Offered Option in the Proposal.



<b>Term</b>	<b>Definition</b>
<b>Operating Hours</b>	The period of time during a Day that the Texas Lottery designates, in its sole discretion, that instant and on-line game sales, validations, reporting, and management functions are available. The Texas Lottery's current operating hours are daily from 12:30 a.m. to midnight Central Time.
<b>Pack</b>	A shrink-wrapped package of instant tickets.
<b>Prime Contract</b>	The following contracts which the Texas Lottery has entered into or may enter into in the future are considered prime contracts: lottery operator, instant ticket manufacturer, advertising services, lottery drawings audit services, drawings broadcast services, instant ticket testing services, annual financial audit and Mega Millions and Powerball agreed-upon engagement procedures, outside counsel for intellectual property matters, statistical consulting services, surveillance camera products and related services and internal control system. The Texas Lottery may, at its sole option, add or delete contracts that are considered prime contracts.
<b>Prize Fund</b>	The monies allocated to be returned to players presenting winning tickets within a specific game. It is calculated by multiplying the total sales of the game by the overall prize payout percentage.
<b>Proposal</b>	All information and materials submitted by a Proposer in response to this RFP. This includes the Cost Proposal, Technical Proposal, and other information and materials provided to the Texas Lottery by the Proposer prior to Contract Award.
<b>Proposer</b>	An individual or entity that submits a Proposal. The term includes anyone acting on behalf of the individual or entity that submits a Proposal, such as agents, employees and representatives.
<b>RFP</b>	This Request for Proposals.
<b>Responsive Proposal</b>	A Proposal submitted which conforms in all material respects to the RFP.
<b>Retailer</b>	A Texas Lottery sales agent, licensed by the Texas Lottery to sell lottery tickets, as contemplated by Texas Government Code, Chapter 466.
<b>Sales</b>	Any full or partial pack of instant tickets that has been settled.
<b>Specified Option</b>	A Specified Option must be proposed by the Proposer; however, the Texas Lottery does not commit to any quantity or timing for acquisition of a Specified Option. A Proposal may be rejected if a Specified Option is not included.



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<b>Term</b>	<b>Definition</b>
<b>State</b>	The State of Texas and its agencies, boards and commissions, officers and employees.
<b>Subcontractor</b>	A person who contracts with the Successful Proposer to work, to supply commodities, or contribute toward completing work for the Texas Lottery.
<b>Successful Proposer</b>	The Proposer(s) with whom the Texas Lottery executes a Contract to provide the goods and services that this RFP requires.
<b>TPASS</b>	Texas Procurement and Support Services. TPASS is a division of the Texas Comptroller of Public Accounts (CPA).
<b>Texas Lottery Commission, Texas Lottery, Lottery or TLC</b>	That agency created by Chapters 466 and 467, Texas Government Code. The Texas Lottery Commission may be referred to as the Texas Lottery, Lottery or TLC throughout this document.
<b>Working Days</b>	Business days occurring Monday through Friday except for the legal holidays observed by the State of Texas. The terms “working days” and “business days” may be used interchangeably.



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Term	Definition
<b>Works</b>	Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced or developed by a Successful Proposer (or such third parties as the Successful Proposer may be permitted to engage) at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to any (i) works of authorship (such as literary works, musical works, dramatic works, choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works, which includes but is not limited to lottery games, game names, game designs, ticket format and layout, manuals, instructions, printed material, graphics, artwork, images, illustrations, photographs, computer software, scripts, object code, source code or other programming code, HTML code, data, information, multimedia files, text web pages or web sites, other written or machine readable expression of such works fixed in any tangible media, and all other copyrightable works), (ii) trademarks, service marks, trade dress, trade names, logos, or other indicia of source or origin, (iii) ideas, designs, concepts, personality rights, methods, processes, techniques, apparatuses, inventions, formulas, discoveries, or improvements, including any patents, trade secrets and know-how, (iv) domain names, (v) any copies, and similar or derivative works to any of the foregoing, (vi) all documentation and materials related to any of the foregoing, (vii) all other goods, services or deliverables to be provided to TLC under the Contract, and (viii) all Intellectual Property Rights in any of the foregoing.

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## PART 1

### GENERAL INFORMATION

#### 1.1 PURPOSE

- 1.1.1 The Texas Lottery Commission is issuing this Request for Proposals (RFP) to obtain proposals from qualified Proposers to provide instant ticket manufacturing and services.
- 1.1.2 Proposers must have a minimum two years of related lottery experience in instant ticket printing in North America and at least three current clients who are members of the North American Association of State and Provincial Lotteries.
- 1.1.3 The Texas Lottery currently contracts with three vendors (Scientific Games International, Inc., Pollard Banknote Limited, GTECH Printing Corporation) for instant ticket manufacturing and services. Unlike many other North American lotteries, the Texas Lottery does not require traditional marketing support from its instant ticket vendors as such marketing support is already provided to the Texas Lottery via the Lottery Operator contract.
- 1.1.4 From the Texas Lottery's launch in May 1992 to July 2011, total transfers by the Texas Lottery to the Foundation School Fund equal more than \$13 billion and total transfers by the Texas Lottery to the State of Texas equal more than \$18 billion. The Texas Lottery continues to explore new and better ways to generate revenue for the State.
- 1.1.5 In fiscal year 2011, Texas Lottery sales totaled \$3.81 billion. Approximately 75% of the sales were from the instant ticket product category. During the past two years, the Lottery has seen average annual instant sales of \$2.80 billion.
- 1.1.6 The Texas Lottery currently has instant ticket price points at \$1, \$2, \$3, \$5, \$7, \$10, \$20 and \$50. During fiscal year 2011, the Texas Lottery produced approximately 85 instant games. The Texas Lottery anticipates similar price points, number of games and overall ticket production going forward.
- 1.1.7 The Texas Lottery, in its sole discretion, shall make all final decisions regarding instant ticket strategy and overall product mix consistent with its statutory charge to produce revenues for the State of Texas.
- 1.1.8 The Texas Lottery's objective is to maximize revenue to the State of Texas through the selection of "industry best" games and those consistent with the Texas Lottery's current product mix and instant ticket strategy. The Texas Lottery evaluates games based on a variety of criteria including, but not limited to, sales performance, ticket theme, play style, planned start date and overall fit within the overall instant game portfolio. Using these criteria and others, the Texas Lottery also includes branded, proprietary or licensed games which it believes present the best opportunity for maximizing ticket sales and generating revenues for the State.





#### 1.1.9 Goals of the Texas Lottery include the following:

- In working toward its objective to maximize revenue to the State of Texas through the selection of “industry best” games and those consistent with the Texas Lottery’s current product mix and instant ticket strategy, the Texas Lottery believes that utilizing multiple vendors for instant ticket manufacturing and services promotes competition, optimizes vendor performance and enhances business resumption capabilities.
- The Texas Lottery desires to select multiple Successful Proposers that demonstrate superior technical quality and service and that offer competitive pricing.
- The Texas Lottery, through negotiations with all Apparent Successful Proposers, desires to establish common prices for the goods/services included in the Base Price and certain Specified Options as identified in the Sealed Cost Proposal (Attachment H).
- As an incentive to accept the common prices established by the Texas Lottery and at the agency’s sole discretion, Successful Proposers may be offered an opportunity to produce a comparable number of games for a set period (as determined by the Texas Lottery in its sole discretion) following Contract Award. The Texas Lottery, in its sole discretion, will determine the quantity and volume of ticket production awarded to each Successful Proposer and expressly reserves the right to decrease or increase game orders consistent with the considerations in section 1.1.7, together with other factors including, but not limited to, technical quality and customer service.

1.1.10 Any Proposer(s) that rejects the Texas Lottery’s common prices may still be awarded a Contract in the Texas Lottery’s sole discretion, principally to allow the Texas Lottery to use the Proposer’s proprietary printing process(es) and licensed game inventory -- but is not assured a certain number of games.

### 1.2 OUR VISION AND MISSION

1.2.1 Vision – To be the preeminent Lottery and Charitable Bingo agency through innovative leadership.

1.2.2 Mission – The Texas Lottery is committed to generating revenue for the state of Texas through the responsible management and sale of entertaining lottery products. The Texas Lottery will incorporate the highest standards of security and integrity, set and achieve challenging goals, provide quality customer service and utilize a TEAM approach.

### 1.3 OUR CORE VALUES

1.3.1 Integrity and Responsibility — The Texas Lottery Commission works hard to maintain the public trust by protecting and ensuring the security of our lottery games, systems, drawings and operational facilities. We value and require ethical behavior by our employees, licensees and vendors. We promote the integrity of Charitable Bingo in Texas for the benefit of charitable organizations.



- 1.3.2 Innovation — We strive to incorporate innovation into our products to provide the citizens of Texas with the best entertainment experience available through our products. We pursue the use of technology that enhances the services that we provide to our customers and reduces our operating expenses.
- 1.3.3 Fiscal Accountability — We emphasize fiscal accountability by ensuring that all expenditures directly or indirectly generate revenue, enhance security, fulfill regulatory requirements, improve customer service and/or boost productivity. We recognize our responsibility in generating revenue for the State of Texas without unduly influencing players to participate in our games. We maximize benefits to charities through the continual examination and review of Charitable Bingo operations.
- 1.3.4 Customer Responsiveness — The Texas Lottery Commission takes pride in providing exemplary service to the people of Texas through the courteous dissemination of clear and accurate information about our products, services and regulatory functions. We seek and respond to feedback expressed by our employees, retailers, licensees and the playing and non-playing public. We apply this feedback in the development of our products and in the services that we provide.
- 1.3.5 Teamwork — We are committed to creating an environment of mutual respect where open, honest communication is our cornerstone. We embrace the diversity of our team and individual perspectives in working together to achieve our common goals.
- 1.3.6 Excellence — We strive for excellence by taking a position of leadership on issues that impact the Texas Lottery Commission and achieve challenging goals by focusing on our core values.

**1.4 SCHEDULE OF EVENTS**

The following time periods are set forth for informational and planning purposes only. The Texas Lottery reserves the right to change any of the time periods and will post all changes on the Electronic State Business Daily, <http://esbd.cpa.state.tx.us/> and/or the Texas Lottery website, <http://www.txlottery.org/> (Click on About Us, Doing Business with TLC, Procurement).

DATE	EVENT
November 7, 2011 (4:00 p.m., CENTRAL TIME)	Issuance of RFP
November 17, 2011 (1:30 p.m., CENTRAL TIME)	Pre-Proposal Conference at Texas Lottery Headquarters
November 28, 2011 – December 9, 2011 (as may be revised by the Texas Lottery)	Mandatory HSP Workshops
December 6, 2011 (4:00 p.m., CENTRAL TIME) (Late Questions will not be answered)	Written Questions Due
December 16, 2011	Responses to Written Questions Issued



January 11, 2012 (4:00 p.m., CENTRAL TIME) (Late Proposals will not be considered)	Deadline for Proposals
February 6-17, 2012	Site Visits
on or before February 29, 2012 (or as soon as possible thereafter)	Announcement of Apparent Successful Proposer

## 1.5 SUCCESSFUL PROPOSER'S / LOTTERY RELATIONSHIP

The Texas Lottery Commission is a part of the Executive Branch of Texas State Government. The Texas Lottery will not relinquish control over Texas Lottery instant ticket game portfolio. The Successful Proposer shall function under the supervision of the Texas Lottery. Its operations will be subject to the same scrutiny and oversight that would apply if all operations were performed by Texas Lottery employees. Accordingly, all operations must be conducted in adherence to applicable statutes and the highest ethical standards.

- 1.5.1 The Texas Lottery may rely upon the guidance of the Successful Proposer in all matters related to instant game development and manufacturing services, but reserves the sole right to reject that guidance for any reason. The Successful Proposer, conversely, must accept and support the decisions of the Texas Lottery.
- 1.5.2 The Successful Proposers(s) will function under the supervision of the Texas Lottery and must operate in a manner that will not cause any embarrassment to the Texas Lottery and the State of Texas. The Lottery is a publicly owned and managed institution. Although the Successful Proposer comes from the private sector, its operations will be subject to the same scrutiny and oversight that would exist if all operations were performed by Texas Lottery employees. All operations must be conducted in adherence to the highest ethical standards.
- 1.5.3 Final decisions regarding the direction or control of the Lottery are always the prerogative of the Texas Lottery in its sole discretion as an agency of the State of Texas. In order to enhance communication and sharing of information, the Successful Proposer's word processing, spreadsheet, presentation, project management and e-mail applications must be compatible with Texas Lottery applications.

## 1.6 PROCUREMENT AUTHORITY

This RFP and all activities leading toward the execution of a written contract pursuant to this RFP are being conducted in accordance with the State Lottery Act (Tex. Gov't Code ANN. § 466.001 et seq.), as amended; the Texas Lottery's administrative regulations (16 Tex. Admin. Code § 401.101 et seq.); and other applicable laws of the State of Texas. All Proposers should read and be familiar with the State Lottery Act and 16 TAC §401.101.



## **1.7 PROPOSALS SUBJECT TO TEXAS PUBLIC INFORMATION ACT**

- 1.7.1 The Texas Lottery is subject to the Texas Public Information Act (Act) (Tex. Gov't Code ANN. Ch. 552). Proposals submitted to the Texas Lottery in response to this RFP are subject (in their entirety) to release by the Texas Lottery as public information. However, a Proposal, or specific parts thereof, may be shown by the Proposer to fall within one or more of the exceptions to disclosure provided in the Act, the State Lottery Act or other applicable law. Marking an entire Proposal as "confidential" or copyrighted is unacceptable. If a Proposer believes that parts of its Proposal are confidential under the Act, it should specify the confidential information by marking "Confidential" on each page or by each paragraph containing such information prior to submitting the Proposal to the Texas Lottery. In response to this Section, Proposers shall provide the Texas Lottery with specific and detailed reasons for each item marked "Confidential". Vague and general claims to confidentiality are not acceptable. This detail is necessary so that the Texas Lottery will have sufficient information to provide to the Attorney General of Texas, if a ruling regarding the confidentiality of such information is requested. The Texas Lottery will notify a Proposer if all or part of its Proposal is requested under the Act. Failure of a Proposer to respond to such notification may result in the release of all or part of the Proposal as public information. It is the Proposer's obligation to submit briefing to the Attorney General setting forth the basis upon which the requested information should remain confidential. The Attorney General may determine all or part of a Proposal to be public information even though parts of the Proposal were marked "Confidential" by the Proposer. Please also note that the Attorney General has previously ruled that the statutory exception in Section 552.104 of the Act (Exception: Information Related to Competition or Bidding) generally does not apply after a contract has been awarded.
- 1.7.2 The Texas Lottery assumes no responsibility for asserting legal arguments to the Attorney General on behalf of Proposers.
- 1.7.3 Proposers are advised to consult with their legal counsel concerning disclosure issues resulting from this procurement process and to take precautions to safeguard trade secrets and other proprietary information.

## **1.8 MISUNDERSTANDING OR LACK OF INFORMATION**

By submitting a Proposal, a Proposer covenants and agrees that it fully understands and will abide by the terms and conditions of the RFP and it will not make any claims for, or have any rights to, cancellation or relief without penalty because of any misunderstanding or lack of information. The Executive Director reserves the right to accept Proposals by waiving minor technicalities therein if the Executive Director, within his or her sole discretion, determines it to be in the best interests of the Texas Lottery. The decision of the Executive Director shall be conclusive, subject to protest under Section 2.17 of this RFP.



## **1.9 REJECTION OF PROPOSALS AND CANCELLATION OF RFP**

Issuance of this RFP and/or retention of Proposals do not constitute a commitment on the part of the Texas Lottery to award a Contract. The Texas Lottery maintains the right to reject any or all Proposals and to cancel this RFP if the Executive Director, in his or her sole discretion, considers it to be in the best interests of the Texas Lottery to do so.

## **1.10 OWNERSHIP OF PROPOSALS**

All materials submitted by a Proposer will become the property of the Texas Lottery and may be used as the Texas Lottery deems appropriate.

## **1.11 INCURRED EXPENSES**

The Texas Lottery accepts no obligations for costs incurred in preparing and submitting a Proposal. Proposals shall be submitted at the sole expense of the Proposer. All Proposals shall be prepared simply and economically, providing a straightforward, concise delineation of the Proposer's capabilities to satisfy the requirements of this RFP.

## **1.12 PROPOSAL TENURE**

All Proposals shall be valid for a period of one hundred and eighty (180) Days from the deadline for submitting Proposals.

## **1.13 NO TEXAS LOTTERY OBLIGATIONS**

The Texas Lottery reserves the right to select qualified Proposals to this RFP without discussion of the Proposals with Proposers. It is understood that all Proposals will become a part of the Texas Lottery's official procurement files after a Contract has been awarded or the procurement has been terminated, and will be available for public inspection except for portions that the Proposer has designated as proprietary and confidential (*see* Sections 552.110 and 552.305 of the Public Information Act and RFP Section 1.7 above).

## **1.14 SUCCESSFUL PROPOSER'S OBLIGATIONS**

The Successful Proposer shall always be responsible for the performance of any contractual obligations that may result from the award of a Contract based on this RFP and shall be liable for the non-performance of any or all Subcontractors.

## **1.15 CAPTIONS**

The captions to the Sections of this RFP are for convenience only and are not part of the RFP's substantive terms.

## **1.16 SURVIVAL**

Provisions of this RFP which of their nature and effect are necessary to enable the Lottery to function normally and to meet all of its obligations shall survive any termination of any Contract resulting from this RFP. These provisions include, but are not limited to, all of



the warranties and representations and any provision that by its terms provides for applicability beyond the end of any Contract period.

**1.17 PARTS INCORPORATED**

All attachments listed in the Table of Contents are incorporated into and expressly made a part of this RFP.



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## PART 2 PROPOSAL PROCESS

### 2.1 CONTACT PERSON

The sole point of contact for communications concerning this RFP will be Angela Zgabay-Zgarba, whose address and facsimile number are as follows:

Angela Zgabay-Zgarba  
Contracts Administrator  
Texas Lottery Commission  
P. O. Box 16630  
Austin, TX 78761-6630  
Fax (512) 344-5444  
contracts@lottery.state.tx.us

The Texas Lottery headquarters' physical address for deliveries is:

Angela Zgabay-Zgarba  
Contracts Administration  
Texas Lottery Commission  
611 East 6th Street  
Austin, TX 78701

### 2.2 PROHIBITION AGAINST UNAUTHORIZED CONTACT

- 2.2.1 The Texas Lottery is committed to a procurement process that maintains the highest level of integrity. Accordingly, Proposers, as well as their agents, liaisons, advocates, lobbyists, "legislative consultants," representatives or others promoting their position, are limited to those communications authorized by and described in this RFP. Any attempt to influence any of the participants, whether that attempt is oral or written, formal or informal, direct or indirect, outside of this RFP process is strictly prohibited.
- 2.2.2 Should allegations of improper contact be made prior to any Contract Award, the Executive Director may investigate those allegations and, in his sole discretion, disqualify a Proposer.

### 2.3 PRE-PROPOSAL CONFERENCE

Prospective Proposers are encouraged to attend a pre-Proposal Conference to be held at the Texas Lottery headquarters. See the Schedule of Events for the date and time. The pre-Proposal Conference will include an overview of the RFP and a presentation on the HUB Subcontracting Plan (HSP) requirements. A question and answer session will also take place regarding general, technical and HSP questions. A video of the pre-proposal conference will be posted on the Texas Lottery website at [www.txlottery.org](http://www.txlottery.org).



Attendance at the pre-proposal conference is not mandatory; however, Proposers are highly encouraged to view the video.

## 2.4 MANDATORY HUB SUBCONTRACTING PLAN (HSP) WORKSHOP

The Texas Lottery will schedule mandatory one-on-one workshops with Proposers as discussed further in Part 5 of this RFP.

## 2.5 INQUIRIES

2.5.1 Written inquiries concerning this RFP will be accepted and responses posted on the Electronic State Business Daily, <http://esbd.cpa.state.tx.us/> and the Texas Lottery website, [www.txlottery.org](http://www.txlottery.org), according to the timetable established in the Schedule of Events. Inquiries received after the deadlines set in the Schedule of Events may be reviewed by the Texas Lottery, but will not be answered. Any addenda or amendments, whether made as a result of a prospective Proposer's written inquiries or otherwise, will be posted on the Electronic State Business Daily, and the Texas Lottery website. **It is the responsibility of the Proposer to check these websites for any additional information regarding this RFP.**

2.5.2 Inquiries shall be submitted by email and/or facsimile by the inquiry submission deadline. If there is any discrepancy between the electronic version (e-mail) and the printed version (facsimile) of a document, the printed version will control. Emailed inquiries shall be emailed to:

contracts@lottery.state.tx.us

2.5.3 A Proposer shall inquire in writing and should obtain clarification as to any ambiguity, conflict, discrepancy, exclusionary specification, omission or error in this RFP (collectively, "errors") prior to submitting a Proposal, but in no event shall be entitled to additional compensation, relief or time by reason of any error or its later correction. If a Proposer fails to obtain written clarification of any errors, the Proposer shall submit a Proposal at its own risk; and, if awarded a Contract, the Proposer shall be deemed to have waived any claim to contest the Texas Lottery's interpretation thereof.

## 2.6 SUBMISSION OF PROPOSAL

2.6.1 Proposals must be delivered to Angela Zgabay-Zgarba at the address provided in Section 2.1 and received no later than the deadline established in the Schedule of Events. No exceptions will be made.

2.6.2 The Proposer shall submit one (1) signed original and fifteen (15) copies of its Proposal. For Part 5 only, Proposers shall provide one (1) signed original and two (2) copies of all required HSP documentation. All Proposals submitted must be bound in a three-ring binder, organized and arranged to correspond directly with the numbered sections of this RFP, and all pages must be numbered. For Parts 1, 2, and 3 only, Proposers may provide a blanket acknowledgment and acceptance in lieu of a section-by-section response. For Parts 4, 6 and 7 only, Proposers shall provide a section-by-section response





to the RFP. For Part 5, Proposers shall follow the instructions for completing and submitting a HSP. If a Proposer is claiming any part(s) of its Proposal is confidential, the Proposer must provide a detailed response to Section 1.7. A Proposer may not amend a commitment to comply with a specific section of this RFP by a later reference back to that section.

- 2.6.3 The Proposer's Commitment (Attachment A) must be signed by an officer or agent of the Proposer with authority to contractually bind the Proposer, and the attachment must be included with the original Proposal.
- 2.6.4 Proposers are required to propose a complete solution to the Texas Lottery's requirements in their Proposal. Any items not specifically requested, but integral to the requested services, shall be included in the Proposal and identified in the appropriate sections thereof.
- 2.6.5 Proposers responding to this RFP must fully and completely address all goods, services and other requirements as described by this RFP. Incomplete or partial Proposals will not be considered. A Proposer shall provide all information that the Proposer believes would be helpful to the Texas Lottery in evaluating the Proposer's ability to fulfill the RFP requirements.
- 2.6.6 In addition to the printed Proposal, the Proposer must also submit one copy of the text portion of its Proposal, excluding the Cost Proposal, on a compact disk in a searchable PDF file. If there is any disparity between the contents of the printed Proposal and the contents of the Proposal contained in electronic format, the contents of the printed Proposal shall take precedence. The electronic or soft copy provided herein will not be accepted in lieu of the signed original and copies as required in section 2.6.2.
- 2.6.7 Proposals that have been copyrighted by any Proposer are unacceptable and may be rejected as non-responsive.

## **2.7 RESPONSE FORMAT & CONTENTS**

The Proposer must demonstrate its understanding of the requested goods and services and must address specifically, in writing, the Proposer's approach to providing each requirement in this RFP. Each Proposal must be organized in the manner described below:

- (a) Letter of Transmittal;
- (b) Executive Summary;
- (c) Section-by-section response to the RFP (see Section 2.6.2 above); and,
- (d) Sealed Cost Proposal (Attachment to original proposal only).

## **2.8 LETTER OF TRANSMITTAL**

- 2.8.1 Proposers must submit a Letter of Transmittal that identifies the entity submitting the Proposal and includes a commitment by that entity to provide the goods and services required by the Texas Lottery in this RFP. The Letter of Transmittal must state that the Proposal is valid for one hundred and eighty (180) Days from the Day after the deadline for submitting Proposals. Any Proposal containing a term of less than one hundred and



eighty (180) Days for acceptance shall be rejected. The Letter of Transmittal must be signed by a person(s) legally authorized to bind the Proposer to the representations in the Proposal. The Proposer should also indicate, in its Letter of Transmittal, why it believes it is the most qualified Proposer to provide the goods and services required by the Texas Lottery in this RFP.

- 2.8.2 The Letter of Transmittal must include a statement of acceptance of the terms and conditions set forth in Part 3 of this RFP that will be included in any Contract resulting from this RFP. If the Proposer takes exception to any of the proposed terms and conditions, those exceptions must be noted in the Letter of Transmittal. The Proposer should realize, however, that failure to accept the terms and conditions specified in Part 3 of the RFP may result in disqualification of the Proposal.

## **2.9 EXECUTIVE SUMMARY**

- 2.9.1 Proposers must provide an executive summary of their Proposal (excluding cost information) that asserts that the Proposer is providing, in its Proposal, all the requirements of this RFP. If the Proposer is providing goods or services beyond those specifically requested, those goods or services must be identified. If the Proposer is offering goods or services that do not meet the specific requirements of this RFP, but in the opinion of the Proposer are equivalent or superior to those specifically requested, any such differences must be noted in the Executive Summary. The Proposer should realize, however, that failure to provide the goods and services specifically required may result in disqualification.
- 2.9.2 The Proposer must demonstrate its understanding of the requested goods and services and must address specifically, in writing, the Proposer's approach to providing each requirement in this RFP.
- 2.9.3 The Executive Summary must not exceed five (5) pages and should represent a full and concise summary of the contents of the Proposal.

## **2.10 PROPOSER'S CONTRACTING AUTHORITY**

The Proposer warrants and represents that the person named on the Proposer's Commitment (Attachment A) has the full right, power and authority to execute a Contract resulting from this RFP on behalf of the Proposer. Commitments must be unqualified, not limited, and fully commit the Proposer to provide the goods and services required under this RFP.

## **2.11 PROPOSER'S COST PROPOSAL**

- 2.11.1 The Proposer must state its pricing for all goods and services rendered during the course of the proposed Contract, including any and all costs involved that are to be paid or reimbursed by the Texas Lottery. The pricing for the required services is to be presented only in the format set forth in Attachment H of the RFP. Pricing information shall include all costs associated with providing the required goods and services and must be submitted in a separate, sealed envelope clearly marked as such, attached to the original



Proposal only. No reimbursement is available to the Successful Proposer beyond the amount agreed to be paid for the goods and services provided. Pricing agreed to in any resulting Contract shall be firm and remain constant through the life of the Contract.

- 2.11.2 The Proposer shall not disclose its Cost Proposal or other cost information in the body of the written Proposal. Including cost information in the written Proposal may be cause for disqualification.

## **2.12 MULTIPLE PROPOSALS**

The Proposer may submit only one Proposal. If a Proposer submits more than one Proposal, all Proposals from that Proposer may be rejected.

## **2.13 CHANGES, MODIFICATIONS AND CANCELLATION**

The Texas Lottery reserves the right to make changes to and/or cancel this RFP and will post all changes and modifications, whether made as a result of a potential Proposer's written inquiries or otherwise, and cancellation notices on the Electronic State Business Daily and the Texas Lottery web sites. **It is the responsibility of the Proposer to check these web sites for any additional information regarding this RFP. If the Proposer fails to monitor the ESB and TLC web sites for any changes or modifications to the RFP, such failure will not relieve the Proposer of its obligation to fulfill the requirements as posted.**

## **2.14 UPDATES TO INFORMATION SUPPORTING A PROPOSAL**

Following the submission of Proposals and prior to the signing of a Contract, the Proposer is under a continuing obligation to notify the Texas Lottery in writing of any updates or changes to information offered in support of its Proposal that might reasonably be expected to affect the Texas Lottery's consideration of the Proposal. Nothing in this Section shall be interpreted to permit the unilateral modification by a Proposer of its commitment to provide goods and services described in its Proposal as filed for the cost stated therein.

## **2.15 ADDITIONAL INFORMATION**

By submitting a Proposal, a Proposer grants the Executive Director the right to obtain any information from any lawful source regarding the past history, practices, conduct, ability and eligibility under the State Lottery Act of a Proposer to supply goods, services and to fulfill requirements under this RFP, and the past history, practices, conduct, ability and eligibility of any director, officer or key employee of a Proposer. By submitting a Proposal, the Proposer generally releases from liability and waives all claims against any party providing information about the Proposer at the request of the Executive Director. Such information may be taken into consideration in evaluating Proposals.



## 2.16 PROPOSAL EVALUATION AND CONTRACT AWARD

- 2.16.1 The Executive Director intends to conduct a fair, comprehensive and impartial evaluation of all Proposals received in response to this RFP using an evaluation committee. The evaluation committee will be selected by the Executive Director and may consist of Texas Lottery employees or outside individuals with expertise in particular areas. In addition, the Texas Lottery's General Counsel, other in-house legal counsel, and outside legal counsel may assist by advising the evaluation committee. Texas Lottery employees, including the Executive Director, and consultants may also assist in the process as technical non-voting members of the evaluation committee.
- 2.16.2 Each member of the evaluation committee will independently score each Proposal responsive to this RFP. Evaluation committee members may seek, obtain and consider the opinions of other committee members or subject matter experts (including Texas Lottery staff, staff from other Texas agencies and consultants retained by the Texas Lottery) when evaluating and independently scoring particular areas of the Proposals.
- 2.16.3 The evaluation committee may request clarification of information or representations in a Proposal before completing the initial evaluation. Requests for clarification and responses to requests for clarification will be in writing and will become part of the evaluation record.
- 2.16.4 The procurement process will be conducted in accordance with 16 Texas Administrative Code § 401.101.
- 2.16.5 At a minimum, the factors to be considered by the evaluation committee in evaluating Proposals shall include:
- (i) the proposer's price to provide the goods or services;
  - (ii) the probable quality of the offered goods or services;
  - (iii) The agency's evaluation of the likelihood of the proposal to produce the desired outcome for the agency, considering, among other criteria:
    - (I) the quality of the proposer's past performance in contracting with the agency, with other state entities, or with private sector entities;
    - (II) the qualifications of the proposer's personnel;
    - (III) the experience of the proposer in providing the requested goods or services;
    - (IV) the financial status of the proposer; and
  - (iv) whether the proposer performed the good faith effort required by the HUB subcontracting plan, when the agency has determined that subcontracting is probable.

A copy of the scoring matrix is included as Attachment G.



2.16.6 A written notice of Contract Award will be sent to all Proposers immediately following execution of a written Contract.

## **2.17 PROTEST PROCEDURE**

Any protest shall be governed by Texas Government Code ANN. § 466.101 and 16 Tex. Admin. Code §§ 401.102-103. In accordance with Texas Lottery administrative rules 401.102(a) and 401.103(a), the Executive Director will refer protests directly to the Texas Lottery Commission for determination.

## **2.18 SITE VISITS AND/OR ORAL PRESENTATIONS**

The Texas Lottery, in its sole discretion, reserves the right to conduct site visits and/or to require Proposers to make oral presentations prior to the Contract Award. Proposers will be notified in writing and will be provided with equal advance notification of site visits and/or oral presentation assignments and guidelines.



## **PART 3**

### **CONTRACTUAL TERMS AND CONDITIONS**

#### **3.1 INTRODUCTION**

This part sets forth terms and conditions applicable to the procurement process as well as terms and conditions that will become part of any Contract executed pursuant to this RFP. The Texas Lottery reserves the right to incorporate additional provisions in any Contract in the best interest of the Texas Lottery.

#### **3.2 GOVERNING LAW**

The procurement process, the award procedure, and any Contract resulting from this RFP shall be governed by, construed and interpreted in accordance with the applicable laws of the State of Texas. Any and all actions or suits brought by a Proposer or any related party regarding this RFP or any Contract resulting therefrom shall be brought in the state district court located in Austin, Travis County, Texas. By submitting a Proposal, a Proposer is deemed to waive the right to bring any action in any other court. This section is purely a venue provision and shall not be deemed a waiver of sovereign immunity.

#### **3.3 CONTRACT ELEMENTS**

- 3.3.1 Any Contract between the Texas Lottery and the Successful Proposer will follow the general format specified by the Texas Lottery. The Texas Lottery reserves the right to negotiate provisions in addition to those stipulated in this RFP. The contents of this RFP, as modified by published addenda, and the Successful Proposer's Proposal will be incorporated into the Contract. In the event of any conflict or contradiction between or among these documents, the documents shall control in the following order of precedence: the written Contract, the RFP, and the Successful Proposer's Proposal. Specific exceptions to this general rule may be noted in the written Contract.
- 3.3.2 The Texas Lottery has determined that subcontracting opportunities are probable under this RFP. Therefore, the Texas Lottery requires the submission of an HSP as a part of each Proposal, as discussed further in Part 5 of this RFP. The HSP, if accepted by the Texas Lottery, will become a provision of any Contract awarded as a result of this RFP.
- 3.3.3 If any term or provision of this RFP or a Contract executed pursuant to this RFP is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the RFP or Contract shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

#### **3.4 AMENDMENTS**

Any Contract resulting from this RFP may be amended only by a written agreement signed by both parties.



