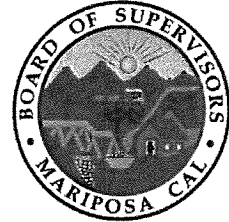


# MARIPOSA COUNTY

Administration • 966-3222



## **RESOLUTION - ACTION REQUESTED 2018-6**

MEETING: January 9, 2018

TO: The Board of Supervisors

FROM: Dallin Kimble, County Administrative Officer

RE: Tourism Business Improvement District (TBID) Agreement

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### **RECOMMENDATION AND JUSTIFICATION:**

Approve an Agreement with the Tourism Business Improvement District; and Authorize the Board of Supervisors Chair to Sign the Agreement.

When the Tourism Business Improvement District (TBID) Management Plan was renewed in 2013, the County agreed to continue collecting the TBID assessment on behalf of the Yosemite Mariposa County Tourism Bureau (YMCTB) for a monthly fee of \$750. Unfortunately, this agreement was not made in writing pursuant to Streets and Highways Code Sections 36600 et. seq.

This oversight was included in the findings of the most recent grand jury report and is corrected with this action. The attached agreement addresses the remaining period for the current management plan. Staff will ensure a new agreement accompanies any future TBID renewals. It is recommended that this item be approved to bring the County and YMCTB back into full compliance with state code.

### **BACKGROUND AND HISTORY OF BOARD ACTIONS:**

Resolution 08-129 established the TBID.

Resolution 13-162 renewed the TBID.

### **ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:**

Do not approve the agreement for services. The County will be collecting the TBID assessment outside of compliance with Streets and Highways Code.

### **FINANCIAL IMPACT:**

**There is no financial impact**

### **ATTACHMENTS:**

**2017 TBID Agreement (DOCX)**

**RESULT: ADOPTED BY CONSENT VOTE [UNANIMOUS]**

**MOVER:** Marshall Long, District III Supervisor

**SECONDER:** Merlin Jones, District II Supervisor

**AYES:** Smallcombe, Jones, Long, Cann, Menetrey

**AGREEMENT FOR TOURISM BUSINESS IMPROVEMENT DISTRICT**

THIS AGREEMENT (“Agreement”) is made and entered into this 1st day of October, 2017, by and between the County of Mariposa, a political subdivision of the State of California, (“County”), and the Yosemite Mariposa County Tourism Bureau, (“Contractor”), pursuant to the following terms and conditions.

**RECITALS**

- (1) On April 1, 2008, the Mariposa County Board of Supervisors adopted Resolution number 08-129, hereinafter the “Resolution,” creating the Mariposa County Tourism Business Improvement District, hereinafter “TBID,” in accordance with the provisions of the Property and Business Improvement District Law of 1994, Streets and Highways Code section 36600 et seq., hereinafter the “1994 Law.”
- (2) Contractor was designated in the Resolution and TBID Management District Plan as the Owners’ Association in accordance with Streets and Highways Code section 36614.5.
- (3) Streets and Highways Code section 36651 authorizes the County to contract with the Owners’ Association for provision of TBID services.
- (4) Contractor is willing to provide services to the County on the terms and conditions set forth in this Agreement.

**WITNESSETH:**

**1. TERM**

The term of this Agreement shall commence on October 1, 2017, and terminate on April 30, 2018, unless extended as provided by this Agreement.

**2. SERVICES**

Contractor shall perform tourism business improvement district services, as described in Exhibit A, “Scope of Work,” which is attached hereto and incorporated herein by reference. Contractor shall provide all staffing and materials necessary to perform the Scope of Work.

**3. COMPENSATION**

County shall forward to Contractor all TBID assessment funds collected within thirty days of collection, less any County administrative fees as authorized in the TBID Management District Plan.

#### 4. INSURANCE

Contractor shall procure and maintain for the duration of the agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Contractor, its agents, representatives, or employees.

