

The following Liquidated Damage may become part of any resulting agreement from this ITN.

1. LIQUIDATED DAMAGES PROVISIONS

In all the below liquidated damages sections, the Lottery and the Contractor agree that it will be extremely impractical and difficult to determine actual damages which the Lottery will sustain. The commodities and/or services to be provided under the Contract are not readily available on the open market; any breach by the Contractor will delay and disrupt the Lottery's operations and will lead to damages. Therefore, the parties agree that the liquidated damages as specified in all the sections below are reasonable. Additionally, the Lottery reserves the right to define additional liquidated damages provisions dependent on the successful Vendor's offerings and negotiations. Except and to the extent expressly provided herein, the Lottery shall be entitled to recover liquidated damages under each section applicable to any given incident.

1.1. Notification of Liquidated Damages

Upon determination that liquidated damages are to be assessed, the Lottery shall notify the Contractor of the assessment in writing.

1.2. Severability of Individual Liquidated Damages

If any portion of the liquidated damages provisions is determined to be unenforceable, that portion is severable, and the other provisions shall remain in full force and effect.

1.3. Waivers of Liquidated Damages

The waiver of any liquidated damages due the Lottery shall constitute a waiver only as to such liquidated damages and not a waiver of any future liquidated damages. Failure to assess liquidated damages within any period of time shall not constitute a waiver of such claim by the Lottery at any time during the contract term and any renewals.

1.4. Payment of Liquidated Damages

- 1.4.1. Each of the categories of liquidated damages set forth below in section 2, shall be a separate liability of the Contractor, and one shall not mitigate another. For example, liquidated damages assessed for failure to meet production dates shall not mitigate any liquidated damages that may occur for outage of service. Once the Lottery has determined that liquidated damages are to be assessed, the Secretary shall notify the Contractor of the assessment(s). Unless otherwise directed by the Secretary, all assessed liquidated damages will be deducted from any moneys owed to the Contractor by the Lottery. In the event the amount due the Contractor is not sufficient

to satisfy the amount of liquidated damages, the Contractor shall pay the balance to the Lottery within 30 calendar days of written notification by the Lottery.

1.4.2. The Lottery may make a claim for payment against the Performance Bond, with or without notice to the Contractor.

1.5. Delays and Liquidated Damages

The Contractor shall not be required to pay liquidated damages for delays or difficulties due solely to matters that fall under *Force Majeure (unforeseeable circumstances that impact Contractor's ability to perform)*, nor for time delays specifically due to, or approved in writing by, the Lottery. During a period of non-performance due to Force Majeure, payments from the Lottery to the Contractor may be suspended.

2. Categories of Liquidated Damages

2.1. System Installation

2.1.1. Condition

The Contractor shall complete all installation preparations as required, complete System testing to the Lottery's satisfaction, pass Lottery acceptance testing, comply with all other contractual requirements in effect during the implementation period, and achieve readiness for production operations.

2.1.2. Damage

Liquidated damages for each calendar day of delay are as follows:

2.1.2.1. Readiness for Start of Lottery Acceptance Testing

\$1,000 per hour, beginning 90 days prior to the production start-up date, as stipulated by the Contract.

2.1.2.2. Successful Completion of Lottery Acceptance Testing

\$10,000 per day beginning 30 days prior to the production start-up date, as stipulated by the Contract, when such delay is caused by unresolved errors and issues encountered in acceptance testing.

- 2.1.2.3. Production Operations
\$100,000 per day beginning with the production start-up date, as stipulated by the Contract.
- 2.1.2.4. Missing Deliverables
\$5000 per day for each failure to provide a deliverable, meet a requirement, or resolve an acceptance test problem pursuant to the agreed-upon project schedule until such is provided or performed.

2.2. System Down

2.2.1. Condition

The system shall be defined to be "down" if claimants cannot be paid, the system cannot be accessed by a specific group of assigned users, or the system loses connectivity to any of the payment platforms. The total time during which the system is down during the day shall be the sum of all time during such that operational work cannot be conducted when the system is "down."

2.2.2. Damage

Liquidated damages are \$60,000 per hour for each hour the system is down, or fraction thereof, which is greater than two (2) minutes in duration during the operational period, or the most recent 12-month total claims count divided by the normal operating hours of Lottery offices multiplied by \$600, whichever is greater.

2.3. Accurate Reports

2.3.1. Condition

The system must provide sufficient and accurate management reports within the specified time frames.

2.3.2. Damage

Liquidated damages are \$500 per day that the above condition is not satisfied.

2.4. Failure to Produce an Administrative Software Change

2.4.1. Condition

The Contractor shall modify or add software to produce reports, enhance capabilities, or other administrative applications within 90 days from delivery of a Lottery approved set of change specifications, unless an extension is authorized in writing by the Lottery. The Contractor's change must pass an acceptance test and receive the Lottery's written approval within the time frame specified.

