

## PROFESSIONAL SERVICES AGREEMENT

THIS PROFESSIONAL SERVICES AGREEMENT, dated as of \_\_\_\_\_, 200\_ (“Agreement”), is made and entered into by and between Viejas Enterprises a wholly owned business of the Viejas Band of Kumeyaay Indians, a federally recognized Indian Tribe located at 5000 Willows Road, Alpine, California 91901 (“Viejas”), and \_\_\_\_\_, located at \_\_\_\_\_ a \_\_\_\_\_ corporation (“Contractor”), with reference to the following:

- A. Viejas desires certain materials and professional services in connection with Request for Proposal No. \_\_\_\_\_ (“RFP”).
- B. Contractor warrants it is qualified and desires to provide such materials and professional services to Viejas as further described in this Agreement.
- C. The exhibits set forth below are hereby incorporated by this reference and made part of this Agreement. In the event of any conflict, doubt, uncertainty, ambiguity, or inconsistency, the terms and conditions set forth in the Professional Services Agreement document will control and then the Agreement will be interpreted by the following order of precedence:

Exhibit 1: RFP No. \_\_\_\_\_ dated \_\_\_\_\_, 200\_;

Exhibit 2: \_\_\_\_\_’s Proposal dated \_\_\_\_\_, 200\_; and

Exhibit \_\_: (Any additional document(s) to be made part of this Agreement).

NOW, THEREFORE, in consideration of the foregoing, the provisions contained herein and the mutual benefits to be derived here from, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Contractor and Viejas agree as follows:

- 1. Services and Deliverables.
  - 1.1 Scope of Work. Contractor shall provide the materials and services which are set forth in this Agreement (“Work”) to Viejas in the timeframe and manner set forth herein.
  - 1.2 Standard of Performance. Contractor represents and warrants that it has the necessary knowledge, experience, abilities, skills and resources to perform its obligations under this Agreement, and agrees to perform its obligations under this Agreement in a professional manner, consistent with prevailing industry standards and practices.
- 2. Title and Assignment of Rights Regarding Deliverables.
  - 2.1 Title. Contractor represents and warrants that it owns all right, title, and interest in and to the deliverables under this Agreement, and that such rights are not the subject of any encumbrances, liens, or legal claims of ownership by any third party.
  - 2.2 Assignment. Except for intellectual property rights owned by Contractor or any third party, Contractor assigns all rights regarding the Work to Viejas. Except for intellectual property rights owned by Contractor or any third party, Contractor does hereby assign, grant, and deliver to Viejas, and Viejas hereby accepts, the entire worldwide right, title, and interest of every kind and nature whatsoever in

and to the Work delivered under this Agreement, including but not limited to any related intellectual property rights.

- 2.3 Non-Infringement. If applicable, Contractor represents and warrants to the best of their knowledge that the use of the deliverables under this Agreement shall not infringe or otherwise violate the trademark, trade dress, patent, trade secret, copyright, or other intellectual property rights of any third party.

In the event of an intellectual property right claim, Contractor agrees to indemnify and hold Viejas harmless provided Viejas (i) gives Contractor prompt written notice of such claim, (ii) permits Contractor to defend or settle the claim and (iii) provides all reasonable assistance to Contractor in defending or settling the claim.

3. Payment and Invoicing Terms.

Contractor shall be paid a total **not to exceed \$ XXXX.XX** for all Work provided pursuant to this Agreement. Contractor agrees to invoice Viejas and Viejas agrees to pay said invoice Net 30 from receipt provided all Work has been completed and accepted by Viejas.

4. Term; Termination; Survival.

- 4.1 Term. Except for the rights and obligations set forth in Section 5 (Insurance and Indemnification), section 6 (Warranty and Inspection), and section 8 (Licenses and Permits; Compliance with Law), this Agreement will terminate upon satisfaction of the obligations set forth in section 3 (Payment and Invoicing Terms). Notwithstanding the foregoing, the term of this Agreement will not exceed \_\_\_\_\_year(s) from the date of its execution by both parties.

- 4.2 Termination. This Agreement may be terminated prior to the completion of Contractor's performance (i) by written agreement of the parties, or (ii) by either party upon a breach of this Agreement (including, but not limited to, Contractor's Work being deemed unsatisfactory by Viejas) by the other party that remains uncured 10 days after receiving written notice of such breach from the terminating party. In the event of a termination of this Agreement pursuant to this Section 4.2, Viejas and Contractor will in good faith negotiate an appropriate reduction in the fees payable to Contractor pursuant to Section 3 above.

- 4.3 Termination for Convenience. Viejas may at any time and for any reason terminate Contractor's performance at Viejas' convenience. Upon receipt of such written notice, Contractor shall, unless the notice directs otherwise, immediately discontinue the work and placing of orders for materials, facilities and supplies in connection with its performance of this Agreement.

