

**PROFESSIONAL SERVICES AGREEMENT  
BETWEEN THE CITY OF CALISTOGA  
AND  
THE CALISTOGA CHAMBER OF COMMERCE**

THIS AGREEMENT is entered into as of the \_\_\_ day of June 2012, by and between the CITY OF CALISTOGA herein called the "CITY", and the CALISTOGA CHAMBER OF COMMERCE, herein called the "CHAMBER".

Recitals

WHEREAS, CITY desires to obtain services in connection with marketing and promotional services for the City of Calistoga; and

WHEREAS, CHAMBER hereby warrants to the CITY that CHAMBER is skilled and able to provide such services described in Section 1 of this Agreement; and

WHEREAS, CITY desires to retain CHAMBER pursuant to this Agreement to provide the services described in Section 1 of this Agreement.

Agreement

NOW, THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:

1. Scope of Services. Subject to such policy direction and approvals as the CITY through its staff may determine from time to time, CHAMBER shall perform the services set out in the "Scope of Work" attached hereto as Exhibit "A" and incorporated herein by reference.

2. Time of Performance. The services of CHAMBER are to commence no sooner than July 1, 2012 and be completed not later than June 30, 2013. Any changes to these dates must be approved in writing by the City Manager or his or her designee.

3. Compensation and Method of Payment.

A. Compensation. The compensation to be paid to CHAMBER, including both payment for professional services and reimbursable expenses, shall be \$21,000 per month for a base compensation not to exceed \$252,000 for the entire year. In addition, a performance bonus shall be applied on a quarterly basis up to \$12,500 should the Transient Occupancy Tax revenue received by the City exceed 3.5% of the projected FY 2012-13 Operating Budget for these revenues for the same quarterly time period. Should any quarter's payout fall short of the \$12,500 maximum, but the year end incremental Transient Occupancy Tax exceed the 3.5% budgeted growth, a year end reconciliation payment will be made to ensure

the maximum performance bonus of \$50,000 is realized. However, in no event shall the amount compensated by the City for the basic compensation and performance bonus exceed \$302,000.

Payment by CITY under this Agreement shall not be deemed a waiver of defects, even if such defects were known to the CITY at the time of payment.

B. Timing of Payment. Billing for base compensation services may be made on a monthly basis. CITY shall review CHAMBER'S statement and pay CHAMBER for services rendered within 15 days of receipt of the CHAMBER'S statement. Performance payments shall be made within 30 days of the close of each quarter.

C. Changes in Compensation. CHAMBER will not undertake any work that will incur costs in excess of the amount identified in Section 3. A. without written approval from CITY

D. Litigation Support. CHAMBER agrees to testify at CITY's request if litigation is brought against CITY in connection with CHAMBER'S services. Unless the action is brought by CHAMBER or is based upon CHAMBER'S negligence, CITY will compensate CHAMBER for the preparation and the testimony at CHAMBER'S standard hourly rates.

4. Ownership of Documents. All plans, studies, documents and other writings prepared by and for CHAMBER, its officers, employees and agents in the course of implementing this Agreement, except working notes and internal documents, shall become the sole property of the CITY upon payment to CHAMBER for such work, and the CITY shall have the sole right to use such materials in its sole discretion without further compensation to CHAMBER or to any other party. Any modifications made by the CITY to any of the CHAMBER'S documents or any partial use or reuse of the documents without the express written consent of the CHAMBER will be at the CITY's sole risk and without liability to the CHAMBER and the CITY shall indemnify, defend, and hold harmless from all claims, damages, losses and expenses including, but not limited to, attorney's fees resulting there from.

5. Employment of Other CHAMBERS, Specialists or Experts. CHAMBER will not employ or otherwise incur an obligation to pay other CHAMBER, specialists or experts for services in connection with this Agreement without the prior written approval of the CITY.