##### A. MINIMUM SCOPE AND LIMIT OF INSURANCE

Coverage shall be at least as broad as:

(1) Commercial General Liability (CGL): Insurance Services Office (ISO) Form CG 00 01 covering CGL on an "occurrence" basis, including products and completed operations, property damage, bodily injury and personal and advertising injury with limits no less than \$2,000,000 per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location (ISO CG 25 03 or 25 04) or the general aggregate limit shall be twice the required occurrence limit.

(2) Automobile Liability: ISO Form Number CA 00 01 covering any auto, (Code 1), or if Contractor has no owned autos, hired (Code 8) and non-owned autos (Code 9), with limits no less than \$1,000,000 per accident for bodily injury and property damage.

(3) Workers' Compensation insurance as required by the State of California, with Statutory Limits, and Employer's Liability Insurance with limit of no less than \$2,000,000 per accident for bodily injury or disease.

If the Contractor maintains broader coverage and/or higher limits than the minimums shown above, the County requires and shall be entitled to the broader coverage and/or higher limits maintained by the Contractor. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the County.

##### B. OTHER INSURANCE PROVISIONS

The insurance policies are to contain, or be endorsed to contain, the following provision:

(1) Additional Insured Status: The County, its officers, officials, employees, and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Contractor's insurance (at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10 and CG 20 37 forms if a later edition is used).

(2) Primary Coverage: For any claims related to this Agreement, the Contractor's insurance coverage shall be primary insurance as respects the County, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the County, its officers, officials, employees, or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.

(3) Notice of Cancellation: Each insurance policy required above shall state that coverage shall not be canceled, except with notice to the County.

(4) Waiver of Subrogation: Contractor hereby grants to County a waiver of any right to subrogation which any insurer of said Contractor may acquire against the County by virtue of the payment of any loss under such insurance. Contractor agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the County has received a waiver of subrogation endorsement from the insurer.

(5) Deductibles and Self-Insured Retentions: Any deductibles or self-insured retentions must be declared to and approved by the Entity. The Entity may require the Contractor to purchase coverage with a lower deductible or retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention.

(6) Acceptability of Insurers: Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VII, unless otherwise acceptable to the County.

(7) Verification of Coverage: Contractor shall furnish the County with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. All certificates and endorsements are to be received and approved by the County before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive the Contractor's obligation to provide them. The County reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

(8) Subcontractors: Contractor shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein, and Contractor shall ensure that County is an additional insured on insurance required from subcontractors.

(9) Special Risks or Circumstances: County reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

## **5. HOLD HARMLESS/INDEMNIFICATION**

To the fullest extent permitted by law, Contractor shall hold harmless, defend at its own expense, and indemnify Entity its officers, employees, agents, and volunteers, against any and all liability, claims, losses, damages, or expenses, including reasonable attorney's fees, arising from all acts or omissions to act of contractor or its officers, agents, or employees in rendering services under this contract; excluding, however, such liability, claims, losses, damages, or expenses arising from Entity's sole negligence or willful acts.

## **6. INDEPENDENT CONTRACTOR**

It is the expressed intention of the parties that Contractor is an independent contractor and not an employee, agent, joint venturer or partner of County. Nothing in this Agreement shall be

interpreted or construed as creating or establishing the relationship of employer and employee between County and Contractor or any employee or agent of Contractor. Both parties acknowledge that Contractor is not an employee for state or federal tax purposes. Contractor shall retain the right to perform services for others during the term of this Agreement.

## **7. PUBLIC EMPLOYEES RETIREMENT SYSTEM (CALPERS)**

In the event that Contractor or any employee, agent, or subcontractor of Contractor providing services under this Agreement is determined by a court of competent jurisdiction or the Public Employees Retirement System (CalPERS) to be eligible for enrollment in CalPERS as an employee of the County, Contractor shall indemnify, defend, and hold harmless County for the payment of any employee and/or employer contributions for CalPERS benefits on behalf of Contractor or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of County.

