

## **AGREEMENT BETWEEN THE CITY OF AUSTIN AND AUSTIN CONVENTION AND VISITORS BUREAU**

This Agreement is entered into between the City of Austin, a Texas home-rule Municipality (City), and the Austin Convention and Visitors Bureau, a Texas non-profit corporation (the "Corporation"; "ACVB") pursuant to Chapter 351 of the Texas Tax Code (as amended from time to time, the "Authorizing Legislation"). In furtherance of the purposes of the authorizing Legislation, and in consideration of the mutual covenants in this Agreement, the City and the Corporation agree as follows:

1. **Term.** This Agreement shall be effective and binding upon the parties beginning on October 1, 2011, and shall remain in effect until September 30, 2016, subject to early termination as described below. Following this five-year term, the City may elect to extend this contract under the same terms for an additional five-year term. To exercise its option to extend the contract for an additional five-year term, the City shall notify the Corporation in writing at least ninety (90) days prior to the contract expiration date. Except as otherwise expressly provided in this Agreement, any written notice or other written communication requested or permitted to be given under this Agreement shall be delivered, or sent by United States registered or certified mail, postage prepaid, or by express carrier, to:

Austin Convention and Visitors Bureau  
President and CEO  
301 Congress Avenue, Suite #200  
Austin, Texas 78701

unless another address is substituted by notice delivered or sent as provided in this paragraph. Unless specifically noted in this Agreement, any notice is deemed given when received.

2. **Statement of Work.** The marketing plan approved by the City pursuant to Section 4(b) shall state the work to be performed by the Corporation with the money paid it by the City from the hotel occupancy tax (Work). The Work shall be consistent with the Corporation's "Mission Statement" as follows: to market and sell Austin as a premier business and leisure destination, enriching Austin's hospitality industry and the community's overall quality of life. Any material proposed changes to the approved marketing plan must be approved in writing by the City Manager or his

designee. As used in this Agreement, the term "Hotel Tax Revenue" means the money paid by the City to the Corporation from the hotel occupancy tax levied and collected by the City in accordance with the Authorizing Legislation (Tax Collections). The Corporation agrees to perform the Work in accordance with Chapter 351 of the Texas Tax Code, all other applicable laws and regulations, this Agreement, and the applicable marketing plan and the Budget. Contract performance will commence on October 1, 2011, (Commencement Date).

**3. Budget, Accounting and Reports**

- (a) As used in this Agreement, "Fiscal Year" means the twelve-month period beginning October 1 and ending September 30. The Corporation shall adopt this Fiscal Year as its fiscal year unless the City otherwise agrees.

No later than June 15 of each year the Corporation shall provide to the City a proposed written Budget and Marketing Plan for the Work, which shall reflect consultations between the Corporation and appropriate City staff concerning, with respect to the budget, projected available Tax Collections for the ensuing Fiscal Year, any amounts available in the reserve fund, and estimated costs of the Work.

The City Council shall have the right to approve any budget and marketing plan. The City and the Corporation shall negotiate in good faith to reach agreement on a marketing plan and budget for a Fiscal Year by September 1 of the preceding Fiscal Year. Failure to reach an agreement shall authorize the City or the Corporation to terminate this agreement on ninety (90) day's notice.

- (b) The Work shall be conducted, and all marketing plans and budgets shall have contain the following requirements:
- (i) The marketing plans shall have separate work statements for, and the budgets shall separately state and account for, (A) new "Class "A" Bookings" for the period commencing 18 months after the commitment date, (B) Convention Sales, (C) the music and film activities, (D) Marketing, Advertising and Communications (including heritage, cultural and minority marketing), (E) Tourism, (F) Convention Services including Housing, (G) Visitor Services, (H) Austin Sports Commission, and (I) the other Work.