### **3.5 WAIVER**

The failure of the Texas Lottery to object to or to take affirmative action with respect to any conduct of the Successful Proposer which is in violation or breach of the terms of any Contract resulting from this RFP shall not be construed as a waiver of the violation or breach, or of any future violation or breach.

### **3.6 CLARIFICATION OF LOTTERY'S INTENT**

It is the responsibility of the Successful Proposer to address and resolve all questions with the Texas Lottery's designated staff members, and achieve a clear understanding of all Texas Lottery requirements during each stage of the Contract term. The Texas Lottery will use reasonable efforts to provide timely responses to questions of policy or procedure as they may affect the Successful Proposer's performance. Key Texas Lottery staff will be available to the Successful Proposer on a reasonable basis, but may not be available on State or national holidays, as defined in Section 662.003 of the Texas Government Code, or weekends. The Texas Lottery's normal office hours are from 8:00 a.m. to 5:00 p.m., Central Time, Monday through Friday of each week of the Contract term, except State holidays.

### **3.7 LOTTERY'S FINANCIAL OBLIGATIONS**

The financial obligations of the Texas Lottery under any Contract resulting from this RFP are payable solely out of the receipts of the Texas Lottery and are subject to statutory restrictions and appropriations. Performance by the Texas Lottery under any Contract resulting from this RFP is subject to acts of the Texas Legislature. The Texas Lottery shall have no responsibility or liability for any damages, losses, financial obligations, breach of contract, or other claims in the event that performance by the Texas Lottery is compromised or terminated by acts or omissions of the Texas Legislature (*e.g.*, if the Texas Lottery is discontinued or not funded by the Texas Legislature).

### **3.8 RELATIONSHIP OF THE PARTIES**

The Successful Proposer and the Texas Lottery agree and understand that the Successful Proposer shall render the goods, services and requirements under any resulting Contract as an independent contractor, and nothing contained in the Contract will be construed to create or imply a joint venture, partnership, employer/employee relationship, principal-agent relationship or any other relationship between the parties. Employees of the Successful Proposer will not be considered employees of the Texas Lottery within the meaning of any federal, state, or local law, ordinance, or regulation including, but not limited to, laws, ordinances, or regulations concerning unemployment insurance, social security benefits, workers compensation, or withholding requirements. The Successful Proposer shall be responsible for complying with any such laws, ordinances, or regulations, and shall indemnify and hold harmless the Texas Lottery from any costs or damages, including attorney's fees, sustained by the Texas Lottery resulting from the Successful Proposer's breach of its obligations under this section. The Texas Lottery will withhold indemnified losses from payments to the Successful Proposer, or, if no payments



are made, the Texas Lottery will make demand of payment of indemnified losses. The Successful Proposer must make payment within thirty (30) Days of the Texas Lottery's demand.

### **3.9 PAYMENT**

- 3.9.1 All payments will be made in accordance with Texas Government Code ANN. § 2251 et seq. ("Payments for Goods and Services"). The Successful Proposer shall submit invoices monthly for the previous month's services. Each invoice shall note the contract number, services rendered, and date of services. The Successful Proposer shall submit invoices for each game, noting the Contract number and detailing services rendered, including game name, game number, quantity of tickets shipped, cost per thousand per executed working papers and/or any costs associated with the game. Invoices must also include the individual purchase order number provided by the Texas Lottery for that particular game.
- 3.9.2 Invoices may be submitted by mail to the Texas Lottery Commission, P. O. Box 16630, Austin, Texas 78761-6630, Attn: Accounts Payable or by e-mail to AccountsPayable@lottery.state.tx.us. Payments will be made only upon the completion of services or after the delivery of goods authorized in an approved invoice.
- 3.9.3 Pursuant to Texas Government Code ANN. Section 2251.025, interest is not due on a payment until it becomes "overdue." A payment is not "overdue" until the 31<sup>st</sup> day after the latter of: (1) the date the Texas Lottery receives the goods covered by the contract; (2) the date the performance of service under the contract is completed; or (3) the date the Texas Lottery receives an invoice for the goods or services. Tex. Gov't Code ANN. Section 2251.021. Services are "completed" when accepted by the Texas Lottery.
- 3.9.4 The Successful Proposer agrees that if the Texas Comptroller of Public Accounts is prohibited from issuing a warrant to the Successful Proposer under Section 403.055 of the Texas Government Code, any payments owed to the Successful Proposer under any Contract resulting from this RFP will be applied towards the debt or delinquent taxes that the Successful Proposer owes the State of Texas until the debt or delinquent taxes are paid in full.

### **3.10 FEDERAL TAX WITHHOLDING FROM PAYMENTS**

If required by law, the Texas Lottery will deduct a 3% federal income tax withholding on vendor payments issued for goods or services after Dec. 31, 2012.

### **3.11 ASSIGNMENTS**

No right or obligation of the Successful Proposer under any Contract may be assigned by the Successful Proposer without the prior written approval of the Texas Lottery, and in the event of any such approval, the terms and conditions hereof shall apply to and bind the party or parties to whom the right or obligation is assigned as fully and completely as the Successful Proposer is hereunder bound and obligated. No assignment shall operate to release the Successful Proposer from its liability for the timely and effective performance





of its obligations hereunder. Assignments made in violation of this provision shall be null and void.

Subject to the limitations on assignment contained herein, any Contract shall inure to the benefit of, and be binding upon, the successors and assigns of the respective parties hereto.

### **3.12 SUBCONTRACTING**

- 3.12.1 The Successful Proposer is prohibited from subletting, conveying, assigning or otherwise disposing of all or any portion of any Contract resulting from this RFP, its rights, title, or interest therein, or its power to execute such agreement without the previous written approval of the Texas Lottery. If any part of any Contract between the Texas Lottery and the Successful Proposer is to be subcontracted, the Successful Proposer must obtain prior written approval from the Texas Lottery, and the Subcontractor must comply with all applicable requirements of the Texas Lottery. The Texas Lottery reserves the sole right to require the Successful Proposer to terminate any Subcontractor with or without cause.
- 3.12.2 In the event the Texas Lottery approves of the use of any Subcontractor in performance of the Contract, the Successful Proposer is not relieved of its responsibility and obligation to meet all the requirements of this RFP.
- 3.12.3 The Texas Lottery will incur no additional obligations and the obligations of the Successful Proposer will not be reduced as a result of any such subcontracts.
- 3.12.4 The Successful Proposer agrees to indemnify and hold the Texas Lottery harmless from any of the claims or actions of its Subcontractors. The Texas Lottery will withhold indemnified losses from payments to the Successful Proposer, or, if no payments are made, the Texas Lottery will make demand of payment of indemnified losses. The Successful Proposer must make payment within thirty (30) Days of the Texas Lottery's demand.
- 3.12.5 The Successful Proposer's obligation to pay Subcontractors is governed by Texas Government Code ANN. § 2251.022 ("Time for Payment by Vendor"), as it may be amended.

### **3.13 LOTTERY APPROVAL OF STAFFING**

- 3.13.1 The Successful Proposer shall not employ or contract with or permit the employment of unfit or unqualified persons or persons not skilled in the tasks assigned to them. The Successful Proposer shall at all times employ sufficient labor to carry out functions and services in the manner and time prescribed by any Contract awarded pursuant to this RFP. "Unfit" is defined as any person convicted of a felony, criminal fraud, gambling or gambling-related offense or a person convicted of a misdemeanor involving moral turpitude whose sentence, parole, mandatory supervision or probation ended less than ten (10) years ago. The Successful Proposer shall be responsible to the Texas Lottery for the acts and omissions of the Successful Proposer's employees, agents (including, but not limited to, lobbyists) and Subcontractors and the Successful Proposer shall enforce



strict discipline among the Successful Proposer's employees, agents (including, but not limited to, lobbyists) and Subcontractors performing the services under the Contract.

- 3.13.2 The Successful Proposer shall provide the Texas Lottery written notification and justification within three (3) Working Days of any personnel changes in accordance with Section 4.2.4.
- 3.13.3 Notwithstanding anything herein to the contrary, any person employed by the Successful Proposer shall, at the written request of the Texas Lottery, and within the Texas Lottery's sole discretion, be removed forthwith by the Successful Proposer from work relating to the Contract.

### **3.14 BACKGROUND INVESTIGATIONS**

- 3.14.1 The Texas Lottery Commission may initiate investigations into the backgrounds of (a) the Successful Proposer; (b) any of the Successful Proposer's officers, directors, investors, owners, partners and other principals, as more particularly described in Texas Government Code ANN. § 466.155 (collectively, Successful Proposer Principals); (c) any of the Successful Proposer's employees; (d) any of the Successful Proposer's Subcontractors, or Subcontractors' officers, directors, investors, owners, partners, principals or employees (collectively, Subcontractor Personnel); or (e) any other associates of the Successful Proposer it deems appropriate. The Texas Lottery Commission may also request background information for a spouse, child, brother, sister or parent residing as a member of the same household in the principal place of residence of the Successful Proposer, any Successful Proposer Principals, or Successful Proposer employees described above. Such background investigations may include fingerprint identification by the Texas Department of Public Safety, the Federal Bureau of Investigation, and any other law enforcement agency. The Texas Lottery may terminate any Contract resulting from this RFP based solely upon the results of these background investigations.
- 3.14.2 The Successful Proposer agrees that, during the term of the Contract and any renewal thereof, it shall be obligated to provide such information about any Successful Proposer Principals, Successful Proposer employees, and Subcontractor Personnel as the Texas Lottery may prescribe. The Successful Proposer also agrees that the Texas Lottery may conduct background investigations of such persons.
- 3.14.3 Upon notification by the Texas Lottery to the Successful Proposer that the Texas Lottery objects to an employee based on a background investigation, the Successful Proposer shall prevent that employee from working on the Texas Lottery account and shall deny that employee access to the Texas Lottery systems.

### **3.15 COMPLIANCE**

The Successful Proposer agrees to comply with all applicable laws, rules and regulations, including without limitation those involving non-discrimination on the basis of race, color, religion, national origin, age, sex and disability.



### **3.16 TERM OF CONTRACT**

- 3.16.1 Any Contract resulting from this RFP will commence on the Contract execution date and continue through August 31, 2018 subject to the termination provisions in this RFP and subject to the Texas Lottery being continued and funded by the Texas Legislature.
- 3.16.2 The Texas Lottery reserves the right to extend any Contract resulting from this RFP, at its sole discretion, for up to two (2) additional three (3) year periods, at the Contract rate or rates as modified during the term of the Contract.
- 3.16.3 At the end of the initial term or any renewal period, and instead of exercising the renewal above, the Texas Lottery reserves the right to extend any Contract resulting from this RFP, at its sole discretion, for up to three (3) additional months, in one month intervals, at the Contract rate or rates as modified during the term of this Contract.
- 3.16.4 No later than sixty (60) days prior to the start of any renewal period(s), the Successful Proposer may be required to submit prices for the applicable renewal period. The Texas Lottery reserves the right to re-negotiate prices at any time during the Contract term or any renewal period.
- 3.16.5 At the end of the Contract term, or upon earlier termination under any provision of this Contract, the Successful Proposer shall, in good faith and with reasonable cooperation, aid in the transition to any new arrangement and provider, if requested by the Texas Lottery.

### **3.17 TERMINATION AT WILL**

The Texas Lottery, in its sole discretion, may terminate, in whole or in part, any Contract resulting from this RFP at will and without cause upon no less than thirty (30) Days' advance written notice. The Texas Lottery also may terminate any Contract immediately with written notice if the Executive Director, in his or her sole judgment, believes that the integrity or security of the Texas Lottery is in jeopardy and it is in the best interest of the Texas Lottery to do so. The Texas Lottery's right to terminate for convenience any Contract resulting from this RFP is cumulative of all rights and remedies which exist now or in the future.

### **3.18 TERMINATION FOR CAUSE**

The Texas Lottery reserves the right to terminate, in whole or in part, any Contract resulting from this RFP upon no less than five (5) Days' notice upon the following conditions:

- (a) A receiver, conservator, liquidator or trustee of the Successful Proposer, or of any of its property, is appointed by order or decree of any court or agency or supervisory authority having jurisdiction; or an order for relief is entered against the Successful Proposer under the Federal Bankruptcy Code; or the Successful Proposer is adjudicated bankrupt or insolvent; or any portion of the property of the Successful Proposer is sequestered by court order and such order remains in effect for more than thirty (30) Days after such party obtains knowledge thereof; or a petition is filed



against the Successful Proposer under any state, reorganization, arrangement, insolvency, readjustment of debt, dissolution, liquidation, or receivership law of any jurisdiction, whether now or hereafter in effect, and such petition is not dismissed within thirty (30) Days, or

- (b) The Successful Proposer files a case under the Federal Bankruptcy Code or is seeking relief under any provision of any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution, receivership or liquidation law of any jurisdiction, whether now or hereafter in effect, or consents to the filing of any case or petition against it under any such law, or
- (c) The Successful Proposer makes an assignment for the benefit of its creditors, or admits in writing its inability to pay its debts generally as they become due, or consents to the appointment of a receiver, trustee, or liquidator of the Successful Proposer or of all or any part of its property; or judgment for the payment of money in excess of \$50,000.00 (which is not covered by insurance) is rendered by any court or governmental body against the Successful Proposer, and the Successful Proposer does not discharge the same or provide for its discharge in accordance with its terms, or procure a stay of execution thereof within thirty (30) Days from the date of entry thereof, and within said 30-Day period or such longer period during which execution of such judgment shall have been stayed, appeal therefrom and cause the execution thereof to be stayed during such appeal while providing such reserves therefore as may be required under generally accepted accounting principles; or a writ or warrant of attachment or any similar process shall be issued by any court against all or any material portion of the property of the Successful Proposer, and such writ or warrant of attachment or any similar process is not released or bonded within thirty (30) Days after its entry, or
- (d) A court of competent jurisdiction finds that the Successful Proposer has failed to adhere to any laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or
- (e) The Successful Proposer fails to communicate with the Texas Lottery as required by the Contract, or
- (f) The Successful Proposer fails to remove any person from work relating to the Contract upon written notice from the Texas Lottery, or
- (g) The Successful Proposer breaches the RFP's standard of confidentiality with respect to this RFP or the goods or services provided thereunder, or
- (h) The Texas Lottery makes a written determination that the Successful Proposer has failed to substantially perform under the Contract and specifies the events resulting in the Texas Lottery's determination thereof, or
- (i) The Successful Proposer fails to comply with any of the terms, conditions or provisions of the Contract, in any manner whatsoever, or



- (j) The Successful Proposer engages in any conduct that results in a negative public impression including, but not limited to, creating even an appearance of impropriety with respect to the Texas Lottery, Texas Lottery games, the Successful Proposer, or the State of Texas.

### **3.19 TERMINATION FOR IMPOSSIBILITY OF PERFORMANCE**

The Texas Lottery reserves the right to terminate, in whole or in part, any Contract resulting from this RFP upon no less than five (5) Days' notice upon any of the following conditions:

- (a) The failure of the Texas Legislature to appropriate funds to the Texas Lottery for any Contract resulting from this RFP.
- (b) Any act or omission by the Texas Legislature which renders performance by the Texas Lottery impossible.

### **3.20 TERMINATION WITHOUT PENALTY**

Pursuant to Texas Government Code ANN. § 466.014(c), the Executive Director is permitted to terminate any Contract entered into as a result of this RFP, without penalty, if an investigation reveals that the Successful Proposer would not be eligible for a sales agent license under Texas Government Code ANN. § 466.155.

### **3.21 EFFECT OF TERMINATION – EXECUTED WORKING PAPERS**

The Texas Lottery, in its sole discretion, may require the Successful Proposer to complete production and delivery of instant tickets for which working papers have been executed prior to expiration or termination of any Contract resulting from this RFP, even if such production and delivery extends beyond the initial Contract period or any extension thereof.

### **3.22 NO LIABILITY UPON TERMINATION**

If any Contract entered into as a result of this RFP is terminated for any reason, the Texas Lottery and the State of Texas shall not be liable to the Successful Proposer for any damages, losses, financial obligations, breach of contract, or any other claims or amounts arising from or related to any such termination. However, the Successful Proposer may be entitled to the remedies provided in Gov't Code, Chapter 2260.

### **3.23 WARRANTIES**

- 3.23.1 The Successful Proposer warrants and agrees that it is lawfully organized and constituted under all applicable national, international, state and local laws, ordinances and other authorities of its domicile and is otherwise in full compliance with all legal requirements of its domicile.



- 3.23.2 The Successful Proposer warrants and agrees that it has the legal authority and capacity to enter into and perform any Contract resulting from its response to this RFP, and that it has the financial ability to perform its obligations under such Contract.
- 3.23.3 The Successful Proposer warrants and agrees that it has been duly authorized to operate and do business in all places where it will be required to do business under any Contract awarded pursuant to this RFP; that it has obtained or will obtain all necessary licenses and permits required in connection with such Contract; and that it will fully comply with all laws, decrees, labor standards and regulations of its domicile and wherever performance occurs during the term of such Contract.
- 3.23.4 The Successful Proposer warrants and agrees that it has no present interest and shall not acquire, or assign to any third party, any interest that would conflict in any manner with its duties and obligations under any Contract awarded pursuant to this RFP.
- 3.23.5 The Successful Proposer warrants and agrees that all goods and services it supplies in its performance under any Contract awarded pursuant to this RFP shall meet the performance standards required thereunder and shall be performed in a prompt, high quality, professional and competent manner using only qualified personnel.
- 3.23.6 The Successful Proposer warrants and agrees that its tickets, games, goods and services shall in all respects conform to, and function in accordance with, Texas Lottery-approved specifications and designs.
- 3.23.7 The Successful Proposer warrants and agrees to pay the apparent prize value of misprinted, quality control or omitted tickets that do not validate as winners. Altered tickets are not misprinted tickets.
- 3.23.8 The Successful Proposer warrants and agrees that instant tickets and games it manufactures for the Texas Lottery shall comply with all requirements specified in this RFP through the “end of validation” date of each game.
- 3.23.9 The Successful Proposer warrants and agrees that it shall not take any action inconsistent with any of the terms, conditions, agreements, or covenants set forth in this RFP without the express written consent of the Texas Lottery.
- 3.23.10 The Successful Proposer warrants that it is eligible for a sales agent license under Texas Government Code ANN. § 466.155 (Chapter 466 is also known as the State Lottery Act).
- 3.23.11 The Successful Proposer warrants and agrees that it shall not sell, assign, lease, transfer, pledge, hypothecate, or otherwise dispose of any component of any goods or system proposed in response to the RFP or any interest therein, or permit any of it to become a fixture or accession to other goods or property.

All of the above warranties contained in this section 3.23 shall survive expiration or termination of the Contract.



### **3.24 LICENSES AND PERMITS**

The Successful Proposer shall obtain, maintain and pay for all licenses, permits and certificates including all professional licenses required by any statute, ordinance, rule or regulation. The Successful Proposer shall immediately notify the Texas Lottery of any suspension, revocation or other detrimental action against its licenses, permits or certificates.

### **3.25 SUCCESSFUL PROPOSER SITE VISITS**

The Texas Lottery shall have the free and unrestricted right, acting by itself or through its authorized representatives, to enter the premises of the Successful Proposer and any Subcontractors, and to enter any other sites involved in providing goods and/or services under any Contract resulting from this RFP, to examine their operations and to inspect and copy the records of the Successful Proposer and/or Subcontractors pertaining to goods and services provided under any Contract resulting from this RFP. The Successful Proposer agrees that the Successful Proposer and its Subcontractors shall implement all reasonable quality control and security procedures requested by the Texas Lottery or representatives as designated by the Texas Lottery. The Texas Lottery will use reasonable efforts not to disrupt the normal business operations of the Successful Proposer (or Subcontractor, as applicable) during site visits announced or unannounced.

### **3.26 INTELLECTUAL PROPERTY RIGHTS**

3.26.1 *Ownership.* As between the Successful Proposer and the Texas Lottery, the Works and Intellectual Property Rights in the Works are and shall be owned exclusively by the Texas Lottery, and not the Successful Proposer. The Successful Proposer specifically agrees that all Works shall be considered “works made for hire” and that the Works shall, upon creation, be owned exclusively by the Texas Lottery. To the extent that the Works, under applicable law, may not be considered works made for hire, the Successful Proposer hereby agrees that the Contract resulting from this RFP transfers, grants, conveys, assigns, and relinquishes exclusively to the Texas Lottery all right, title and interest in and to the Works, and all Intellectual Property Rights in the Works, without the necessity of any further consideration, and the Texas Lottery shall be entitled to obtain and hold in its own name all Intellectual Property Rights in and to the Works, subject to any exceptions with respect to pre-existing or third party rights as set forth below.

3.26.2 *Ownership of Prior Rights by the Texas Lottery.* All property and tangible or intangible items, including the Intellectual Property Rights therein, that were created, developed or owned by the Texas Lottery prior to the issuance of this RFP or execution of any Contract resulting therefrom (e.g., copyrights, trademarks, etc.) shall continue to be exclusively owned by the Texas Lottery, and the Successful Proposer shall have no ownership thereof, and no rights thereto, other than the limited, non-exclusive right to use such property or tangible and intangible items solely for the purposes set forth in this RFP or resulting Contract, if any, and only for the duration of such Contract.



- 3.26.3 *Ownership of Prior Rights by the Successful Proposer.* All property and tangible or intangible items, including the Intellectual Property Rights therein, that were created, developed or owned by the Successful Proposer prior to the issuance of this RFP shall continue to be exclusively owned by the Successful Proposer, and the Texas Lottery shall have no ownership thereof, and no rights thereto, other than the limited, non-exclusive right to use such property or tangible or intangible items solely for the purposes set forth in this RFP or resulting Contract, if any. All intellectual property relating to the goods and/or services set forth herein or under the Contract, including the Intellectual Property Rights in those goods and/or services, that was created, developed or licensed by the Successful Proposer prior to the issuance of this RFP or the execution of the Contract, or during the term of the Contract, to the extent such intellectual property is not considered “works” as defined above, shall be, and is, licensed to the Texas Lottery on a non-exclusive, perpetual, irrevocable, royalty-free, worldwide basis, to allow the Texas Lottery or its designees to provide, and continue to provide, the goods and services set forth herein or under the Contract, including after the expiration or termination of the Contract.
- 3.26.4 *Further Actions.* The Successful Proposer, upon request and without further consideration, shall perform any acts that may be deemed necessary or desirable by the Texas Lottery to evidence more fully the transfer of ownership of all Works to the Texas Lottery to the fullest extent possible, including but not limited to the execution, acknowledgement and delivery of such further documents in a form determined by the Texas Lottery. In the event the Texas Lottery shall be unable for any reason to obtain the Successful Proposer’s signature on any document necessary for any purpose set forth in the foregoing sentence, the Successful Proposer hereby irrevocably designates and appoints the Texas Lottery and its duly authorized officers and agents as the Successful Proposer’s agent and the Successful Proposer’s attorney-in-fact to act for and in the Successful Proposer’s behalf and stead to execute and file any such document and to do all other lawfully permitted acts to further any such purpose with the same force and effect as if executed and delivered by the Successful Proposer.
- 3.26.5 *Waiver of Moral Rights.* The Successful Proposer hereby irrevocably and forever waives, and agrees never to assert, any Moral Rights in or to the Works which the Successful Proposer may now have or which may accrue to the Successful Proposer’s benefit under U.S. or foreign copyright laws and any and all other residual rights and benefits which arise under any other applicable law now in force or hereafter enacted. The term “Moral Rights” shall mean any and all rights of paternity or integrity of the Works and the right to object to any modification, translation or use of the Works, and any similar rights existing under the judicial or statutory law of any country in the world or under any treaty, regardless of whether or not such right is denominated or referred to as a moral right.
- 3.26.6 *Confidentiality.* All Works and all materials forwarded to the Successful Proposer by the Texas Lottery for use in and preparation of the Works, shall be deemed the confidential information of the Texas Lottery, and the Successful Proposer shall not use,





disclose, or permit any person to use or obtain the Works, or any portion thereof, in any manner without the prior written approval of the Texas Lottery.

- 3.26.7 *Injunctive Relief.* The RFP and Contract are intended to protect the Texas Lottery's proprietary rights pertaining to the Works, and the Intellectual Property Rights therein, and any misuse of such rights would cause substantial and irreparable harm to the Texas Lottery's business. Therefore, the Successful Proposer acknowledges and stipulates that a court of competent jurisdiction should immediately enjoin any material breach of the intellectual property, licensing, and confidentiality provisions of the RFP or Contract, upon a request by the Texas Lottery, without requiring proof of irreparable injury as same should be presumed.
- 3.26.8 *Return of Works.* Upon the request of the Texas Lottery, but in any event upon expiration or termination of any Contract resulting from this RFP, the Successful Proposer shall surrender to the Texas Lottery all documents and things pertaining to the Works, including but not limited to drafts, memoranda, notes, records, drawings, manuals, computer software, reports, data, and all other documents or materials (and copies of same) generated or developed by the Successful Proposer or furnished by the Texas Lottery to the Successful Proposer, including all materials embodying the Works, any Texas Lottery confidential information, or Intellectual Property Rights, regardless of whether complete or incomplete. This section is intended to apply to all Works made or compiled by the Successful Proposer, as well as to all documents and things furnished to the Successful Proposer by the Texas Lottery or by anyone else that pertains to the Works.
- 3.26.9 *Successful Proposer's Name or Logo.* The Successful Proposer shall not affix its company name, label, logo, or any other similar identifying information to or on any products, equipment or any other goods provided under any Contract resulting from this RFP.

### **3.27 PRE-EXISTING AND THIRD PARTY RIGHTS**

- 3.27.1 To the extent that any pre-existing rights and/or third party rights or limitations are embodied, reserved or reflected in the Works, the Successful Proposer shall either (a) grant to the Texas Lottery the irrevocable, perpetual, non-exclusive, worldwide, royalty-free right and license to (i) use, execute, reproduce, display, perform, distribute copies of, and prepare derivative works based upon such pre-existing rights and any derivative works thereof and (ii) authorize others to do any or all of the foregoing, or (b) where the obtaining of worldwide rights is not reasonably practical or feasible, provide written notice to the Texas Lottery of such pre-existing or third party rights or limitations, request the Texas Lottery's approval of such pre-existing or third party rights, obtain a limited right and license to use such pre-existing or third party rights on such terms as may be reasonably negotiated, and obtain the Texas Lottery's written approval of such pre-existing or third party rights and the limited use of same. The Successful Proposer shall provide the Texas Lottery with documentation indicating a third party's written approval for the Successful Proposer to use any pre-existing or third party rights that



may be embodied, reserved or reflected in the Works. The Successful Proposer shall indemnify, defend and hold the Texas Lottery harmless from and against any and all claims, demands, regulatory proceedings and/or causes of action, and all losses, damages, and costs (including attorneys' fees and settlement costs) arising from or relating to, directly or indirectly, any claim or assertion by any third party that the Works infringe any third party rights. The foregoing indemnity obligation shall not apply to instances in which the Texas Lottery either (y) exceeded the scope of the limited license that was previously obtained by the Successful Proposer and agreed to by the Texas Lottery, or (z) obtained information or materials, independent of the Successful Proposer's involvement or creation, and provided such information or materials to the Successful Proposer for inclusion in the Works, and such information or materials were included by the Successful Proposer, in an unaltered and unmodified fashion, in the Works.

- 3.27.2 The Successful Proposer agrees that it shall have and maintain, during performance of any Contract arising from this RFP, written agreements with all employees, Subcontractors, or agents engaged by the Successful Proposer in performance hereunder, granting the Successful Proposer rights sufficient to support all performance and grants of rights by the Successful Proposer. Copies of such agreements shall be provided to the Texas Lottery promptly upon request.

### **3.28 REMEDIATION**

If the Works or the Intellectual Property Rights therein become the subject of a lawsuit or claim of infringement, or the Successful Proposer becomes aware that such items are likely to become the subject of a lawsuit or claim of infringement, the Successful Proposer shall exercise one (1) of the following two (2) options in order to provide the Texas Lottery with continued and uninterrupted use of the Works and Intellectual Property Rights therein: (a) obtain for the Texas Lottery the right to continue the use of the alleged infringing Works at no additional cost to the Texas Lottery, or (b) obtain alternative, substitute or new Works for the allegedly infringing Works, which are of equivalent or superior quality to the allegedly infringing Works, at no additional cost to the Texas Lottery, and subject to the acceptance of the Texas Lottery in its sole discretion.

### **3.29 INTELLECTUAL PROPERTY SEARCH**

The Successful Proposer, at its expense, shall conduct all appropriate intellectual property searches (*e.g.*, full copyright, trademark or service mark or patent searches) for all proposed Works, to ensure that the proposed Works are protectable by the Texas Lottery and do not infringe the Intellectual Property Rights of any third person or entity. The Successful Proposer holds the Texas Lottery harmless from the infringement of such Works, as set forth above. The Successful Proposer shall ensure that the search results shall remain valid and effective at least through the end of game date. Intellectual property searches must be completed and the approval letter and supporting documentation must be submitted to the Texas Lottery prior to the execution of the working papers. Original documents should be sent to the Texas Lottery's Lottery



Operations Instant Product Coordinator. The Successful Proposer, at its expense, shall, upon request of TLC, timely register the Works (*e.g.*, federal copyright or federal and/or state trademark or service mark registration) in the name of TLC. TLC retains the right and option to obtain or secure registration of the Works in its own name, and on its own behalf, without the substantive involvement of the Successful Proposer.

### **3.30 ACCOUNTING RECORDS**

The Successful Proposer and its Subcontractors are required to maintain their books, records, information and other materials pertaining to any Contract awarded pursuant to this RFP in accordance with generally accepted accounting principles. These records shall be available to the Texas Lottery, its internal auditor or external auditors (and other designees) and the Texas State Auditor at all times during the Contract period and for a period of four (4) full years after (i) the expiration date of any Contract awarded pursuant to this RFP, or (ii) final payment under any Contract awarded pursuant to this RFP, whichever is later.

### **3.31 RIGHT TO AUDIT**

The Successful Proposer understands that acceptance of state funds under this Contract acts as acceptance of the authority of the State Auditor's Office, or its designee, to conduct an audit, other assurance services or investigation in connection with those funds. The Successful Proposer further agrees to cooperate fully with the State Auditor's Office in the conduct of the audit, other assurance services or investigation, including providing all records requested. The Successful Proposer shall ensure that this provision concerning the State Auditor's Office's authority to audit state funds and the requirement to cooperate fully with the State Auditor's Office is included in any subcontracts it awards. Additionally, the State Auditor's Office shall at any time have access to and the rights to examine, audit, excerpt, and transcribe any pertinent books, documents, working papers, and records of the Successful Proposer relating to this Contract.

### **3.32 INDEMNIFICATION**

- 3.32.1 The Successful Proposer shall indemnify, defend and hold the Texas Lottery, its commission members, the State of Texas, and its agents, attorneys, employees, representatives and assigns (the "Indemnified Parties") harmless from and against any and all claims, demands, causes of action, liabilities, lawsuits, losses, damages, costs, expenses or attorneys' fees (collectively, "Claim"), and including any liability of any nature or kind arising out of a Claim for or on account of the Works, or other goods, services or deliverables provided as the result of any Contract resulting from this RFP, which may be incurred, suffered, or required in whole or in part by an actual or alleged act or omission of the Successful Proposer, or a Subcontractor of the Successful Proposer, or any person directly or indirectly employed by the Successful Proposer or a Subcontractor of the Successful Proposer, whether the Claim is based on negligence, strict liability, intellectual property infringement or any other culpable conduct, whether frivolous or not. The foregoing indemnity obligations of the Successful Proposer shall



not apply to Claims arising out of or related to the exceptions (y) and (z) set forth in Section 3.27.1 above.

3.32.2 The Successful Proposer's liability shall extend to and include all reasonable costs, expenses and attorneys' fees incurred or sustained by the Indemnified Parties in: (a) making any investigation and in prosecuting or defending any Claim arising out of or in connection with the Works, or other goods, services or deliverables provided under any Contract resulting from this RFP (including but not limited to any claim that all or any portion of the Works infringes the patent, copyright, trade secret, trademark, confidential information, or other Intellectual Property Rights of any third party); (b) obtaining or seeking to obtain a release therefrom; or (c) enforcing any of the provisions contained in this RFP or the Contract. The Texas Lottery will withhold all indemnification costs and related expenses and fees (incurred or sustained by the Indemnified Parties) from payments to the Successful Proposer under any Contract resulting from this RFP, or if no contract payments are to be made, the Texas Lottery will make demand of payment from the Successful Proposer or seek recovery against the Successful Proposer's Performance Bond. The Indemnified Parties, upon giving notice to the Successful Proposer, shall have the right in good faith to pay, settle or compromise, or litigate any Claim under the belief that the Claim is well founded, whether it is or not, without the consent or approval of the Successful Proposer. The Texas Lottery has sole discretion as to the choice and selection of any attorney who may represent the Texas Lottery. To the extent that the Successful Proposer makes any payments to or on behalf of the Indemnified Parties under the Contract, and to the extent permissible by law, the Successful Proposer shall be fully subrogated to all rights and claims of the Indemnified Parties in connection therewith. In any event, the Indemnified Parties shall provide reasonable notice to the Successful Proposer of any Claim known to the Indemnified Parties to arise out of the Contract.