Upon such termination, Contractor shall be entitled to payment only as follows: (1) the actual cost of the Work completed in conformity with this Agreement; plus, (2) such other costs actually incurred by Contractor as are permitted by the Agreement and approved in writing by Viejas. There shall be deducted from such sums as provided in this subparagraph the amount of any payments made to Contractor prior to the date of the termination of this Agreement. Contractor shall not be entitled to any claim or claim of lien against Viejas for any additional compensation or damages in the event of such termination and payment.

4.4 Survival. Notwithstanding anything in this Agreement to the contrary, the provisions of Section 5 (Insurance and Indemnification), section 6 (Warranty and Inspection), and section 8 (Licenses and Permits; Compliance with Law) below, shall survive any expiration or termination of this Agreement, and each party shall remain obligated to the other party under all provisions of this Agreement that expressly or by their nature extend beyond and survive the expiration or termination of this Agreement.

5. Insurance and Indemnification.

5.1 Insurance: Contractor, at its own expense, shall procure and maintain policies of insurance to include the following coverage:

- (i) Workers' Compensation Insurance coverage for its own employees that meets or exceeds the applicable statutory limits, as well as Employer's Liability coverage with limits of at least \$500,000;
- (ii) Comprehensive General Liability Insurance of at least \$1,000,000 combined single limit and \$2,000,000 annual aggregate; and
- (iii) Comprehensive Automobile Liability Insurance, including Automobile Non-Ownership Liability, with a limit of not less than \$1,000,000 and Umbrella or Excess Liability Insurance in an amount not less than \$2,000,000.

Contractor shall provide Viejas with certificates of insurance evidencing such policies within five (5) days before beginning the Work. In addition, such policies shall provide that (i) Viejas is named as an additional insured, (ii) coverage shall not be invalidated by any act, omission or negligence of Viejas, (iii) coverage is on a "claims occurring" basis and not a "claims made" basis, (iv) coverage shall not be canceled, terminated, reduced, restricted, limited or materially changed without providing 30 days' prior written notice to Viejas, and (v) all rights of subrogation are waived as against Viejas and its insurers. In addition, any commercial general liability insurance shall include coverage for Contractor's independent contractors and blanket contractual coverage for Contractor's obligations and liabilities under this Agreement, including, but not limited to, the indemnification obligations set forth in Section 5.2 below.

5.2 Indemnification. Contractor shall indemnify, hold harmless, protect and defend Viejas, Viejas Band of Kumeyaay Indians and its Tribal Council, Tribal Members, trustees, officers, employees and representatives (the "Indemnified Parties") for, from and against any and all demands, claims, suits, damages, losses, liabilities, costs and expenses, including, but not limited to, court costs and attorneys' fees (the "Indemnified Matters"), of any nature whatsoever (including, but not limited to, damage to or loss of property, bodily injury, tort, breach of contract or death), directly or indirectly arising out of or in connection with the performance of Contractor's obligations under this Agreement. Contractor's indemnification obligations under this Section 5.2 shall apply whether the Indemnified Matters are due in part to the concurrent fault or negligence of the Indemnified Parties or others. Contractor's defense obligations under this Section 5.2 shall be with attorneys approved by Viejas, which approval shall not be unreasonably withheld.

6. Warranty and Inspection

Contractor represents and warrants that it has the necessary knowledge, experience,

abilities, skills and resources to perform its obligations under this Agreement, and agrees to perform its obligations under this Agreement in a professional manner, consistent with prevailing industry standards and practices. Contractor further warrants that all Work performed under this Agreement shall comply with any and all laws, ordinances, and regulations of any and all governmental agencies entitled to impose such laws, ordinances and regulations. All Work performed by Contractor shall be subject to Viejas' inspection before acceptance, and payment for Work rendered shall not constitute a waiver of any of the rights granted to Viejas under this section.

Contractor warrants that all labor, workmanship and material provided will comply with the requirements of this Agreement and will be free of defects for a period of five (5) years. Contractor will supply labor and materials to correct any defective condition without additional cost to Viejas during the five (5) year warranty period.

7. Liquidated Damages and Timely Completion of Work

The parties further agree that **"TIME IS OF THE ESSENCE"** regarding the timely completion by Contractor of the Work set forth in this Agreement. As such, Contractor agrees that its failure to complete the Work within the timeframe set forth in this Agreement will cause damage(s) to Viejas which are uncertain and difficult to quantify. Therefore, Contractor and Viejas agree that if Contractor fails to complete the Work by \_\_\_\_\_, 200\_\_\_\_. Contractor agrees to pay Viejas \$\_\_\_\_\_/day for each day Contractor has not completed the Work. The parties agree that this \$\_\_\_\_\_/day payment is not a penalty but liquidated damages which are deemed reasonable and a fair estimation of the losses, expenses and damages that Viejas will suffer as a result of Contractor's failure to achieve a timely completion of the Work.

