

CONSULTANT SERVICES AGREEMENT
Professional services related to the City's National
Pollutant Discharge Elimination System (NPDES)
Permit Renewal

AGREEMENT NO. _____

THIS AGREEMENT is entered into as of the _____ day of July, 2009 by and between the CITY OF CALISTOGA, herein called the "City", and LARRY WALKER ASSOCIATES, herein called the "Consultant".

Recitals

WHEREAS, the City desires to obtain professional services in connection with the City's National Pollutant Discharge Elimination Systems (NPDES) permit renewal; and

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

WHEREAS, the City desires to retain Consultant 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, Consultant shall perform the services set out in the "Scope of Work" attached hereto as Exhibit "A".

2. Time of Performance. The services of Consultant are to commence no sooner than July 22, 2009 and, subject to City Council approval, be completed not later than December 31, 2010. Any changes to these dates in Section 2 must be approved in writing by the Public Works Director or his/her representative.

3. Compensation and Method of Payment.

A. Compensation. The compensation to be paid to Consultant, including both payment for professional services and reimbursable expenses, shall be at the rate and schedules attached hereto as Exhibit "B". However, in no event shall the amount the City pays Consultant exceed Fifty Thousand Eighty Dollars (\$50,080). Payment by the City under this Agreement shall not be deemed a waiver of unsatisfactory work, even if such defects were known to the City at the time of payment.

B. Timing of Payment. Billing for said services shall be made once at the conclusion of the work and submittal of the records and any appropriate report. The City shall

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review Consultant's billing statement and pay Consultant for services rendered within 45 days of receipt of a complete billing statement that meets all requirements of this Agreement.

C. Changes in Compensation. Consultant will not undertake any work that will incur costs in excess of the amount set forth in Paragraph 3(A) without prior written amendment to this Agreement.

D. Taxes. Consultant shall pay all taxes, assessments and premiums under the federal Social Security Act, any applicable unemployment insurance contributions, Workers Compensation insurance premiums, sales taxes, use taxes, personal property taxes, or other taxes or assessments now or hereafter in effect and payable by reason of or in connection with the services to be performed by Consultant.

E. No Overtime or Premium Pay. Consultant shall receive no premium or enhanced pay for work normally understood as overtime, i.e., hours that exceed forty (40) hours per work week, or work performed during non-standard business hours, such as in the evenings or on weekends. Consultant shall not receive a premium or enhanced pay for work performed on a recognized holiday. Consultant shall not receive paid time off for days not worked, whether it be in the form of sick leave, administrative leave, or for any other form of absence.

F. Litigation Support. Consultant agrees to testify at the City's request if litigation is brought against the City in connection with Consultant's report. Unless the action is brought by Consultant or is based upon Consultant's negligence, the City will compensate Consultant for the preparation and the testimony at Consultant's standard hourly rates, if requested by the City and not part of the litigation brought by the City against Consultant.

4. Amendment to Scope of Work. The City shall have the right to amend the Scope of Work within the Agreement by written notification to the Consultant. In such event, the compensation and time of performance shall be subject to renegotiation upon written demand of either party to the Agreement. Failure of the Consultant to secure the City's written authorization for extra or changed work shall constitute a waiver of any and all right to adjustment in the contract price or time due, whether by way of compensation, restitution, quantum meruit, etc. for work done without the appropriate City authorization.

5. Duties of City. The City shall provide all information requested by Consultant that is reasonably necessary to performing the Scope of Work. The City retains all rights of approval and discretion with respect to the projects and undertakings contemplated by this Agreement.

6. Ownership of Documents. Title to all plans, specifications, maps, estimates, reports, manuscripts, drawings, descriptions and other final work products compiled by the Consultant under the Agreement shall be vested in the City, none of which shall be used in any manner whatsoever, by any person, firm, corporation, or agency without the expressed written consent of the City. Basic survey notes and sketches, charts, computations, and other data prepared or obtained under the Agreement shall be made available, upon request, to the City without restriction or limitations on their use. Consultant may retain copies of the above-described information but agrees not to disclose or discuss any information gathered, discussed

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or generated in any way through this Agreement without the written permission of the City during the term of this Agreement, unless required by law.