### **3.33 BONDS AND INSURANCE**

3.33.1 All required bonds and insurance must be issued by companies or financial institutions which are financially rated Excellent or better as rated by A.M. Best Company and duly licensed, admitted, and authorized to do business in the State of Texas. The Texas Lottery shall be named as the obligee in each required bond. Each insurance policy, except those for workers' compensation, employer's liability and professional liability, must name the Texas Lottery (and its officers, agents and employees) as an additional insured on the original policy and all renewals or replacements. Insurance coverage must include a waiver of subrogation in favor of the Texas Lottery, its officers, and employees for bodily injury (including death), property damage or any other loss. The insurance shall be evidenced by delivery to the Texas Lottery of certificates of insurance executed by the insurer or its authorized agency stating coverage, limits, expiration dates, and compliance with all applicable required provisions. Upon request, the Texas Lottery shall be entitled to receive, without expense, certified copies of the policies and all endorsements. Except as otherwise expressly provided herein, required coverage must remain in full force and effect throughout the term of the Contract and any



extensions thereof, and provide adequate coverage for incidents discovered after termination of the Contract. Insurance coverage shall not be canceled, non-renewed or materially changed except after thirty (30) Days' notice by certified mail to the Texas Lottery. The Successful Proposer must submit original certificates of insurance for each required insurance contract, and any renewals thereof, within fifteen (15) Days after contract execution. Renewal certificates shall be submitted prior to or within fifteen (15) Days after expiration of the existing policy. Proposers must submit required bonds when and as provided in sections of this RFP outlining bond requirements.

- 3.33.2 The Successful Proposer shall be responsible for ensuring that any subcontractor(s) used in the performance of the Contract maintains the required insurance as stated in Sections 3.33 – 3.39 (covering all goods and services provided by such subcontractors) throughout the Contract term and any renewals thereof.

### **3.34 SELF INSURANCE**

The Successful Proposer may not elect to provide entirely or in part for the insurance/bond protections described in this RFP through self-insurance. A deductible provision contained in an insurance policy that meets the requirements of this RFP is not considered as self-insurance unless the deductible amount exceeds five percent (5%) of the face amount of the insurance policy.

### **3.35 PERFORMANCE BOND**

- 3.35.1 The Successful Proposer shall provide an original performance bond (as shown in Attachment F attached hereto and incorporated for all purposes) in the amount of one million dollars (\$1,000,000) within fifteen (15) Days of execution of the Contract. Failure to have and keep the bond in place shall constitute a breach of any Contract entered into as a result of this RFP.
- 3.35.2 The bond must be maintained in full force and effect for the initial term and any renewal term of the Contract. The bond shall be forfeited to the Texas Lottery if the Successful Proposer fails to perform as required by the Contract, pay sanctions or liquidated damages, or indemnify the Texas Lottery.

### **3.36 GENERAL LIABILITY INSURANCE**

The Successful Proposer must maintain general liability insurance coverage with limits of not less than two million dollars (\$2,000,000) per occurrence, four million dollars (\$4,000,000) general aggregate, two million dollars (\$2,000,000) products/completed operations aggregate, two million dollars (\$2,000,000) personal and advertising injury and fifty thousand (\$50,000) fire damage. Professional Liability coverage must be included or provided through a separate policy as described in Section 3.37.

### **3.37 PROFESSIONAL LIABILITY (ERRORS AND OMISSIONS) INSURANCE**

The Successful Proposer must maintain professional liability (including errors and omissions) insurance coverage for the rendering of, or failure to render, professional



services with minimum limits of two million dollars (\$2,000,000) per occurrence, to be in full force and effect during the term of the Contract, including any extension thereof and one year thereafter. Coverage must indemnify the Texas Lottery for direct loss due to errors, omissions, printing or production problems of any type caused by the Successful Proposer, its officers, employees, agents, or Subcontractors of the Successful Proposer regardless of negligence. Claims against the insurance may be invoked when the over-redemption exceeds one hundred percent (100%) of the anticipated prize payout based on the number of tickets actually sold. The insurance for over-redemption shall be enforced through thirteen (13) months following the official “announced end of game” for each game.

### **3.38 CRIME INSURANCE**

The Successful Proposer must maintain crime insurance with a limit of not less than one million dollars (\$1,000,000) protecting the Texas Lottery against losses, including lost income, lost profits, extra expenses and other consequential losses suffered by the Texas Lottery, resulting from loss of property (including money, securities and Texas Lottery tickets) by robbery, burglary, or theft, or the loss of money, securities or Texas Lottery tickets because of destruction or disappearance. This policy shall cover any loss to the Texas Lottery due to any fraudulent or dishonest act on the part of the officers and/or employees of the Successful Proposer and (through insurance carried by Subcontractors) officers and/or employees of any Subcontractors. Policy(ies) must be endorsed to include third party property.

### **3.39 PROPERTY INSURANCE**

The Successful Proposer must maintain insurance on all buildings, furniture, fixtures, computer and communications equipment used in operating and supporting the Successful Proposer’s operation in an amount equal to or greater than the actual replacement cost thereof. Coverage must include Equipment Breakdown and an All Risk Property Floater to insure personal property including contents, equipment, and mobile items against fire, theft, collision, flood, etc. The Texas Lottery will not be responsible for insuring any equipment or facilities included in or associated with the Successful Proposer’s operations.

### **3.40 DISCLOSURE OF LITIGATION**

The Proposer must include in its Proposal a complete disclosure of any material civil or criminal litigation or indictment either threatened or pending involving the Proposer. “Threatened litigation” as used herein shall include governmental investigations and civil investigative demands. “Litigation” as used herein shall include administrative enforcement actions brought by governmental agencies. The Proposer must also disclose any material litigation threatened or pending involving Subcontractors, consultants, and/or lobbyists. For purposes of this section, “material” refers to, but is not limited to, any action or pending action that a reasonable person knowledgeable in the gaming industry would consider relevant to any gaming operation or any development such a



person would want to be aware of in order to stay fully apprised of the total mix of information relevant to the gaming industry and its operations, together with any litigation threatened or pending that may result in a substantial change in the Proposer's financial condition, as described in Section 4.6. This is a continuing disclosure requirement, any litigation commencing after submission of a Proposal (and for the Successful Proposer, after Contract Award) must be disclosed in a written statement to the Texas Lottery's General Counsel within fifteen (15) Days of its occurrence. The Successful Proposer shall be required to file with the Texas Lottery comprehensive monthly reports regarding all threatened or pending litigation involving the Successful Proposer's Texas operations and all threatened or pending litigation that may be considered material to the overall operations of the Successful Proposer.

### **3.41 DISCLOSURE OF SANCTIONS AND LIQUIDATED DAMAGES**

The Texas Lottery reserves the right to request, and the Successful Proposer must provide, a complete list of all sanctions and liquidated damages assessed against the Successful Proposer during any calendar year for the following: (i) a single sanctionable event under any contract that occurred five (5) times or more in a rolling calendar year; (ii) any sanction or liquidated damage assessment under any contract totaling fifty thousand dollars (\$50,000) or more; and (iii) a complete account of all goods or services provided in consideration of contract sanctions or liquidated damages that would have been assessed, including the jurisdiction, the reason for the penalty or liquidated damages and the goods or services provided in lieu of the assessment.

### **3.42 CHANGES IN OWNERSHIP**

During the term of any Contract resulting from this RFP or any extension or renewal thereof, the Successful Proposer shall notify the Texas Lottery in writing of any substantial change in the ownership or control of the Successful Proposer. The Successful Proposer must notify the Texas Lottery of the change as soon as possible, but no later than fifteen (15) days after its occurrence.

### **3.43 FORCE MAJEURE / DELAY OF PERFORMANCE**

- 3.43.1 Except as otherwise provided, neither the Successful Proposer nor the Texas Lottery shall be liable to the other for any delay in, or failure of performance of, any covenant contained herein caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. For purposes of this RFP and any Contract resulting therefrom, "force majeure" is defined as "an act of God or any other cause of like kind not reasonably within a party's control and which, by the exercise of due diligence of such party, could not have been prevented or is unable to be overcome." The Successful Proposer must inform the Texas Lottery in writing within three (3) Days of the existence of any such force majeure or otherwise waives this right as a defense.



3.43.2 The Successful Proposer shall immediately upon discovery notify the Executive Director in writing of any delays in performance regardless of responsibility, fault or negligence. If the Successful Proposer contends that the delay is the responsibility, fault or negligence of Texas Lottery staff, the Successful Proposer must provide written notice within three (3) Days of the discovery, and to the extent possible, identify the event or individual responsible so that the Executive Director may take appropriate action to remedy the situation. Failure to provide such notice to the Executive Director as required in this Section 3.43 shall constitute a waiver of the Successful Proposer's right to assert the Texas Lottery's action/inaction as a defense.

### **3.44 SECURITY REQUIREMENTS**

- 3.44.1 Prior to beginning operations under any Contract awarded pursuant to this RFP, the Successful Proposer shall establish a physical and software security program, subject to the prior written approval of the Texas Lottery as specified in this RFP.
- 3.44.2 The Texas Lottery reserves the right to require at any time such further and additional security measures as deemed necessary or appropriate to ensure the integrity of the Successful Proposer's instant games.

### **3.45 TAXES, FEES AND ASSESSMENTS**

- 3.45.1 The Texas Lottery shall have no responsibility whatsoever for the payment of any federal, state or local taxes which become payable by the Successful Proposer or its Subcontractors, or their agents, officers or employees. The Successful Proposer shall pay and discharge when due all such taxes, license fees, levies, and other obligations or charges of every nature.
- 3.45.2 The Successful Proposer shall be responsible for payment of all taxes attributable to any Contract awarded pursuant to this RFP and any and all such taxes shall be identified under the Successful Proposer's federal tax identification number. The Successful Proposer shall pay all federal, state and local taxes of any kind, including without limitation income, franchise, ad valorem personal property, sales, use, lease, payroll, consumption, distribution and storage taxes, for the goods, services and systems relating thereto provided by the Successful Proposer, whether or not such taxes are in effect as of the date the Contract resulting from this RFP is signed or scheduled to go into effect, or become effective during the initial term and any and all renewal terms, if any.

### **3.46 NEWS RELEASES**

The Successful Proposer shall not issue any news releases or publish information to the public pertaining to this procurement process or the performance of any Contract awarded by the Texas Lottery without prior written approval of the Texas Lottery. For any required disclosure or any public release of information of any kind, including a non-required disclosure, that is under a deadline imposed by any statutory or regulatory authority, the Successful Proposer shall seek approval from the Texas Lottery no less than two (2) Working Days prior to the deadline for the release of the information. In any case in





which a deadline for the release of information exists, approval of the release by the Texas Lottery shall neither be construed as an endorsement of the release, as assent to the content of the release, as an indication of the accuracy of the information in the release, nor as any admission of any kind regarding any subject covered in the release.

### **3.47 ADVERTISING**

- 3.47.1 The Successful Proposer agrees not to use the Texas Lottery's name, logos, images, nor any data or results arising from this procurement process or Contract awarded pursuant to this RFP as a part of any commercial advertising, or to promote the Successful Proposer in another jurisdiction's procurement process, without prior written approval by the Texas Lottery.
- 3.47.2 Any advertising, promotions and point of sale material must be pre-approved by the Texas Lottery.

### **3.48 HIRING OF TEXAS LOTTERY PERSONNEL**

- 3.48.1 At all times following issuance of this RFP and ending with either the award of a Contract or the rejection of all Proposals, prospective Proposers are prohibited from officially or unofficially making any employment offer or proposing any business arrangement whatsoever to any Texas Lottery employee involved in the evaluation of Proposals, the Contract Award, or contract negotiations. A prospective Proposer making such an offer or proposition may be disqualified from further consideration.
- 3.48.2 At all times following the issuance of this RFP and ending with either the award of a Contract or the rejection of all Proposals, Proposers shall not engage the services of any State of Texas employee while such person remains employed by the State without the written consent of the Texas Lottery. During the term of the Contract, the Successful Proposer shall not engage the services of any State of Texas employee while such person remains employed by the State without the written consent of the Lottery.

### **3.49 HIRING OF LOBBYIST, CONSULTANT AND/OR ADVISOR; SUPPLEMENTAL INFORMATION**

The Proposer shall list the names, addresses and telephone numbers for all lobbyists, consultants, and/or advisors who will perform services related to the Proposer's operations or interests in the State of Texas, pursuant to previously executed contracts, or during the three (3) years prior to the issuance of the RFP, who have performed services related to the Proposer's operations or interests in the State of Texas for the Proposer or any Subcontractors of the Proposer. The Proposer shall immediately notify the Texas Lottery in the event of change of lobbyist, consultant, or advisor information.

### **3.50 NOTICES**

The Proposer shall indicate in its Proposal the name and address of the person to whom any notices shall be given. Notices to the Texas Lottery shall be made by personal delivery or by certified (or registered) mail return receipt requested to the Texas Lottery at



the address below unless the Proposer is notified in writing by the Texas Lottery of any change:

Texas Lottery Commission  
Attention: Contracts Administration  
P.O. Box 16630  
Austin, Texas 78761-6630  
Fax (512) 344-5058  
Contracts@lottery.state.tx.us

### **3.51 NON-DISCLOSURE**

The Successful Proposer shall maintain as confidential, and shall not disclose to third parties without the Texas Lottery's prior written consent, any Texas Lottery information including but not limited to the Texas Lottery's business activities, practices, systems, conditions, products, services, public information and education plans and related materials, and game and marketing plans.

### **3.52 USUFRUCT**

If, for any reason other than breach of contract by the Texas Lottery, the Successful Proposer should lose its ability to service a Contract resulting from this RFP, the Texas Lottery shall acquire a usufruct in all contractual items owned by the Successful Proposer in conjunction with the Contract and which are necessary to provide such services. Said usufruct shall be limited to the right of the Texas Lottery to possess and make use of such contractual items solely for the use and benefit of the Texas Lottery in operating, maintaining, altering, replacing and improving the programs and systems being used by the Texas Lottery under the Contract. Such usufruct shall be limited in time to the duration of the Contract and any extension thereof, and in scope for programs, systems, and other items being used by the Texas Lottery under the Contract.

### **3.53 TICKET PURCHASE**

3.53.1 In accordance with Texas Government Code ANN. § 466.254 (Purchase of Ticket by or Payment of Prize to Certain Persons), no member, officer or employee of the Successful Proposer directly involved in selling or leasing the goods or performing the services that are subject of the Contract shall purchase a Texas Lottery ticket or be paid a prize in any Texas Lottery game. No spouse, child, brother, sister, or parent of such member, officer or employee who resides in the household of such member, officer or employee (collectively, "Family Members"), shall purchase a Texas Lottery ticket or be paid a prize in any Texas Lottery game. The Successful Proposer shall ensure that these statutory prohibitions are made known to each member, officer and employee of the Successful Proposer, prior to that person becoming involved in selling or leasing the goods or performing the services that are the subject of the Contract. The Successful Proposer shall require its members, officers and employees to make the statutory prohibition known to Family Members. The Successful Proposer shall promptly notify the Texas Lottery of any violation of Texas Government Code ANN. § 466.254.



3.53.2 TLC considers “directly involved” to mean, by way of illustration only, responsible for and/or actively participating in (1) Contract negotiations (including Contract signatories); (2) Contract administration (e.g., regular or direct contact with TLC staff); or (3) Contract performance (including assigned project/team leaders and members and anyone else who oversees or performs the work or provides the services). Again, by way of illustration, support staff (such as clerical, accounting or delivery employees) are not considered to be “directly involved” unless they also serve in the roles listed above for “directly involved” employees.

### **3.54 SANCTIONS AND REMEDIES SCHEDULE**

3.54.1 **General.** Section 2261.101 of the Texas Government Code requires that all state contracts contain a remedies schedule, a graduated sanctions schedule, or both. Pursuant to that statutory provision, sanctions and remedies will apply for the incidents specified in this section. The sanctions and remedies will be referred to as “sanctions.”

3.54.2 **Assessment of Sanctions.** Once the Texas Lottery has determined that sanctions are to be assessed, the Executive Director or Executive Director’s designee may notify the Successful Proposer of the assessment(s). Failure or delay in notifying does not impact the Texas Lottery’s assessment of sanctions and is not a condition precedent thereto. The Texas Lottery will withhold sanctions from payments to the Successful Proposer, or, if no payments are to be made, the Texas Lottery will make demand of payment of sanctions. The Successful Proposer must make payment within thirty (30) calendar days of the Texas Lottery’s demand. In the event the Successful Proposer fails to pay within the thirty (30) day period, the Texas Lottery may make a claim for payment against the Performance Bond, with or without notice to the Successful Proposer. The Texas Lottery reserves the right to assess sanctions against the Successful Proposer for all instances described herein through the end of the validation date for each respective game under any Contract resulting from this RFP.

3.54.3 **Failure to Assess Sanctions.** The failure of the Texas Lottery to assess sanctions in any instance where the Texas Lottery is entitled to sanctions pursuant to the terms of this RFP shall not constitute waiver in any fashion of the Texas Lottery’s rights to assess sanctions.

3.54.4 **Severability of Individual Sanctions Clause.** If any portion of this sanctions provision is determined to be unenforceable, the other portions of this provision shall remain in full force and effect.

3.54.5 **Missing/Incomplete Intellectual Property Search.** The failure of the Successful Proposer to adequately conduct an intellectual property search as required by this RFP may result in the Successful Proposer being assessed sanctions in the amount of ten thousand dollars (\$10,000) per incident. The foregoing is in addition to, and shall not supplant the other rights and remedies accorded to TLC, or the obligations of the Successful Proposer in the event of a Claim.

3.54.6 **Omitted Packs and Quality Control Packs/Tickets.** The failure of the Successful Proposer to comply with the requirement of this RFP regarding omissions may result in



the Successful Proposer being assessed sanctions in the amount of the face value of the pack(s) shipped. In addition, the Successful Proposer shall also be responsible for payment of the prize amount of any apparent winning ticket from omit packs or quality control packs/ticket presented to the Texas Lottery by a player, except in the event of theft, fraud or wrongdoing. The Texas Lottery will notify the Successful Proposer once an apparent winning ticket from omit packs and/or quality control packs/ticket for an otherwise valid claim has been presented. The Successful Proposer will be provided with contact information for the player and must notify the Texas Lottery in writing once the prize amount has been paid. All such payments resulting from this provision shall be paid directly by the Successful Proposer to the player within 10 calendar days from the date of notification by the Texas Lottery.

- 3.54.7 **Test Packs.** The failure of the Successful Proposer to comply with the requirements of this RFP regarding delivery of sample packs for security testing may result in the Successful Proposer being assessed sanctions in the amount of five hundred dollars (\$500) per day per game.
- 3.54.8 **Late Deliverables.** The failure of the Successful Proposer to provide any deliverables according to the deadlines/schedules set forth in this RFP, executed working papers or approved Customer Specifications documents may result in the Successful Proposer being assessed sanctions at the rate of five hundred dollars (\$500) per day, per deliverable until the deliverable is provided by the Successful Proposer and accepted by the Texas Lottery. (Deliverables include, but are not limited to, draft artwork, prize structures, working papers, press sheets, point of sale materials (POS), void ticket samples, etc.) The sanction for late delivery in this section 3.54.8 will apply unless there is a specific sanction otherwise set forth in the Sanction and Remedies Schedule (section 3.54), e.g., late reports and game files (section 3.54.9), scheduled delivery of tickets (section 3.54.12), etc.
- 3.54.9 **Late Reports and Game Files, Including Validation Media.** The failure of the Successful Proposer to provide any reports and game files in accordance with the deliverables schedule specified in the executed working papers and/or the Customer Specifications documents may result in the Successful Proposer being assessed sanctions at the rate of one thousand dollars (\$1000) per Day or part of a Day, per game file, report or information until correct, complete and usable data, reports or information are provided. The failure of the Successful Proposer to deliver timely reports and/or game files no later than fourteen (14) calendar days prior to the game's scheduled launch date, may result in the Successful Proposer being assessed sanctions at the rate of twenty-five thousand dollars (\$25,000) per game per Day or part of a Day up to a maximum of one-hundred thousand dollars (\$100,000).
- 3.54.10 **Faulty Reports and Game Files, Including Validation Media.** The failure of the Successful Proposer to provide correct, complete, and usable reports, and game files agreed to in the executed working papers and/or the Customer Specifications document, may result in the Successful Proposer being assessed sanctions at the rate of one thousand dollars (\$1000) per day for each game report or information, until correct,



complete and usable data, reports or information are provided. The failure of the Successful Proposer to correct faulty reports and/or game files at least fourteen (14) calendar days prior to the game's scheduled launch date, may result in the Successful Proposer being assessed sanctions at the rate of twenty-five thousand dollars (\$25,000) per game per Day or part of a Day for the game up to a maximum of one-hundred thousand dollars (\$100,000).

- 3.54.11 ***Incorrect Validation Media Prohibiting Validation of Game.*** The failure of the Successful Proposer to provide validation media for a specific game that conforms to the specifications set forth in the executed working papers and/or the Customer Specifications Document, which prohibits validation of tickets or correct validation of tickets, may result in the Successful Proposer being assessed sanctions at the rate of twenty five thousand dollars (\$25,000) per game per day or part of a day that the validation media is not operating properly. In addition, the Texas Lottery may assess sanctions against the Successful Proposer in the amount of any prizes improperly paid due to the non-conforming validation media.
- 3.54.12 ***Scheduled Delivery of Tickets.*** The failure of the Successful Proposer to meet the delivery deadline for a game as required in the executed working papers may result in the Successful Proposer being assessed sanctions in the amount of ten thousand dollars (\$10,000) per game per Day, or part of a Day, the tickets are delivered past the required delivery date up to a maximum of \$40,000 per game.
- 3.54.13 ***End of Production Variance.*** The failure of the Successful Proposer to deliver the tickets ordered within the variances allowed by this RFP may result in the Successful Proposer being assessed sanctions in the amount of ten thousand dollars (\$10,000) per game.
- 3.54.14 ***Partial, Broken, Miscut or Incomplete Packs.*** The failure of the Successful Proposer to comply with the requirements of this RFP regarding partial, broken, miscut or incomplete packs may result in the Successful Proposer being assessed sanctions in the amount of one hundred dollars (\$100) per pack.
- 3.54.15 ***Non-conforming Delivered Tickets.*** The failure of the Successful Proposer to comply with the requirements of this RFP regarding tickets which have been delivered to the Texas Lottery and determined to be non-conforming or defective may result in the Successful Proposer being assessed sanctions in the amount of one hundred dollars (\$100) per pack. In the event the entire game is determined to be non-conforming by the Texas Lottery, the Successful Proposer shall be responsible for the secure destruction of that game and shall be required to replace the non-conforming game at no additional charge to the Texas Lottery. In the event that the sale of the game is delayed, sanctions may be assessed at a rate of twenty-five thousand dollars (\$25,000) per Day or part of a Day from the scheduled launch date for the game up to a maximum of one-hundred thousand dollars (\$100,000). This sanction is not intended to apply where the Successful Proposer discovers the manufacturing error post-production, re-prints the order and delivers the conforming tickets to the Texas Lottery on or before the scheduled delivery date.



- 3.54.16 ***Non-conforming Instant Ticket Artwork.*** The failure of the Successful Proposer to produce instant tickets that conform to all elements specified in the final working papers for artwork and color may result in the Successful Proposer being assessed sanctions in the amount of ten thousand dollars (\$10,000) per incident. In the event the entire delivered game is determined to be non-conforming and the Texas Lottery, in its sole discretion, determines not to distribute the game, the Successful Proposer shall be responsible for the secure destruction of that game and shall be required to replace the non-conforming game at no additional charge to the Texas Lottery. In the event that the sale of the game is delayed, sanctions may be assessed at a rate of twenty-five thousand dollars (\$25,000) per Day or part of a Day from the scheduled launch date for the game up to a maximum of one-hundred thousand dollars (\$100,000). This sanction is not intended to apply where the Successful Proposer discovers the manufacturing error post-production, re-prints the order and delivers the conforming tickets to the Texas Lottery on or before the scheduled delivery date.
- 3.54.17 ***Failure to Conduct Promotional Second Chance Drawings in accordance with Texas Lottery-approved Procedures.*** The failure of the Successful Proposer to conduct promotional second chance drawings in accordance with procedures approved by the Texas Lottery may result in the Successful Proposer being assessed sanctions in the amount of ten thousand dollars (\$10,000) per incident.
- 3.54.18 ***Invalidated drawing.*** If, as a result of the Successful Proposer's failure to follow approved procedures, the Texas Lottery invalidates the results of a completed promotional second chance drawing, then, at the Lottery's sole discretion, the Successful Proposer i) may be assessed sanctions in an amount equal to the total of any prize amounts paid to players whose entries were selected in the drawing, or, ii) the Successful Proposer instead shall be required to pay such apparent prize amounts directly to players whose entries were selected in the drawing. In these cases, the Successful Proposer will be provided with contact information for the player and must notify the Texas Lottery in writing once the prize amount has been paid. All such prize amounts payments resulting from this provision shall be paid directly by the Successful Proposer to the player within 10 calendar days from the date of notification by the Texas Lottery.
- 3.54.19 ***Failure to provide entry data timely.*** The failure of the Successful Proposer to provide the entry data to timely conduct each individual internet entry promotional second chance drawing, in accordance with procedures and drawing dates approved by the Texas Lottery, may result in the Successful Proposer being assessed sanctions in the amount of five hundred dollars (\$500) per drawing for the day of the scheduled draw and an additional two thousand dollars (\$2,000) per drawing for each day thereafter until the entry data is provided.
- 3.54.20 ***Failure to Cooperate with and/or Produce Records or Information as part of Background Investigation.*** The failure of the Successful Proposer to cooperate with and/or produce records or information as part of a background investigation conducted pursuant to Section 4.7 of this RFP may result in the Successful Proposer being assessed



sanctions in the amount of one hundred dollars (\$100) per day for each day the records/information are not produced or answers are not provided.

- 3.54.21 ***Failure to Disclose Litigation.*** The failure of the Successful Proposer to disclose litigation as required by Section 3.40 of this RFP may result in the Successful Proposer being assessed sanctions in the amount of one thousand dollars (\$1000) per incident.
- 3.54.22 ***Failure to Obtain Prior Written Approval before Issuing News Release.*** The failure of the Successful Proposer to comply with Section 3.46 of this RFP regarding the issuance of news releases may result in the Successful Proposer being assessed sanctions in the amount of one thousand dollars (\$1000) per incident.
- 3.54.23 ***Purchase of Texas Lottery Tickets.*** The failure of the Successful Proposer to comply with the requirements of Section 3.53 of this RFP regarding the purchase of Texas Lottery tickets may result in the Successful Proposer being assessed sanctions in the amount of five thousand dollars (\$5000) per incident.
- 3.54.24 ***Failure to Report Significant Incidents and Anomalies and/or to Comply with the RFP Code of Conduct Requirements.*** The failure of the Successful Proposer to report all significant incidents and anomalies to the Texas Lottery as required by Section 3.66 of this RFP may result in the Successful Proposer being assessed sanctions in the amount of one thousand dollars (\$1000) per day for each day not reported. The failure of the Successful Proposer to comply with the code of conduct requirements in Section 3.64 of this RFP may result in the Successful Proposer being assessed sanctions in the amount of one thousand dollars (\$1000) per incident.
- 3.54.25 ***Failure to Notify Texas Lottery of Changes in Lobbyist Information.*** The failure of the Successful Proposer to inform the Texas Lottery of any change of lobbyist information as required by this RFP may result in the Successful Proposer being assessed sanctions in the amount of one thousand dollars (\$1000) per day for each day that the filing is not provided.
- 3.54.26 ***Failure to Notify the Texas Lottery of a Change in Financial Condition or Change of Ownership.*** The failure of the Successful Proposer to notify the Texas Lottery of a change in financial condition or change of ownership or control as required by this RFP may result in the Successful Proposer being assessed sanctions in the amount of one thousand dollars (\$1000) per incident.
- 3.54.27 ***Failure to Permit an Examination, Produce Requested Records/Information or Reports, or Provide an Answer Timely.*** Notwithstanding anything herein to the contrary and except as otherwise provided above, the failure of the Successful Proposer to permit an examination, produce requested records/information or reports, or provide an answer timely, as required by this RFP, may result in the Successful Proposer being assessed sanctions in the amount of five thousand dollars (\$5000) per day for each day the examination is not permitted, the records/information or reports are not produced, or the answer is not provided.
- 3.54.28 ***Unauthorized Disclosure.*** The failure of the Successful Proposer to comply with the non-disclosure requirement in Section 3.51 of this RFP may result in the Successful



Proposer being assessed sanctions in the amount of five thousand dollars (\$5,000) for each unauthorized disclosure.

### **3.55 DISPUTE RESOLUTION**

The dispute resolution process provided for in Texas Government Code Chapter 2260 and 16 Texas Administrative Code Ch. 403 must be used by the Successful Proposer to attempt to resolve any disputes brought by the Successful Proposer arising under this Contract.

### **3.56 CERTIFICATIONS**

- 3.56.1 Pursuant to Texas Government Code ANN. § 466.103, the Executive Director may not award a contract for the purchase or lease of facilities, goods or services related to lottery operations to a person who would be denied a license as a sales agent under Texas Government Code ANN. § 466.155. All Proposers must read and be familiar with Texas Government Code ANN. § 466.155, attached hereto as Attachment D. All Proposals shall include a completed Background Information Certification Form, attached hereto as Attachment D-1, which certifies that the Proposer has reviewed Texas Government Code ANN. § 466.155 and neither the Proposer nor any of the following persons would be denied a license as a sales agent pursuant to said section: (a) Proposer's officers, directors, investors, owners, partners and other principals, as more particularly described in Texas Government Code ANN. § 466.155 (collectively, Proposer Principals); or (b) any spouse, child, brother, sister or parent residing as a member of the same household in the principal place of residence of the Proposer or any of the Proposer Principals.
- 3.56.2 Under § 231.006 of the Texas Family Code, the Proposer certifies that the individual or business entity named in the Proposal or Contract is not ineligible to receive the specified grant, loan or payment and acknowledges that any Contract resulting from this RFP may be terminated and payment may be withheld if this certification is inaccurate. Furthermore, any Proposer subject to Section 231.006 must include names and social security numbers of each person with at least 25% ownership of the business entity submitting the Proposal. This information must be provided prior to Contract Award.
- 3.56.3 Under Section 2261.053 of the Texas Government Code, a state agency may not accept a bid or award a contract that includes proposed financial participation by a person who, during the five year period preceding the date of the bid or award, has been: (1) convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005; or (2) assessed a penalty in a federal civil or administrative enforcement action in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005. In submitting a Proposal under this RFP, the Proposer certifies as follows: "Under Section 2261.053 of the Texas Government Code,





the contractor certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate.”

3.56.4 The Proposer certifies that: (a) the Proposer has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted Proposal; and (b) neither the Proposer nor the firm, corporation, partnership, or institution represented by the Proposer, nor anyone acting for such firm, corporation, partnership, or institution has violated the antitrust laws of the State of Texas (Tex. Bus. & Comm. Code Sec. 15.01, et seq.), or the antitrust laws of the United States (15 U.S.C.A. Section 1, et seq.), nor communicated directly or indirectly the submitted Proposal to any competitor or any other person engaged in such line of business.

3.56.5 The Proposer certifies that it is in compliance with Texas Government Code, Title 6, Subtitle B, Section 669.003 of the Government Code, relating to contracting with the executive head of a state agency. If Section 669.003 applies, the Proposer will complete the following information in order for the Proposal to be evaluated:

Name of Former Executive

Name of State Agency

Date of Separation from State Agency

Position with Proposer

Date of Employment with Proposer

3.56.6 By signing this Proposal, the Proposer certifies that if a Texas address is shown as the address of the Proposer, the Proposer qualifies as a Texas Resident Bidder as defined in Texas Administrative Code, Title 34, Part 1, Chapter 20.

3.56.7 The Texas Lottery is federally mandated to adhere to the directions provided in the President’s Executive Order (EO) 13224, Executive Order on Terrorist Financing – Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, effective 9/24/2001 and any subsequent changes made to it via cross-referencing respondents/vendors with the Federal General Services Administration’s Excluded Parties List System (EPLS, <http://www.epls.gov>), which is inclusive of the United States Treasury’s Office of Foreign Assets Control (OFAC) Specially Designated National (SDN) list.