## **8. STATE AND FEDERAL TAXES**

As Contractor is not County's employee, Contractor is responsible for paying all required state and federal taxes. In particular:

- a. County will not withhold FICA (Social Security) from Contractor's payments;
- b. County will not make state or federal unemployment insurance contributions on behalf of Contractor;
- c. County will not withhold state or federal income tax from payment to Contractor;
- d. County will not make disability insurance contributions on behalf of Contractor;
- e. County will not obtain workers' compensation insurance on behalf of Contractor.

## **9. ASSIGNMENT**

It is understood and agreed that this Contract contemplates personal performance by the Contractor and is based upon a determination of its unique personal competence and experience and upon its specialized personal knowledge. Assignments of any or all rights, duties or obligations of the Contractor under this Contract will be permitted only with the express written consent of the County.

## **10. NOTICE**

Any and all notices, reports or other communications to be given to County or Contractor shall be given to the persons representing the respective parties at the following addresses:

**CONTRACTOR:**

Terry Selk  
Yosemite Mariposa County Tourism Bureau  
P.O. Box 967  
Mariposa, CA 95338

**COUNTY:**

Dallin Kimble  
Mariposa County  
P.O. Box 784  
Mariposa, CA 95338

## **11. COMPLIANCE**

Contractor shall comply with all federal, state and local laws, codes, ordinance and regulations applicable to Contractor's performance under this Agreement, including, but not limited to, laws related to prevailing wages. Specifically, Contractor shall not engage in unlawful employment discrimination, including, but not limited to, discrimination based upon a person's race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, gender, citizenship or sexual orientation, as prohibited by state or federal law.

## **12. PUBLIC RECORDS ACT**

Contractor is aware that this Agreement and any documents provided to the County may be subject to the California Public Records Act and may be disclosed to members of the public upon request. It is the responsibility of the Contractor to clearly identify information in those documents that it considers to be confidential under the California Public Records Act. To the extent that the County agrees with that designation, such information will be held in confidence whenever possible. All other information will be considered public.

## **13. ENTIRE AGREEMENT AND MODIFICATION**

This Agreement contains the entire agreement of the parties relating to the subject matter of this Agreement and supersedes all prior agreements and representations with respect to the subject matter hereof. This Agreement may only be modified by a written amendment hereto, executed by both parties; however, matters concerning the scope of services which do not affect the agreed price may be modified by mutual written consent of the Contractor and the County Administrative Officer. If there are exhibits attached hereto, and a conflict exists between the terms of this Agreement and any exhibit, the terms of this Agreement shall control.

## **14. ENFORCEABILITY AND SEVERABILITY**

The invalidity or enforceability of any term or provisions of this Agreement shall not, unless otherwise specified, affect the validity or enforceability of any other term or provision, which shall remain in full force and effect.

## **15. TERMINATION AND RIGHTS UPON TERMINATION**

The County has and reserves the right to suspend, terminate or abandon the execution of any work by Contractor upon adoption of a resolution disestablishing the TBID pursuant to the 1994 Law. Per the 1994 Law, such a resolution may only be adopted if:

- (1) the County Board of Supervisors finds there has been misappropriation of funds, malfeasance, or a violation of law in connection with the management of the district and a noticed hearing on disestablishment is held, or
- (2) in the thirty-day period following the anniversary of the district's formation, business owners paying fifty percent or more of the assessment file a written protest with the County and a hearing on disestablishment is held.

In the event the County disestablishes the TBID, Contractor shall be entitled to retain TBID revenues only for paying the Contractor's current liabilities of the TBID. Pursuant to the 1994 Law, Contractor shall refund to County any remaining TBID revenues or any revenues derived from the sale of assets acquired with TBID revenues to enable distribution of the revenues to the business owners which paid the assessment.

Contractor agrees that County has and reserves the right to deny the transfer of TBID revenues and/or suspend, terminate or abandon the execution of any work by the Contractor in accordance with this agreement or misfeasance, nonfeasance, or gross malfeasance, or criminal conduct as determined by a court of competent jurisdiction. Any retention of TBID revenues by Contractor shall comply with the 1994 Law.