Contractor shall not be responsible for delays or failures if such delay arises out of acts of God or of the public enemy, fires, floods, epidemics, riots, quarantine restrictions, strikes, freight embargoes, earthquakes, electrical outages, computer or communications failures, and severe weather, and acts or omissions of subcontractors or third parties.

8. Licenses and Permits; Compliance with Law. Contractor represents and warrants that it has all licenses and permits necessary to conduct its business and perform its obligations under this Agreement, and agrees to comply with all applicable federal, state and local statutes, regulations, codes, ordinances and policies in performing its obligations under this Agreement. Contractor will also comply with all applicable regulations, standards, policies and procedures, and requirements of the Viejas Band of Kumeyaay Indians, a federally recognized Sovereign Indian tribe, its Enterprises, including but not limited to, safety requirements; security requirements; Tribal Government Gaming Commission licensing, Minimum Internal Control Standards and regulations; Tribal Gaming Compact requirements; and applicable insurance and bonding requirements.

**(Gaming Devices, Supplies, or Equipment):** If applicable, a Contractor who is leasing, supplying or otherwise providing gaming devices, gaming supplies or gaming equipment, shall obtain and maintain in good standing, a Viejas' Tribal Government Gaming Commission vendor gaming license from the Viejas' Tribal Government Gaming Commission. Such license shall be obtained prior to the culmination of any agreement for the sale, lease or loan of any gaming device, supplies or equipment. Such license shall be maintained in good standing throughout the duration of any business relationship with Viejas. Contractor will be accountable for maintaining compliance with all applicable gaming regulations and Minimum Internal Control Standards within the jurisdiction of Viejas and Viejas' Tribal Government Gaming Commission. Failure to comply with the applicable gaming regulations, Minimum Internal Control Standards and applicable laws and regulations within the jurisdiction of the Viejas Tribal Gaming Commission will subject the licensee to possible regulatory sanctions. Sanctions may include license suspension

or revocation and/or the imposition of fines and may invalidate any existing contracts. Additionally any gaming devices, supplies or equipment sold, leased or otherwise supplied to Viejas shall first be examined or reviewed, approved, and authorized by Viejas Tribal Gaming Commission. In addition, where deemed necessary or appropriate by the Viejas Tribal Gaming Commission, gaming devices, gaming supplies or gaming equipment shall be tested and certified by an independent testing laboratory at the manufacturer's, vendor's or supplier's expense. All contracts or agreements for the sale, lease or loan of gaming devices, gaming supplies or gaming equipment shall require review and approval of the Viejas Tribal Gaming Commission prior to execution by either or both parties.

9. Independent Contractor Relationship. The parties intend that Contractor's relationship to Viejas in providing the Work hereunder shall be that of an independent contractor. Nothing in this Agreement, nor any performance hereunder, is intended or shall be construed to create a partnership, joint venture or relationship of agency or employment between Viejas and Contractor. In providing the Work hereunder, Contractor shall represent itself to third parties as an independent contractor to Viejas and shall not hold itself out as having any authority to obligate Viejas.
10. Limitation of Liability. Except for personal injury or death, Viejas' total liability, whether for breach of contract, warranty, negligence, strict liability in tort, or otherwise, will be limited to the direct damages recoverable under law. **ALTHOUGH THE PARTIES ACKNOWLEDGE THE POSSIBILITY OF SUCH LOSSES OR DAMAGES, THEY AGREE THAT VIEJAS WILL NOT BE LIABLE FOR ANY COMMERCIAL LOSS; INCONVENIENCE; LOSS OF USE, TIME, DATA, GOOD WILL, REVENUES, PROFITS OR SAVINGS; OR OTHER SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES.**
11. Miscellaneous.
  - 11.1 Power and Authority; Due Authorization; No Conflict; Enforceability. Each party represents and warrants to the other party that (i) such party has the power and authority to execute, deliver and perform its obligations under this Agreement, (ii) the execution, delivery and performance of this Agreement have been duly authorized by such party and do not and shall not conflict with any agreement or instrument to which it is bound, and (iii) this Agreement constitutes the legal, valid and binding obligation of such party, enforceable against it in accordance with its terms.
  - 11.2 Entire Agreement; Severability; Further Assurances. This Agreement, including any exhibits attached hereto, constitutes the entire agreement between the parties, and supersedes all prior and contemporaneous agreements, understandings and negotiations, with respect to the subject matter hereof. In the event any provision of this Agreement is determined to be invalid or unenforceable, it is the desire and intention of the parties that such invalidity or unenforceability not invalidate or render unenforceable the remainder of the Agreement and that such provision be reformed and construed in such a manner that it will, to the maximum extent practicable, be deemed valid and enforceable, and the rights and obligations of the parties shall be construed and enforced accordingly. Each party shall execute and deliver such further documents and take such further actions as may be required or reasonably requested by the other party to effectuate the purposes of this Agreement.
  - 11.3 No Assignment; No Amendment; No Waiver. This Agreement (i) may not be assigned or transferred, in whole or in part, by operation of law or otherwise, by either party without the prior written consent of the other party, and (ii) may not