3.56.8 Pursuant to Section 2155.004 of the Texas Government Code, the Proposer has not received compensation from the Texas Lottery for participating in the preparation of the specifications for this RFP and certifies as follows: “Under Section 2155.004, Government Code, the vendor certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate.”



### **3.57 PREFERENCES**

Any bidder or Proposer entitled to a preference(s) under Texas law shall claim the preference(s) in its Proposal.

### **3.58 DECEPTIVE TRADE PRACTICES; UNFAIR BUSINESS PRACTICES**

The Successful Proposer represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Tex. Bus. & Com. Code, Chapter 17, or allegations of any unfair business practice in any administrative hearing or court suit and that the Successful Proposer has not been found to be liable for such practices in such proceedings. The Successful Proposer certifies that it has no officers who have served as officers of other entities that have been the subject of allegations of Deceptive Trade Practices violations or allegations of any unfair business practices in an administrative hearing or court suit and that such officers have not been found to be liable for such practices in such proceedings.

### **3.59 IMMIGRATION**

The Successful Proposer represents and warrants that it shall comply with the requirements of the Immigration Reform and Control Act of 1986, the Immigration Act of 1990 and the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 regarding employment of any individual who will perform labor or services under any Contract entered into as a result of this RFP.

### **3.60 ELECTRONIC AND INFORMATION RESOURCES ACCESSIBILITY STANDARDS, AS REQUIRED BY 1 TAC CHAPTER 213 (APPLICABLE TO STATE AGENCY AND INSTITUTIONS OF HIGHER EDUCATION PURCHASES ONLY).**

- 3.60.1 Effective September 1, 2006 state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation.
- 3.60.2 The Successful Proposer shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (<http://www.buyaccessible.gov>). Proposers not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at <http://www.section508.gov/>.



### **3.61 FALSE STATEMENTS; BREACH OF REPRESENTATIONS**

By submitting a Proposal, the Proposer makes all the representations, warranties, guarantees, certifications and affirmations included in its Proposal. If a Proposer signed its Proposal with a false statement or is selected as the Apparent Successful Proposer and signs any Contract resulting from this RFP with a false statement, or it is subsequently determined that Proposer has violated any of the representations, warranties, guarantees, certifications or affirmations included in the RFP or resulting Contract, the Proposer shall be in default and if the determination is made before Contract Award, the Texas Lottery may reject the Proposal or if the determination is made after Contract Award, the Texas Lottery may terminate the Contract for cause and pursue all other remedies available to the Texas Lottery under the RFP, Contract and applicable law.

### **3.62 LIMITATION ON AUTHORITY; NO OTHER OBLIGATIONS**

The Successful Proposer shall have no authority to act for or on behalf of the Texas Lottery or the State of Texas except as expressly provided for in this RFP or any resulting Contract. The Successful Proposer may not incur any debts, obligations, expenses or liabilities of any kind on behalf of the State of Texas or the Texas Lottery.

### **3.63 PROPOSER ASSIGNMENT**

The Successful Proposer hereby assigns to the Texas Lottery any and all claims for overcharges associated with any Contract resulting from this RFP arising under the antitrust laws of the United States, 15 U.S.C.A. Section 1, et seq., and the antitrust laws of the State of Texas, Tex. Bus. & Comm. Code Sec. 15.01, et seq.

### **3.64 CODE OF CONDUCT**

The Texas Lottery is an extremely sensitive enterprise because its success depends on maintaining the public trust by protecting and ensuring the security of lottery products. The Texas Lottery incorporates the highest standards of security and integrity in the management and sale of entertaining lottery products, and lottery vendors are held to the same standards. Therefore, it is essential that operation of the Texas Lottery, and the operation of other enterprises which would be linked to it in the public mind, avoid not only impropriety, but also the appearance of impropriety. Because of this, the Successful Proposer shall:

- (a) Offer goods and services only of the highest quality and standards.
- (b) Use its best efforts to prevent the industry from becoming embroiled in unfavorable publicity.
- (c) Make presentations in a responsible manner and when it is felt necessary to point out the superiority of its goods or services over those of its competitors, do so in such a manner as to avoid unfavorable publicity for the industry.
- (d) Avoid activities, operations, and practices that could be interpreted as improper and cause embarrassment to the Texas Lottery and/or to the industry.



- (e) Report security problems or potential security problems with any services provided pursuant to this RFP immediately and only to the Texas Lottery.
- (f) Otherwise comply with the State Lottery Act (Texas Gov't Code ANN.Ch. 466) and Texas Lottery rules, procedures and policies.
- (g) Provide best practices related to security and integrity standards within the industry.

### **3.65 CONTACT WITH TEXAS LOTTERY COMMISSION**

- 3.65.1 Employees, Subcontractors and agents of all prospective Proposers and employees, Subcontractors and agents of the Successful Proposer may not offer or give a gift to a Texas Lottery employee. For purposes of this section, "gift" has the meaning as defined in Tex. Gov't Code ANN. § 467.001(4) and as may be subsequently changed or amended by acts of the Texas Legislature.
- 3.65.2 Employees, Subcontractors and agents of all prospective Proposers and employees, Subcontractors and agents of the Successful Proposer should not engage in nonprofessional socialization (socialization outside of a work context) with a Texas Lottery employee. There may be circumstances, however, in which nonprofessional socialization is acceptable, for example, because of family relationships, common acquaintances, or common outside activities. The restrictions on nonprofessional socialization are not meant to apply to unplanned, incidental social contact. In such circumstances, employees, Subcontractors and agents of all prospective Proposers and employees, Subcontractors and agents of the Successful Proposer should not discuss Texas Lottery business.
- 3.65.3 Professional socialization at activities such as industry trade conferences and site visits is permitted.

### **3.66 INCIDENTS AND ANOMALIES**

- 3.66.1 The Successful Proposer shall report immediately all significant incidents and anomalies to the Texas Lottery, followed by a written report to be submitted within one workday of the incident or anomaly. At a minimum, incident and anomaly reporting shall include a description of the incident, its cause, and corrective action taken. For purposes of this section, "significant" incidents include, by way of illustration only, any occurrence that affects the Texas Lottery, lottery retailers, or players, and deviation from established procedures and those items where sanctions or liquidated damages are applicable.
- 3.66.2 The Texas Lottery will assign an investigator to monitor the Successful Proposer throughout the Contract term and during any renewal period. The Successful Proposer shall maintain close contact and regular communication with the investigator regarding all matters under the Contract. In addition, the Successful Proposer shall notify Texas Lottery senior management directly and promptly of any matters impacting the security and integrity of the instant ticket process.



### **3.67 NON-EXCLUSIVE CONTRACT**

In accordance with the purpose and goals stated in section 1.1 of this RFP, the Texas Lottery intends to enter into a non-exclusive contract with each Successful Proposer to provide the services described in this RFP and expressly reserves the right to engage other vendor(s) to perform similar services.



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## PART 4 REQUIRED INFORMATION

### 4.1 EXPERIENCE OF RESPONDING FIRM

Each Proposer shall provide the following information relating to its experience:

- 4.1.1 Years of Experience. Proposers must indicate the number of years' experience the Proposer has in manufacturing instant tickets and providing related services as specified in this RFP. Each Proposer shall include descriptions and verifiable references (including names, titles, addresses and telephone numbers) documenting its experience for all engagements of comparable complexity and sensitivity for the past five (5) years.
- 4.1.1 Proposers must indicate any previous State of Texas or other lottery experience providing similar services, including name of agency or lottery, type of work performed, and duration of project. Proposers must have a minimum two years of related lottery experience in instant ticket printing in North America and at least three current clients who are members of the North American Association of State and Provincial Lotteries. Proposers with less than the minimum required lottery experience and fewer than three current NASPL clients will be disqualified and their Proposals will be rejected and not evaluated.
- 4.1.2 The description of experience shall be detailed and cover the contracts the Proposer and any Subcontractors have had and all experience similar to this Contract which qualifies the Proposer to meet the requirements of this Contract, including but not limited to:
- (a) Size of contract.
  - (b) Types of services directly provided by the Proposer and whether the Proposer was the contractor or subcontractor.
  - (c) Term and type of contract, including effective dates.
  - (d) Reason for contract termination/expiration, if contract is no longer in effect.
- 4.1.3 The Proposer shall state whether or not any of the following have occurred during the last five years:
- (a) The Proposer has had a contract terminated, and if so, shall provide full details, including the other party's name, address and telephone number.
  - (b) The Proposer has been assessed any penalties or liquidated damages under any existing or past contracts and if so note the reason for and the amount of the penalty or liquidated damages for each incident.
  - (c) The Proposer was the subject of (i) any disciplinary action for substandard work and unethical practices or (ii) any order, judgment or decree of any federal or state authority barring, suspending or otherwise limiting the right of the Proposer to engage in any business, practice or activity.
  - (d) The Proposer has been involved in any litigation related to contract performance.



- 4.1.4 The Proposer must demonstrate its understanding of the requested services and must address specifically, in writing, the Proposer's approach to providing each requirement in this RFP.

## 4.2 EXPERIENCE OF PERSONNEL

- 4.2.1 The Successful Proposer must provide a dedicated account services team to assist with Instant game development.

Each Proposer must provide the resumes and supporting information for key personnel (including name, title and detailed job experience) who will be assigned to the Texas Lottery Account Team. The Account Team shall include, but not be limited to, the following positions:

- Account Manager - responsible for managing the Successful Proposer's relationship with the Texas Lottery. Coordinates, directs and implements the Successful Proposer's instant game development processes. Confers with TLC to assess needs, determine goals and establish plans while ensuring the accuracy of each phase of the production process.
- Account Services Representative- responsible for serving as the day-to-day liaison with the Texas Lottery ensuring the successful and timely completion of working papers and/or Customer Specifications Document and any and all communications between the Texas Lottery and the Successful Proposer as related to instant game development.
- Quality Control individual or team - responsibilities include accuracy of all content in the working papers and/or Customer Specifications Document, printing processes and continuous quality inspection of final product.
- Information Technology individual or team - responsibilities include the accuracy of all game data in each instant game as specified in the working papers and/or the Customer Specifications Document and Security requirements.
- Graphic Artists - responsible for creative design and final ticket graphic output.

- 4.2.2 At a minimum, the Account Team members must demonstrate knowledge and experience as it applies to the following job functions:

- (a) Prize structure design
- (b) Game design elements including names, themes, play formats, color selection, etc.



- (c) Graphic design
- (d) Secure computer game tape/production file generation
- (e) Production scheduling
- (f) Secure instant ticket manufacturing processes
- (g) Quality control and assurance
- (h) Packaging and distribution
- (i) Lottery sales, industry trends and market analysis relating to game recommendations
- (j) Product management
- (k) Information technology
- (l) Accounting
- (m) Security

4.2.3 The Texas Lottery does not rely on its instant ticket manufacturers for traditional marketing support. Therefore, the Texas Lottery does not require personnel assigned to this account to be based in Austin, Texas.

4.2.4 The Successful Proposer shall provide the Texas Lottery written notification of any key personnel changes involving employees or any Subcontractors actively involved in the service of the Texas Lottery project. The Successful Proposer shall provide written notification and justification to the TLC within three (3) business days of the personnel changes. The resume of the person who is to be hired or placed should be sent to the Texas Lottery, and the Successful Proposer must receive written approval from the Texas Lottery prior to the person working on the account.

#### **4.3 REFERENCES**

A minimum of five (5) verifiable references must be provided that include contact person, name of company, phone, fax number, and e-mail address, if available. Proposers' references shall include references for which Proposer has provided products and services similar in size and scope to those described in Parts 6, 7 and 8 of this RFP. The Texas Lottery reserves the right to verify all information in the Proposal submitted by the Proposer and seek other information it deems necessary to conduct a thorough review.

#### **4.4 CONTACT PERSON**

Each Proposer shall provide the name, address, telephone number, email address, and facsimile number of a person to contact concerning questions regarding its Proposal.





## 4.5 CONFLICT OF INTEREST

- 4.5.1 The Proposer must disclose any actual, potential or perceived conflict of interest relative to the performance of the requirements of this RFP. The Proposer must disclose any personal or business relationship of (a) itself; (b) any of its principals, officers, directors, investors, owners, partners, and employees (collectively, Proposer Personnel); (c) any spouse, child, brother, sister, or parent residing as a member of the same household in the principal place of residence of any Proposer Personnel; (d) any affiliate; or (e) any Subcontractor with any employee or representative of the Texas Lottery (including the Texas Lottery Executive Director and its commissioners) or its prime vendors. As of the time of the issuance of this RFP, prime Texas Lottery vendors include, but are not limited to: GTECH Corporation, lottery operator; Scientific Games International, instant ticket manufacturer; Pollard Banknote Limited Partnership, instant ticket manufacturer; GTECH Printing Corporation, instant ticket manufacturer; TLP, Inc. dba TracyLocke and LatinWorks, advertising services; Davila, Buschhorn and Associates, P.C., lottery drawings audit services; Elephant Productions, Inc., drawings broadcast services; Barker & Herbert Analytical Laboratories, Inc., instant ticket testing services; Maxwell Locke & Ritter, LLP., annual financial audit and Mega Millions and Powerball agreed-upon procedures engagement; Meyertons, Hood, Kivlin, Kowert & Goetzl, P.C., outside counsel for intellectual property matters; Eubank & Young Statistical Consulting, LLC, statistical consulting services; Knight Security Systems, LLC, surveillance camera products and related services; and Elsym Consulting, Inc., internal control systems and services. Additionally, any such relationship that might be perceived or represented as a conflict should be disclosed. Failure to disclose any such relationship may be a cause for disqualification of a Proposal.
- 4.5.2 This is a continuing disclosure requirement. The Proposer shall disclose to the Texas Lottery in writing any actual, potential or perceived conflict of interest, relative to the performance of the requirements of this RFP, during the period prior to the award of any Contract pursuant to the RFP, at the time the conflict is identified. Failure to promptly notify the Texas Lottery will be sufficient grounds for rejecting the Proposal.

## 4.6 FINANCIAL SOUNDNESS

- 4.6.1 Each Proposer must provide evidence of financial responsibility and stability for performance of any Contract awarded as a result of this RFP and must demonstrate the ability to finance the project described in its submission.
- 4.6.2 Each Proposer shall provide evidence of financial responsibility and stability based on any and/or all of the following:
1. If the Proposer is the sole source of financial resources and will finance the project on its own with current resources;
  2. If the Proposer is the subsidiary of a parent corporation and the parent corporation is providing financial resources or assurance, the parent corporation must complete Attachment B, and the Proposer must submit financials for both the Proposer and the parent;



3. If the Proposer is a joint venture or a group of affiliated companies, the Proposal must include financials for each member or affiliate of such joint venture or group, as applicable;

If 1, 2 or 3 apply, then, the Proposer shall submit the following documentation with its Proposal:

(a) Copies of audited financial statements and/or complete tax returns for each of the Proposer's (and its parent corporation, if applicable, or joint venture member or affiliate, if applicable) two (2) most recently ended fiscal years; and/or

(b) If documentation under (a) is not available, provide other proof of financial assurance.

4. If Proposer is relying on financial resources other than items 1 through 3 above, then Proposer shall submit the following documentation with its Proposal:

(a) Other proof of financial assurance.

4.6.3 If the information in Section 4.6.2 is not available at the time of submission, the Proposer shall provide other proof of financial responsibility acceptable to the Texas Lottery prior to the deadline for submission of Proposals.

4.6.4 The Texas Lottery reserves the right to require any additional information necessary to determine the financial integrity and responsibility of the Proposer.

4.6.5 The Proposal must include a certification that the Proposer, if named the Successful Proposer, will notify the Texas Lottery of a change in financial condition during the Contract term and any renewal thereof. If a Proposer experiences a substantial change in its financial condition prior to the award of any Contract pursuant to the RFP, or if the Successful Proposer experiences a substantial change in its financial condition during the term of the Contract or any extension thereof, the Texas Lottery must be notified of the change in writing at the time the change occurs or is identified. Failure to notify the Texas Lottery of such substantial change in financial condition will be sufficient grounds for rejecting the Proposal or terminating any Contract. For the purposes of this section, examples of a substantial change in financial condition are events such as insolvency, bankruptcy or receivership.

#### **4.7 BACKGROUND INVESTIGATIONS**

4.7.1 The Texas Lottery Commission may initiate investigations into the backgrounds of (a) any Apparent Successful Proposer; (b) any of the Apparent Successful Proposer's officers, directors, investors, owners, partners and other principals, as more particularly described in Texas Government Code ANN. § 466.155 (collectively, Apparent Successful Proposer Principals); (c) any of the Apparent Successful Proposer's employees; (d) any of the Apparent Successful Proposer's Subcontractors, or the Subcontractors' officers, directors, investors, owners, partners, principals or employees (collectively, Subcontractor Personnel); or (e) any other associates of the Apparent Successful Proposer it deems appropriate. The Texas Lottery Commission may also



request background information for a spouse, child, brother, sister or parent residing as a member of the same household in the principal place of residence of the Apparent Successful Proposer, any Apparent Successful Proposer Principals, or Apparent Successful Proposer employees described above. Such background investigations may include fingerprint identification by the Texas Department of Public Safety and the Federal Bureau of Investigation, and any other law enforcement agency. The Texas Lottery may reject a Proposal and/or terminate any Contract resulting from this RFP based solely upon the results of these background investigations.

- 4.7.2 In order to facilitate the background investigations, the Apparent Successful Proposer, including the parent or subsidiary of the Apparent Successful Proposer, must complete and return:
- a. the Texas Lottery's Background Information Certified List of Vendor Principals Form (located in Attachment E-1) within three (3) business days, or as otherwise directed by the Texas Lottery, after the written Announcement of the Apparent Successful Proposer.
  - b. the Texas Lottery's Vendor Background Investigation Packet (Attachment E) within ten (10) business days, or as otherwise directed by the Texas Lottery, after the written Announcement of the Apparent Successful Proposer.
- 4.7.3 The Texas Lottery reserves the right to require additional background information.
- 4.7.4 The Successful Proposer agrees that, during the term of the Contract and any extension thereof, it shall be obligated to provide such information about any principals, employees, and Subcontractor personnel as the Texas Lottery may prescribe. The Successful Proposer also agrees that the Texas Lottery may conduct background investigations of such persons.



## PART 5

### HUB SUBCONTRACTING PLAN (HSP)

#### 5.1 HSP REQUIREMENT

The Texas Lottery has adopted the rules promulgated by the Comptroller of Public Accounts (CPA) regarding Historically Underutilized Businesses (HUBs) in 34 Texas Administrative Code (TAC) §§ 20.10 – 20.28 (See [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.ViewTAC?tac\\_view=5&ti=34&pt=1&ch=20&sch=B&rl=Y](http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=5&ti=34&pt=1&ch=20&sch=B&rl=Y)). By submitting a Proposal, the Proposer certifies that it has reviewed 34 TAC §§ 20.10 - 20.28. Rule 20.14 addresses the specific requirements of Historically Underutilized Business subcontracting plans (HSPs).

#### 5.2 HSP SUBMISSION AND TEXAS LOTTERY REVIEW

- 5.2.1 All proposals must include an HSP (see Attachment C, including Method A or B pages, if applicable) in the format required by the Comptroller of Public Accounts. The HSP is a pass/fail requirement. PROPOSALS THAT DO NOT INCLUDE A COMPLETED HUB SUBCONTRACTING PLAN PREPARED IN ACCORDANCE WITH 34 TEXAS ADMINISTRATIVE CODE (TAC) § 20.14 SHALL BE REJECTED AND WILL NOT BE EVALUATED.
- 5.2.2 To determine whether a good faith effort has been performed as required by the Comptroller's HUB rules, the Texas Lottery may request clarifications from Proposers, if necessary. The HSP will be reviewed based on the Proposer's submission and any clarifications requested by the agency.

#### 5.3 MANDATORY HSP WORKSHOPS

The Texas Lottery will schedule mandatory one-on-one workshops with each Proposer to discuss HUB subcontracting plan requirements, answer any questions specific to meeting the good faith effort, and provide instructions on completing the required HSP forms. In these workshops, the Texas Lottery will not answer any questions that are not directly related to the HSP process. At the RFP pre-proposal conference, the Texas Lottery will provide notice to Proposers of planned dates for the HSP workshops. Information provided in the workshops and in any follow-up discussions regarding the HSP requirements is intended solely to assist Proposers in complying with the HSP requirements set forth in the Texas statutes and the Comptroller's HUB rules, and shall not modify or amend any such requirements for any Proposer. Each Proposer is responsible for compliance with the HSP requirements under this RFP. Attendance at any HSP workshop does not guarantee that the HSP submitted with a Proposal will pass.



## 5.4 ASSISTANCE FOR PREPARATION OF HSP

- 5.4.1 *Pre-Proposal Conference.* Proposers are encouraged to attend the pre-proposal conference. Proposers may ask questions at the pre-proposal conference regarding the HSP. A video of the pre-proposal conference as well as a copy of the HSP booklet provided during the conference will be posted on the Texas Lottery website.
- 5.4.2 *HUB Subcontracting Opportunity Notification Form and HSP Quick Check List.* Attached to this RFP is a HUB Subcontracting Opportunity Notification Form (Attachment C-1) and HSP Quick Check List (Attachment C-2) prepared by the Texas Comptroller. Proposers are encouraged to use Attachment C-1 when sending notice of the subcontracting opportunity. Attachment C-2 is intended to assist Proposers in preparing the HSP forms, but is not required to be submitted with Proposals.
- 5.4.3 *Additional TLC Assistance.* During the period following issuance of the RFP and up to fifteen (15) Working Days prior to the deadline for proposals, the TLC will:
- Review draft HSP forms submitted by any Proposer and provide feedback to that Proposer only; and/or
  - Schedule one-on-one workshops with a Proposer to discuss HSP requirements and/or to review draft HSP forms, at the Proposer's request. These workshops would be in addition to the mandatory HSP workshops required by Section 5.3.

The Texas Lottery also will respond to any written questions regarding the HSP process that are submitted in writing, up to the date of the deadline for Proposals.

## 5.5 REQUIREMENTS FOR COMPLETING THE HSP FORMS

- 5.5.1 *TLC's HUB Participation Goal.* The goods and/or services requested in this RFP are classified in the category of Other Services Contracts. The agency's HUB participation goal for this RFP is 24.6%.
- 5.5.2 *Requirements of a HUB subcontracting plan.* Each Proposer shall complete the HSP forms prescribed by the Comptroller (Attachment C) which shall include the following:
- (A) certification the Proposer has made a good faith effort to meet the requirements of 34 Texas Administrative Code (TAC) § 20.14;
  - (B) identification of the subcontractors that will be used during the course of any contract resulting from this RFP;
  - (C) the expected percentage of work to be subcontracted; and
  - (D) the approximate dollar value of that percentage of work.

Each Proposer shall provide documentation required by the agency to demonstrate compliance with good faith effort requirements prior to contract award. If a Proposer fails to provide supporting documentation (phone logs, fax transmittals, electronic mail, etc.) within the timeframe specified by the agency to demonstrate compliance with this subsection prior to contract award, the Proposal shall be rejected for material failure to comply with Texas Government Code §2161.252 (b).



## 5.6 SUBCONTRACTING OPPORTUNITIES

5.6.1 The Texas Lottery has identified the following potential subcontracting opportunities under this RFP.

(a) **CLASS: 560 MATERIAL HANDLING, CONVEYORS, STORAGE EQUIPMENT AND ACCESSORIES**

Item Numbers and Commodity Descriptions:

560-54 Pallets and Skids (Metal, Plastic, Wood)

(b) **CLASS: 640 PAPER AND PLASTIC PRODUCTS, DISPOSABLE**

Item Numbers and Commodity Descriptions:

640- 25 Corrugated Boxes and Sheets (Including Fillers)

(c) **CLASS: 645 PAPER, FOR OFFICE AND PRINT SHOP USE**

Item Numbers and Commodity Descriptions:

645-64 Offset Paper (Including Recycled)

(d) **CLASS: 665 PLASTICS, RESINS, FIBERGLASS: CONSTRUCTION, FORMING, LAMINATING, AND MOLDING EQUIPMENT, ACCESSORIES, AND SUPPLIES**

Item Numbers and Commodity Descriptions:

665-82 Shrink Film Packaging Equipment and Supplies

(e) **CLASS: 700 PRINTING PLANT EQUIPMENT AND SUPPLIES (EXCEPT PAPER)**

Item Numbers and Commodity Descriptions:

700-57 Printing Accessories and Supplies (Incl. Electrostatic Types): Blankets, Chemicals, Gum, Inks, Mats, Negatives, Plates, Roller Covers, Rubber Rejuvenators, Sleeves, etc.

(f) **CLASS: 915 COMMUNICATIONS AND MEDIA RELATED SERVICES**

Item Numbers and Commodity Descriptions:

915-48 Graphic Arts Services (Not Printing)

(g) **CLASS: 946 FINANCIAL SERVICES**

Item Numbers and Commodity Descriptions:

946-20 Auditing

946-31 Certified Public Accountant (CPA) Services



**(h) CLASS: 961 MISCELLANEOUS SERVICES, NO. 1**

Item Numbers and Commodity Descriptions:

- 961-49 Legal Services, Attorneys
- 961-50 Legal Services Including Depositions and Expert Witness Testimony
- 961-78 Travel Agency Services

**(i) CLASS: 962 MISCELLANEOUS SERVICES, NO. 2**

Item Numbers and Commodity Descriptions:

- 962-86 Transportation of Goods and Other Freight Services

**(j) CLASS: 966 PRINTING AND TYPESETTING SERVICES**

Item Numbers and Commodity Descriptions:

- 966-61 Offset Printing, Large Production Runs (Quan. Over 100,000); 4 Color Process or Close Registration Required: Color Brochures, Maps, etc.

**(k) CLASS: 971 REAL PROPERTY RENTAL OR LEASE**

Item Numbers and Commodity Descriptions:

- 971-45 Office Space Rental or Lease

5.6.2 The potential subcontracting opportunities listed above may or may not be areas that a Proposer would subcontract, depending on that Proposer's existing resources, employees, and business model. Further, Proposers are not limited to the list above, and may identify additional areas of subcontracting. Proposers who intend to subcontract are responsible for identifying all areas that will be subcontracted and shall submit a completed HSP demonstrating evidence of good faith effort in developing that plan.

A list of HUB vendors registered with the Comptroller of Public Accounts (CPA) for the subcontracting opportunities identified above is included under the HUB/CMBL tab of this RFP. Note that currently active certified HUBs will have a status code of "A." All other status codes indicate that a vendor is inactive or not a HUB.

5.6.3 Please refer to the HUB/CMBL Directory Instructions and HUB Vendor Reference Lists under the HUB/CMBL tab of this RFP to locate potential HUB Subcontractors.

**5.7 POST CONTRACT AWARD**

5.7.1 Notification of Subcontractors

Following Contract Award, the Successful Proposer must provide notice to all subcontractors (HUBs and Non-HUBs) of their selection for the awarded Contract. The Successful Proposer is also required to provide a copy of each notice to the agency's



point of contact for the Contract no later than ten (10) Working Days after the Contract is awarded. Proposers should refer to Section 4 of the HSP form for additional information about this requirement.

#### 5.7.2 HSP Changes

Notwithstanding anything to the contrary in this RFP or any resulting Contract, following Contract Award, any proposed changes to the HSP must be submitted, in writing, by the Successful Proposer to the Texas Lottery for prior review and must be approved by the Texas Lottery in writing before becoming effective under the Contract.

#### 5.7.3 HSP Reporting

Following Contract Award, if the Successful Proposer is subcontracting, the Successful Proposer shall maintain business records documenting compliance with the HSP and shall submit a monthly compliance report in the format required by the Texas Lottery. The monthly compliance report shall be submitted to the Texas Lottery by the 10<sup>th</sup> of the following month or on the date requested by the agency's HUB Coordinator or his/her designee. The submission of the monthly compliance report is required as a condition of payment.





## **PART 6**

### **TEXAS LOTTERY'S OBJECTIVES, GOALS AND EXPECTATIONS**

#### **6.1 OVERVIEW**

Part 6 of this RFP contains the Texas Lottery's objectives, goals and expectations for this procurement. Parts 7 and 8 comprise the Scope of Services for any Contract resulting from this RFP.

#### **6.2 TEXAS LOTTERY OBJECTIVE**

The Texas Lottery's objective is to maximize revenue to the State of Texas through the selection of "industry best" games and those consistent with the Texas Lottery's current product mix and instant ticket strategy. The Texas Lottery evaluates games based on a variety of criteria including, but not limited to, sales performance, ticket theme, play style, planned start date and overall fit within the overall instant game portfolio. Using these criteria and others, the Texas Lottery also includes branded, proprietary or licensed games which it believes present the best opportunity for maximizing ticket sales and generating revenues for the State.

#### **6.3 TEXAS LOTTERY GOALS AND EXPECTATIONS**

- 6.3.1 In working toward its objective to maximize revenue to the State of Texas through the selection of "industry best" games and those consistent with the Texas Lottery's current product mix and instant ticket strategy, the Texas Lottery believes that utilizing multiple vendors for instant ticket manufacturing and services promotes competition, optimizes vendor performance and enhances business resumption capabilities.
- 6.3.2 The Texas Lottery desires to select multiple Successful Proposers that demonstrate superior technical quality and service and that offer competitive pricing.
- 6.3.3 The Texas Lottery, through negotiations with all Apparent Successful Proposers desires to establish common prices for the goods/services included in the Base price and certain Specified Options as identified in the Sealed Cost Proposal (Attachment H).
- 6.3.4 As an incentive to accept the common prices established by the Texas Lottery and at the agency's sole discretion, Successful Proposers may be offered an opportunity to produce a comparable number of games for a set period (as determined by the Texas Lottery in its sole discretion) following Contract Award. The Texas Lottery, in its sole discretion, will determine the quantity and volume of ticket production awarded to each Successful Proposer and expressly reserves the right to cancel or increase game orders consistent with the considerations in section 1.1.7, together with other factors including, but not limited to, technical quality and customer service.
- 6.3.5 Any Proposer(s) that rejects the Texas Lottery's common prices still may be awarded a Contract in the Lottery's sole discretion, principally to allow the Texas Lottery to use



the Proposer's proprietary printing process(es) and licensed game inventory – but is not assured a certain number of games.

- 6.3.6 The Texas Lottery does not intend to limit the creativity of interested parties or preclude contracted vendors from bringing forward new products or product enhancements during the life of the Contract. The Texas Lottery continually evaluates operations to determine the most cost-effective, reliable, market-oriented solutions that offer the best value to the State. Throughout the Contract term, the Successful Proposer is encouraged to alert the Texas Lottery of changes, service/product enhancements, and new product offerings that were not available at the time of Contract Award. The Texas Lottery makes no commitment to quantity or timing for acquisition of such changes, service/product enhancements, or new product offerings. However, should the Texas Lottery determine such changes, service/product enhancements, or new product offerings potentially are of value to the State, the parties will work together to develop detailed specifications and agreed prices for such changes, service/product enhancements, or new product offerings should these offerings not be covered by the terms of the existing Contract.



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## PART 7 INSTANT GAME DEVELOPMENT

### 7.1 STAFFING

At a minimum, the Successful Proposer must provide the positions required under Section 4.2 of this RFP for the Texas Lottery account. If any staff proposed under Section 4.2 change during the term of any Contract resulting from this RFP, the Successful Proposer shall replace such staff with staff comparable in experience and training. That replacement shall be made subject to the Texas Lottery's approval. The Successful Proposer shall provide the résumé of the person who is proposed to be hired or placed on the Texas Lottery's Account Team and shall receive written approval from the Texas Lottery prior to the person working on the account.

### 7.2 GAME PLANNING

7.2.1 Game planning services support will be required of the Successful Proposer. The Successful Proposer shall work closely with the Texas Lottery to identify instant ticket games that meet the criteria and requirements of the Texas Lottery. The Successful Proposer shall provide suggested game designs for inclusion in the plan. At a minimum, the Successful Proposer shall provide:

- (1) Recommendations for each price point and theme, including the game name and play style, together with an album of representative tickets produced by the Successful Proposer. The recommendations should be made for tickets that are considered "industry best", have had positive responses in focus testing, have strong sales performance in other jurisdictions, and/or have indexed well in comparison with other games. Recommendations should be supported by trend and data analysis.
- (2) Game Development Services to include but not be limited to graphic design, game design, artwork, prize structures and play style.

7.2.2 The Texas Lottery works directly with the Lottery Operator vendor in the development of its comprehensive instant ticket game plan. The comprehensive instant ticket game plan will identify all elements of the games to be introduced including the launch date, price point, theme, and print quantity. The instant ticket game plan will be provided to the Successful Proposer and updated as deemed necessary by the Texas Lottery. The Texas Lottery shall make all final decisions regarding the selection and inclusion of instant ticket games in the plan.

