

WHOLESALE DISTRIBUTION AGREEMENT  
BETWEEN THE CITY OF SUISUN CITY  
AND

\_\_\_\_\_  
FOR  
SUPPLY AND DISTRIBUTION OF "SAFE AND SANE" FIREWORKS  
IN THE CITY OF SUISUN CITY

THIS AGREEMENT ("Agreement") is made and entered into by and between the City of Suisun City a municipal corporation of the State of California, hereinafter called "City," and \_\_\_\_\_, a \_\_\_\_\_ hereinafter referred to as "Wholesaler."

Recitals

- A The City desires to retain a Wholesaler having special skill and knowledge in the field of supply and distribution of "safe and sane" fireworks products, and leasing and constructing fireworks sales stands to supply "safe and sane" fireworks to selected non-profit organizations in the City of Suisun City.
- B. Wholesaler represents that Wholesaler is able and willing to provide such services to the City,
- C. In undertaking the performance of this Agreement, Wholesaler represents that it is knowledgeable in its field and that any services performed by Wholesaler under this Agreement will be performed in compliance with such standards as may reasonably be expected from a comparable company in the field.

Wholesaler has been selected to perform these services pursuant to Title 8, Chapter 8.4 of the Suisun City Municipal Code.

NOW, THEREFORE, it is agreed by City and Wholesaler as follows:

1. Scope of Services

Wholesaler shall provide all services as described in this Agreement, including Exhibit A, which is attached hereto and incorporated into this Agreement by this reference, and Title 8, Chapter 8.4 of the Suisun City Municipal Code. These services shall sometimes hereinafter be referred to as the "Services."

Wholesaler hereby designates \_\_\_\_\_ who shall represent Wholesaler and be its primary contact and agent in all consultations with City during the performance of this Agreement.

2. City Staff Assistance

City shall assign a staff coordinator to work directly with Wholesaler in the performance of this Agreement.

3. Compensation

a. Wholesaler agrees that total compensation for its services shall be provided by the selected non-profit fireworks stand operator, as further described in Exhibit A.

#### 4. Term

Time is of the essence of this Agreement. The services of Wholesaler are to commence as soon as practicable after the execution of this Agreement by City (the "Commencement Date") and terminate on December 31, 2012, unless terminated earlier in accordance with the provisions of this Agreement. All tasks specified in Exhibit A shall be completed no later than August 1, 2012. This schedule and Term may be amended if mutually agreed to in writing by City and Wholesaler.

#### 5. Hold Harmless

Wholesaler hereby agrees to protect, defend, indemnify and hold harmless the City, its officers, elected or appointed officials, employees, agents, and volunteers from and against any and all, claims, damages, losses, expenses, judgments, demands and defense costs, and consequential damage or liability of any kind or nature, however caused, including those resulting from death or injury to Wholesaler's employees and damage to Wholesaler's property, arising directly or indirectly out of the obligations or operations herein undertaken by Wholesaler, caused in whole or in part by any negligent act or omission of the Wholesaler, anyone directly or indirectly employed by Wholesaler for whose acts it may be liable, including but not limited to concurrent active or passive negligence, except where caused by active negligence, sole negligence, or willful misconduct of the City. Wholesaler will conduct all defense at its sole cost and expense and City shall approve selection of Wholesaler's counsel. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by Wholesaler.

#### 6. Workers Compensation Insurance

Pursuant to California Labor Code Section 1861, Wholesaler acknowledges awareness of Section 3700 *et seq.* of this Code, which requires every employer to be insured against liability for workers' compensation. Wholesaler covenants that it will comply with such provisions prior to commencing performance of the work hereunder.

Wholesaler shall obtain and furnish to City workers' compensation and employer's liability insurance in an amount of not less than the State statutory limits.

Wholesaler shall furnish to City a certificate of waiver of subrogation under the terms of the workers' compensation and employer's liability insurance.

#### 7. General Liability Insurance

In addition to the workers' compensation and employer's liability insurance and Wholesaler's covenant to defend, hold harmless and indemnify City, Wholesaler shall obtain and furnish to City a policy of general public liability insurance, including motor vehicle coverage, covering the Services. This policy shall indemnify Wholesaler, its officers, employees and agents, while acting within the scope of their duties, against any and all claims arising out of or in connection with the Services and shall provide coverage in not less than the following amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of Five Million Dollars (\$5,000,000) per occurrence. If coverage is provided under a form that includes a designated general aggregate limit, the aggregate limit must be no less than Five Million Dollars (\$5,000,000). This policy shall name City, its officers, elected or appointed officials, employees, agents, and volunteers as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable to the Services shall be deemed excess coverage and that Wholesaler's insurance shall be primary.

Under no circumstances shall said above-mentioned insurance contain a self-insured retention, or a "deductible" or any other similar form of limitation on the required coverage.