7. Employment of Other Consultants, Specialists or Experts. Consultant will not employ or otherwise incur an obligation to pay other consultants, specialists or experts for services in connection with this Agreement without the prior written approval of the City. Any consultants, specialists or experts approved by the City are listed in Exhibit "C".

8. Conflict of Interest.

A. Consultant covenants and represents that neither it, nor any officer or principal of its firm, has, or shall acquire any interest, directly or indirectly, which would conflict in any manner with the interests of the City or which would in any way hinder Consultant's performance of services under this Agreement. Consultant further covenants that in the performance of the Agreement, no person having any such interest shall be employed by it as an officer, employee, agent or subcontractor without the express written consent of the City. Consultant agrees to at all times avoid conflicts of interest, or the appearance of any conflicts of interest, with the interests of the City in the performance of this Agreement.

B. Consultant is not a designated employee within the meaning of the Political Reform Act because Consultant:

(1) will conduct research and arrive at conclusions with respect to its 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. (2 Cal. Code Regs. § 18700(a)(2).)

9. 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 its personal interests or the interest of any corporation, partnership or association in which he/she is directly or indirectly interested.

10. 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 Consultant or otherwise in the event of any default or breach of the City, or for any amount which may become due to Consultant or any successor in interest, or for any obligations directly or indirectly incurred under the terms of this Agreement.

11. Indemnity. Consultant hereby agrees to defend, indemnify and hold harmless the City, its officers, agents, employees and servants, from and against any and all claims, demands, damages, costs, liabilities or obligations based on negligence or willful misconduct brought on account of or arising out of any acts, errors or omissions of Consultant 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. Consultant'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.

12. Consultant Not an Agent of City. Consultant, its officers, employees and agents shall not have any power to bind or commit the City to any decision.

13. Independent Contractor. It is understood that Consultant, in the performance of the work and services agreed to be performed by Consultant, shall act as and be an independent contractor and not an agent or employee of the City; and as an independent contractor, Consultant shall obtain no rights to retirement benefits or other benefits which accrue to the City's employees, and Consultant hereby expressly waives any claim it may have to any such rights.

14. Compliance with Laws.

A. General. Consultant shall use the standard of care in its profession to comply with all applicable federal, state and local laws, codes, ordinances and regulations. Consultant represents and warrants to the City that it has all licenses, permits, qualifications, insurance and approvals of whatsoever nature which are legally required for Consultant to practice its profession. Consultant represents and warrants to the City that Consultant 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 Consultant to practice its profession.

B. Workers' Compensation. Consultant 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 Consultant certifies that it will comply with such provisions before commencing performance of this Agreement.

C. Prevailing Wage. Consultant and Consultant's sub-consultants, shall, to the extent required by the California Labor Code, pay not less than the latest prevailing wage rates to workers and professionals as determined by the Director of Industrial Relations of the State of California pursuant to California Labor Code, Part 7, Chapter 1, Article 2. Copies of the applicable wage determination can be obtained from the Director of Industrial Relations at the following website: www.dir.ca.gov/DLSR/DPreWageDetermination.htm. A copy can be requested from the Public Works Department office.

D. Injury and Illness Prevention Program. Consultant certifies that it is aware of and has complied with the provisions of California Labor Code section 6401.7, which requires every employer to adopt a written injury and illness prevention program.

E. City Not Responsible. The City is not responsible or liable for Consultant's failure to comply with any and all of said requirements.

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

16. Insurance.

A. Minimum Scope of Insurance.

(1) Consultant agrees to have and maintain, for the duration of this Agreement, a General Liability insurance policy insuring it and its firm to an amount not less than \$1,000,000 (One Million Dollars) combined single limit per occurrence and in the aggregate for bodily injury, personal injury and property damage.

(2) Consultant agrees to have and maintain for the duration of this Agreement an Automobile Liability insurance policy insuring it and its staff to an amount not less than \$1,000,000 (One Million Dollars) combined single limit per accident for bodily injury and property damage.

(3) Consultant shall maintain professional errors and omissions liability insurance for protection against claims alleging negligent acts, errors or omissions which may arise from Consultant's operations under this Agreement, whether such operations be by Consultant or by its employees, subcontractors, or subconsultants. The amount of this insurance shall not be less than \$1,000,000 (One Million Dollars) 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 Consultant:

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

(b) This policy shall also provide required coverage for Employers' Liability (Coverage B.)