7.2.3 At the request of the Texas Lottery, the Successful Proposer may be required to attend marketing planning meetings and commission meetings at the Texas Lottery headquarters.

### 7.3 INDIVIDUAL INSTANT GAME DEVELOPMENT SCHEDULE

For those games within the fiscal year instant ticket Game Plan, it is the expectation of the Texas Lottery that each Successful Proposer designated to produce their games will



prepare draft artwork and prize structures well in advance of the scheduled launch date for each game or each Successful Proposer shall provide draft artwork and prize structure to the Texas Lottery within five (5) Working Days upon request from the Texas Lottery.

- 7.3.1 Upon receiving approval of artwork and prize structure from the Texas Lottery, the Successful Proposer must provide draft working papers to the Texas Lottery within five (5) business days.
- 7.3.2 Upon review of the draft working papers, the Texas Lottery will provide requested changes to the Successful Proposer. The Successful Proposer must provide final working papers to the Texas Lottery within two (2) business days of receipt of the requested changes.
- 7.3.3 The Successful Proposer must deliver tickets to the Texas Lottery's warehouse no later than the delivery date specified in the final executed working papers.
- 7.3.4 Post Executed Changes. Any changes to the final executed working papers must be in writing and approved by the Executive Director or his designee before production of the instant game begins.

For those games that the Texas Lottery determines to add to the fiscal year instant ticket Game Plan, it is the expectation of the Texas Lottery that each Successful Proposer shall provide draft artwork and prize structure to the Texas Lottery within five (5) business days upon request from the Texas Lottery.

- 7.3.5 Upon receiving approval of artwork and prize structure from the Texas Lottery, the Successful Proposer must provide draft working papers to the Texas Lottery within five (5) business days.
- 7.3.6 Upon review of the draft working papers, the Texas Lottery will provide requested changes to the Successful Proposer. The Successful Proposer must provide final working papers to the Texas Lottery within two (2) business days of receipt of the requested changes.
- 7.3.7 The Successful Proposer must deliver tickets to the Texas Lottery's warehouse no later than the delivery date specified in the final executed working papers.
- 7.3.8 Post Executed Changes. Any changes to the final executed working papers must be in writing and approved by the Executive Director or his designee before production of the instant game begins.

## **7.4 CREATIVE GAME DESIGN**

The Successful Proposer shall provide creative game and graphic design of instant games including mechanical artwork and specifications of the game ticket layout consistent with Texas Lottery security requirements and methods.



## **7.5 GRAPHIC CAPABILITIES & DATA TRANSFER**

- 7.5.1 To provide for timely graphic design and approval of artwork, it is necessary for the Successful Proposer to maintain compatibility and efficient communication with the Successful Proposer Texas Lottery. The Successful Proposer shall be required to archive the final artwork for each instant game for the duration of the Contract, including all renewal periods.
- 7.5.2 The Successful Proposer must either use compatible software or provide software to transmit data, to the Texas Lottery's specifications, to exchange artwork files and other files with the Texas Lottery. The cost to acquire or upgrade the application software shall be the responsibility of the Successful Proposer and shall not be included in the Proposal.

## **7.6 ARTWORK**

Upon execution of each game, the Successful Proposer must provide color artwork in electronic format including an unscratched version of the ticket, a scratched version of the ticket revealing a top prize winning combination of play symbols, and the back of the ticket which includes the UPC code, and all other elements specified in the final working papers and/or approved Customer Specifications Document. This artwork must be provided within five (5) days of the execution of the final working papers. Artwork must be provided in an Adobe Illustrator file with all font information converted to outline, and in a Photoshop TIF file.

The Successful Proposer shall provide an image to be used on the Texas Lottery's website to support each instant game produced. The size and format of the image will be indicated in the working papers for each game or in the approved customer specifications documents.

## **7.7 PRODUCTION SCHEDULE REPORT**

The Successful Proposer shall be required to develop and provide to specified TLC staff a weekly report that provides current updates on production schedules for all games, including, at a minimum:

- (a) Game number
- (b) Game name
- (c) Ticket quantity
- (d) Ticket size
- (e) Pack size
- (f) Scheduled press date
- (g) Scheduled ship date
- (h) Scheduled delivery date



- (i) Number of trucks for delivery
- (j) Date of shipment of test packs to the Texas Lottery's testing vendor.

The dates listed on the production schedule report are for planning purposes only. In the event of any conflict or contradiction between or among the dates listed on the production schedule report and the deliverables schedule in the executed working papers, the working papers will control.

## **7.8 WORKING PAPERS**

- 7.8.1 Working papers for each instant game will be generated by the Successful Proposer in a format designated by the Texas Lottery. Executed working papers must be complete and free of any errors. Production of any instant game will not proceed until the Texas Lottery Executive Director or designee gives written authorization. Any changes made after the execution of working papers must be approved through the execution of a post executed change and signed by the Texas Lottery Executive Director or designee. Instant game development schedules will be established by the Texas Lottery and working papers executed in order to facilitate an orderly process for the production and delivery of instant games. The TLC reserves the right to cease production of any executed game that has not been printed yet. The Successful Proposer may invoice the Texas Lottery for actual costs incurred up to the cancellation date; the Texas Lottery agrees to pay such costs up to a maximum of \$4,000 per game.
- 7.8.2 Working papers for each Texas Lottery instant game will at a minimum include, but not be limited to, specifications for the following:
  - (a) Game name, number, date and version.
  - (b) Color version of ticket, covered and uncovered, at 100% and 200%.
  - (c) Back of ticket at 100% and 200%.
  - (d) Ticket size and paper stock to be used.
  - (e) Uniform Product Code (UPC) number, which is unique to each game.
  - (f) Placement of Bar code on uncovered ticket.
  - (g) Front display colors, overprint colors, and security tint colors.
  - (h) Description of play style.
  - (i) Quantity ordered.
  - (j) Orientation of ticket front and back, and press layout configuration.
  - (k) Pack size and configuration.
  - (l) Prize structure including: game name, number, date and version, ticket price point, production quantity, percent of prize payout, net revenue generated, each tier level for prizes and play action indicating how each tier is won, odds per prize level, overall odds of winning any prize in the game and consolidated odds if there is more than one way to win a prize, winners per pack and per pool, prize cost and percent of prize fund dedicated to each prize level, and percent of prize fund dedicated to low, mid and high tier prize levels, designation of low, mid and high tier prizes,



Guaranteed Low-End Prize Structure (GLEPS) for each pack of tickets - broken out into four (4) different GLEPS patterns and number of winners per pack. Prize structure may be required to show a statement that all top prizes and combination of prizes totaling the top prize are guaranteed.

- (m) Ticket layout for front and back imaging.
- (n) Description of validation number, bar code and UPC code.
- (o) Detail of all actual size of legends, play spots, captions, numbers/symbols, and prize spots
- (p) Description of validation media, inventory files and end of production reports. Description should include file characteristics and record layout.
- (q) Programming parameters or constraints as directed by the Texas Lottery.
- (r) Deliverables schedule.
- (s) Order and price confirmation page for sign-off approval by the Texas Lottery.
- (t) Color ink draw downs, including proposed options such as varnish, tints, metallic inks, fluorescent inks, etc.

## **7.9 CUSTOMER SPECIFICATIONS DOCUMENT**

Each game must adhere to the requirements detailed in the Customer Specification document and the executed Working papers. Customer specifications document must be complete and free of any errors.



## **PART 8**

### **INSTANT GAME MANUFACTURING**

#### **8.1 OVERVIEW OF GAME MANUFACTURING METHODS**

Proposers must provide a detailed description of the methods to be employed in the manufacturing of tickets. Each of the major manufacturing steps must be identified and described. The Texas Lottery is committed to ensuring the highest standards of security and integrity are incorporated in its products. Proposers should provide details regarding security procedures and controls.

#### **8.2 MANUFACTURING SPECIFICATIONS**

The Successful Proposer must manufacture individual game tickets that meet the following minimum requirements.

#### **8.3 TICKET STOCK**

- (1) Tickets may be printed on various stocks, including but not limited to: 10 point virgin/recyclable coated two (2) sides and 10 point foil stock coated one (1) side and foil laminate one (1) side. The ticket stock coated two (2) side and foil must not curl, separate, or be easily split.
- (2) All products provided by the Successful Proposer under the Contract must conform to the Texas Lottery's requirements. In addition, if required by the Texas Lottery, the Successful Proposer must produce proof to the Texas Lottery's satisfaction that its ticket stock meets the guidelines specified in this RFP.
- (3) Requirements for ticket stock may vary per game and will be specified by the Texas Lottery in the executed working papers.
- (4) The Texas Lottery, in its sole discretion, reserves the right to modify ticket stock requirements at any time during the Contract with notice to the Successful Proposer. All tickets produced by the Successful Proposer under the Contract must be compatible with the ticket dispensing systems (in-counter, countertop and self-service instant ticket vending machines) as utilized now or in the future by the Texas Lottery.

##### **8.3.1 Point of Sales (POS) Pieces**

Except as otherwise specified by the Texas Lottery, the Successful Proposer shall be required to provide one (1) Point of Sales (POS) piece in a 4" x 4" size which shall be included in each shrink-wrapped pack of tickets. An additional 500 4" x 4" pieces must be delivered two weeks prior to ticket delivery.

- ##### **8.3.2**
- The POS pieces must be printed on front and back according to Texas Lottery specifications as indicated in the working papers for a specific game. The working papers must include sample draft artwork of the POS. Retail Samples (Voids)





At the Texas Lottery's request, the Successful Proposer may be required to supply approximately one thousand (1,000) (depending upon pack size) voided, non-winning ticket samples delivered in full pack quantities of actual size tickets for each game produced with quantities as detailed in the Customer Specification document. Such tickets shall have the word "VOID" printed prominently on the back of the ticket. The word VOID will also replace the ticket number on the front of the ticket. All void samples must be shrink-wrapped in pack sizes equal to those of the actual game. The number of retail (void) samples to be produced is subject to change at the Texas Lottery's sole discretion during the Contract period, based on the use of these samples in the field.

### 8.3.3 Ticket and Pack Sizes

The Successful Proposer shall be required to produce tickets and packs in various sizes. Ticket and pack size (number of tickets per pack) will vary and will be determined by the Texas Lottery on a game-by-game basis and will be specified in the executed working papers. Ticket and pack sizes may be modified at the Texas Lottery's sole discretion and will be specified in the executed working papers.

### 8.3.4 Ticket Orientation

The Texas Lottery will require tickets to be printed in either horizontal or vertical formats.

### 8.3.5 Perforations

Perforations must be placed on the four (4) inch side of the ticket regardless of the vertical or horizontal format.

The perforations between tickets must be deep enough, and must contain adequate space between perforations, to allow retailers and/or self-service vending machines to separate the tickets without damage. However, the perforations must not be so deep as to allow unintentional detachment of the tickets during normal handling or dispensing.

### 8.3.6 Font Generation

All imaged data (computer controlled) or graphic fonts (display printing) produced by the Successful Proposer for Texas Lottery instant games -- whether the data or fonts are standard, customized or licensed -- must be approved by the Texas Lottery. The Successful Proposer shall be required to provide the Texas Lottery with samples of all imaged fonts and symbols that are available for use on tickets. In addition, the Successful Proposer shall be required to create any imaged data or graphic fonts, whether or not provided as samples, as specified in the executed working papers.

### 8.3.7 Imaged Data

The game data will include, but not be limited to the following items: symbols, legends, captions, ticket numbers, pack numbers, validation numbers, and standard bar codes. These must be printed using a computer controlled imaging printer. Imaged data must meet the following requirements:



- (a) printed in black or colored ink approved by the Texas Lottery on the display printing side.
- (b) uniformly positioned and aligned on the tickets, unless otherwise specified in the executed working papers to prevent potential pick-out problems associated with said positioning and alignment.
- (c) the imaged symbols must be printed clearly, easily readable and distinguishable, and the images shall not bleed, be distorted or smeared.
- (d) accompanied by appropriate captions and legends for play and prize symbols to provide redundancy for security reasons, to prevent consumer disputes and/or to preserve alignment between play and prize symbols and their relative position on the ticket. Captions and legends must spell out or abbreviate the play and prize symbols in smaller font size than the actual play and prize symbols, in a different but recognizable format. The captions and legends used in each game must be specified in the executed working papers and agreed to by the Texas Lottery.
- (e) no instant ticket will contain more game data than authorized in the executed working papers.
- (f) all game data must meet Texas Lottery security guidelines as specified in this RFP and as may be required during the Contract with respect to compromise and resistance to alteration.
- (g) the imaged data must not be damaged to a degree where the imaging is made illegible in the course of removing the scratch-off covering, using normal pressure. The protective coating/seal coat must remain intact. In addition, after removal of the scratch-off covering, by application of any commonly-occurring solvent, perspiration, saliva, water, soft drinks, coffee, etc., and then moderate rubbing (a minimum of ten (10) strokes) with a tissue, cotton swab or other soft object, the imaged data must remain readable.
- (h) each and every imaged symbol on the front of the ticket must be completely covered by scratch-off material with the exception of the quality control inspection window on each ticket. Additionally, an exception to this requirement is granted for any game where the imaging is duplicated on the security coating, visible through translucent security coating or any other process so players know where to scratch.
- (i) any and all imaging must meet the requirements as specified in the executed working papers regardless of design, ticket size and press layout.

### 8.3.8 Game Pack Numbers

Each pack of tickets within a game must be identified with a unique consecutive and non-duplicating pack number (except for omissions that occur in production) for use in



controlling ticket distribution, retailer inventory and accounting. Game and pack numbers must appear on the back of the ticket above the bar code image.

#### 8.3.9 Ticket Numbers

Each ticket within a pack must display a unique sequential number and reverse ticket count such that the ticket count left in the pack is to be included as part of the ticket number. For example, numbering will begin on a 250 ticket pack with 001(250), 002(249) . . . 250(001). The ticket numbers must be consecutive and non-duplicating in the pack and no omissions are allowed within the pack. Ticket numbers must appear on the back of the ticket and must follow the game and pack number printed above the bar code.

In addition, a quality control inspection window must be placed on the front of all tickets. This window must contain the three-digit ticket number as printed on the back of the ticket. Proposers must document the procedures used to assure that ticket numbers are consecutive and must not appear more than one time per pack.

#### 8.3.10 Validation Number

A unique “validation” number will be imaged on the front of the ticket. The format of the validation number will be detailed in the Customer Specifications document. This validation number must be covered with a security coating scratch-off material and must meet the requirements of the Texas Lottery. The location of the validation number will be at the approval of the Texas Lottery.

#### 8.3.11 Validation Algorithm

The Successful Proposer must use the low-tier algorithm the Texas Lottery currently has in use, subject to change/revision during the Contract term in the Texas Lottery’s sole discretion. The Texas Lottery’s lottery operator will provide the software code to the Successful Proposer. The Successful Proposer must provide a compatible mid/high-tier algorithm within two days of Contract execution. Otherwise, the Successful Proposer must use the mid/high-tier algorithm provided by the Texas Lottery.

#### 8.3.12 Back of Ticket Bar Codes

Each ticket must contain a bar code imaged on the back of the ticket. The bar code will consist of a game ID, the pack number, validation number and the individual ticket number. The Successful Proposer must place the bar code in a location suitable for reading by the validation equipment used by the Texas Lottery. If any restrictions on placement apply, the Proposer must state such restrictions in its Proposal. The bar code will have a quiet zone at each end. The format of the bar code will be detailed in the Customer Specifications document. The bar code must meet ANSI specifications, achieve a first-time read rate of 95%, achieve a third-time read rate of 99% and be printed to Texas Lottery specifications. The Successful Proposer must be able to support standard bar codes.

#### 8.3.13 PDF 417 Bar codes



The Successful Proposer shall be required to print PDF 417 or other bar codes in the play area for all Texas Lottery instant tickets. The addition of this bar code to the ticket design will be at no additional cost to the Texas Lottery. The bar codes shall comply with the standards agreed to by the Texas Lottery.

#### 8.3.14 Uniform Product Codes (UPC)

UPC bar codes must be printed on the back of all instant tickets as specified in the executed working papers and the Customer Specifications document.

#### 8.3.15 Screened Price Point

The price point of each instant game must be screened on the back of the ticket in no more than a 25% screen of the same ink color as the ticket back.

#### 8.3.16 Security Coating /Scratch-Off Material

The security coating must be opaque and of such quality as to maintain the security of the ticket symbols and validation numbers. (Refer to Section 8.26.1 regarding security expectations.) The border between the scratch-off surface and the uncovered portion of the ticket must be sharp and even, i.e., the scratch-off material may not "drip" onto the display printing. The scratch-off material must be smooth and regular to the touch. The scratch-off material must be readily removable with a reasonable degree of resistance when scratched with commonly used items (scrapers, knives, keys, coins, etc.). After the scratch-off material is removed, significant residue must not be present. Scratch-off material must remain readily removable for a minimum shelf life of thirty-six (36) months under normal warehouse conditions. The scratch-off material must be non-toxic and not irritating to the skin. It must cover the play area and overlay into the display area.

The design of the overprint must be such that virtually all of the scratch-off material is covered by an overprint color (either a "Full" or "Screened Down" intensity). The overprint must extend up to or beyond the edges of the scratch-off onto the paper or foil and must be regular so that the consumer may easily detect any irregularities in the ticket.

Any and all security coating areas must meet the requirements as specified in the executed working papers regardless of design, ticket size and press layout.

#### 8.3.17 Protective Coating/Seal Coat

The game data under the opaque scratch-off material must be covered by a transparent coating in a manner such that the symbols are protected when the consumer rubs off the scratch-off material. If the seal coat is removed, it must exhibit evidence of tampering and be non-repairable.

#### 8.3.18 Display Printing

Display colors on the front of the ticket must be printed using either four-color process or spot colors or both. Spot colors may be specified by the Texas Lottery as PMS (Pantone® Matching System) colors or equivalents. One color must be available for printing on the back of the ticket. The Successful Proposer is required to employ the necessary



production processes in order to produce the game tickets as represented in the executed working papers.

Inks must be of such nature that there is no “offsetting” or picking from the front of tickets to the back of tickets on an adjacent page, and vice versa.

Subject to normal printing trade tolerances and practices, the display printing must be properly registered.

#### 8.3.19 Overprint

The overprint colors must be printed on top of the scratch-off material. The overprint must consist of an artistic design that covers at least the same dimensions as the scratch-off material. The overprint must be well defined, unblurred and sharp in order to highlight any tampering of the ticket.

Inks must be of such nature that there is no "offsetting" or picking from the front of tickets to the back of tickets on an adjacent page, and vice versa.

Subject to normal printing trade tolerances and practices, the scratch-off material and overprint must be properly registered.

#### 8.3.20 Ink Colors

The Successful Proposer must be able to produce a total of up to ten (10) colors projected to be five (5) front display colors, with one (1) display color being a full bleed, one (1) back color, three (3) overprint colors and one (1) ultraviolet ink for benday patterns. When using a four-color process method of printing one design across the display graphics and the overprint area, colors must be consistent from one surface to the other, i.e., the same ink used for display and overprint colors. The printing method (or process) must be approved by the Texas Lottery.

#### 8.3.21 Benday Patterns

The benday patterns used for all games must be printed in a configuration approved by the Texas Lottery. Unless previously authorized by the Texas Lottery, the benday pattern must be printed using the maximum number of patterns used based on the number of tickets across the web and the number of repeats on the press in each game. The use of ultraviolet or fluorescent inks that are visible only under a specialized light source are required to print the benday pattern. Benday patterns must cross every symbol and prize and must be applied in such a manner as to cause detection if an alteration has taken place.

#### 8.3.22 Security Tint or Primer

Each game must include a security tint in the play area on either or both the lily pad or seal coat which provides security against color copying. The design must be such that removal or tampering of the lily pad and/or seal coat will exhibit evidence of tampering. Security tints are required regardless of paper stock or printing process. The color tint used will be determined by the Texas Lottery and specified in the executed working papers. Proposers must submit sample draw downs of all security tint colors available on



specified paper stock at the time of submission of response to this RFP, with a breakdown of the components that make up each color (e.g., white lily pad and yellow security tint).

#### **8.4 OMISSIONS**

- 8.4.1 If any part of a pack fails to meet the quality requirements specified in this RFP, the entire pack must be omitted. Omitted packs must be reflected in the validation and inventory media, and the Successful Proposer shall provide an independently audited report showing the disposition of all omitted tickets. Actual packs omitted must be pulled from the shipping cartons and not delivered to the Texas Lottery. Proposers must provide a detailed overview of the system used to track omitted packs, including, but not limited to, the use of automation, audit tools, etc.
- 8.4.2 The number of omitted packs must not result in a variation unacceptable under Section 8.8 (Prize Guarantees) between the end of production prize structure and the executed working papers prize structure as specified in this RFP.

#### **8.5 SCRATCH-OFF MATERIAL QUALITY**

- 8.5.1 Neither winning tickets nor non-winning tickets shall be recognizable from any characteristic of the ticket other than by the symbols concealed by the scratch-off or other exposing material.
- 8.5.2 To maximize the security and integrity of the game and to maximize consumer confidence in the game, the Texas Lottery deems it essential to minimize the possibility of tampering. Ticket design must be such that tampering or attempts to tamper are evident. Accordingly, visible scratches, holes or pitting in the scratch-off material that expose any portion of the underlying ticket stock (whether or not any portion of the imaged symbols are exposed) may be cause for the Texas Lottery's rejection of or games produced by the Successful Proposer.
- 8.5.3 The Successful Proposer must make a continuous and best effort to ensure that the risk of ticket or game compromise is minimized.

#### **8.6 RANDOMIZATION**

- 8.6.1 The odds of winning any prize of any level on a given ticket must not vary from the odds of winning that prize as stated in the final approved prize structure by reason of deficiencies of randomization including, without limitation, by virtue of the ticket's location in its strip, pack, lot, shipping box, or pool; or by virtue of the contents (whether exposed or covered with scratch-off material) of any other ticket in the same or neighboring strip (page), shipping box, or pool.
- 8.6.2 High-tier winners must be randomly distributed within the pools of tickets or the game as a whole as specified by the Texas Lottery in the executed working papers. The size of said pools must be agreed to by the Texas Lottery and the Successful Proposer.



- 8.6.3 The Successful Proposer must be able to limit the number of consecutive non-winning tickets in a pack. The maximum number of consecutive non-winning tickets within a pack will be specified in the executed working papers by the Texas Lottery.
- 8.6.4 The Texas Lottery reserves the right to inspect the methodology and implementation of such randomization on its own or with the aid of an independent consultant at any time. In accordance with the Texas Public Information Act, any information gathered throughout this process will be held in confidence by the Texas Lottery and/or its representative.

## **8.7 GUARANTEED LOW END PRIZE STRUCTURE (GLEPS)**

Each pack of tickets must contain a guaranteed dollar value of low-tier prizes as specified by the Texas Lottery in the executed working papers. Four (4) different configurations of low-tier prizes must be equally and randomly incorporated in each pool and throughout all pools in the game. The different ways to win a low-tier prize within a GLEPS configuration will be randomly placed within a pack of tickets. Each configuration must have the same total dollar value of low-tier winners, but each will have varying numbers of winners of various denominations. Low-tier is currently defined as a prize value of \$24.99 or less. For higher price point games that do not contain low-tier or adequate low-tier prizes, a comparable structure for lower value prizes will be required as specified by the Texas Lottery in the executed working papers and/or the Customer Specifications Document. The low-tier values will be defined in the Customer Specifications document and working papers.

## **8.8 PRIZE GUARANTEES**

The Successful Proposer shall be required to submit a standard audit letter by a certified public accounting firm relating to game production within two (2) weeks of delivery of each game. The Successful Proposer must guarantee the following:

- (1) Winning tickets are distributed with no discernible pattern throughout the entire population.
- (2) Ticket quantities will be guaranteed within  $\pm 2\%$  from the quantity stated in the executed working papers, and all prize levels will be guaranteed within  $\pm 2\%$  of the percentage of prize fund within the final executed prize structure from the executed working papers proportionate to actual quantity shipped. Overall prize payout will be within  $\pm .005$  (1/2 percent).
- (3) Overall odds of the game should not vary more than  $\pm .0005$  (1/20 percent) from the final executed prize structure from the executed working papers.
- (4) Top or other tier-level prizes that are specified in the executed working papers as a guaranteed quantity, will be verified and guaranteed in the end of production prize structure for the game produced.



## 8.9 SECURITY SPECIFICATIONS

- 8.9.1 It is intended that all sections of this RFP have implied the essential need for security, though such may not be explicitly stated. The Proposal must make clear and specify the precautions, safeguards, inspections, reporting and other measures that will attend the entire program and its parts.
- 8.9.2 The Proposer must demonstrate the capability and integrity required to maintain constant vigilance against any breach of security. Failure to meet or to maintain security standards acceptable to the Texas Lottery may be grounds for Contract cancellation.
- 8.9.3 Together with its Proposal, each Proposer must submit one thousand (1000) constructed samples of instant lottery tickets: five hundred (500) on coated two-side paper stock and five hundred (500) samples on foil stock. Each Proposer must provide sample tickets that represent each printing process currently in use (e.g., flexographic, gravure, offset or combination printing). These samples must have all required bar codes on the ticket. The tickets submitted will be used for further security testing by the Texas Lottery, should it so desire, and for examination of the appearance and overall quality of the construction of the proposed ticket. Conforming lottery tickets or similar tickets produced for other lotteries will be acceptable. No samples will be accepted other than those produced by the proposed manufacturing process.

Notwithstanding anything herein to the contrary, acceptance of sample tickets as part of a Proposal does not limit or restrict the Texas Lottery's authority to test tickets manufactured and submitted by the Successful Proposer under any Contract resulting from this RFP. Acceptance of sample tickets as part of a Proposal shall not be deemed approval of tickets manufactured under any Contract resulting from this RFP.

## 8.10 TEST GAME SAMPLES

- 8.10.1 Prior to approval of the first game, the Successful Proposer must provide, at no additional cost to the Texas Lottery, a test game that includes the high-tier algorithm, inventory, high- and low-tier validation media and sample tickets of high-, mid-, low-tier and non-winning tickets to verify compatibility and functionality of information and systems. The Successful Proposer must submit a minimum of four (4) packs to the Texas Lottery's independent ticket testing laboratory or the Texas Lottery upon request. The remaining instant ticket inventory will be shipped to the Texas Lottery's instant ticket warehouse. The test game must be approved by the Texas Lottery prior to production of the first game under the Contract. The test game must be delivered to the Texas Lottery no later than six (6) weeks from the date of execution of the Contract resulting from this RFP.
- 8.10.2 If at any time the Texas Lottery decides to change ticket, bar code or validation media formats, it shall be the responsibility of the Successful Proposer to provide additional test games at no additional cost to the Texas Lottery.





### **8.11 TICKET RECONSTRUCTION**

Upon request of the Texas Lottery, the Successful Proposer must provide only to authorized Texas Lottery security personnel a report reconstructing the play data of any ticket. The reconstruction may be accomplished by using either the game, pack and ticket numbers, validation number or bar code or portions or combinations of those items. The reconstruction report must be submitted by electronic transfer or, upon request, by fax and must contain the following information:

- (1) The complete game number, pack number, ticket and validation number;
- (2) An indication of whether the ticket was a winning or non-winning ticket; and
- (3) In the case of a winning ticket, the prize amount.

Upon request, the Successful Proposer must be able to provide a representation of the play area as it would have appeared on the actual ticket. This image can be electronically transferred via a secure transfer protocol approved by the Texas Lottery. The Successful Proposer must maintain an audit log of each ticket reconstructed that will provide the requestor, game/ticket information, date requested, date of reply, non-winning or winning ticket, amount of prize and person responding.

A monthly reconciliation report listing all reconstructions requested by the Texas Lottery shall be provided to the Texas Lottery Security Manager no later than the 10th of the following month.

### **8.12 EMPLOYEE SECURITY**

The Successful Proposer must prevent its employees involved in game production and TLC retailers involved in the sale of instant lottery tickets from ascertaining or learning the location of winning tickets, and at the Texas Lottery's request, the Successful Proposer shall provide its employee security procedures.

### **8.13 SECURITY BREACH**

Upon discovery of any breach of security, especially theft or disappearance of any paper stock, tickets, waste, printing plates, imaged media, program files or the like, the Successful Proposer must immediately notify by telephone the Texas Lottery Security Manager and the TLC designated contacts in the Customer Specifications document. The Successful Proposer must promptly follow up with written notification to the Texas Lottery detailing the specifics of the occurrence and what steps have been taken by the Successful Proposer to correct the problem. If a breach of security occurs, the Successful Proposer must provide to the assigned Texas Lottery Enforcement investigator any and all information and documentation requested during the investigation of the breach. The Texas Lottery will be the sole judge of the adequacy of the steps taken and reserves the right to specify other steps to be taken.



## **8.14 PRODUCTION AND TRANSFER OF GAME PRODUCTION DATA**

In the event that the game tickets are produced at a location different than the production media, the Texas Lottery requires secure transfer of the game production data. Any production media data that is transported via telecommunications must be encrypted and transferred using a method approved by the Texas Lottery.

## **8.15 PLANT AND SYSTEM SECURITY**

8.15.1 The Successful Proposer must understand the overriding importance of security in all phases of design, material procurement, production, transportation, storage, validation and disposition of game tickets.

8.15.2 The Successful Proposer and each Subcontractor, at minimum, must provide the following security measures for each area where game tickets and waste are produced or stored:

- (1) Adequate security procedures to prevent unauthorized entry to computer areas, ticket production and storage area(s) through window and door entry points. Locking and alarm devices must secure each critical computer production and storage area (including computer media) through all possible entry points. The Texas Lottery Enforcement Director or designated representative must approve the Successful Proposer's and, if applicable, any Subcontractor's plant security prior to first production under any Contract resulting from this RFP and reserves the right to request changes in plant and system security procedures at any time during the Contract term. The Successful Proposer and its Subcontractors must implement all TLC-requested modifications prior to production taking place.
- (2) A visitors' log for all facilities where Texas Lottery instant tickets are manufactured or stored. A log of the destination and disposition of Texas Lottery imaged material, and omitted tickets by shredding, burning, or dissolving at the Successful Proposer's facility. Such material must not leave the Successful Proposer's facility until it has been processed and is no longer identifiable as Texas Lottery material. The Successful Proposer must use an auditable record system to account for all ticket stock and materials destroyed.
- (3) Access to the area where lottery tickets are produced or stored must be approved by the Texas Lottery. A system of identification of such individuals (such as badges, cards, etc.) is required. If the area is part of a larger plant, it must be possible to limit this access and to secure the area outside normal work hours.

8.15.3 Unless specifically authorized to be kept for a specific period of time by the Texas Lottery, all production computer generated media must be degaussed at the completion of production of the game(s) for which they were used. Computer generated media not scheduled for erasure at the end of the production run must be kept in a secure manner as specified by the Texas Lottery.

8.15.4 The Successful Proposer must provide a data security plan approved by the Texas Lottery Security Manager and the Texas Lottery Business Continuity and Information Security Administrator detailing the security, during development and production, of all



computer generated media, software, systems, and any other information designated by the Texas Lottery. This is to include any encryption and decryption. Any and all changes to the data security plan must be pre-approved by the Texas Lottery Security Manager and the Texas Lottery Business Continuity and Information Security Administrator.

## **8.16 PRE-PRODUCTION CERTIFICATION AND COLOR PROOF APPROVAL**

- 8.16.1 The Texas Lottery incorporates the highest standards of security and integrity and reserves the right to inspect all tickets produced under any Contract to ensure compliance with the RFP specifications.
- 8.16.2 The Successful Proposer(s) shall certify the accuracy of the game prize structure, and that all Texas Lottery requirements including any parameters and/or constraints have been met, via email to specified Texas Lottery staff, prior to game production.
- 8.16.3 Upon written request by the Texas Lottery Operations Director, the Successful Proposer shall furnish all of the actual game computer and related program reports to the Texas Lottery prior to production.
- 8.16.4 Upon written request by the Texas Lottery Operations Director, the Successful Proposer also must provide, for each game, an image of the computer-generated printout from the test pools illustrating each of the four (4) GLEP patterns and the reconstruction reports of these packs. Also upon request, the Successful Proposer shall also provide all information pertinent to the test pools, including any summary reports.
- 8.16.5 The Successful Proposer shall provide to the Texas Lottery Instant Product Coordinator a color proof of the ticket image for each game for approval.
- 8.16.6 The Successful Proposer shall not produce any game until the Texas Lottery receives the preproduction certification email, approves the ticket color proof, and authorizes game production.