- (ii) The marketing plans and the budgets shall be consistent with the required allocation of uses of Tax Collections as set forth in the Authorizing Legislation and the applicable City Ordinances, and shall identify those scheduled activities, programs or events that will directly enhance and promote tourism and the convention and hotel industry.
- (iii) The Marketing Plans shall be consistent with the policy that the primary role of the Corporation is to market space in the Austin Convention Center and related City facilities, beyond 18 months from the first day of use, with the intent to maximize hotel occupancy tax and use of the Austin Convention Center. Marketing of this space within 18 months of the first day of use is the primary role of the Austin Convention Center Department.
- (iv) The City Council has approved the booking policy for the Austin Convention Center, and retains the exclusive right to change that policy. Pursuant to that policy, the Austin Convention Center Department of the City has sole responsibility and authority for booking and contracting all events at the Austin Convention Center. The Corporation's authorized representatives shall have the ability to view and identify tentative dates. The Convention Center Department shall provide a written response for space availability after receiving a written request from the Corporation for tentative space. Should the Corporation present a written request for space over dates with an existing tentative or definite hold on the space, the Convention Center shall weigh the value of the request and, when it determines that the new request would provide a greater benefit to the community, the Convention Center shall aggressively pursue the opportunity of accommodating both pieces of business and shall keep the Corporation apprised of the efforts.

As part of the Work, the Corporation shall provide, at a minimum, the following services, activities, and functions:

- (A) Market, solicit and advertise for conventions, tourism, and other gatherings to maximize use of the Austin Convention Center, commercial lodging facilities and tourism facilities consistent with the adopted marketing plan.

- (B) Provide registration, housing and information services for convention groups. Act as a liaison for the City in its relationships with the music and film industries.
  - (C) Develop public awareness of the desirability, benefits and importance of the travel, music and film industries to the Austin area economy.
  - (D) Market and distribute materials promoting Austin as a preferred destination city consistent with the marketing plan.
  - (E) Demonstrate the advantages the Austin area has to offer visitors from other parts of the state, the nation and the world.
  - (F) Perform all responsibilities of Tourism and Marketing.
  - (G) Market and promote tourism and conventions among heritage, cultural and minority markets in accordance with performance criteria set forth in each year's Marketing Plan.
  - (H) Perform additional duties as agreed upon by both parties which are consistent with the aforementioned Mission Statement.
- (v) The marketing plan shall include, but not be limited to, a description of the proposed program of action for the Fiscal Year. It shall contain a specific numerical goal regarding the Class "A" bookings for the Austin Convention Center and quantifiable goals against which success may be measured. In addition, the annual budget document of the Corporation shall be presented in such a way as to associate direct costs, where applicable, to the programs presented in the marketing plan. The marketing plan shall contain convention marketing goals and convention marketing programs. In addition, the marketing plan shall include convention services, tourism, marketing and communication, housing, visitor services, Austin Sports Commission and music and film marketing goals and programs. Upon approval of the marketing plan and the budget by the Austin City Council, the Corporation shall

implement the plan and allocate funds within budgeted limits without further action on the part of the City.

The following criteria shall be used for goal measurement in the individual departments:

1. Convention Sales
  - a) Class A Rooms – Groups utilizing the Austin Convention Center.
  - b) Class B Rooms – Groups of more than 151 rooms that do not utilize the Austin Convention Center.
  - c) Class C Rooms – Groups of 10-150 rooms that do not utilize the Austin Convention Center.
  - d) Total Room nights
  - e) City Wide Conventions Booked, (1,000 room nights peak *is the current criteria.*)
  - f) Room nights generated through Leads
  - g) Number of Group Leads Sent
  - h) Other Industry Standards
  
2. Austin Sports Commission
  - a) Room Nights – including Class A, Class B and Class C Rooms
  - b) Event Leads Sent
  - c) Site Visits
  - d) Media Coverage/Press Communications
  - e) Other Industry Standards
  
3. Tourism
  - a) Product Placed with Tour Operators
  - b) Destination Training
  - c) Tourism Partner Leads
  - d) Online Package Development
  - e) Other Industry Standards
  