## **16. AUDITS AND RECORDS ACCESS**

- (1) Contractor shall make available to the County, its authorized agents, officers, or employees, for examination any and all ledgers, books of accounts, invoices, vouchers, cancelled checks, and other records or documents evidencing or relating to the expenditures and disbursement of TBID assessment funds, and shall furnish to the County, within sixty (60) days after examination, its authorized agents, officers or employees such other evidence or information as the County may require with regard to any such expenditure or disbursement charged by Contractor.
- (2) Contractor shall maintain full and adequate records in accordance with County requirements to show the actual costs incurred by the Contractor in the performance of this Agreement. If such books and records are not kept and maintained by Contractor within the County, Contractor shall, upon request of the County, make such books and records available to the County for inspection at a location within the county or Contractor shall pay to the County the reasonable and necessary costs incurred by the County in inspecting Contractor's books and records, including, but not limited to, travel, lodging and subsistence costs. Contractor shall provide such assistance as may be reasonably required in the course of such inspection.



- (3) The County further reserves the right to examine and re-examine said books, records and data during the four (4) year period following termination of this Agreement or completion of all work hereunder, as evidenced in writing by the County, and Contractor shall in no event dispose of, destroy, alter, or mutilate said books, records, accounts, and data in any manner whatsoever for four (4) years after the County makes the final or last payment or within four (4) years after any pending issues between the County and Contractor with respect to this Agreement are closed, whichever is later.
- (4) Contractor shall not be required to conduct an annual audit. However, if the County has a reasonable basis to believe that expenditures have not been consistent with the TBID Management District Plan, the 1994 Law, or any other applicable laws, the County may request an audit of expenditures for the period in question.

## **17. NO WAIVER**

The failure to exercise any right to enforce any remedy contained in this Agreement shall not operate as to be construed to be a waiver or relinquishment of the exercise of such right or remedy, or of any other right or remedy herein contained.

## **18. DISPUTES**

Should it become necessary for a party to this Agreement to enforce any of the provisions hereof, the prevailing party in any claim or action shall be entitled to reimbursement for all expenses so incurred, including reasonable attorney's fees.

It is agreed by the parties hereto that unless otherwise expressly waived by them, any action brought to enforce any of the provisions hereof or for declaratory relief hereunder shall be filed and remain in a court of competent jurisdiction in the County of Mariposa, State of California.

## **19. CAPTIONS**

The captions of this Agreement are for convenience in reference only and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

## **20. NUMBER AND GENDER**

In this Agreement, the neutral gender includes the feminine and masculine, the singular includes the plural, and the word "person" includes corporations, partnerships, firms or associations, wherever the context so requires.

## **21. MANDATORY AND PERMISSIVE**

"Shall" is mandatory. "May" is permissive.

## **22. SUCCESSORS AND ASSIGNS**

All representations, covenants and warranties specifically set forth in this Agreement, by or on behalf of, or for the benefit of any or all of the parties hereto, shall be binding upon and inure to the benefit of such party, its successors and assigns.

## **23. COUNTERPARTS**

This Agreement may be executed simultaneously and in several counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument.

## **24. OTHER DOCUMENTS**

The parties agree that they shall cooperate in good faith to accomplish the object of this Agreement and, to that end, agree to execute and deliver such other and further instruments and documents as may be necessary and convenient to the fulfillment of these purposes.

## **25. CONTROLLING LAW**

The validity, interpretation and performance of this Agreement shall be controlled by and construed under the laws of the State of California.

## **26. AUTHORITY**

Each party and each party's signatory warrant and represent that each has full authority and capacity to enter into this Agreement in accordance with all requirements of law. The parties also warrant that any signed amendment or modification to the agreement shall comply with all requirements of law, including capacity and authority to amend or modify the Agreement.