6. Interest of CHAMBER.

A. CHAMBER (including principals, associates and professional employees) covenants and represents that it does not now have any investment or interest in real property and shall not acquire any interest, direct or indirect, in the area covered by this contract or any other source of income, interest in real property or investment which would be affected in any manner or degree by the performance of CHAMBER'S services hereunder. CHAMBER further covenants and represents that in

the performance of its duties hereunder no person having any such interest shall perform any services under this contract.

CHAMBER is not a designated employee within the meaning of the Political Reform Act because CHAMBER:

(1) will conduct research and arrive at conclusions with respect to his/her rendition of information, advice, recommendation or counsel independent of the control and direction of the CITY or of any CITY official, other than normal contract monitoring; and

(2) possesses no authority with respect to any CITY decision beyond the rendition of information, advice, recommendation or counsel. (FPPC Reg. 18700(a) (2).)

7. Interest of Members and Employees of CITY. No member of the CITY and no other officer, employee or agent of the CITY who exercises any functions or responsibilities in connection with the carrying out of any project to which this Agreement pertains, shall have any personal interest, direct or indirect, in this Agreement, nor shall any such person participate in any decision relating to this Agreement which affects his/her personal interests or the interest of any corporation, partnership or association in which he/she is directly or indirectly interested.

8. Liability of Members and Employees of CITY. No member of the CITY and no other officer, employee or agent of the CITY shall be personally liable to CHAMBER or otherwise in the event of any default or breach of the CITY, or for any amount which may become due to CHAMBER or any successor in interest, or for any obligations directly or indirectly incurred under the terms of this Agreement.

9. Indemnification of CITY. CHAMBER hereby agrees to defend, indemnify and save harmless the CITY, its officers, agents, employees and servants, from and against any and all claims, liability or obligations based on negligence or willful misconduct brought on account of or arising out of any acts, errors or omissions of CHAMBER undertaken pursuant to this Agreement. The CITY has no liability or responsibility for any accident, loss or damage to any work performed under this Agreement whether prior to its completion and acceptance or otherwise. CHAMBER'S duty to indemnify and hold harmless, as set forth herein, shall include the duty to defend as set forth in Section 2778 of the California Civil Code.

10. CHAMBER Not an Agent of CITY. CITY retains all rights of approval and discretion with respect to the projects and undertakings contemplated by this Agreement. CHAMBER, its officers, employees and agents shall not have any power to bind or commit the CITY to any decision.

11. Independent Contractor. It is understood that CHAMBER, in the performance of the work and services agreed to be performed by CHAMBER, shall act as and be an independent contractor and not an agent or employee of CITY; and as an independent contractor, CHAMBER shall obtain no rights to retirement benefits or other

benefits which accrue to CITY's employees, and CHAMBER hereby expressly waives any claim it may have to any such rights.

12. Compliance with Laws.

A. General. CHAMBER shall use the standard of care in its profession to comply with all applicable federal, state and local laws, codes, ordinances and regulations. CHAMBER represents and warrants to CITY that it has all licenses, permits, qualifications, insurance and approvals of whatsoever nature, which are legally required for CHAMBER to practice its profession. CHAMBER represents and warrants to CITY that CHAMBER shall, at its sole cost and expense, keep in effect or obtain at all times during the term of this Agreement any licenses, permits, insurance and approvals which are legally required for CHAMBER to practice its profession. CHAMBER shall maintain a CITY of Calistoga business license.

B. Workers' Compensation. CHAMBER certifies that it is aware of the provisions of the California Labor Code, which require every employee to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that Code, and CHAMBER certifies that it will comply with such provisions before commencing performance of this Agreement.

C. Injury and Illness Prevention Program. CHAMBER certifies that it is aware of and has complied with the provisions of California Labor Code Section 6401.7.

D. CITY Not Responsible. The CITY is not responsible or liable for CHAMBER'S failure to comply with any and all of said requirements.

13. Confidential Information. All data, documents, discussions or other information developed or received by or for CHAMBER in performance of this Agreement are confidential and not to be disclosed to any person except as authorized by CITY, or as required by law.