2.4.2. Damage

Liquidated damages are \$1,000 per day beyond the 90 day period from delivery of a Lottery approved set of change specifications that the modified or additional software is not installed.

2.5. Unauthorized Software/Hardware Modifications

2.5.1. Condition

The Contractor shall not modify any software or hardware without the prior written consent of the Lottery. If the Contractor modifies any software or hardware without the prior written approval of the Lottery, the Lottery may issue a written order that the change or modification be removed, and the system restored to its previous operating state at the Contractor's expense. "Modification" does not include replacement of a system component with an essentially similar component in the event of necessary maintenance.

2.5.2. Damage

Liquidated damages are \$25,000 for each unauthorized modification.

2.6. Unauthorized Access

2.6.1. Condition

The Contractor shall preclude personnel not authorized by the Lottery from accessing the system computer facilities, the computerized systems, and any system data or software.

2.6.2. Damage

Liquidated damages are \$25,000 for each person, each instance in which such unauthorized personnel is not precluded from assessing the system computer facilities, the computerized systems, system data or software.

2.7. Incorrect Payment

2.7.1. Condition

A System error leads to an inaccurate payment which results in a claimant receiving less the full ticket prize value resulting in damage to the Lottery's reputation.

2.7.2. Damage

Liquidated damages are the \$50,000 per incident.

2.8. Failure to Report Incidents

2.8.1. Condition

It will be the responsibility of the Contractor to immediately report all significant events, that is those that singularly or collectively with other events create a condition that exceeds any liquidated damages threshold or places the integrity of the Lottery's transactions, reputation for integrity of its systems' operations, or customer relationships at risk. The immediate reporting shall be delivered electronically or by telephone within one hour of the discovery of the incident, followed by a letter addressed to the Lottery's Contract Manager within 24 hours of the incident. All written reports and notifications may be sent by courier or electronically mailed directly to the Lottery's Contract Manager. At a minimum, each of the following types of events shall require a written report:

- 2.8.1.1. System takeovers;
- 2.8.1.2. Major communications failures;
- 2.8.1.3. Significant operator errors;
- 2.8.1.4. Out of balance conditions;
- 2.8.1.5. Emergency software or hardware changes;
- 2.8.1.6. Security violations or breaches; or
- 2.8.1.7. Any situation which may cause the general public to become alarmed and/or which may damage the integrity or public image of the Lottery.

2.8.2. Damage

In the event that the Contractor fails to report incidents as required by this ITN, liquidated damages are \$1,000 per day (pertaining to written notification) or per hour (pertaining to oral notification), or prorated fraction thereof, until an incident is correctly reported.

2.9. Staffing

2.9.1. Condition

The Contractor is required to meet the expectation of filling all positions with qualified staff that meet all personnel criteria within 90 days of a vacancy.

2.9.2. Damage

In the event that the Contractor fails to meet the stated condition liquidated damages are \$2,000 per day per vacancy (at the Lottery's discretion) until the condition is rectified.

2.10. Failure to Comply

2.10.1. Condition

The Contractor is required to comply with all commitments of the ITN, the Reply, and the Contract, and all clarifications and amendments to these documents. If the Contractor should fail to provide products, services, data, or documents as obligated thereby, the Lottery may invoke liquidated damages where not otherwise addressed liquidated damages heretofore.

2.10.2. Damage

In the event that the Contractor fails to provide an obligated product, service, data, liquidated damages are \$5,000 per day or per incident until the condition is rectified.

2.11. Degraded Performance

2.11.1. Condition

The central computer system shall be in "degraded performance" when the System:

- 2.11.1.1. Cannot process a minimum of 9,500 per second (95% of the ITN stated expectations).
- 2.11.1.2. Cannot accommodate 142 Lottery staff members (95% of stated ITN expectations) accessing the system concurrently.
- 2.11.1.3. Cannot process claims due to connectivity issues or system components like TIN matching, address verification not being accessible.
- 2.11.1.4. Does not provide expected interface files within agree upon timeframes.

2.11.2. Damage

- 2.11.2.1. Liquidated damages are \$50,000 per hour of degraded time, or fraction thereof, which is greater than fifteen minutes in duration during the operational period on any day.
- 2.11.2.2. The total time during which the System is degraded during the day will be calculated as the sum of all time during the daily operational sales period when the Systems are operating at a "degraded performance level." To address chronic problems, in the event that two degraded performance events of more than thirty minutes in length have already occurred in a Business Week, the grace period of thirty minutes must be rescinded, and liquidated damages must begin immediately with any subsequent degraded performance event in that Business Week.