4. Marketing Communications
  - a) Press Releases/Pitches
  - b) Media Outlets Contacted
  - c) Dollar Impact of Media
  - d) Unique Website Visitors
  - e) Visitors Guide Fulfillment
  - f) Other Industry Standards

5. Convention Services
  - a) Meetings Serviced
  - b) Housing Assigned
  - c) Registration Hours
  - d) Other Industry Standards
  
6. Music Marketing
  - a) Booking Assists
  - b) Industry Contacts
  - c) Media Contacts
  - d) Media Events
  
7. Film Office
  - a) Production inquires
  - b) Fulfillment location packages delivered
  - c) Project starts
  - d) Production days
  - e) Other Industry Standards
  
8. Visitor Services
  - a) Visitor Guide Requests
  - b) Downtown Visitors
  - c) Phone Calls/Email Inquiries
  - d) Historic Walking Tour Participants
  - e) Retail Revenue
  - f) Other Industry Standards

All requests by the Corporation to the City for funds, services, or other items of value shall be directed in writing for approval to the City Manager or appropriate Assistant City Manager.

- (vi) The Corporation acknowledges that the City Council has adopted as a logo and motto "Austin, the Live Music Capital of the World" which may be used on Corporation stationery, bulletins, displays, posters and media and press releases. The Corporation is authorized to use any trade or service marks of the City in connection with its performance of the Work. Promotional material should contain the logo "Austin, the Live Music Capital of the World" and the Corporation can use any additional logo adopted by its Board of Directors.
  
- (c) It is the intention of the City and the Corporation that the budgets for the Work reflect the amount of Tax Collections available for the Work

and that Tax Collections equal to 1.45 cents for each dollar of hotel revenue that is taxable and collected under the Authorizing Legislation and Article I, Chapter 5-3 of the City Code, be available for the Work. If during a Fiscal Year Tax Collections vary more than ten percent from the expectations on which the applicable budget is based, the Corporation shall send the Director of the Convention Center Department written notice of how the Corporation proposes to adjust its budget accordingly. If the Director agrees with the proposed adjustments, the Corporation shall effect them as soon as practicable. If the Director does not agree with the proposed adjustments, he or she shall propose other adjustments to the work plan. The City Manager or the City Manager's designee will resolve disputed adjustments to the work plan, and the Corporation will effect as soon as practicable the adjustments as resolved. It is not intended that the scope of Work should be decreased if there are adequate funds available in the reserve fund to continue to pay for the Work; provided, however, that once the available Tax Collections and any available money in such reserve funds have been spent, then no further money shall be available or paid by the City.

- (d) The Corporation shall maintain complete and accurate books and records of its activities and finances, which the City may audit at any time upon reasonable notice. Financial records shall be maintained on a regular basis in accordance with generally accepted accounting principles, subject to any variations as are required by State law, or are agreed to in writing by the City. Specifically, the Corporation shall account separately for the Hotel Tax Revenue, and any other funds provided it by the City, and shall account separately for the receipts and expenditures related to each of the following activities; (A) Convention Sales, (B) Convention Services and Housing, (C) Tourism, (D) film and music, (E) Marketing and Communications, (F) Visitor Services, (G) Administration, (H) Advertising, (I) the Austin Sports Commission and (J) other Work. On request of the City, the Corporation shall make the records relating to the handling and expenditure of Hotel Tax Revenue and other City payments available to the City or any other person designated by the City.
- (e) The Corporation shall engage an independent firm of certified public accountants to audit its annual financial statements and shall deliver to the Contract Administrator a copy of its audited annual financial statements, consisting of a balance sheet, an income statement, a statement of cash flows, and notes to the financial statements, no later than 120 days after the end of each Fiscal Year. The engagement letter from the independent firm of certified public accountants shall

contain a statement that the Corporation may request a copy of all audit workpapers produced either by the client or the firm during the annual audit of the financial statements. The notes to the audited annual financial statements shall contain a detailed breakdown of revenues by source and expenditures by category. In addition to the audited annual financial statements, upon request, the Corporation shall deliver a copy of all audit workpapers that underlie the audited annual financial statements.