14. Insurance.

A. Minimum Scope of Insurance.

(1) CHAMBER agrees to have and maintain, for the duration of the contract, a General Liability insurance policy insuring him/her and his/her firm to an amount not less than One Million Dollars (\$1,000,000.00) combined single limit per occurrence and in the aggregate for bodily injury, personal injury and property damage.

(2) CHAMBER agrees to have and maintain for the duration of the contract an Automobile Liability insurance policy insuring him/her and his/her staff to an amount not less than Five Hundred Thousand Dollars (\$500,000.00) combined single limit per accident for bodily injury and property damage.

(3) CHAMBER shall maintain professional errors and omissions liability insurance for protection against claims alleging negligent acts, errors or omissions which may arise from CHAMBER'S operations under this Agreement,

whether such operations be by CHAMBER or by its employees, subcontractors, or sub consultants. The amount of this insurance shall not be less than One Million Dollars (\$1,000,000.00) on a claims-made annual aggregate basis.

(4) A Workers' Compensation and Employers' Liability policy written in accordance with the laws of the State of California and providing coverage for any and all employees of CHAMBER:

(a) This policy shall provide coverage for Workers' Compensation (Coverage A).

(b) This policy shall also provide coverage for One Million Dollars (\$1,000,000.00) Employers' Liability (Coverage B).

(c) Contractor shall provide to the CITY an endorsement that the insurer waives the right of subrogation against the CITY, its officials, officers, employees, volunteers, and agents.

(5) All of the following endorsements are required to be made a part of each of the required policies, except for the Professional Liability and Workers' Compensation and Employers' Liability policies, as stipulated below:

(a) "The City of Calistoga, its employees, officers, agents and contractors are hereby added as additional insurers, but only as respects work done by, for on behalf of the named insured."

(b) "This policy shall be considered primary insurance as respects any other valid and collectible insurance the CITY may possess, including any self-insured retention the CITY may have, and any other insurance the CITY does possess shall be considered excess insurance only and shall not contribute with it."

(c) "This insurance shall act for each insured and additional insured as though a separate policy had been written for each. This, however, will not act to increase the limit of liability of the insuring company."

(6) CHAMBER shall provide to the CITY all certificates of insurance with original endorsements affecting coverage required by this paragraph. Certificates of such insurance shall be filed with the CITY on or before commencement of performance of this Agreement. The CITY reserves the right to require complete, certified copies of all required insurance policies at any time.

B. General Liability.

(1) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the CITY, its officers, officials, employees or volunteers.

(2) CHAMBER'S insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

C. All Coverages. Each insurance policy required in this item shall provide that coverage shall not be canceled, except after 30 days' prior written notice by certified mail, return receipt requested, has been given to the CITY. Current certification of such insurance shall be kept on file with the CITY Secretary at all times during the term of this Agreement.

D. Acceptability of Insurers. Insurance is to be placed with insurers approved by the California Department of Insurance with a Best/Es rating of no less than A: VII.

E. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by the CITY. At the CITY's option, CHAMBER shall demonstrate financial capability for payment of such deductibles or self-insured retentions.

15. Assignment Prohibited. Neither the CITY nor CHAMBER may assign any right or obligation pursuant to this Agreement. Any attempted or purported assignment of any right or obligation hereunder shall be void and of no effect.

16. Termination of Agreement.

A. This Agreement and all obligations hereunder may be terminated at any time, with or without cause, by the CITY upon written notice to the CHAMBER upon 5 days' written notice. CHAMBER may terminate this Agreement upon 30 days' written notice.

B. If CHAMBER fails to perform any of its material obligations under this Agreement, in addition to all other remedies provided by law, CITY may terminate this Agreement immediately upon written notice.

C. Upon termination with or without cause, all finished and unfinished documents, project data and reports shall, at the option of the CITY, become its sole property and shall, at CHAMBER'S expense, be delivered to the CITY or to any party it may so designate.