## **8.17 PRODUCTION AUDIT**

The Successful Proposer, at its expense, shall engage a qualified and independent certified public accountant to review the procedures and controls employed by the Successful Proposer for each game. The certified public accountant shall render a letter to the Texas Lottery stating the results of the audit performed on the Successful Proposer's production procedures and controls. The procedures for these audits are as follows:

- (1) randomly select two (2) pools prepared for printing;
- (2) review the audit program reports for the two pools selected for agreed conformity of such results with the game specifications and prize structure in the final executed working papers, noting any and all exceptions;
- (3) review test data and the audit error report to determine whether the audit program detected errors corresponding to the programming parameters and game specifications, noting any and all exceptions;



- (4) compare the recorded date and time stamp of the audit program used in the performance of the above reports, including updates, to the date and time stamp of the audit program used in the production of the game tickets, noting any and all exceptions;
- (5) review print image data for each possible character image used and determine whether the correct character is set to print, noting any and all exceptions;
- (6) review End of Production Prize Structure and agreed high tier seeded prizes with the prize structure in the final executed working papers, noting any and all exceptions.

The Successful Proposer shall provide the following documentation to the Texas Lottery Products Manager prior to the arrival of a printed game at the Texas Lottery warehouse facility:

- i. Letter from the certified public accountant stating results of the audit performed.
- ii. Final working papers for the game being audited.

#### **8.18 SECURITY TESTING SAMPLE PACKS**

Upon completion of a press run, the Successful Proposer must place a minimum number of packs to achieve a total ticket quantity of 150 live tickets per game in omit status and ship via overnight delivery to the Texas Lottery's independent laboratory testing facility and/or directly to the Texas Lottery. Tickets will be tested in accordance with Section 8.26. These packs must not be drilled, stamped or rubbed. Additionally, the Successful Proposer must provide a minimum number of representative packs to reflect samples of the beginning, middle and end of the press run for the game. The Successful Proposer shall be responsible for its own test costs associated with testing not required by the Texas Lottery.

#### **8.19 END OF PRODUCTION PRIZE STRUCTURE**

Prior to the arrival of a printed game at the Texas Lottery warehouse facility, the Successful Proposer must submit an end of production prize structure report for the game. This report is a listing of the summary of the prize value in the game by prize level. The end of production prize structure report must be e-mailed as specified by the Texas Lottery with the low and mid/high tier electronic validation files, and all must be received by the Texas Lottery prior to actual delivery of tickets to the warehouse. The Texas Lottery will review the Successful Proposer's end of game prize structure for each game and if any errors are detected, the Successful Proposer must correct the errors as soon as identified. However, in no event shall the deadline for instant ticket delivery specified in the executed working papers be extended. Should the End of Production variance cause the odds or other statements on the printed tickets to be incorrect, the Texas Lottery may determine the game to be non-conforming and, in accordance with Section 3.54.15, withhold any amounts due to the Successful Proposer under the Contract.



## **8.20 PACKAGING**

Packaging specifications will be detailed in the Customer Specifications document. No breaks in packs will be permitted. The number of tickets per pack in a game must be specified in the executed working papers. Partial, broken, miscut or incomplete packs are not acceptable. In addition, the tickets within each pack must be in the numerical sequence prescribed by the Texas Lottery (e.g., 001 to 250; 001 to 125).

## **8.21 SHRINK WRAPPING**

All packs produced must be individually shrink-wrapped in pack sizes determined by the Texas Lottery on a game-by-game basis. Subject to normal printing trade tolerances and practices, the packs of tickets must be properly trimmed and slit. The Texas Lottery requires all ticket packs be wrapped in a manner such that the sealing seam of the pack does not obscure the bar code when packs are scanned. Individual shrink-wrapped packs must be able to withstand normal handling during distribution. Shrink-wrapped packs shall not contain more than a minimal amount of security coating, foil or paper residue or other material that falls out upon opening. Shrink-wrapping must remain intact through the shelf life of the game and packs must be assembled in a uniform manner.

## **8.22 SHIPPING CARTONS**

- 8.22.1 Carton sizes will vary dependent upon ticket sizes as specified in the executed Customer Specifications document. Shipping carton sizes must be pre-approved by the Texas Lottery.
- 8.22.2 Cartons must be consecutively numbered and labeled with a computer-produced label showing game name, game number, shipping carton number, range of pack numbers, omissions (if any) and a bar code showing the game number and beginning and ending pack numbers for the carton. Labels should be color coded by game or an additional color-coded sticker should be placed on the box. The sticker should not obscure the shipping label. There will be "Full Packing" in each shipping carton. If, during the balancing process, a carton contains less than the required number of packs per carton for that game, the omitted pack(s) should be replaced by a cardboard filler. "Full Packing" may vary dependent upon ticket sizes.
- 8.22.3 The Successful Proposer shall be required to pack each carton so that the lowest numbered pack of tickets is visible when the carton is opened from the top. The lowest pack number must be in the front left corner and the highest pack number must be in the right back. Packing tape should not obscure the shipping label. Shipping cartons must be numbered starting with 00001. Shipping cartons are to be 275-lb. test.

## **8.23 PALLETS**

- 8.23.1 Currently, for a 4" x 2.4" ticket, the pallet contains 56-60 cartons. Cartons must be packed with the lowest carton number on the top layer of the pallet, highest carton number on the bottom layer of the pallet. The pallet size must be 48" x 40" and provide four-way entry with bottom boards and center brace to allow a forklift to enter 40" sides.



Pallets loaded with tickets must be able to be transported, moved and double stacked without damage to pallets or product. The four corners of the pallet must be stabilized by cardboard brackets, or similar means, running the height of the pallet. Cartons must be tightly stretch-wrapped and secured to the pallet so not to topple in transit. Carton labels must face outward and must be color-coded by game. The label must be placed on narrow side of carton (packs of tickets inside carton will face label). Pallets must contain bar-coded labels indicating game name, game number, pallet number, range of carton numbers and pack numbers on the pallet. The bar codes must show the game number and the beginning and ending pack number for the pallet. Pallet labels must also be color-coded to match the same color as the carton label. Omits must be legibly written on the pallet label when applicable. Labels must be placed on both 40" sides. Other pallet sizes and configurations may vary dependent upon ticket sizes and must be specified in the executed working papers for each game. The use of pallets other than 48" x 40" must be pre-approved by the Texas Lottery.

- 8.23.2 Pallets of finished tickets must be loaded with the lowest numbered pallet in the "nose" of the trailer and the highest numbered pallet at the rear of the trailer. Texas Lottery Commission-required shipping documentation must be placed on the highest numbered pallet at the rear of each trailer. Shipping documentation must be placed in a sealed envelope and labeled "Texas Lottery Commission Shipment Report". The format of each report must be pre-approved by the Texas Lottery.

## **8.24 DELIVERY OF TICKETS TO LOTTERY WAREHOUSE(S)**

- 8.24.1 After production when the game is ready to be shipped to the Texas Lottery Commission, the Successful Proposer must e-mail a "Shipment Departure Notification" to the TLC contacts identified in the executed working papers and/or Customer Specifications Document. The "Shipment Departure Notification" must include, at a minimum, the following: date, Successful Proposer name, shipment date and time, expected delivery date and time, game number and name, transportation carrier, trailer number, all seal numbers per trailer, total pallets per trailer, total number of trailers and total number of pallets. The Successful Proposer must provide a primary and secondary contact with name, title, e-mail address and phone number.
- 8.24.2 All ticket shipments must represent the whole game per the executed working papers. Split shipments of game and validation media will not be accepted. Deliveries of packaged tickets are to be F.O.B. the Texas Lottery Commission instant ticket distribution warehouse, Austin, Texas, or such other location(s) in Texas as designated by the Texas Lottery Commission. The Successful Proposer must make continuous and uninterrupted delivery of instant game tickets, without storage. All instant game tickets must be transported on a sealed and dedicated vehicle, i.e., no other customer's products may be on board. The seal requirements must be approved by the Texas Lottery Commission. The seal must be broken only by an authorized representative of the Texas Lottery; failure to adhere to this requirement may be grounds for rejection of the entire shipment. Each game shipment must include retail void samples. Each trailer delivered must have Texas Lottery Commission shipping documentation on the last pallet loaded



on the trailer. The shipping documentation shall consist of two reports: 1) Texas Lottery Commission Shipment Summary Report and 2) Texas Lottery Commission Shipment Detail Report. The Texas Lottery Commission Shipment Summary Report shall include game number and name, date shipped, number of tickets per pack, number of packs per carton, number of tickets per carton, number of pallets per trailer, number of cartons per pallet. The Texas Lottery Commission Shipment Detail Report shall include game number and name, date shipped, pallet number, starting carton number per pallet, ending carton number per pallet, number of packs on pallet, starting pack number per pallet, ending pack number per pallet and total tickets per pallet. At the end of the Texas Lottery Commission Shipment Detail Report, the Successful Proposer must include the total number of packs and the total number of tickets in the shipment.

- 8.24.3 The Successful Proposer must immediately notify, by e-mail and telephone, the Instant Product Coordinator and the Products Manager of the Texas Lottery of any changes to scheduled delivery dates of instant game tickets. All changes in scheduled delivery dates must be in writing and pre-approved by the Texas Lottery.

## **8.25 INSTANT TICKET TESTING**

The Texas Lottery contracts with an independent laboratory to test all instant games for compliance with quality, security and durability standards set by the Texas Lottery. In the event an instant game fails testing and is not accepted by the Texas Lottery, all testing costs for any new production run of the same game will be at the Successful Proposer's expense, and the Successful Proposer shall reimburse the Texas Lottery for all test expenses.

## **8.26 TESTING PROTOCOLS**

Instant tickets are subjected to an array of tests to ensure their security, integrity, and "playability." Tickets are tested for consistency from ticket to ticket and from pack to pack within each game. The Texas Lottery tests all games and reserves the right to require additional tests on any instant ticket game. The Texas Lottery conducts a series of tests that fall into the categories detailed below.

The Texas Lottery will regularly review the tests and at any time may consider the addition or elimination of one or more tests based on necessity, and/or benefits or effectiveness of substituted methods. Subsequent tests may be developed based upon newly acquired industry information or advancements in ticket technology.

Instant tickets may be subject to additional tests after initial release as deemed necessary by the Texas Lottery.

Upon Contract Award the Texas Lottery will provide to the Successful Proposer a copy of the instant ticket testing procedures.

### **8.26.1 Guidelines for Instant Ticket Testing**

Tickets are tested to determine if they meet the following criteria:



Quality: The construction of the ticket must meet the specifications stated in the working papers and/or Customer Specifications Document for bar codes and benday patterns. In addition, quality tests will establish whether the ticket is playable before release for sale.

Durability: The construction of the ticket is reasonably sufficient to endure environmental rigors and still be readily marketable.

Compromiseability: The construction of the ticket is sufficient and secure enough to withstand attempts, using methods and materials generally available to the public, to determine if the ticket is a winning or non-winning ticket without evidence of tampering.

Alterability: The construction of the ticket is sufficient and secure enough to withstand attempts, using methods and materials generally available to the public, to alter or copy the play data, prize amounts, or bar code that would change a non-winning ticket into a redeemable winning ticket and/or increase the prize amount on a winning ticket.

8.26.2 A summary of the current tests is identified below:

(1) Security Coating Scratch Test:

Purpose is to determine the amount of force needed to remove the scratch-off security coating.

(2) Bar code Measurements

Purpose is to determine that quality of the bar codes is sufficiently compatible with the electronic equipment that reads them.

(3) Washing Test:

Purpose is to determine the durability when exposed to conditions simulating “accidental” machine washing.

(4) Environmental Exposure Tests:

Purpose is to determine susceptibility to compromise when exposed to intense light, heat, humidity, water, and steam.

(5) Chemical Exposure Tests:

Purpose is to determine susceptibility to compromise when exposed to commonly available chemicals and chemical fumes.

(6) Electrostatic/Magnetic Tests:

Purpose is to determine susceptibility to compromise after electrical charging or exposure to magnetic sources.





(7) Mechanical Lift Tests:

Purpose is to determine the security coating's susceptibility to compromise by lifting it and replacing it onto the ticket.

(8) Delamination Test:

Purpose is to determine susceptibility to compromise by separating the card stock.

(9) Ultraviolet Test:

Purpose is to evaluate the ultraviolet security features that may or may not be present on the ticket.

(10) Alteration Tests:

Purpose is to determine susceptibility to compromise by alteration attempts such as cut and paste, hand alterations, color copy reproduction and computer counterfeiting.

(11) Transparentizing Tests:

Purpose is to determine susceptibility to compromise when exposed to alternate light sources, microscopes, magnification and computer equipment.

## **8.27 NON-CONFORMING TICKETS**

8.27.1 If the result of any test or inspection establishes that any ticket(s), pack(s) or the entire game fails to meet the requirements specified in this RFP, the ticket(s), pack(s) or the entire game may be deemed non-conforming by the Texas Lottery and, in accordance with Section 3.54.15, the Texas Lottery may withhold any amounts due to the Successful Proposer under the Contract.

8.27.2 If the Successful Proposer makes the recommendation to pull selected packs of nonconforming tickets and the Texas Lottery agrees, the Texas Lottery may assess sanctions for these packs, pursuant to section 3.54.15 of this RFP.

## **8.28 COMPUTER SYSTEM COMPATIBILITY**

The Successful Proposer must maintain compatibility with the Texas Lottery's and the Lottery Operator's computer systems. Detailed programming specifications, including but not limited to production and validation, will be developed in joint meetings between the Successful Proposer and the Texas Lottery. Programming specifications will be approved by the Texas Lottery before any systems work or programming begins.

## **8.29 HIGH-TIER WINNER VALIDATION MEDIA**

Tickets must be manufactured in such a manner that there is no record of any kind, in the validation media, that connects the location of high tier winning tickets in the game with the exposed pack number on the ticket.



### **8.30 ELECTRONIC DATA TRANSFER PROCESS**

The validation files must be transferred using an electronic data transfer process as defined by the Texas Lottery. The Successful Proposer will be provided with the procedures for this electronic data transfer process.

#### **8.30.1 CD Requirements:**

The Texas Lottery may request the Successful Proposer provide original validation CD(s) in a sealed container meeting all the requirements in this RFP. The numbers of all single use seals applied must be recorded. The seal information must be faxed to the Texas Lottery Operations Security Manager. The seal number must be verified by telephone, fax and e-mail. All CD's must be delivered as soon as possible by approved courier. All validation media (high/mid and low tier), inventory and balancing reports must be provided on CD.

### **8.31 BACK-UP CAPABILITIES**

The Successful Proposer must have internal and external backup capability that exists for all phases of ticket manufacturing which must ensure delivery of game tickets by the dates specified in the executed working papers.

### **8.32 SPECIFIED OPTIONS**

8.32.1 As a specified option, the Successful Proposer must be able to provide the following ticket manufacturing options:

- (1) Reduction for colors less than ten (10)
- (2) Fluorescent inks (other than required fluorescent benday)
- (3) Metallic inks
- (4) Dual color game data imaging - Proposer must specify colors available.
- (5) Multiple scenes or continuous scene game
- (6) Color pulsing/color changes within a press run
- (7) Full ultraviolet coating
- (8) Marking process other than full opaque security coating covering
- (9) Cylinder or plate changes before and during production
- (10) Multiple games across the web
- (11) Hourly rate for programming test games for software changes
- (12) Holographic Paper Stock
- (13) Foil Paper Stock

#### **8.32.2 Second Chance Drawings**



(1) Mail-In Promotional Second Chance Drawings.

The Texas Lottery may use promotional second chance drawings. The Successful Proposer must provide a drawing location (subject to Texas Lottery approval) in Texas where mail-in entries will be received and stored and drawings conducted. The drawing location must be accessible to the general public for viewing of each drawing. Additionally, the Successful Proposer shall provide sufficient space for Texas Lottery verification equipment to be installed by the Texas Lottery and used during these drawings. The Successful Proposer shall allow the Texas Lottery (and its authorized designees) access to the equipment for software updates and maintenance. The Texas Lottery will arrange for connection of the equipment at no cost to the Successful Proposer. The Successful Proposer shall be required to transport second chance drawing equipment to the drawing location and is permitted to invoice the Texas Lottery for the actual cost of freight and insurance with no mark-up. The Successful Proposer shall provide at no additional cost to the Texas Lottery an independent Certified Public Accountant selected by the Successful Proposer to observe and certify each drawing. The Successful Proposer must also provide a web page(s) that outlines the features of the game being promoted, includes the promotional second chance drawing rules and regulations using the U.S. Mail and shows available prizes and other features deemed necessary for the promotion and marketing of the specific game, information on claiming prizes and links to related information (e.g., TLC web site information sheet, PDF and HTML versions of full How-To-Play brochure, etc.).

(2) Promotional Internet Entry Second Chance Drawings.

The Texas Lottery may use internet entry promotional second chance drawings. The Successful Proposer shall conduct drawings at Texas Lottery Headquarters, or another location in Texas, as specified by the Texas Lottery in its sole discretion. The Successful Proposer shall provide and utilize an automated drawing solution/Random Number Generator (RNG) to select winning entries for these drawings. The Successful Proposer shall provide written certification from an independent third party, approved by the Texas Lottery, that the drawing solution/RNG has been tested and certified. The Successful Proposer thereafter shall have the drawing solution/RNG tested and recertified each time updates, if any, are made. Prior to the date of the first internet entry second chance drawing, the Successful Proposer shall ensure that two drawing solution/RNGs are delivered to the Texas Lottery. The Texas Lottery shall store such drawing solutions/RNGs in a secure room provided by the Texas Lottery and shall provide the Successful Proposer's drawing personnel with access to a drawing solution/RNG upon their arrival to conduct each drawing. The Texas Lottery shall return the drawing solution/RNG to the designated secure room for storage between drawings. The Successful Proposer shall provide, at no additional cost to the Texas Lottery, an independent certified public accountant



selected by the Successful Proposer to observe and certify each internet entry second chance drawing. On the day of each internet entry second chance drawing and under the observation of the independent certified public accountant, the Texas Lottery shall provide the Successful Proposer with a secure internet connection to enable the Successful Proposer to transfer and verify the drawing entry records for the drawing. After the drawing entry records have been transferred via a secure internet connection and verified by the Successful Proposer, the Successful Proposer shall securely transfer the drawing entry records file to the drawing solution/RNG being used for the drawing. In the event that the foregoing method of transferring drawing entry records becomes impracticable (e.g., the electronic file containing the entry records becomes too large to fully download the day of a particular drawing), the parties agree to collaboratively consult on alternative methods for the transfer of drawing entry records.

The Successful Proposer a) shall develop, maintain and host web pages for internet second chance entries; b) shall provide customized database management systems including player account management and entry management; c) shall provide real-time entry validation; d) shall provide files of drawing entry records for the Successful Proposer to conduct promotional second chance drawings as approved by Texas Lottery security; and e) if requested by the Texas Lottery, shall provide geo-location services for in-state address verification of all entries submitted. The Successful Proposer must securely store all electronic internet entries for each drawing and securely transfer the appropriate drawing entry records for the appropriate drawings according to agreed upon entry deadlines and drawing schedules.

The Successful Proposer may also be required to provide a web page(s) that outlines the features of each game that offers internet entry promotional second chance drawings. The web page will include the drawing rules and regulations and show available prizes and other features for the specific game, including information on claiming prizes and links to related information (e.g., TLC web site information sheet, PDF and HTML versions of full How-To-Play brochure, etc.).

- 8.32.3 Bar Coded Coupons. To accomplish marketing or product objectives, the Texas Lottery may utilize direct mail coupons, electronic coupons or other coupon types such as hand-out coupons. Each coupon must have a unique bar code that meets the validation specifications outlined in this RFP. For direct mail pieces, the Texas Lottery or designee will supply the mailing address data to be printed on these direct mail pieces to the Successful Proposer.
- 8.32.4 The Texas Lottery may use branded, proprietary or licensed games as part of its game portfolio. The Successful Proposer shall be required to provide, in writing, to the Texas Lottery the fee for each new game within thirty (30) days of acquiring that brand, license or proprietary process. The Texas Lottery may require the Successful Proposer provide prize fulfillment services for games manufactured by the Successful Proposer in



accordance with the executed working papers. Proposers should detail their capabilities in providing such services and submit samples with the proposal.

### **8.33 INVITED OPTIONS**

As an invited option, Proposers may offer the following instant ticket manufacturing options:

- (1) Die cut tickets
- (2) Additional inserts in each pack of tickets
- (3) Pouch Tickets
- (4) Holograms
- (5) Continuous image four color process– unbroken graphic image covers entire ticket including rub-off area.
- (6) Four-color process printing on ticket back
- (7) Stub tickets with horizontal or vertical perforations with or without imaging
- (8) Scored tickets
- (9) Scented tickets
- (10) Break-open tickets with perforated window
- (11) Thermal ink imaging.

### **8.34 OFFERED OPTIONS**

Recognizing that the lottery industry is dynamic and that technology will change, the Texas Lottery will, on a continuing basis, evaluate the most cost effective, reliable, market oriented and secure operations. The Texas Lottery does not intend to limit the creativity of the Successful Proposer from bringing forward new products or product enhancements not described in the RFP. Proposers are encouraged to describe offered options for other types of ticket manufacturing technology and specialized games.



**ATTACHMENT A  
PROPOSER'S COMMITMENT**

I hereby commit \_\_\_\_\_

(Company Name)

to provide the goods and services described in the attached Proposal for Instant Ticket Manufacturing and Services required by the Request for Proposals for the Texas Lottery Commission.

Signature: \_\_\_\_\_

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

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



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**ATTACHMENT B  
FINANCIAL COMMITMENT AND RESPONSIBILITY**

This financial commitment and responsibility statement is to be completed by the parent corporation's chief financial officer.

\_\_\_\_\_ is a fully-owned subsidiary of  
(Subject)

\_\_\_\_\_ and that as such \_\_\_\_\_  
(Parent) (Parent)

is fully responsible for any and all financial obligations of  
\_\_\_\_\_.  
(Subject)

Signature: \_\_\_\_\_

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

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



**ATTACHMENT C  
HUB SUBCONTRACTING PLAN**





# HUB SUBCONTRACTING PLAN (HSP)

In accordance with Texas Gov't Code §2161.252, the contracting agency has determined that subcontracting opportunities are probable under this contract. Therefore, all respondents, including State of Texas certified Historically Underutilized Businesses (HUBs) must complete and submit this State of Texas HUB Subcontracting Plan (HSP) with their response to the bid requisition (solicitation).

**NOTE: Responses that do not include a completed HSP shall be rejected pursuant to Texas Gov't Code §2161.252(b).**

The HUB Program promotes equal business opportunities for economically disadvantaged persons to contract with the State of Texas in accordance with the goals specified in the 2009 State of Texas Disparity Study. The statewide HUB goals defined in 34 Texas Administrative Code (TAC) §20.13 are:

- **11.2 percent for heavy construction other than building contracts,**
- **21.1 percent for all building construction, including general contractors and operative builders contracts,**
- **32.7 percent for all special trade construction contracts,**
- **23.6 percent for professional services contracts,**
- **24.6 percent for all other services contracts, and**
- **21 percent for commodities contracts.**

**-- Agency Special Instructions/Additional Requirements --**

In accordance with 34 TAC §20.14(d)(1)(D)(iii), a respondent (prime contractor) may demonstrate good faith effort to utilize Texas certified HUBs for its subcontracting opportunities if the total value of the respondent's subcontracts with Texas certified HUBs meets or exceeds the statewide HUB goal or the agency specific HUB goal, whichever is higher. When a respondent uses this method to demonstrate good faith effort, the respondent must identify the HUBs with which it will subcontract. If using existing contracts with Texas certified HUBs to satisfy this requirement, only contracts that have been in place for five years or less shall qualify for meeting the HUB goal. This limitation is designed to encourage vendor rotation as recommended by the 2009 Texas Disparity Study.

The goods and/or services requested in this RFP are classified in the category of other services contracts.

The goal for this Contract is 24.6%

**SECTION 1 RESPONDENT AND REQUISITION INFORMATION**

a. Respondent (Company) Name: \_\_\_\_\_ State of Texas VID #: \_\_\_\_\_  
 Point of Contact: \_\_\_\_\_ Phone #: \_\_\_\_\_  
 E-mail Address: \_\_\_\_\_ Fax #: \_\_\_\_\_

b. Is your company a State of Texas certified HUB?  - Yes  - No

c. Requisition #: \_\_\_\_\_ Bid Open Date: \_\_\_\_/\_\_\_\_/\_\_\_\_  
(mm/dd/yyyy)

# ATTACHMENT C

Enter your company's name here: \_\_\_\_\_

Requisition #: \_\_\_\_\_

## SECTION 2 SUBCONTRACTING INTENTIONS

After dividing the contract work into reasonable lots or portions to the extent consistent with prudent industry practices, and taking into consideration the scope of work to be performed under the proposed contract, including all potential subcontracting opportunities, the respondent must determine what portions of work, including goods and services, will be subcontracted. Note: In accordance with 34 TAC §20.11., an "Subcontractor" means a person who contracts with a prime contractor to work, to supply commodities, or to contribute toward completing work for a governmental entity.

a. Check the appropriate box (Yes or No) that identifies your subcontracting intentions:

- **Yes**, I will be subcontracting portions of the contract. (If **Yes**, complete Item b, of this SECTION and continue to Item c of this SECTION.)

- **No**, I will not be subcontracting any portion of the contract, and I will be fulfilling the entire contract with my own resources. (If **No**, continue to SECTION 3.)

b. List all the portions of work (subcontracting opportunities) you will subcontract. Also, based on the total value of the contract, identify the percentages of the contract you expect to award to Texas certified HUBs, and the percentage of the contract you expect to award to vendors that are not a Texas certified HUB (i.e., Non-HUB).

Item #	Subcontracting Opportunity Description	HUBs		Non-HUBs
		Percentage of the contract expected to be subcontracted to HUBs with which you have had contracts in place for <u>five (5) years or less.</u>	Percentage of the contract expected to be subcontracted to HUBs with which you have had contracts in place for <u>more than five (5) years.</u>	Percentage of the contract expected to be subcontracted to non-HUBs .
1		%	%	%
2		%	%	%
3		%	%	%
4		%	%	%
5		%	%	%
6		%	%	%
7		%	%	%
8		%	%	%
9		%	%	%
10		%	%	%
11		%	%	%
12		%	%	%
13		%	%	%
14		%	%	%
15		%	%	%
	<b>Aggregate percentages of the contract expected to be subcontracted:</b>	<b>%</b>	<b>%</b>	<b>%</b>

(Note: If you have more than fifteen subcontracting opportunities, a continuation sheet is available online at <http://window.state.tx.us/procurement/prog/hub/hub-subcontracting-plan/>)

c. Check the appropriate box (Yes or No) that indicates whether you will be using only Texas certified HUBs to perform all of the subcontracting opportunities you listed in SECTION 2, Item b.

- **Yes** (If **Yes**, continue to SECTION 4 **and** complete an "HSP Good Faith Effort - Method A (Attachment A)" for each of the subcontracting opportunities you listed.)

- **No** (If **No**, continue to Item d, of this SECTION.)

d. Check the appropriate box (Yes or No) that indicates whether the **aggregate expected percentage** of the contract you will subcontract with Texas certified HUBs with which you have had contracts in place with for five (5) years or less **meets or exceeds** the HUB goal the contracting agency identified on page 1 in the "Agency Special Instructions/Additional Requirements".

- **Yes** (If **Yes**, continue to SECTION 4 **and** complete an "HSP Good Faith Effort - Method A (Attachment A)" for each of the subcontracting opportunities you listed.)

- **No** (If **No**, continue to SECTION 4 **and** complete an "HSP Good Faith Effort - Method B (Attachment B)" for each of the subcontracting opportunities you listed.)

**ATTACHMENT C**

Enter your company's name here: _____	Requisition #: _____
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**SECTION 2 SUBCONTRACTING INTENTIONS (CONTINUATION SHEET)**

a. This page can be used as a continuation sheet to the HSP Form's page 2, SECTION 2, Item b. Continue listing the portions of work (subcontracting opportunities) you will subcontract. Also, based on the total value of the contract, identify the percentages of the contract you expect to award to Texas certified HUBs, and the percentage of the contract you expect to award to vendors that are not a Texas certified HUB (i.e., Non-HUB).

Item #	Subcontracting Opportunity Description	HUBs		Non-HUBs
		Percentage of the contract expected to be subcontracted to HUBs with which you have had contracts in place for five (5) years or less.	Percentage of the contract expected to be subcontracted to HUBs with which you have had contracts in place for more than five (5) years.	Percentage of the contract expected to be subcontracted to non-HUBs .
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
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		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
		%	%	%
<b>Aggregate percentages of the contract expected to be subcontracted:</b>		<b>%</b>	<b>%</b>	<b>%</b>

# ATTACHMENT C

## SECTION 3 SELF PERFORMING JUSTIFICATION (If you responded "No" to SECTION 2, Item a, you must complete this SECTION and continue to SECTION 4.)

Check the appropriate box (Yes or No) that indicates whether your response/proposal contains an explanation demonstrating how your company will fulfill the entire contract with its own resources.

- **Yes** (If **Yes**, in the space provided below **list the specific page(s)/section(s)** of your proposal which explains how your company will perform the entire contract with its own equipment, supplies, materials and/or employees.)
- **No** (If **No**, in the space provided below **explain how** your company will perform the entire contract with its own equipment, supplies, materials and/or employees.)

## SECTION 4 AFFIRMATION

As evidenced by my signature below, I affirm that I am an authorized representative of the respondent listed in SECTION 1, and that the information and supporting documentation submitted with the HSP is true and correct. Respondent understands and agrees that, if awarded any portion of the requisition:

- The respondent will provide notice as soon as practical to **all** the subcontractors (HUBs and Non-HUBs) of their selection as a subcontractor for the awarded contract. The notice must specify at a minimum the contracting agency's name and its point of contact for the contract, the contract award number, the subcontracting opportunity they (the subcontractor) will perform, the approximate dollar value of the subcontracting opportunity and the expected percentage of the total contract that the subcontracting opportunity represents. A copy of the notice required by this section must also be provided to the contracting agency's point of contact for the contract no later than ten (10) working days after the contract is awarded.
- The respondent must submit monthly compliance reports (Prime Contractor Progress Assessment Report – PAR) to the contracting agency, verifying its compliance with the HSP, including the use of and expenditures made to its subcontractors (HUBs and Non-HUBs). (The PAR is available at <http://www.window.state.tx.us/procurement/prog/hub/hub-forms/progressassessmentrpt.xls>).
- The respondent must seek approval from the contracting agency prior to making any modifications to its HSP, including the hiring of additional or different subcontractors and the termination of a subcontractor the respondent identified in its HSP. If the HSP is modified without the contracting agency's prior approval, respondent may be subject to any and all enforcement remedies available under the contract or otherwise available by law, up to and including debarment from all state contracting.
- The respondent must, upon request, allow the contracting agency to perform on-site reviews of the company's headquarters and/or work-site where services are being performed and must provide documentation regarding staffing and other resources.

Signature

Printed Name

Title

Date

- REMINDER:** ➤ If you responded "**Yes**" to **SECTION 2, Items c or d**, you must complete an "HSP Good Faith Effort - Method A (Attachment A)" for **each** of the subcontracting opportunities you listed in SECTION 2, Item b.
- If you responded "**No**" **SECTION 2, Items c and d**, you must complete an "HSP Good Faith Effort - Method B (Attachment B)" for **each** of the subcontracting opportunities you listed in SECTION 2, Item b.

# HSP Good Faith Effort - Method A (Attachment A)

(Rev. 10/11)

Enter your company's name here: \_\_\_\_\_ Requisition #: \_\_\_\_\_

**IMPORTANT:** If you responded "Yes" to SECTION 2, Items c or d of the completed HSP form, you must submit a completed "HSP Good Faith Effort - Method A (Attachment A)" for each of the subcontracting opportunities you listed in SECTION 2, Item b of the completed HSP form. You may photo-copy this page or download the form at <http://www.window.state.tx.us/procurement/prog/hub/hub-forms/HUBSubcontractingPlanAttachment-A.doc>

## SECTION A-1 SUBCONTRACTING OPPORTUNITY

Enter the item number and description of the subcontracting opportunity you listed in SECTION 2, Item b, of the completed HSP form for which you are completing this attachment.

Item #: \_\_\_\_\_ Description: \_\_\_\_\_

## SECTION A-2 SUBCONTRACTOR SELECTION

List the subcontractor(s) you selected to perform the subcontracting opportunity you listed above in SECTION A-1. Also identify whether they are a Texas Certified HUB and their VID number, the approximate dollar value of the work to be subcontracted, the expected percentage of work to be subcontracted, and indicate whether the company is a Texas certified HUB.

Company Name	Texas Certified HUB	VID # (Required if Texas Certified HUB)	Approximate Dollar Amount	Expected Percentage of Contract
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%

**REMINDER:** As specified in SECTION 4 of the completed HSP form, if you (respondent) are awarded any portion of the requisition, you are required to provide notice as soon as practical to all the subcontractors (HUBs and Non-HUBs) of their selection as a subcontractor. The notice must specify at a minimum the contracting agency's name and its point of contact for the contract, the contract award number, the subcontracting opportunity they (the subcontractor) will perform, the approximate dollar value of the subcontracting opportunity and the expected percentage of the total contract that the subcontracting opportunity represents. A copy of the notice required by this section must also be provided to the contracting agency's point of contact for the contract no later than ten (10) working days after the contract is awarded.