be amended or modified, by course of conduct or otherwise, except in a writing duly executed by each of the parties. Any waiver of any provision of this Agreement shall be in writing duly executed by the waiving party. The failure or delay by either party to seek redress for any breach or default under this Agreement, or to insist upon the strict performance of any provision of this Agreement, shall not constitute a waiver thereof or of any other provision of this Agreement, and such party shall have all remedies provided herein and at law and in equity with respect to such act and any subsequent act constituting the same.

- 11.4 Tribal Sovereignty: The parties hereto acknowledge that Viejas Enterprises is the wholly owned business enterprise of the Viejas Band of Kumeyaay Indians, a federally recognized Indian tribe that retains and has not waived sovereign immunity from suit or process. Nothing in this Agreement is intended, nor shall it be interpreted, to subject the Viejas Band to the jurisdiction of the federal courts, or the courts of the States of California, or any other state or any political subdivision thereof.
- 11.5 Construction of Agreement. The parties acknowledge and agree that both parties substantially participated in negotiating the provisions of this Agreement; and, therefore, the parties agree that this Agreement shall not be construed more favorably toward one party than the other party as a result of one party primarily drafting the Agreement. The section and other headings in this Agreement are for convenience of reference only and shall not be construed, expressly or by implication, so as to affect the meaning or interpretation of any of the provisions hereof. This section and other headings in this Agreement are for convenience of reference only and shall not affect, expressly or by implication, the meaning or interpretation of any of the provisions hereof.
- 11.6 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.
- 11.7 Sales and Use Taxes. The Viejas Enterprise is a tribal enterprise operated by the Viejas Band of Kumeyaay Indians, a federally recognized Indian tribe. As a federally recognized Indian tribe, Viejas is exempt from sales and use taxes imposed by the State of California or by any political subdivision thereof. Taxpayer identification number is 33-0821753.
- 11.8 Confidentiality; Name or Logo Use. Contractor shall treat all information disclosed by Viejas pursuant to this Agreement as confidential, and Contractor shall not disclose or use any such information except as required in connection with the performance of its obligations under this Agreement. Contractor shall not use Viejas' name or logos in any manner or media (including, but not limited to, press releases, promotions, advertisements or solicitations) without the prior written approval of Viejas.
- 11.9 MSDS's: For all services performed or shipments made that include Hazardous Substances, an appropriate Material Safety Data Sheet ("MSDS") and labeling must precede or accompany each shipment, as required to satisfy Cal/OSHA, and all other applicable local, state, and federal laws. Further, Contractor shall send to Viejas updated MSDS's and labeling as required by applicable law.
- 11.10 Mechanics Liens: Contractor shall pay promptly all valid bills and charges for designs, drawings, blueprints, materials, labor, machinery equipment, delivery charges, and any other item, service or facility used in connection with or arising

out of the construction of the Project, and will indemnify and hold Viejas free and harmless from and against all liens and claims of lien for labor, services, fixtures or materials. For the benefit of Viejas, Contractor shall notify all Subcontractors, vendors, suppliers and service providers of the inapplicability of mechanic's liens on the property and premises of the Viejas Indian Reservation, and the ineffectiveness of liens against the Viejas Band of Kumeyaay Indians, by informing all Subcontractors, suppliers, vendors and service providers in language identical or substantially similar to the following:

"The Viejas Band of Kumeyaay Indians is a federally recognized Indian tribe retaining full sovereign immunity from unconsented suit. The Viejas Band is not subject to the civil jurisdiction of the courts of California. Mechanic's liens and other claims for payment that are filed with the State of California or with political subdivisions of the State, such as the County of San Diego, have no effect and are not enforceable on the premises of the Viejas Reservation, nor against the Viejas Band or its enterprises."

IN WITNESS WHEREOF, Contractor and Viejas have duly executed and delivered this Agreement as of the date first written above.

**(CONTRACTOR'S NAME)** \_\_\_\_\_

**VIEJAS ENTERPRISES**

By \_\_\_\_\_

By \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

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

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