D. In the event termination is without cause, CHAMBER shall be entitled to any compensation owing to it hereunder up to the time of such termination, it being understood that any payments are full compensation for services rendered prior to the time of payment; provided, however, that CHAMBER shall be entitled to compensation for work in progress at the time of termination.

17. Amendment. This Agreement constitutes the complete and exclusive statement of the Agreement to CITY and CHAMBER. It may be amended or extended from time to time by written agreement of the parties hereto.

18. Litigation Costs. If either party becomes involved in litigation arising out of this Agreement or the performance thereof, the court in such litigation shall award reasonable costs and expenses, including attorneys' fees, to the prevailing party. In awarding attorneys' fees, the court will not be bound by any court fee schedule, but shall, if it is in the interest of justice to do so, award the full amount of costs, expenses, and attorneys' fees paid or incurred in good faith.

19. Time of the Essence. Time is of the essence of this Agreement, however, the CHAMBER shall not be held responsible for delays caused by acts outside of CHAMBER'S control.

20. Written Notification. Any notice, demand, request, consent, approval or communications that either party desires or is required to give to the other party shall be in writing and either served personally or sent by prepaid, first class mail. Any such notice, demand, etc. shall be addressed to the other party at the address set forth herein below. Either party may change its address by notifying the other party of the change of address. Notice shall be deemed communicated within 48 hours from the time of mailing if mailed as provided in this section.

If to CITY: **City Of Calistoga  
City Manager  
1232 Washington Street  
Calistoga, CA 94515**

If to CHAMBER: **Calistoga Chamber of Commerce  
Executive Director  
1133 Washington Street  
Calistoga, CA 94515**

21. CHAMBER'S Books and Records.

A. CHAMBER shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services, or expenditures and disbursements charged to CITY for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to CHAMBER to this Agreement.

B. CHAMBER shall maintain all documents and records, which demonstrate performance under this Agreement for a minimum period of three (3) years, or for any longer period required by law, from the date of termination or completion of this Agreement.

C. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to CITY for inspection at City Hall when it is practical to do

so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at CHAMBER'S address indicated for receipt of notices in this Agreement.

D. Where CITY has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of CHAMBER'S business, CITY may, by written request by any of the above-named officers, require that custody of the records be given to CITY and that the records and documents be maintained in City Hall. Access to such records and documents shall be granted to any party authorized by CHAMBER, CHAMBER'S representatives, or CHAMBER'S successor-in-interest.

22. Equal Employment Opportunity. CHAMBER is an equal opportunity employer and agrees to comply with all applicable state and federal regulations governing equal employment opportunity. CHAMBER will not discriminate against any employee or applicant for employment because of race, age, sex, creed, color, sexual orientation, marital status or national origin. CHAMBER will take affirmative action to ensure that applicants are treated during such employment without regard to race, age, sex, creed, color, sexual orientation, marital status or national origin. Such action shall include, but shall not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; lay-offs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. CHAMBER further agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

23. Waiver. No failure on the part of either party to exercise any right or remedy hereunder shall operate as a waiver of any other right or remedy that party may have hereunder.

24. Execution. This Agreement may be executed in several counterparts, each of which shall constitute one and the same instrument and shall become binding upon the parties when at least one copy hereof shall have been signed by both parties hereto. In approving this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

25. News Releases/Interviews: All CHAMBER and sub consultant news releases, media interviews, testimony at hearings and public comment shall be prohibited unless expressly authorized by the CITY.

26. Venue. In the event that suit shall be brought by either party hereunder, the parties agree that trial of such action shall be held exclusively in a state court in the County of Napa, California.



IN WITNESS WHEREOF, the CITY and CHAMBER have executed this Agreement as of the date first above written.

CITY OF CALISTOGA

CHAMBER

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

Richard Spitler

Title: City Manager

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

Chris Canning

Title: Executive Director

APPROVED AS TO FORM:

ATTEST

\_\_\_\_\_  
Michelle Marchetta Kenyon  
City Attorney

\_\_\_\_\_  
Amanda Davis, Deputy City Clerk