- (f) Within 30 days after the end of each quarter in the Fiscal Year, the Corporation shall deliver to the Austin Convention Center Department a (i) written report of its expenditures relating to the Work and (ii) unaudited financial statements for the quarter just ended, including at a minimum a balance sheet and an income statement. Within 45 days after the end of each quarter in the Fiscal year, the Corporation shall conduct a meeting (on at least three (3) days advance published notice) to present the financial report for the quarter just ended and obtain public input on it and the Work.
- (g) The Corporation will provide the City with monthly reports containing detailed information on performance of the Work, including performance reports listing all groups and/or events added to the Austin Convention Center Department schedule in that period with accompanying information such as names, dates booked, estimated attendance and estimated room nights,. The Corporation shall also provide City with any reports or documentation required by federal or state law, as such laws may be amended from time to time during the term of this Agreement.

**4. Payments by the City.**

- (a) In addition to any particular limitations and conditions that may be specifically stated in this Agreement, all obligations of the City are subject to annual appropriation by the City for this Agreement from proceeds of the hotel occupancy tax that are available to pay for the Work under this Agreement, and further subject to the ability of the City to collect these tax proceeds. This Agreement imposes no obligation upon the City to levy and collect this tax. The City does agree that, subject to adequate appropriations and collections, the City will utilize the portion of the Tax Collections described in Section 4(f) to pay for Work performed by the Corporation in accordance with the budget approved by the City pursuant to Section 4(b).



- (b) The parties acknowledge that Corporation received \$424,600 as an advance payment that was made to Corporation by City entered into between the parties in 1996 (Advance). The Advance was treated as an advance from the City to enable the Corporation to pay its initial payroll, rent, and other costs for services under the initial agreement. During the term of the previous agreement (from October 1, 2006 – September 30, 2011), the Corporation received a total of \$626,910 from the City from funds other than Hotel Tax Revenue to fund the Music and Film activities of the Corporation. The total payment to the Corporation from the City for these two periods was \$1,051,510. From October 1, 2006 – September 30, 2010 the Corporation has expended a total of \$1,296,337 (as evidenced by audited financial statements) on Music and Film Activities. Additionally, the Corporation has budgeted an additional \$333,464 for the term of October 1, 2010 – September 30, 2011 for Music and Film Activities for an estimated total expenditure on these activities of \$1,629,801 which is \$578,291 in excess of actual funds received for this work. In exchange for the excess funds expended by the Corporation, the City acknowledges that it has been repaid the Advance in full.
- (c) The City shall pay to the Corporation monthly in arrears from Hotel Tax Revenue appropriated for this Agreement the amounts invoiced by the Corporation for actual expenses incurred during the preceding month in performing the Work, not to exceed the monthly amounts budgeted for the Work in the approved budget including applicable overages. If the Corporation submits a conforming invoice by the third business day of the month following the month in which the Work was performed, the City shall pay the invoiced amount on or before the 15<sup>th</sup> day of the month in which the invoice was submitted. The parties agree, however, that if an invoice is incomplete or does not contain adequate information, the City may request additional information from the Corporation within ten (10) working days after receipt of the invoice, and City's payment deadline shall be extended to five (5) working days following receipt of such additional information. Prior to expending Hotel Tax Revenue, the Corporation shall hold these Hotel Tax Revenues in a segregated account not commingled with any other funds, and invested and collateralized as required by the City's Department of Financial Services. Hotel Tax Revenue shall be spent solely to perform the Work and to fund compliance with this Agreement, including the preparation of reports and financial statements, and the auditing of the latter.
- (d) During the term of this contract the Corporation shall use funds from the City as authorized by Council for funding music and film Full Time

Equivalent (FTE) positions and related services for music and film. So long as the Council provides adequate funds, the Corporation shall continue to provide the necessary 2 FTE's, including all related employment benefits and taxes, and related services for music and film.