(c) Consultant shall provide to the City an endorsement that the Consultant 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, its employees, officers, agents and volunteers are hereby added as additional insureds, but only as respects work done by, for, or 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) Consultant shall provide to the City all certificates of insurance with original endorsements effecting 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.

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

(8) Consultant’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.

B. All Coverages. Each insurance policy required 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 Manager at all times during the term of this Agreement.

C. Acceptability of Insurers. Insurance is to be placed with insurers with a Best’s rating of no less than A:VII.

D. 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, Consultant shall demonstrate financial capability for payment of such deductibles or self-insured retentions.

17. Assignment Prohibited. Neither the City nor Consultant 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.

18. Termination of Agreement.

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

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

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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 Consultant's expense, be delivered to the City or to any party it may so designate.

D. In the event termination is without cause, Consultant 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 Consultant shall be entitled to compensation for work in progress at the time of termination.

19. Suspension. The City shall have the authority to suspend this Agreement and the services contemplated herein, wholly or in part, for such period as he/she deems necessary due to unfavorable conditions or to the failure on the part of the Consultant to perform any provision of this Agreement. Consultant will be paid for satisfactory Services performed through the date of temporary suspension. In the event that Consultant's services hereunder are delayed for a period in excess of six (6) months due to causes beyond Consultant's reasonable control, Consultant's compensation shall be subject to renegotiation.

20. Amendment. This Agreement constitutes the complete and exclusive statement of the agreement between the City and Consultant shall supersede any previous agreements, whether verbal or written, concerning the same subject matter. This Agreement may be amended or extended from time to time by written agreement of the parties hereto.

21. Interpretation. This Agreement shall be interpreted as though it was a product of a joint drafting effort and no provisions shall be interpreted against a party on the ground that said party was solely or primarily responsible for drafting the language to be interpreted.

22. 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.

23. Time of the Essence. Time is of the essence of this Agreement.

24. Written Notification. Any notice, demand, request, consent, approval or communication 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 hereinbelow. 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 the City:	City Manager City of Calistoga 1232 Washington Street Calistoga, CA 94515
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If to Consultant:

Gil Wheeler
Larry Walker Associates
707 Fourth Street, Suite 200
Davis, CA 95616-4124

25. Consultant's Books and Records.

A. Consultant 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 the City for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to Consultant.

B. Consultant 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 the City for inspection when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Consultant's address indicated for receipt of notices in this Agreement.

D. The City may, by written request by any of the above-named officers, require that custody of the records be given to the City and that the records and documents be maintained in the City Manager's office. Access to such records and documents shall be granted to any party authorized by Consultant, Consultant's representatives, or Consultant's successor-in-interest.

26. Equal Employment Opportunity. Consultant is an equal opportunity employer and agrees to comply with all applicable state and federal regulations governing equal employment opportunity. Consultant will not discriminate against any employee or applicant for employment because of race, religion, age, sex, creed, color, sexual orientation, marital status or national origin. Consultant will take affirmative action to ensure that applicants are treated during such employment without regard to race, religion, 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. Consultant further agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

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27. City Not Obligated to Third Parties. The City shall not be obligated or liable for payment hereunder to any party other than the Consultant.

28. 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.

29. Severability. If any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, then such provision or provisions shall be deemed severable from the remaining provisions hereof, and such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

30. Exhibits. The following exhibits are attached to this Agreement and incorporated herein by this reference:

- A. Exhibit A: Scope of Work
- B. Exhibit B: Rate Schedules
- C. Exhibit C: Other Consultants, Specialists or Experts Employed by Consultant

31. 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.

32. News Releases/Interviews. All Consultant and subconsultant news releases, media interviews, testimony at hearings and public comment shall be prohibited unless expressly authorized by the City.

33. 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 Consultant have executed this Agreement as of the date first above written.

CITY OF CALISTOGA

LARRY WALKER ASSOCIATES

By: _____

By: _____

James C. McCann

Gil Wheeler

Its: City Manager

Its: Vice President

APPROVED AS TO FORM:

ATTEST:

By: _____

By: _____

Michelle Marchetta Kenyon,
City Attorney

Susan Sneddon
City Clerk

EXHIBIT A

Scope of Work

EXHIBIT B
Rate Schedules

EXHIBIT C

Other Consultants, Specialists or Experts Employed by Consultant