# HSP Good Faith Effort - Method B (Attachment B)

(Rev. 10/11)

Enter your company's name here: _____	Requisition #: _____
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**IMPORTANT:** If you responded “No” to SECTION 2, Items c and d of the completed HSP form, you must submit a completed “HSP Good Faith Effort - Method B (Attachment B)” for each of the subcontracting opportunities you listed in SECTION 2, Item b of the completed HSP form. You may photo-copy this page or download the form at <http://www.window.state.tx.us/procurement/prog/hub/hub-forms/HUBSubcontractingPlanAttachment-B.doc>

## SECTION B-1 SUBCONTRACTING OPPORTUNITY

Enter the item number and description of the subcontracting opportunity you listed in SECTION 2, Item b, of the completed HSP form for which you are completing this attachment.

Item #: \_\_\_\_\_ Description: \_\_\_\_\_

## SECTION B-2 MENTOR PROTÉGÉ PROGRAM

If respondent is participating as a Mentor in a State of Texas Mentor Protégé Program, submitting its Protégé (Protégé must be a State of Texas certified HUB) as a subcontractor to perform the subcontracting opportunity listed in SECTION B-1, constitutes a good faith effort to subcontract with a Texas certified HUB towards that specific portion of work.

Check the appropriate box (Yes or No) that indicates whether you will be subcontracting the portion of work you listed in SECTION B-1 to your Protégé.

- Yes (If **Yes**, to continue to SECTION B-4.)
- No / Not Applicable (If **No** or **Not Applicable**, continue to SECTION B-3.)

## SECTION B-3 NOTIFICATION OF SUBCONTRACTING OPPORTUNITY

When completing this section you MUST comply with items a, b, c and d, thereby demonstrating your Good Faith Effort of having notified Texas certified HUBs and minority or women trade organizations or development centers about the subcontracting opportunity you listed in SECTION B-1. Your notice should include the scope of work, information regarding the location to review plans and specifications, bonding and insurance requirements, required qualifications, and identify a contact person.

When sending notice of your subcontracting opportunity, you are encouraged to use the attached HUB Subcontracting Opportunity Notice form, which is also available online at <http://www.window.state.tx.us/procurement/prog/hub/hub-subcontracting-plan/>

Retain supporting documentation (i.e., certified letter, fax, e-mail) demonstrating evidence of your good faith effort to notify the Texas certified HUBs and minority or women trade organizations or development centers.

- a. Provide written notification of the subcontracting opportunity you listed in SECTION B-1, to three (3) or more Texas certified HUBs. Unless the contracting agency specified a different time period, you must allow the HUBs at least seven (7) working days to respond to the notice prior to your submitting your bid response to the contracting agency. When searching for Texas certified HUBs, ensure that you use the State of Texas' Centralized Master Bidders List (CMBL) and Historically Underutilized Business (HUB) Search directory located at <http://www.window.state.tx.us/procurement/cmb/cmbhub.html>. HUB Status code “A” signifies that the company is a Texas certified HUB.
- b. List the three (3) Texas certified HUBs you notified regarding the subcontracting opportunity you listed in SECTION B-1. Include the company's Vendor ID (VID) number, the date you sent notice to that company, and indicate whether it was responsive or non-responsive to your subcontracting opportunity notice.

Company Name	VID #	Date Notice Sent (mm/dd/yyyy)	Did the HUB Respond?
		/ /	<input type="checkbox"/> - Yes <input type="checkbox"/> - No
		/ /	<input type="checkbox"/> - Yes <input type="checkbox"/> - No
		/ /	<input type="checkbox"/> - Yes <input type="checkbox"/> - No

- c. Provide written notification of the subcontracting opportunity you listed in SECTION B-1 to minority or women trade organizations or development centers to assist in identifying potential HUBs by disseminating the subcontracting opportunity to their members/participants. Unless the contracting agency specified a different time period, you must provide your subcontracting opportunity notice to minority or women trade organizations or development centers at least seven (7) working days prior to submitting your bid response to the contracting agency.

A list of trade organizations and development centers that have expressed an interest in receiving notices of subcontracting opportunities is available on the Statewide HUB Program's webpage at <http://www.window.state.tx.us/procurement/prog/hub/mwb-links-1/>

- d. Enter the name of the minority or women trade organizations or development centers you notified regarding the subcontracting opportunity you listed in SECTION B-1. Include the date when you sent notice to it and indicate if it accepted or rejected your notice.

Minority/Women Trade Organizations or Development Centers	Date Notice Sent (mm/dd/yyyy)	Was the Notice Accepted?
	/ /	<input type="checkbox"/> - Yes <input type="checkbox"/> - No
	/ /	<input type="checkbox"/> - Yes <input type="checkbox"/> - No

# HSP Good Faith Effort - Method B (Attachment B) *Cont.*

Enter your company's name here: \_\_\_\_\_ Requisition #: \_\_\_\_\_

## SECTION B-4 SUBCONTRACTOR SELECTION

- a. List the subcontractor(s) you selected to perform the subcontracting opportunity you listed in **SECTION B-1**. Also identify whether they are a Texas Certified HUB and their VID number, the approximate dollar value of the work to be subcontracted, the expected percentage of work to be subcontracted, and indicate whether the company is a Texas certified HUB.

Company Name	Texas Certified HUB	VID # <small>(Required if Texas Certified HUB)</small>	Approximate Dollar Amount	Expected Percentage of Contract
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%
	<input type="checkbox"/> - Yes <input type="checkbox"/> - No		\$	%

- b. If any of the subcontractors you have selected to perform the subcontracting opportunity you listed in SECTION B-1 is **not** a Texas certified HUB, provide written justification for your selection process (attach additional page if necessary):

**REMINDER:** As specified in SECTION 4 of the completed HSP form, if you (respondent) are awarded any portion of the requisition, you are required to provide notice as soon as practical to **all** the subcontractors (HUBs and Non-HUBs) of their selection as a subcontractor. The notice must specify at a minimum the contracting agency's name and its point of contact for the contract, the contract award number, the subcontracting opportunity it (the subcontractor) will perform, the approximate dollar value of the subcontracting opportunity and the expected percentage of the total contract that the subcontracting opportunity represents. A copy of the notice required by this section must also be provided to the contracting agency's point of contact for the contract no later than ten (10) working days after the contract is awarded.



**ATTACHMENT C-1  
HUB SUBCONTRACTING OPPORTUNITY NOTIFICATION FORM**



# HUB Subcontracting Opportunity Notification Form

In accordance with Texas Gov't Code, Chapter 2161, each state agency that considers entering into a contract with an expected value of \$100,000 or more shall, before the agency solicits bids, proposals, offers, or other applicable expressions of interest, determine whether subcontracting opportunities are probable under the contract. The state agency I have identified below in **Section B** has determined that subcontracting opportunities are probable under the requisition to which my company will be responding.

34 Texas Administrative Code, §20.14 requires all respondents (prime contractors) bidding on the contract to provide notice of each of their subcontracting opportunities to at least three (3) Texas certified HUBs (who work within the respective industry applicable to the subcontracting opportunity), and allow the HUBs at least seven (7) working days to respond to the notice prior to the respondent submitting its bid response to the contracting agency. In addition, the respondent must provide notice of each of its subcontracting opportunities to minority/women trade organizations or development centers at least seven (7) working days prior to submitting its bid response to the contracting agency.

We respectfully request that vendors interested in bidding on the subcontracting opportunity identified in **Section C** reply no later than the date and time identified in **Section C, Item 1**. Submit your response to the point-of-contact referenced in **Section A**.

<b>Section A</b>	<b>PRIME CONTRACTOR'S INFORMATION</b>	
Company Name: _____	State of Texas VID #: _____	
Point-of-Contact: _____	Phone #: _____	
E-mail Address: _____	Fax #: _____	

<b>Section B</b>	<b>CONTRACTING STATE AGENCY AND REQUISITION INFORMATION</b>	
Agency Name: _____		
Point-of-Contact: _____	Phone #: _____	
Requisition #: _____	Bid Open Date: _____	

<b>Section C</b>	<b>SUBCONTRACTING OPPORTUNITY RESPONSE DUE DATE, DESCRIPTION, REQUIREMENTS AND RELATED INFORMATION</b>	
1.  Potential Subcontractor's Bid Response Due Date:	<p><b>Our firm must receive your bid response to this subcontracting opportunity no later than 5:00 P.M., Central Daylight Standard Time on:</b> _____</p> <p style="text-align: right; font-size: small;">(Date)</p> <p>(Note: In accordance with 34 TAC §20.14, each notice of subcontracting opportunity shall be provided to <u>at least three (3)</u> Texas certified HUBs, and allow the HUBs <u>at least seven (7) working days</u> to respond to the notice prior to submitting our bid response to the contracting agency. In addition, we must provide the same notice to minority/women trade organizations or development centers <u>at least seven (7) working days</u> prior to submitting our bid response to the contracting agency.)</p>	
2.  Scope of Work:		
3.  Required Qualifications:  <input type="checkbox"/> - Not Applicable		
4.  Bonding/Insurance Requirements:  <input type="checkbox"/> - Not Applicable		
5.  Location to review plans/specifications:  <input type="checkbox"/> - Not Applicable		



**ATTACHMENT C-2  
HSP QUICK CHECK LIST**

# HSP Quick Check List

- ❖ **If you are not subcontracting any portion of the contract and will be fulfilling the entire contract with your own resources, complete:**
  - Section 1 – Respondent and Requisition Information
  - Section 2 a. – No, I will not be subcontracting any portion of the contract, and I will be fulfilling the entire contract with my own resources
  - Section 3 – Self Performing Justification
  - Section 4 – Affirmation
  
- ❖ **If all of your subcontracting opportunities will be performed using only HUB vendors, complete:**
  - Section 1 - Respondent and Requisition Information
  - Section 2 a. – Yes, I will be subcontracting portions of the contract
  - Section 2 b. – List all the portions of work you will subcontract, and indicate the percentage of the contract you expect to award to HUB vendors
  - Section 2 c. – Yes
  - Section 4 – Affirmation
  - GFE Method A (Attachment A) – Complete this attachment for each subcontracting opportunity
  
- ❖ **If you are subcontracting with HUB vendors and Non-HUB vendors, and the aggregate percentage\* of subcontracting with HUB vendors meets or exceeds the HUB Goal the contracting agency identified in the “Agency Special Instructions/Additional Requirements”, complete:**
  - Section 1 - Respondent and Requisition Information
  - Section 2 a. – Yes, I will be subcontracting portions of the contract
  - Section 2 b. – List all the portions of work you will subcontract, and indicate the percentage of the contract you expect to award to HUB vendors and Non HUB vendors
  - Section 2 c. – No
  - Section 2 d. – Yes
  - Section 4 – Affirmation
  - GFE Method A (Attachment A) – Complete this attachment for each subcontracting opportunity
  
- ❖ **If you are subcontracting with HUB vendors and Non-HUB vendors (or only Non HUB vendors), and the aggregate percentage\* of subcontracting with HUB vendors does not meet or exceed the HUB Goal the contracting agency identified in the “Agency Special Instructions/Additional Requirements”, complete:**
  - Section 1 - Respondent and Requisition Information
  - Section 2 a. – Yes, I will be subcontracting portions of the contract
  - Section 2 b. – List all the portions of work you will subcontract, and indicated the percentage of the contract you expect to award to HUB vendors and Non HUB vendors
  - Section 2 c. – No
  - Section 2 d. – No
  - Section 4 – Affirmation
  - GFE Method B (Attachment B) – Complete this attachment for each subcontracting opportunity

\* Aggregate percentage of the contract expected to be subcontracted to HUBs with which you have had contracts in place for five (5) years or less.



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**ATTACHMENT D**  
**V.T.C.A., GOVERNMENT CODE § 466.155**

(a) After a hearing, the director shall deny an application for a license or the commission shall suspend or revoke a license if the director or commission, as applicable, finds that the applicant or sales agent:

(1) is an individual who:

(A) has been convicted of a felony, criminal fraud, gambling or a gambling-related offense, or a misdemeanor involving moral turpitude, if less than 10 years has elapsed since the termination of the sentence, parole, mandatory supervision, or probation served for the offense;

(B) is or has been a professional gambler;

(C) is married to an individual:

(i) described in Paragraph (A) or (B); or

(ii) who is currently delinquent in the payment of any state tax;

(D) is an officer or employee of the commission or a lottery operator; or

(E) is a spouse, child, brother, sister, or parent residing as a member of the same household in the principal place of residence of a person described by Paragraph (D);

(2) is not an individual, and an individual described in Subdivision (1):

(A) is an officer or director of the applicant or sales agent;

(B) holds more than 10 percent of the stock in the applicant or sales agent;

(C) holds an equitable interest greater than 10 percent in the applicant or sales agent;

(D) is a creditor of the applicant or sales agent who holds more than 10 percent of the applicant's or sales agent's outstanding debt;

(E) is the owner or lessee of a business that the applicant or sales agent conducts or through which the applicant will conduct a ticket sales agency;

(F) shares or will share in the profits, other than stock dividends, of the applicant or sales agent;

or

(G) participates in managing the affairs of the applicant or sales agent;

(3) has been finally determined to be:

(A) delinquent in the payment of a tax or other money collected by the comptroller, the Texas Workforce Commission, or the Texas Alcoholic Beverage Commission;

(B) in default on a loan made under Chapter 52, Education Code; or

(C) in default on a loan guaranteed under Chapter 57, Education Code;

(4) is a person whose location for the sales agency is:

(A) a location licensed for games of bingo under Chapter 2001, Occupations Code;

(B) on land that is owned by:

(i) this state; or

(ii) a political subdivision of this state and on which is located a public primary or secondary school, an institution of higher education, or an agency of the state; or

(C) a location for which a person holds a wine and beer retailer's permit, mixed beverage permit, mixed beverage late hours permit, private club registration permit, or private club late hours permit issued under Chapter 25, 28, 29, 32, or 33, Alcoholic Beverage Code; or



- (5) has violated this chapter or a rule adopted under this chapter.
- (b) If the director proposes to deny an application for a license or the commission proposes to suspend or revoke a license under this section, the applicant or sales agent is entitled to written notice of the time and place of the hearing. A notice may be served on an applicant or sales agent personally or sent by certified or registered mail, return receipt requested, to the person's mailing address as it appears on the commission's records. A notice must be served or mailed not later than the 20th day before the date of the hearing. The commission shall provide for a formal administrative hearings process.
- (c) At a hearing, an applicant or sales agent must show by a preponderance of the evidence why the application should not be denied or the license suspended or revoked.
- (d) The director shall give an applicant or sales agent written notice of a denial of an application or a suspension or revocation of a license.
- (e) The director may not issue a license to a person who has previously had a license under this chapter revoked unless the director is satisfied the person will comply with this chapter and the rules adopted under this chapter. The director may prescribe the terms under which a suspended license will be reissued.
- (f) The director may not issue a license to an applicant who fails to certify to the director the applicant's compliance with the federal Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.).
- (g) For purposes of Subsection (a)(3), the comptroller, Texas Workforce Commission, Texas Alcoholic Beverage Commission, Texas Higher Education Coordinating Board, and Texas Guaranteed Student Loan Corporation shall each provide the executive director with a report of persons who have been finally determined to be delinquent in the payment of any money owed to or collected by that agency. The commission shall adopt rules regarding the form and frequency of reports under this subsection.

Added by Acts 1993, 73rd Leg., ch. 107, § 4.03(b), eff. Aug. 30, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 6.21, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 696, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1275, § 51, eff. Sept. 1, 1997.

Amended by Acts 2001, 77th Leg., ch. 394, § 1, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1420, § 14.760, eff. Sept. 1, 2001.



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**ATTACHMENT D-1  
BACKGROUND INFORMATION CERTIFICATION**

Texas Government Code §466.155

Pursuant to Texas Government Code §466.103, the Executive Director of the Texas Lottery Commission may not award a contract for the purchase or lease of facilities, goods or services related to lottery operations to a person who would be denied a license as a sales agent under Texas Government Code §466.155.

---

(Company Name)

certifies that it has reviewed Texas Government Code §466.155 and that it would not be denied a license as a sales agent pursuant to said section.

\_\_\_\_\_  
*(signature of person authorized to contractually bind the Proposer)*

\_\_\_\_\_  
*(printed name)*

\_\_\_\_\_  
*(title)*

\_\_\_\_\_  
*(date)*



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**ATTACHMENT E**  
**VENDOR BACKGROUND INVESTIGATION FORM**  
**APPARENT SUCCESSFUL PROPOSER**

Section 466.103 of the Texas Government Code states that the Executive Director may not award a Contract to a person who would be denied a license as a sales agent under section 466.155 of the Texas Government Code.

**FOR ASSISTANCE**

Please call the Enforcement Division of the Texas Lottery at 512-344-5000.

**GENERAL INSTRUCTIONS**

- Type or print all information.
- The Apparent Successful Proposer, including the parent or subsidiary of the Apparent Successful Proposer, may need to complete and return these forms.
- The Texas Lottery is authorized to obtain criminal history records from the Texas Department of Public Safety, the Federal Bureau of Investigation or any other law enforcement agency.
- This form is open to public inspection during normal business hours as required by the Texas Public Information Act, Tex. Gov't. Code ANN., §552.021.

**SALES AGENT ELIGIBILITY REQUIREMENTS**

The following people are prohibited from holding a Texas Lottery Ticket Sales License:

1. Persons convicted of a felony, criminal fraud, gambling or a gambling-related offense whose sentence, parole, mandatory supervision or probation ended less than 10 years ago.
2. Persons convicted of a misdemeanor involving moral turpitude whose sentence, parole, mandatory supervision or probation ended less than 10 years ago.
3. Persons who are or have been professional gamblers.
4. Persons currently delinquent in the payment of certain state taxes or student loans.
5. The spouses of those people named above.

Also, a business is prohibited from holding a Texas Lottery Ticket Sales License if that business includes a person identified in items 1-5 above and that person:

- is an officer or director of that business;
- holds 10 percent or more of the stock in that business;
- holds an equitable interest greater than 10 percent in that business;
- is owed more than 10 percent of the business's debt;
- owns or leases a business through which the applicant will conduct ticket sales;
- will share in the profits of that business (not including stock dividends); or
- participates in managing the affairs of the applicant or sales agent.



TEXAS LOTTERY COMMISSION
Vendor Background Investigation

OWNERSHIP INFORMATION FOR APPARENT SUCCESSFUL PROPOSER

Form with 7 numbered sections for ownership information: 1. Corporation or Legal Business Name; 2. Business Ownership (check one); 3. If Texas Corporation, enter; 4. If your business is a foreign corporation, enter; 5. If limited partnership, enter; 6. Federal Employer's Identification (FEI) Number, if any; 7. Taxpayer number for reporting any Texas tax OR your Texas Vendor Identification Number if you now have, or have ever had, one.





## ELIGIBILITY STANDARDS

An individual is not eligible for a sales license if:

- a. The individual or the individual's spouse has been convicted of a felony, criminal fraud, gambling or a gambling-related offense or a misdemeanor involving moral turpitude and less than 10 years have passed since the end of the sentence, parole, mandatory supervision or probation served for the conviction.
- b. The individual or the individual's spouse is a professional gambler.
- c. The individual's spouse is currently delinquent in the payment of any state tax.
- d. The individual is an officer or employee of the Texas Lottery Commission or a lottery operator.
- e. The individual's spouse, child, brother, sister or parent (1) lives in the same principal place of residence as the individual and (2) is an officer or employee of the Texas Lottery Commission or a lottery operator.
- f. The individual is delinquent in the payment of a tax or other money collected by the Texas Comptroller of Public Accounts, the Texas Workforce Commission, or the Texas Alcoholic Beverage Commission; in default on a loan made under Chapter 52 of the Texas Education Code; or in default on a loan guaranteed under Chapter 57 of the Texas Education Code.

An entity is not eligible for a sales license if the entity includes any of the following individuals who would be ineligible for a sales license under item a, b, c, d or e above:

- An officer or director of the entity;
- An individual who holds more than 10 percent of the stock in the entity;
- An individual who holds an equitable interest greater than 10 percent in the entity;
- The creditor of the entity who holds more than 10 percent of the entity's outstanding debt;
- The owner or lessee of a business conducted by the entity or through which the entity will conduct a ticket sales agency;
- An individual who shares or will share in the profits, other than stock dividends, of the entity; or
- An individual who participates in managing the affairs of the entity.

An applicant is not eligible for a sales license if the proposed ticket sales location is:

- A location licensed for games of bingo, or
- On land that is owned by:
  - This state, or
  - On which is located a public primary or secondary school, an institution of higher education, or an agency of the state.



By signing below, I certify that the information provided on this form is correct to the best of my knowledge and \_\_\_\_\_ [company name] \_\_\_\_\_ is not ineligible for a sales license under the eligibility standards described above. I understand that providing false or incomplete information may be grounds for termination of any contract. \_\_\_\_\_ [company name] \_\_\_\_\_ has read and agrees to abide by the requirements of section 466.155 of the Texas Government Code. I understand that owners/officers/partners/directors, as designated by the Texas Lottery, must furnish a complete legible set of fingerprints, and that failure to do so will result in the termination of any contract. The Texas Lottery is authorized to obtain criminal history records.

sign  
here \_\_\_\_\_  
Signature of person Title Date  
authorized to contractually bind Proposer

\_\_\_\_\_  
Corporation or Legal Business Name



### TEXAS LOTTERY COMMISSION Consent to Release Personal Information

NOTE: The Apparent Successful Proposer must complete and return Consent to Release Personal Information forms for all individuals subject to background investigation under section 4.7.

TO THE APPLICANT: All persons contracting with the Texas Lottery Commission must meet the requirements of the Texas Government Code § 466.155 (Print or type all information in blue or black ink):

#### CONSENT TO BACKGROUND INVESTIGATION AND RELEASE OF INFORMATION

Vendor Employee -  Vendor Principal -  Operator Employee -  Temporary Employee -

\_\_\_\_\_  
Company Name

Name: \_\_\_\_\_ Date of Birth: \_\_\_\_\_  
Last First Middle

Other Names Used: \_\_\_\_\_ Daytime Phone #: \_\_\_\_\_  
(Maiden, Nicknames, Previous Married Names, etc.)  
Alternate Phone #: \_\_\_\_\_

Drivers License No.: \_\_\_\_\_ State/Country: \_\_\_\_\_

Place of Birth: \_\_\_\_\_ Social Security No.: \_\_\_\_\_

Current Address: \_\_\_\_\_

City: \_\_\_\_\_ State/Country: \_\_\_\_\_ Zipcode: \_\_\_\_\_

I understand and agree that:  
  
The Texas Lottery Commission shall conduct an investigation of my personal background to include criminal history record information maintained by the Department of Public Safety, the Federal Bureau of Investigation, Identification Division, or any other law enforcement agency. The Executive Director may request that I provide a complete set of legible fingerprints and I further understand that I may be precluded from providing services for the



Texas Lottery Commission for failing to provide such fingerprints on request.

I hereby give my voluntary consent to any investigation or any other inquiry into information described above. Further, I hereby consent to the release of any information including academic records to the Texas Lottery Commission, Enforcement Division, or persons conducting an investigation or inquiry on their behalf. I understand that certain information obtained through this investigation or inquiry may preclude me from providing services for the Texas Lottery Commission.

I further hold harmless and release the Texas Lottery Commission, its agents, officers or employees, from any and all liability for this investigation or inquiry, and any action taken as result of information obtained through the investigation or inquiry. I further hold harmless and release any person providing information in good faith to the Texas Lottery Commission or to any person conducting an investigation or inquiry on their behalf.

I further understand that any person or employee who intentionally, knowingly, recklessly, or with criminal negligence makes a material incorrect or deceptive oral or written statement to a person conducting an investigation commits a misdemeanor.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date



**ATTACHMENT E-1  
BACKGROUND INFORMATION  
CERTIFIED LIST OF VENDOR PRINCIPALS**

The following is a list of vendor principals for \_\_\_\_\_ (Company Name)  
as defined by Texas Government Code §466.155.

Vendor Principals as defined by Texas Government Code § 466.155 (attach additional sheets if necessary):

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List of all individuals subject to background investigation under section 4.7(attach additional sheets if necessary):

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\_\_\_\_\_  
(signature of person authorized to contractually bind the Proposer)

\_\_\_\_\_  
(title)

\_\_\_\_\_  
(printed name)

\_\_\_\_\_  
(date)



### ATTACHMENT F SAMPLE PERFORMANCE BOND

Bond No. \_\_\_\_\_

[company name, address], as Principal, and [surety company], a corporation licensed to do business in the State of Texas and admitted to write bonds, as Surety, are held and firmly bound unto the Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630, as Obligee, in the full sum of [written amount] Dollars (\$) for the payment of which said Principal and Surety bind themselves, and their respective heirs, administrators, executors, successors, assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a written Contract with Obligee dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, for [type of services], which Contract is hereby referred to, as if fully and to the same extent as if copied at length herein.

NOW THEREFORE, the condition of this obligation is such that, if during the term of this Contract (or annual bond), the Principal shall faithfully perform such Contract, or shall indemnify and save harmless the Obligee from all cost and damage by reason of Principal's failure to do so, then this obligation shall be null and void, otherwise it shall remain in full force and effect. (If annual bond, add this paragraph.)

The term of this obligation is for the period commencing on \_\_\_\_\_ and expiring at 12:00 a.m. on \_\_\_\_\_. This bond may be renewed on an annual basis at the option of the surety. If the surety does not choose to renew this obligation, it will so notify the Obligee and Principal not later than 30 days prior to its expiration.

IN WITNESS WHEREOF, the Principal and Surety have signed and sealed this instrument this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

(seal)	Principal:	_____
	By:	_____
(seal)	Surety:	_____
	By:	_____
		Attorney-in-Fact



## ATTACHMENT G SCORING MATRIX

Instant Ticket Manufacturing and Services RFP			
The financial status of the Proposer.	Pass/Fail		
Whether the Proposer made a good faith effort to reach the minority participation goals set forth by the Texas Lottery.	Pass/Fail		
Proposers must have a minimum of two years of related lottery experience in instant ticket printing in North America and at least three current clients who are members of the North American Association of State and Provincial Lotteries.	Pass/Fail		
<b>Technical Scoring Criteria:</b>	<b>Possible Points</b>	<b>% of Total</b>	<b>Points Awarded</b>
The probable quality of the offered goods or services.	600	30%	
The quality of the Proposer's past performance in contracting with the agency, with other state entities, or with private sector entities.	240	12%	
The qualifications of the Proposer's personnel.	180	9%	
The experience of the Proposer in providing the requested goods or services.	180	9%	
<b>Technical Scoring Subtotal</b>	<b>1200</b>	<b>60%</b>	
<b>Cost Proposal Criteria:</b>			
The Proposer's price to provide the goods or services	800	40%	
<b>Cost Proposal Scoring Subtotal</b>	<b>800</b>	<b>40%</b>	
<b>TOTAL</b>	<b>2000</b>	<b>100%</b>	



The Texas Lottery will review and consider all items in the Cost Proposals; some items may be given greater consideration than others.

The following formula will be used in scoring cost proposals:

Lowest Cost Proposal Amount / Other Cost Proposal Amount = % of total points available for the Cost Proposal.





## ATTACHMENT H SEALED COST PROPOSAL

NOTE TO ALL PROSPECTIVE PROPOSERS: THE COST PROPOSAL MUST BE SUBMITTED IN A SEPARATE SEALED ENVELOPE AS AN ATTACHMENT TO THE ORIGINAL PROPOSAL.

Payment will be based on cost per thousand tickets manufactured.

### Options

As part of the base cost (price per thousand tickets) submitted by a Proposer, all items represented in the Proposal must be provided unless specifically identified as Invited, Offered or Specified Options. Any such options must be specifically detailed in the Proposal.

If the services represented in the Proposal are not clearly indicated as Invited, Offered or Specified Options, the cost for such services is included in the base price.

Offering a required item as an option may be cause for rejection of the Proposal.

### Evaluation of the Cost Proposal

For purposes of evaluation and comparison, all cost cells for the Base Price and the following four Specified Options (Full UV Coating, Dual Color Imaging, Metallic Ink and Fluorescent Ink) will be evaluated. While all cost cells will be evaluated, some may have greater weight.

### Common Price

The Texas Lottery's objective is to maximize revenue to the State of Texas through the selection of "industry best" games and those consistent with the Texas Lottery's current product mix and instant ticket strategy. The Texas Lottery evaluates games based on a variety of criteria including, but not limited to, sales performance, ticket theme, play style, planned start date and overall fit within the overall instant game portfolio. Using these criteria and others, the Texas Lottery also includes branded, proprietary or licensed games which it believes present the best opportunity for maximizing ticket sales and generating revenues for the State.

In working toward its objective to maximize revenue to the State of Texas through the selection of "industry best" games and those consistent with the Texas Lottery's current product mix and instant ticket strategy, the Texas Lottery believes that utilizing multiple vendors for instant ticket manufacturing and services promotes competition, optimizes vendor performance and enhances business resumption capabilities.

The Texas Lottery desires to select multiple Successful Proposers that demonstrate superior technical quality and service and that offer competitive pricing.

The Texas Lottery, through negotiations with all Apparent Successful Proposers, desires to establish common prices for the goods/services included in the Base Price and four specified options (Full UV Coating, Dual Color Imaging, Metallic Ink and Fluorescent Ink).



As an incentive to accept the common prices established by the Texas Lottery and at the agency's sole discretion, Successful Proposers may be offered an opportunity to produce a comparable number of games for a set period (as determined by the Texas Lottery in its sole discretion) following Contract Award. The Texas Lottery, in its sole discretion, will determine the quantity and volume of ticket production awarded to each Successful Proposer and expressly reserves the right to decrease or increase game orders consistent with the considerations in section 1.1.7, together with other factors including, but not limited to, technical quality and customer service.

**Base Price**

Each Proposer should complete the following matrix utilizing cost per thousand tickets and provide pricing information for each quantity and actual ticket size printed on the identified ticket stock. Prices must be proposed to two (2) decimal places (example: \$6.60/thousand). Base price includes any and all requirements, goods and services described in this RFP that are not Invited, Offered or Specified Options as referenced in this RFP. Specifically, base price shall include insertion of 4" X 4" POS cards in each pack, four color processing, expanded imaging and any additional spot colors required to produce the game tickets as represented in the executed working papers.

Table 1: 10 Point Virgin/Recyclable - Coated Two Sides

NOTE: Use the format provided on the attached Table for your response.

**NOTE: INTERMEDIATE QUANTITIES WILL BE DETERMINED BY INTERPOLATION**

**Table 1 - 10 Point Virgin/Recyclable-Coated Two Sides**

Ticket Size	<u>A</u> 2.4" x 4"		<u>B</u> 4" x 4"			<u>C</u> 6" x 4"		<u>D</u> 8" x 4"			
	250	150	250	150	125	150	125	125	75	50	25
20,000											
120,000											
240,000											
360,000											
480,000											
600,000											
720,000											
840,000											
960,000											
1,000,000											
2,000,000											
3,000,000											
4,000,000											
5,000,000											
6,000,000											
7,000,000											
8,000,000											
9,000,000											
10,000,000											
12,000,000											
15,000,000											
20,000,000											
30,000,000											
50,000,000											
75,000,000											
100,000,000											

Ticket Size	<u>E</u> 10" x 4"		<u>F</u> 12" x 4"				<u>G</u> 6" x 8"	
	50	25	75	50	25	20	20	10
1,000,000								
2,000,000								
3,000,000								
4,000,000								
5,000,000								
6,000,000								
7,000,000								
8,000,000								
9,000,000								
10,000,000								
12,000,000								
15,000,000								
20,000,000								
30,000,000								
50,000,000								
75,000,000								
100,000,000								

NOTE: INTERMEDIATE QUANTITIES WILL BE DETERMINED BY INTERPOLATION



In addition, Proposers shall show the cost breakdown of the following line items that are included in the base costs.

- 1. 4 color processing Per square inch \$ \_\_\_\_\_
- 2. expanded imaging Per square inch \$ \_\_\_\_\_
- 3. additional spot colors Per color per square inch \$ \_\_\_\_\_
- 4. Includes 4x4 card insertion Price Per Pack \$ \_\_\_\_\_  
in each pack

**SPECIFIED OPTIONS**

Prospective Proposers are **required** to submit specifications and pricing for the following options.

Each Proposer should indicate the additional cost per thousand (1,000) tickets for the options listed below.