- (e) The Corporation is an independent entity, and the relationship between the Corporation and City is and shall remain that of independent contractors. The City is not and shall not be liable for any of the Corporation's debts or obligations, including any operating deficit that may arise. The Corporation shall not hold itself out as an agent of the City, nor in any way purport to bind the City with respect to any contract or other obligation. The Corporation shall defend, indemnify and hold the City harmless against any cost, claim, expense, liability, award or judgment (Claim) arising in whole or in part out of, or alleged to arise in whole or in part out of the operations or activities of the Corporation. The City may set-off and apply against any such Claim (or against the city's cost of defending against any such Claim) any amount the City owes the Corporation. The Corporation shall carry insurance in the following types and amounts for the duration of this Agreement and, prior to the Commencement Date, shall furnish the City's Purchasing Director with Certificates of Insurance along with copies of policy declaration pages and all policy endorsements as evidence thereof:
- (i) Statutory Workers' Compensation and Employers' Liability coverage with minimum policy limits for Employers' Liability of \$100,000 bodily injury each accident, \$500,000 bodily injury by disease policy limit, and \$100,000 bodily injury by disease each employee;
  - (ii) Commercial General Liability Insurance with a minimum bodily injury and property damage per occurrence limit of \$1,000,000. The policy shall provide contractual liability coverage for liability assumed under this contract, products and completed operations coverage and independent contractors coverage;
  - (iii) Business Automobile Liability Insurance for all owned, non-owned and hired vehicles with a limit of \$500,000 per occurrence for bodily injury and property damage liability;
  - (iv) Directors and Officers coverage with a minimum of not less than \$1,000,000 per claim shall be in place for protection from claims

arising out of negligent acts, errors or omissions for directors and officers while acting in their capacities as such; and

- (v) "All risk" property coverage (excluding flood and earthquake) at 100% replacement cost value for contents in the Corporation's care, custody, or control. The coverage will be primary and the City will be shown as loss payee on the policy.

If coverage is written on a claims-made basis, the coverage, including renewals, shall have a retroactive date coincident with or prior to the date of this Agreement, and the certificate of insurance shall state that coverage is claims-made and the retroactive date. This coverage shall be continuous for not less than 24 months following completion of services under this Agreement. The Corporation shall provide that all provisions of this Agreement concerning liability, duty, and standard of care, together with the indemnification or defense provisions herein, shall be underwritten by contractual coverage sufficient to include such obligations within applicable policies. The Corporation shall not commence work under this Agreement until it has obtained all required insurance and until the Purchasing Office of the City of Austin has reviewed such insurance coverage. The required insurance shall be written by a company licensed to do business in the State of Texas at the time the policy is issued. In any event, the Company must be rated by A.M. Best at B+VII or better and acceptable to the City. The Corporation shall produce an endorsement to each affected liability policy that: (A) names the City as an additional insured (except workers' compensation), with right of subrogation against the City, waived, and (B) obligates the insurance company to notify the City at the following address, of any non-renewal, cancellation or material change to the policy, at least thirty (30) calendar days before the change or cancellation.

City of Austin  
Director – Austin Convention Center Department  
City of Austin  
P.O. Box 1088  
Austin, TX 78767

The Corporation shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of this Agreement or the twenty-four-month period following completion, in the case of a claims-made policy. The City reserves the right to review the insurance requirements of this section during the effective period of this Agreement and to make reasonable adjustments to insurance

coverage, their limits when deemed necessary, based upon changes in statutory law, court decisions or the claims history of the industry or financial condition of the insurance company, as well as that of the Corporation. The City shall be entitled, upon request, and without expense to the City, to receive copies of the requisite insurance policies and all endorsements thereto and may make any reasonable requests for deletion or revisions or modification of particular policy terms, conditions, limitations, or exclusions. (Except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter on any of such policies.)