## **27. NEGOTIATED AGREEMENT**

This Agreement has been arrived at through negotiation between the parties. Neither party is to be deemed the party which prepared this Agreement within the meaning of California Civil Code section 1654. Each party represents and warrants that in executing this Agreement it does so with full knowledge of the rights and duties it may have with respect to the other party. Each party also warrants and represents that it has received independent legal advice from its attorney with respect to the matters set forth in this Agreement and the rights and duties arising out of this Agreement, or that such party willingly foregoes any such consultation.

## **28. NO RELIANCE ON REPRESENTATIONS**

Each party warrants and represents that it is not relying and has not relied upon any representation or statement made by the other party with respect to the facts involved or its rights or duties. Each party understands and agrees that the facts relevant, or believed to be relevant to this Agreement, have been independently verified. Each party further understands that it is responsible for verifying the representations of law or fact provided by the other party.

**29. WARRANTY**

County has relied upon the professional ability and training of Contractor as a material inducement to enter into this Agreement. Contractor hereby warrants that all work shall be performed in accordance with generally accepted professional practices and standards as well as the requirements of applicable federal, state and local laws, it being understood that acceptance of Contractor's work by County shall not operate as a waiver or release.

**30. FUNDING AVAILABILITY**

It is mutually agreed that if the County budget of the current fiscal year and/or any subsequent fiscal years covered under this Agreement does not appropriate sufficient funds for this Agreement, this Agreement shall be of no further force and effect. In this event, the County shall have no liability to pay any funds whatsoever to Contractor or to furnish any other considerations under this Agreement and Contractor shall not be obligated to perform any provisions of this Agreement. Contractor's assumption of risk of possible non-appropriation is part of the consideration for this Agreement. County budget decisions are subject to the discretion of the Board of Supervisors.

If funding for any fiscal year is reduced or deleted by the County budget for purposes of this Agreement, the County shall have the option to either cancel this Agreement with no liability occurring to the County, or offer an Agreement amendment to Contractor to reflect the reduced amount.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first written above.

COUNTY OF MARIPOSA

CONTRACTOR



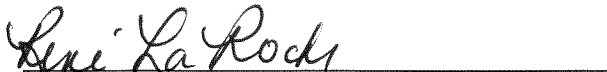


~~Marshall Long~~  
Board of Supervisors  
Rosemarie Smallcombe, Board Chair

Terry Selk, Executive Director  
Yosemite/Mariposa County Tourism Bureau

ATTEST:

APPROVED AS TO FORM:





Rene LaRoche  
Clerk of the Board

Steven W. Dahlem  
County Counsel

Exhibit A  
SCOPE OF WORK

Contractor shall provide the following services:

1. Contractor shall cooperate with County and County staff in the performance of all work hereunder.
2. Contractor will provide projects, programs and activities that benefit businesses within the TBID in accordance with the TBID Management District Plan attached hereto and any subsequent amendments thereto.
3. Contractor will provide and fund such additional projects, programs and activities to further the purposes of the TBID as may be made possible through other non-assessment funding sources. These other funds must be accounted for separately from assessment funds.
4. Contractor shall perform responsibilities under the Property and Business Improvement District Law of 1994 (the "Law") including but not limited to:
  - a. Preparation of the Annual Report required by the Law, which shall include:
    1. Any recommended changes to boundaries;
    2. The improvements and activities to be provided for that fiscal year;
    3. An estimate of cost for providing the improvements and activities;
    4. The method and basis of levying the assessment in sufficient detail to allow each business owner to estimate the amount of the assessment to be levied against his/her business for that fiscal year;
    5. The amount of any surplus or deficit revenues to be carried over from a previous fiscal year; and
    6. The amount of any contributions to be made from sources other than assessments.
  - b. Delivering the Annual Report at least thirty (30) days preceding the fiscal year for which assessments are to be levied and collected to pay the costs of the improvements.
5. Contractor shall develop and maintain financial records related to receipt and/or expenditure of all funds received from County.
6. Contractor may retain subcontractors to deliver the services herein; however, Contractor shall remain fully responsible for compliance by its contractors with all the terms of this Agreement, regardless of the terms of any agreement between the Contractor and its subcontractor.