**Specified Options to be negotiated to establish a common price:**

- 1. Cost per thousand tickets for fluorescent inks (other than required by fluorescent benday)

Per color per square inch \$ \_\_\_\_\_

- 2. Cost per thousand tickets for metallic inks

Per color per square inch \$ \_\_\_\_\_

- 3. Cost per thousand tickets for dual color game data imaging

Per square inch \$ \_\_\_\_\_

- 4. Cost per thousand tickets for full ultraviolet coating in display area

Per square inch \$ \_\_\_\_\_



**Other Specified Options:**

1. Cost per thousand tickets for any reduction for colors less than ten (10).  
Price decrease per color \$ \_\_\_\_\_
2. Cost per thousand tickets for multiple scenes or continuous scene game \$ \_\_\_\_\_
3. Cost per thousand tickets for color pulsing - color changes within a press run. Per color pulse \$ \_\_\_\_\_
4. Cost per thousand tickets for marking process other than full opaque security coating covering. Per square inch \$ \_\_\_\_\_
5. Cost for cylinder or plate change before or during production \$ \_\_\_\_\_
6. Cost per thousand tickets difference for multiple games across the web \$ \_\_\_\_\_
7. Price per square inch for foil ticket stock \$ \_\_\_\_\_
8. Price per square inch for holographic ticket stock \$ \_\_\_\_\_

**Test Games**

Hourly rate for software programming test games \$ \_\_\_\_\_.

**Bar Coded Coupons**

Each coupon must have a unique bar code that meets the validation specifications as outlined in this RFP.

**Direct Mail Bar Coded Coupons**

**Self-Mailer:**

Cost to produce bar coded direct mail pieces of multiple finished and folded sizes (8 1/2" x 14" flat and below), on various paper types (110# card stock and below) with 4-color process printing on both sides, full bleeds ink coverage and various perforations for coupons (up to 4 coupons attached to self-mailer). An example of size, finish and paper is 100# uncoated or coated on an 8 1/2" x 11" sheet with two or three folds. The mailer will be a self-mailer. Perforations would allow for four (4) or fewer unique, bar-coded coupons. The printing,



handling and application of the mailing addresses shall be the responsibility of the Successful Proposer.

- 1. Cost per thousand for 250,000 self-mailer pieces w/coupons \$ \_\_\_\_\_
- 2. Cost per thousand for 500,000 self-mailer pieces w/coupons \$ \_\_\_\_\_
- 3. Cost per thousand for 1 million self-mailer pieces w/coupons \$ \_\_\_\_\_
- 4. Cost per thousand for 1.5 million self-mailer pieces w/coupons \$ \_\_\_\_\_
- 5. Cost per thousand for 2 million self-mailer pieces w/coupons \$ \_\_\_\_\_

**Electronic Coupons**

Cost to develop bar-coded, web-based coupons that interact with the validation equipment used by the Texas Lottery. Limited time vouchers and single-use, unique coupons are necessary. Both types of coupons will have bar codes, and must be able to be presented on both the Internet via a web page or through email messages. Where applicable, costs should include any fees for programming for distribution/dissemination of e-coupons via the Texas Lottery website or email to provide unique bar codes for each contact or visitor.

Cost to create and distribute multi-use, limited-time offer e-coupons (single bar code per offer, not unique bar codes per recipient) \$ \_\_\_\_\_

- 1. Cost per thousand for unique, single-use e-coupons for 100,000 \$ \_\_\_\_\_
- 2. Cost per thousand for unique, single-use e-coupons for 250,000 \$ \_\_\_\_\_
- 3. Cost per thousand for unique, single-use e-coupons for 500,000 \$ \_\_\_\_\_
- 4. Cost per thousand for unique, single-use e-coupons for 1,000,000 \$ \_\_\_\_\_
- 5. Cost per thousand for unique, single-use e-coupons for 2,000,000 \$ \_\_\_\_\_

**Hand Out Coupons - Cost to produce bar coded coupon insert as noted below:**

- Size: Approximately 8.5” x 3.5”, bleed design
- Paper: (25 x 38) 105#, 7pt. Orion Satin Matte
- Colors: A: 4c process front, unprinted back  
           B: 4c process front, 1c back  
           C: 4c process front, 4c back
- Imaging: Image bar code on front in black ink
- Finishing: Padded & glued in pads of 125. (Pad on 8.5in. edge)
- Freight is extra per actual freight invoice.



**Quantity**

**Price per 1,000 individual coupons**

<b>Pieces</b>	<b><u>Option A</u></b>	<b><u>Option B</u></b>	<b><u>Option C</u></b>
5,000 coupons = 40 pads of 125	\$ _____	\$ _____	\$ _____
10,000 coupons = 80 pads of 125	\$ _____	\$ _____	\$ _____
20,000 coupons = 160 pads of 125	\$ _____	\$ _____	\$ _____
30,000 coupons = 240 pads of 125	\$ _____	\$ _____	\$ _____
50,000 coupons = 400 pads of 125	\$ _____	\$ _____	\$ _____
100,000 coupons = 800 pads of 125	\$ _____	\$ _____	\$ _____
125,000 coupons = 1,000 pads of 125	\$ _____	\$ _____	\$ _____
250,000 coupons = 2,000 pads of 125	\$ _____	\$ _____	\$ _____
500,000 coupons = 4,000 pads of 125	\$ _____	\$ _____	\$ _____
1,000,000 coupons = 8,000 pads of 125	\$ _____	\$ _____	\$ _____

**Branded, Proprietary and Licensed Games**

The Texas Lottery may use branded, proprietary and licensed games as part of its game portfolio. The Successful Proposer shall be required to provide, in writing, to the Texas Lottery the fee for each new game within thirty (30) days of acquiring that brand, license or proprietary process. In accordance with the executed working papers, the Texas Lottery may require prize fulfillment services for licensed property games and/or other games manufactured by the Successful Proposer.

Exclusive Pricing rates should be categorized in a table(s) based on product strength/recognition and priced accordingly. Proposers shall provide separate tables for games that utilize licensing fees and games that utilize merchandise allocations. Licensed property games whether utilizing the licensing fee or merchandise model shall include print costs and any necessary fulfillment services. Proposers should provide any volume discounts.

Please provide pricing tables for Branded, Proprietary and Licensed games.

**Promotional Second Chance Drawings**

A. The following fees will apply to Mail-In Second Chance Drawings:

**1. Branded/Licensed Property Games**

Cost to set up, monitor and support the system for a single Branded/Licensed Property game, and any associated second chance drawings in the Branded/Licensed Property game that utilizes the merchandise model. The number of second chance drawings is determined by the Texas Lottery.



\$ \_\_\_\_\_

**2. Non-Branded/Licensed Property Games**

Cost to set up, monitor and support the system for a single Non-Branded/Licensed Property game, or a Branded/Licensed Property game that does not utilize the merchandise model.

- i. Cost to set up, monitor and support the 1<sup>st</sup> drawing for a game.

\$ \_\_\_\_\_

- ii. Cost to set up, monitor and support subsequent drawing(s) for the same game.

\$ \_\_\_\_\_

B. The following fees will apply to Internet Entry Second Chance Drawings:

**1. Branded/Licensed Property Games**

Cost to set up, monitor and support the system for a single Branded/Licensed Property game, and any associated second chance drawings in the Branded/Licensed Property game that utilizes the merchandise model. The number of second chance drawings is determined by the Texas Lottery.

\$ \_\_\_\_\_

**2. Non-Branded/Licensed Property Games**

Cost to set up, monitor and support the system for a single Non-Branded/Licensed Property game, or a Branded/Licensed Property game that does not utilize the merchandise model.

- i. Cost to set up, monitor and support the game.

\$ \_\_\_\_\_





**INVITED OPTIONS**

Proposers are **not required** to submit specifications and pricing for Invited Options. Each Proposer should indicate the additional cost per thousand (1,000) tickets, if any, for any options, including those listed below. Pricing should be noted as cost per square inch, if appropriate.

1. Cost per thousand for die-cut tickets. \$ \_\_\_\_\_
2. Cost per pack, if any, for additional inserts in each pack of tickets. \$ \_\_\_\_\_
3. Cost per thousand for pouch tickets. \$ \_\_\_\_\_
4. Cost per thousand for holograms on tickets. \$ \_\_\_\_\_
5. Cost per thousand for continuous four color process covering entire ticket.  
\$ \_\_\_\_\_
6. Cost per thousand for four-color printed on ticket back. \$ \_\_\_\_\_
7. Cost per thousand for perforated stub, with either horizontal or vertical perforations and with or without imaging.  
  
    Without Imaging \$ \_\_\_\_\_  
  
    With Imaging \$ \_\_\_\_\_
8. Cost per thousand for scored tickets. \$ \_\_\_\_\_
9. Cost per thousand for scented tickets. \$ \_\_\_\_\_
10. Cost per thousand for break-open tickets with perforated window. \$ \_\_\_\_\_
11. Cost per thousand for thermal ink imaging. \$ \_\_\_\_\_

In addition, each Proposer should indicate the additional cost, if any, for the options listed below:

Merchandise fulfillment for non-licensed property games

\$ \_\_\_\_\_



## OFFERED OPTIONS

Proposers should respond to this section on sheets attached hereto the price for Proposer-offered optional items. Proposers are free to describe offered options and the terms and pricing under which they are offered. Proposers are not required to submit any Offered Options under section 8.34 of this RFP.

---

*(signature of person authorized to contractually bind the Proposer)*

---

*(printed name)*

---

*(title)*

---

*(date)*

**TAB C**



**CONTRACT FOR  
INSTANT TICKET MANUFACTURING AND SERVICES  
BETWEEN  
THE TEXAS LOTTERY COMMISSION  
AND  
GTECH PRINTING CORPORATION**

**RECITAL**

This Contract is entered into by and between the Texas Lottery Commission, hereinafter referred to as "the Commission, TLC or the Texas Lottery," and GTECH Printing Corporation, 10 Memorial Boulevard, Providence, Rhode Island 02903, hereinafter referred to as "Contractor."

**WHEREAS**, the TLC previously issued a Request for Proposals (RFP) for Instant Ticket Manufacturing and Services (RFP No. 362-12-0001); and

**WHEREAS**, GTECH Printing Corporation submitted a proposal in response to the RFP; and

**WHEREAS**, following review of proposals submitted in response to the RFP, the TLC has selected Contractor to provide Instant Ticket Manufacturing and Services for the TLC for the Contract term and any renewal periods.

**NOW, THEREFORE**, in consideration of the mutual covenants herein contained, the parties agree as follows:

**I. TERM**

This Contract shall commence on September 1, 2012, and continue through August 31, 2018, subject to the termination provisions in the RFP and subject to the TLC being continued and funded by the Texas Legislature.

The Texas Lottery reserves the right to extend this Contract, at its sole discretion, for up to two (2) additional three (3) year periods, at the Contract rate or rates as modified during the term of the Contract.

At the end of the initial term or any renewal period, and instead of exercising the renewal above, the Texas Lottery reserves the right to extend this Contract, at its sole discretion, for up to three (3) additional months, in one month intervals, at the Contract rate or rates as modified during the term of this Contract.

No later than sixty (60) days prior to the start of any renewal period(s), Contractor may be required to submit prices for the applicable renewal period. The Texas Lottery reserves the right to re-negotiate prices at any time during the Contract term or any renewal period.

At the end of the Contract term, or upon earlier termination under any provision of this Contract, Contractor shall, in good faith and with reasonable cooperation, aid in the transition to any new arrangement and provider, if requested by the Texas Lottery.

The TLC, in its sole discretion, may terminate, in whole or in part, this Contract at will and without cause upon no less than thirty (30) days' advance written notice. The TLC also may terminate this Contract immediately with written notice if the Executive Director, in his sole judgment, believes that the integrity or security of the TLC is in jeopardy and it is in the best interest of the TLC to do so.

## II. PRODUCTS AND SERVICES

During the term of this Contract, Contractor, as an independent contractor and not as an employee or agent of the TLC, shall provide the following services:

Those products and services requested in and pertaining to the TLC Request for Proposals for Instant Ticket Manufacturing and Services (RFP), issued November 7, 2011 (attached hereto as Exhibit A), as may have been clarified and modified in responses to questions submitted by proposers (attached hereto as Exhibit B), Contractor's Proposal submitted January 27, 2012 (attached hereto as Exhibit C), and Contractor's revised Cost Proposal (Exhibit D). Contractor's revised Cost Proposal supersedes the cost proposal included in Contractor's Proposal and shall apply during the Contract term (including any renewal period).

Exhibits A, B, C and D are incorporated into this Contract by reference the same as if recited at length and are made a part of this Contract for all purposes. The terms of the RFP and the Proposal are controlling except as modified by the terms of this Contract, which shall control in all events. In the event of any conflict or contradiction between or among these documents, the documents shall control in the following order of precedence: Sections I-VIII of this document, together with the Contractor's revised Cost Proposal (Exhibit D); the RFP as clarified and modified by amendment and in response to questions submitted by proposers (Exhibits A and B); and Contractor's Proposal (Exhibit C). Contractor's performance shall be in accordance with the terms and conditions established in Exhibits A, B, C and D and as specified in Sections I through VIII of this document.

Notwithstanding anything herein to the contrary, the parties agree the following RFP sections are replaced in their entirety as shown below and shall apply during the Contract term and any renewal period:



## 1. RFP Glossary of Terms, definition of "Works"

Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced, developed, incorporated, provided or obtained by a Successful Proposer (or such third parties as the Successful Proposer may be permitted to engage) at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to any (i) works of authorship (such as literary works, musical works, dramatic works, choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works, which includes but is not limited to lottery games, game names, game designs, ticket format and layout, manuals, instructions, printed material, graphics, artwork, images, illustrations, photographs, computer software, scripts, object code, source code or other programming code, HTML code, data, information, multimedia files, text web pages or web sites, other written or machine readable expression of such works fixed in any tangible media, and all other copyrightable works), (ii) trademarks, service marks, trade dress, trade names, logos, or other indicia of source or origin, (iii) ideas, designs, concepts, personality rights, methods, processes, techniques, apparatuses, inventions, formulas, discoveries, or improvements, including any patents, trade secrets and know-how, (iv) domain names, (v) any copies, and similar or derivative works to any of the foregoing, (vi) all documentation and materials related to any of the foregoing, and (vii) all other goods, services or deliverables to be provided to TLC under the Contract.

## 2. RFP Section 3.27 (Pre-Existing and Third Party Rights)

3.27.1 To the extent that any pre-existing rights and/or third party rights or limitations are embodied, contained, reserved or reflected in the Works, the Successful Proposer shall either (a) grant to the Texas Lottery the irrevocable, perpetual, non-exclusive, worldwide, royalty-free right and license to (i) use, execute, reproduce, display, perform, distribute copies of, and prepare derivative works based upon such pre-existing rights and any derivative works thereof in connection with the sale, offering for sale, marketing, advertising, and promotion of the Texas Lottery's goods and services, and in all forms of media, media channels and/or publicity that may now exist or hereafter be created or developed, including but not limited to television, radio, print, Internet, and social media (e.g., Facebook, Twitter, YouTube, etc.) and (ii) authorize others to do any or all of the foregoing, or (b) where the obtaining of the aforementioned rights is not reasonably practical or feasible, provide written notice to the Texas Lottery of such pre-existing or third party rights or limitations, request the Texas Lottery's approval of such pre-existing or third party rights, obtain a limited right and license to use such pre-existing or third party rights on such terms as may be reasonably negotiated, and obtain the Texas Lottery's written approval of such pre-existing or third party rights and the limited use of same. The Successful Proposer shall provide the Texas Lottery with documentation indicating a third party's written approval for the Successful Proposer to use any pre-existing or third party rights that may be embodied, contained, reserved or reflected in the Works. The Successful Proposer shall indemnify, defend and hold the Texas Lottery harmless from and against any and all claims, demands, regulatory proceedings and/or causes of

action, and all losses, damages, and costs (including attorneys' fees and settlement costs) arising from or relating to, directly or indirectly, any claim or assertion by any third party that the Works infringe any third party rights. The foregoing indemnity obligation shall not apply to instances in which the Texas Lottery either (y) exceeded the scope of the limited license that was previously obtained by the Successful Proposer and agreed to by the Texas Lottery, or (z) obtained information or materials, independent of the Successful Proposer's involvement or creation, and provided such information or materials to the Successful Proposer for inclusion in the Works, and such information or materials were included by the Successful Proposer, in an unaltered and unmodified fashion, in the Works.

3.27.2 The Successful Proposer shall provide the Texas Lottery a copy of the license agreement between the Successful Proposer and the licensor for all licensed, branded and proprietary games produced by the Successful Proposer for the Texas Lottery under this Contract. The Successful Proposer must provide the license agreement to the Texas Lottery with the draft working papers. If the licensor has prohibited the Successful Proposer from providing the license agreement to the Texas Lottery, the Successful Proposer shall provide other proof of its license rights acceptable to the Texas Lottery in the agency's sole discretion.

3.27.3 The Successful Proposer agrees that it shall have and maintain, during performance of any Contract arising from this RFP, written agreements with all employees, Subcontractors, or agents engaged by the Successful Proposer in performance hereunder, granting the Successful Proposer rights sufficient to support all performance and grants of rights by the Successful Proposer. Copies of such agreements shall be provided to the Texas Lottery promptly upon request.

### **3. RFP Section 3.35.2 (Performance Bond)**

3.35.2 The bond must be maintained in full force and effect for the initial term and any renewal term of the Contract. The bond shall be forfeited to the Texas Lottery if the Successful Proposer fails to perform as required by the Contract, pay sanctions or liquidated damages, or indemnify the Texas Lottery. Any alterations to the bond language as shown in Attachment F must be approved in advance by the Texas Lottery.

### **4. RFP Section 7.3 (Individual Instant Game Development Schedule)**

For those games within the fiscal year instant ticket Game Plan, it is the expectation of the Texas Lottery that each Successful Proposer designated to produce their games will prepare draft artwork and prize structures well in advance of the scheduled launch date for each game or each Successful Proposer shall provide draft artwork and prize structure to the Texas Lottery within five (5) Working Days upon request from the Texas Lottery.



- 7.3.1 Upon receiving approval of artwork and prize structure from the Texas Lottery, the Successful Proposer must provide draft working papers to the Texas Lottery within five (5) business days.
- 7.3.2 The Successful Proposer shall provide to the Texas Lottery Instant Product Coordinator two (2) color proofs of the ticket image for each game for approval. One proof shall be provided with the draft working papers and the second prior to production.
- 7.3.3 Upon review of the draft working papers, the Texas Lottery will provide requested changes to the Successful Proposer. The Successful Proposer must provide final working papers to the Texas Lottery within two (2) business days of receipt of the requested changes.
- 7.3.4 The Successful Proposer must deliver tickets to the Texas Lottery's warehouse no later than the delivery date specified in the final executed working papers.
- 7.3.5 Post Executed Changes. Any changes to the final executed working papers must be in writing and approved by the Executive Director or his designee before production of the instant game begins.

For those games that the Texas Lottery determines to add to the fiscal year instant ticket Game Plan, it is the expectation of the Texas Lottery that each Successful Proposer shall provide draft artwork and prize structure to the Texas Lottery within five (5) business days upon request from the Texas Lottery.

- 7.3.6 Upon receiving approval of artwork and prize structure from the Texas Lottery, the Successful Proposer must provide draft working papers to the Texas Lottery within five (5) business days.
- 7.3.7 The Successful Proposer shall provide to the Texas Lottery Instant Product Coordinator two (2) color proofs of the ticket image for each game for approval. One proof shall be provided with the draft working papers and the second prior to production.
- 7.3.8 Upon review of the draft working papers, the Texas Lottery will provide requested changes to the Successful Proposer. The Successful Proposer must provide final working papers to the Texas Lottery within two (2) business days of receipt of the requested changes.
- 7.3.9 The Successful Proposer must deliver tickets to the Texas Lottery's warehouse no later than the delivery date specified in the final executed working papers.
- 7.3.10 Post Executed Changes. Any changes to the final executed working papers must be in writing and approved by the Executive Director or his designee before production of the instant game begins.



5. **RFP Section 7.8 (Working Papers)**

7.8.1 Working papers for each instant game will be generated by the Successful Proposer in a format designated by the Texas Lottery. Executed working papers must be complete and free of any errors. Production of any instant game will not proceed until the Texas Lottery Executive Director or designee gives written authorization. Any changes made after the execution of working papers must be approved through the execution of a post executed change and signed by the Texas Lottery Executive Director or designee. Instant game development schedules will be established by the Texas Lottery and working papers executed in order to facilitate an orderly process for the production and delivery of instant games. The TLC reserves the right to cease production of any executed game that has not been printed yet. The Successful Proposer may invoice the Texas Lottery for actual costs incurred up to the cancellation date; the Texas Lottery agrees to pay such costs up to a maximum of \$4,000 per game.

7.8.2 For licensed property instant games, the terms of the working papers for the particular game will control in the event of a conflict with any provisions of this RFP.

7.8.3 Working papers for each Texas Lottery instant game will at a minimum include, but not be limited to, specifications for the following:

- (a) Game name, number, date and version.
- (b) Color version of ticket, covered and uncovered, at 100% and 200%.
- (c) Back of ticket at 100% and 200%.
- (d) Ticket size and paper stock to be used.
- (e) Uniform Product Code (UPC) number, which is unique to each game.
- (f) Placement of Bar code on uncovered ticket.
- (g) Front display colors, overprint colors, and security tint colors.
- (h) Description of play style.
- (i) Quantity ordered.
- (j) Orientation of ticket front and back, and press layout configuration.
- (k) Pack size and configuration.
- (l) Prize structure including: game name, number, date and version, ticket price point, production quantity, percent of prize payout, net revenue generated, each tier level for prizes and play action indicating how each tier is won, odds per prize level, overall odds of winning any prize in the game and consolidated odds if there is more than one way to win a prize, winners per pack and per pool, prize cost and percent of prize fund dedicated to each prize level, and percent of prize fund dedicated to low, mid and high tier prize levels, designation of low, mid and high tier prizes, Guaranteed Low-End Prize Structure (GLEPS) for each pack of tickets - broken out into different GLEPS patterns (up to six (6)) and number of winners per pack. Prize structure may be required to show a statement that all top prizes and combination of prizes totaling the top prize are guaranteed.
- (m) Ticket layout for front and back imaging.
- (n) Description of validation number, bar code and UPC code.

- (o) Detail of all actual size of legends, play spots, captions, numbers/symbols, and prize spots.
- (p) Description of validation media, inventory files and end of production reports. Description should include file characteristics and record layout.
- (q) Programming parameters or constraints as directed by the Texas Lottery.
- (r) Deliverables schedule.
- (s) Order and price confirmation page for sign-off approval by the Texas Lottery.
- (t) Color ink draw downs, including proposed options such as varnish, tints, metallic inks, fluorescent inks, etc.

**6. RFP Section 8.7 (Guaranteed Low End Prize Structure (GLEPS))**

Each pack of tickets must contain a guaranteed dollar value of low-tier prizes as specified by the Texas Lottery in the executed working papers. Up to six (6) different configurations of low-tier prizes must be equally and randomly incorporated in each pool and throughout all pools in the game. The different ways to win a low-tier prize within a GLEPS configuration will be randomly placed within a pack of tickets. Each configuration must have the same total dollar value of low-tier winners, but each will have varying numbers of winners of various denominations. Low-tier is currently defined as a prize value of \$24.99 or less. For higher price point games that do not contain low-tier or adequate low-tier prizes, a comparable structure for lower value prizes will be required as specified by the Texas Lottery in the executed working papers and/or the Customer Specifications Document. The low-tier values will be defined in the Customer Specifications document and working papers.

**7. RFP Section 8.16 (Pre-Production Certification and Color Proof Approval)**

- 8.16.1 The Texas Lottery incorporates the highest standards of security and integrity and reserves the right to inspect all tickets produced under any Contract to ensure compliance with the RFP specifications.
- 8.16.2 The Successful Proposer(s) shall certify the accuracy of the game prize structure, and that all Texas Lottery requirements including any parameters and/or constraints have been met, via email to specified Texas Lottery staff, prior to game production.
- 8.16.3 Upon written request by the Texas Lottery Operations Director, the Successful Proposer shall furnish all of the actual game computer and related program reports to the Texas Lottery prior to production.
- 8.16.4 Upon written request by the Texas Lottery Operations Director, the Successful Proposer also must provide, for each game, an image of the computer-generated printout from the test pools illustrating each of the GLEP patterns (up to six (6)) and the reconstruction reports of these packs. Also upon request, the Successful Proposer shall also provide all information pertinent to the test pools, including any summary reports.



8.16.5 The Successful Proposer shall provide to the Texas Lottery Instant Product Coordinator two (2) color proofs of the ticket image for each game for approval. One proof shall be provided with the draft working papers and the second prior to production.

8.16.6 The Successful Proposer shall not produce any game until the Texas Lottery receives the preproduction certification email, approves the ticket color proof, and authorizes game production.

#### 8. RFP Section 8.19 (End of Production Prize Structure)

Prior to the arrival of a printed game at the Texas Lottery warehouse facility, the Successful Proposer must submit an end of production prize structure report for the game which shall be verified in the standard audit letter by a certified public accounting firm under Section 8.17. This report is a listing of the summary of the prize value in the game by prize level. The end of production prize structure report must be e-mailed as specified by the Texas Lottery with the low and mid/high tier electronic validation files, and all must be received by the Texas Lottery prior to actual delivery of tickets to the warehouse. The Texas Lottery will review the Successful Proposer's end of game prize structure for each game and if any errors are detected, the Successful Proposer must correct the errors as soon as identified. However, in no event shall the deadline for instant ticket delivery specified in the executed working papers be extended. Should the End of Production variance cause the odds or other statements on the printed tickets to be incorrect, the Texas Lottery may determine the game to be non-conforming and, in accordance with Section 3.54.15, withhold any amounts due to the Successful Proposer under the Contract.

In addition to the RFP changes above, Contractor shall permit the Texas Lottery and its instant ticket manufacturing vendors to use Secure Shield™, Contractor's secure validation algorithm for use with hidden barcodes (described in Contractor's Proposal at pp. 8.34-8-9), on all Texas Lottery instant tickets at no charge.

### III. PAYMENT

All payments will be made in accordance with this Section III and the Texas Government Code ANN. § 2251 et seq. ("Payments for Goods and Services"). Contractor shall submit invoices monthly for the previous month's services. Each invoice shall note the contract number, services rendered, and date of services. Contractor shall submit invoices for each game, noting the Contract number and detailing services rendered, including game name, game number, quantity of tickets shipped, cost per thousand per executed working papers and/or any costs associated with the game. Invoices must also include the individual purchase order number provided by the Texas Lottery for that particular game.

Invoices may be submitted by mail to the Texas Lottery Commission, P. O. Box 16630, Austin, Texas 78761-6630, Attn: Accounts Payable or by e-mail to AccountsPayable@lottery.state.tx.us. Payments will be made only upon the completion of services or after the delivery of goods authorized in an approved invoice.

Pursuant to Texas Government Code Ann. Section 2251.025, interest is not due on a payment until it becomes "overdue." A payment is not "overdue" until the 31<sup>st</sup> day after the latter of: (1) the date the Texas Lottery receives the goods covered by the contract; (2) the date the performance of service under the contract is completed; or (3) the date the Texas Lottery receives an invoice for the goods or services. See Tex. Gov't Code Ann. Section 2251.021. Services are "completed" when accepted by the Texas Lottery.

Contractor agrees that if the Texas Comptroller of Public Accounts is prohibited from issuing a warrant to Contractor under section 403.055 of the Texas Government Code, any payments owed to Contractor will be applied towards the debt or delinquent taxes that Contractor owes the State of Texas until the debt or delinquent taxes are paid in full.

#### IV. MODIFICATION

The TLC and Contractor may by mutual agreement modify the scope, personnel and prices set forth in this Contract. This modification must be in writing, recite that it is a modification pursuant to Section IV of the Contract, and be signed by individuals having the authority to bind the parties.

In no event shall Contractor be paid for work not authorized by the Contract or any of its written modifications.

#### V. GENERAL PROVISIONS

The following general provisions are specifically applicable to Contractor during the term of this Contract and any extension thereof, and shall survive the Contract where necessary:

**A. Marketing and Advertising.** No marketing or advertising related to this Contract may be conducted by Contractor without the prior written consent of the TLC.

**B. Contractor Employees.** In addition and subject to the requirements set forth in the RFP, Contractor shall assign the work required by this Contract only to those persons identified in Contractor's Proposal by name, together with staff category, and who are reasonably satisfactory to the TLC. Contractor shall report on a quarterly basis, with deadlines to be supplied by the TLC, the number of full-time equivalent (FTE) employees used by Contractor or any subcontractors to provide goods and services under this Contract.

**C. Improper Influence.** Contractor hereby agrees that Contractor shall not knowingly make a gift, loan or political contribution, either directly or indirectly, to any Texas State Officer or a member of the Texas State Legislature, during the term of this Contract. For purposes of this Contract, "Texas State Officer" means those whose duties concern the State of Texas at large or the general public, or who are authorized to exercise their official functions throughout the entire State, without limitation to any political subdivision of the State. Contractor further agrees that it shall direct its officers, directors, employees, agents, lobbyists and representatives not to make any such gift, loan or political contribution on Contractor's behalf; provided, that any gifts, loans or political contributions that these individuals or entities may make on their own behalf or on



behalf of someone other than Contractor shall not be a violation of this provision. Any violation of this provision may, at the sole discretion of the TLC, result in either the immediate termination of this Contract or liquidated damages in the amount of \$10,000 for each occurrence.

**D. Conflict of Interest.** Contractor shall promptly disclose to the Texas Lottery in writing any actual, potential or perceived conflict of interest, relative to the performance of the requirements of this Contract. Contractor must disclose any personal or business relationship of (a) itself; (b) any of its principals, officers, directors, investors, owners, partners, and employees (collectively, Contractor Personnel); (c) any spouse, child, brother, sister, or parent residing as a member of the same household in the principal place of residence of any Contractor Personnel; (d) any affiliate; or (e) any Subcontractor, with any employee or representative of the Texas Lottery (including the Texas Lottery Executive Director and its commissioners) or its prime vendors.

**E. Change in Financial Condition.** Contractor shall notify the Texas Lottery of a material adverse change in its financial condition during the Contract term and any renewal thereof. If the Contractor experiences a material adverse change during the term of the Contract or any extension thereof, Contractor shall notify the Texas Lottery in writing of such change at the time the change occurs or is identified. Failure to notify the Texas Lottery of such material adverse change will be sufficient grounds for terminating the Contract. The term "material adverse change" shall mean any change or changes that individually or in the aggregate are materially adverse to (i) the assets, properties, business, results of operations or financial condition, taken as a whole, of Contractor or other applicable obligor, (ii) the ability of Contractor or such other obligor to perform its or their obligations under the Contract, or (iii) the legality or enforceability against Contractor or such obligor of the Contract.

**F. Contractor Standards.** Contractor shall perform its responsibilities by following and applying at all times the highest professional and technical guidelines and standards.

**G. Contingencies.** This Contract is subject to the following contingencies:

- (1) Contractor's presentment of all bonds and insurance certificates in the form and amount required by the TLC in accordance with the requirements set forth in the RFP.
- (2) Satisfactory criminal history and background investigation report in accordance with the requirements of the State Lottery Act (Chapter 466 of the Texas Government Code), including Sections 466.103 and 466.155.

**H. Multiple Originals.** This Contract is executed in three (3) identical copies, each of which shall be deemed an original.

## VI. NOTICES

Unless otherwise directed, all invoices, notices, reports and correspondence required by this Contract shall be in writing and delivered to the following representatives of the TLC and Contractor, or their successors in function:

**Texas Lottery**  
Angela Zgabay-Zgarba  
Contracts Administrator  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

**Contractor**  
Joseph Lapinski  
Account Development Manager  
GTECH Printing Corporation  
5301 Riata Park Court  
Austin, Texas 78727

## VII. APPLICABLE LAW

This Contract [Sections I-VIII of this document, the RFP (Exhibit A), as may have been clarified and modified in responses to questions submitted by proposers (Exhibit B), Contractor's Proposal (Exhibit C), and Contractor's revised Cost Proposal (Exhibit D)] shall be governed by and construed in accordance with the laws of the State of Texas, and venue for any dispute arising from this Contract shall be in state district court, Travis County, Texas. This Contract constitutes the entire agreement between the TLC and Contractor, and may be amended only by formal written agreement properly executed by both the TLC and Contractor.

## VIII. EQUAL OPPORTUNITY

Contractor agrees that all employees shall be recruited, hired, trained, assigned, promoted, transferred, downgraded, laid off, recalled and terminated based upon their own abilities, achievements and experience, and in compliance with the provisions of the Civil Rights Act of 1964 (42 USCA 2000e, *et. seq.*) and other applicable federal and state laws.

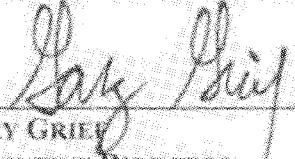
EXECUTED on this 3<sup>rd</sup> day of August 2012, by a person having the authority to contractually bind GTECH Printing Corporation.

**GTECH PRINTING CORPORATION**

By:   
ALAN ELAND  
PRESIDENT

EXECUTED on this 7<sup>th</sup> day of Aug 2012, by a person having the authority to contractually bind the Texas Lottery Commission.

**TEXAS LOTTERY COMMISSION**

By:   
GARY GRIEF  
EXECUTIVE DIRECTOR