- (f) During each Fiscal year, any portion of the Tax Collections that is allocable to the Work and is not needed to pay the Corporation pursuant to the applicable budget shall accrue to the ending balance of the reserve fund. The City and the Corporation shall review the amount of the reserve fund each year and the City shall determine the disposition of the money in the reserve fund in connection with the City's review of its budget and of the Corporation's budget.

**5. Other Requirements.**

- (a) The Corporation's Treasurer and Assistant Treasurer, if any, shall be bonded in a minimum amount of \$100,000.00 each.
- (b) For purposes of this Agreement and the Corporation's Bylaws, the City agrees that the term "competitive strategy" shall mean: selling Austin strengths against competitors' weaknesses, developing and/or negotiating sponsorship and contribution agreements, competition for tourism special events, promotional/seasonal packaging and programs, and introduction of a new advertising campaign.
- (c) Except as provided in the Corporation's Bylaws, articles of incorporation or in this Agreement, the Corporation may conduct its affairs and engage in such other activities as it deems appropriate, so long as such actions (i) are consistent with its purposes as stated in this Agreement and in its articles of incorporation, (ii) comply with applicable laws, and (iii) do not impair its ability to carry out its duties under this Agreement.

**6. Early Termination**

Either party may terminate this Agreement by written notice to the other party if such other party breaches any of its obligations hereunder and does not cure such breach within 30 days after

receiving written demand from the other party specifying the breach in question and demanding that it be cured. Such right to terminate this Agreement shall be without prejudice to the other legal and equitable rights of the parties.

**7. Cooperation**

Upon expiration or termination hereof for any reason, the Corporation shall cooperate with the City to ensure a smooth transition and completion of the Work. Without limiting the generality of the foregoing, the Corporation shall promptly, but not more than sixty (60) days following termination, turn over to the City without charge all unspent Hotel Tax Revenue as well as all other City contributed revenues funds, including the balance of reserve fund, and all property purchased with Hotel Tax Revenue or City provided funds and, upon request, shall assign to the City all contracts, rights and claims relating to the Work. Termination of this Agreement shall not impair the rights of the City under state law, the articles of incorporation or bylaws of the Corporation or under any other contract between the City and the Corporation.

**8. Contract Administration**

This Agreement shall be administered by the City through its Convention Center Department, and all communications from the Corporation to the City concerning this Agreement and the Work shall be directed to the Director of such Department, unless otherwise specified herein or in the Corporation's bylaws. The Corporation shall deliver to such Director simultaneously a copy of any notice required by this Agreement or such bylaws to be delivered to another City official.

**9. Miscellaneous**

This Agreement may not be amended without the written consent of the parties. This Agreement is for the benefit of the City and the Corporation only and no other party may seek to enforce it or assert any rights under it. The Corporation may not assign this Agreement without the prior written consent of the City. Delay by a party in enforcing, or failure by such party to enforce, a right under this Agreement shall not be deemed a waiver of the same. A waiver of party's rights shall be effective only if in writing and shall be limited to the single event or occurrence specified. This Agreement may be executed in one or more counterparts. This Agreement, including its

exhibits, attachments, and applicable City-approved Marketing Plans and Budgets, represents the entire agreement between the parties regarding the subject matter hereof, and there are no other representations, understandings, or agreements between the parties relative to such subject matter.

**10. Articles of Incorporation/Bylaws**

The City shall have the right to approve any proposed changes to the Corporation's Articles of Incorporation or Bylaws.

**IN WITNESS WHEREOF**, The City of Austin and the Austin Convention and Visitors Bureau have caused this Agreement to be executed and delivered by their duly authorized representatives as of the dates specified below:

CITY OF AUSTIN, a Texas home-rule municipality

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

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

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

Date: \_\_\_\_\_

AUSTIN CONVENTION AND VISITOR'S BUREAU, a Texas non-profit corporation

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

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

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

Date: \_\_\_\_\_