#### 8. Automobile Liability Insurance

Wholesaler shall obtain and furnish to City an automotive liability insurance policy covering the work performed by it hereunder. This policy shall provide coverage for Wholesaler's automotive liability in an amount not less than One Million Dollars (\$1,000,000.00) per occurrence and a separate "Additional Insured Endorsement" page listing both the policy number and naming the "*City of Suisun City, its officers, elected or appointed officials, employees, agents and volunteers*" as additional insured on the endorsement. The above-mentioned insurance shall not contain a self-insured retention, "deductible" or any other similar form of limitation on the required coverage except with the express written consent of City.

#### 9. Certificate of Insurance

Prior to commencing performance of the work hereunder, Wholesaler shall furnish to City a certificate of insurance subject to approval of the City Attorney evidencing the foregoing insurance coverage as required by this Agreement; the certificate shall:

- a. provide the name and policy number of each carrier and policy;
- b. state that the policy is currently in force; and
- c. promise that such policy shall not be suspended, voided or canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice; however, ten (10) days' prior written notice in the event of cancellation for nonpayment of premium.

Wholesaler shall maintain the foregoing insurance coverage in force until the Services under this Agreement are fully completed and accepted by City.

The requirement for carrying the foregoing insurance coverage shall not derogate from Wholesaler's defense, hold harmless and indemnification obligations as set forth in this Agreement. City or its representative shall at all times have the right to demand the original or a copy of the policy of insurance. Wholesaler shall pay, in a prompt and timely manner, the premiums on the insurance hereinabove required.

#### 10. Independent Contractor

Wholesaler is, and shall be, acting at all times in the performance of this Agreement as an independent contractor herein and not as an employee of City. Wholesaler shall secure at its own cost and expense, and be responsible for any and all payment of all taxes, social security, state disability insurance compensation, unemployment compensation and other payroll deductions for Wholesaler and its officers, agents and employees and all business licenses in connection with the Services to be performed hereunder.

#### 11. Conflict of Interest

Wholesaler covenants that it presently has no interests and shall not have interests, direct or indirect, which would conflict in any manner with performance of Services specified under this Agreement

#### 12. Termination

This Agreement may be terminated by the City upon thirty (30) days written notice of termination. In such event, Wholesaler shall be entitled to receive compensation for all services performed by Wholesaler prior to receipt of such notice of termination, subject the following conditions:

a. Payment need not be made for work which fails to meet the standard of performance specified in the Recitals of this Agreement.

13. Exclusivity and Amendment

This Agreement, including Exhibit A attached hereto and made a part hereof, represents the complete and exclusive statement between the City and Wholesaler, and supersedes any and all other agreements, oral or written, between the parties. This Agreement may not be modified except by written instrument signed by the City and by an authorized representative of Wholesaler. The parties agree that any terms or conditions of any document that are inconsistent with, or in addition to, the terms and conditions hereof, shall not bind or obligate Wholesaler or the City. Each party to this Agreement acknowledges that no representations, inducements, promises or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, that are not embodied herein.

14. Assignment

Inasmuch as this Agreement is intended to secure the specialized services of Wholesaler, Wholesaler may not assign, transfer, delegate, or subcontract any interest herein without the prior written consent of the City and any such assignment, transfer, delegation or subcontract without the City's prior written consent shall be considered null and void. Nothing in this Agreement shall be construed to limit the City's ability to have any of the Services which are the subject to this Agreement performed by other Wholesalers retained by City.

15. City Employees and Officials

Wholesaler shall employ no City official nor any City employee in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement in violation of the applicable provisions of the California Government Code.

16. Notices

Any notices, certificates, or other communications hereunder shall be given either by personal delivery to Wholesaler's agent (as designated in Section 1 hereinabove) or to City as the situation shall warrant, or by enclosing the same in a sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, to the addresses below. City and Wholesaler may designate different addresses to which subsequent notices, certificates or other communications will be sent by notifying the other party via personal delivery, a reputable overnight carrier or U.S. certified mail - return receipt requested:

To City:

City Manager's Office  
City Hall  
701 Civic Center Blvd.  
Suisun City, Ca 94585

To Wholesaler:

17. Consent

When City's consent/approval is required under this Agreement, its consent/approval for one transaction or event shall not be deemed to be a consent/approval to any subsequent occurrence of the same or any other transactions or event

18. Modification

No waiver or modification of any language in this Agreement shall be valid unless in writing and duly executed by both parties.

19. Section Headings

The titles, captions, section, paragraph and subject headings, and descriptive phrases at the beginning of the various sections in this Agreement are merely descriptive and are included solely for convenience of reference and are not representative of matters included or excluded from such provisions, and do not interpret, define, limit, describe, or construe the intent of the parties or affect the construction or interpretation of any provision of this Agreement.

20. Interpretation of this Agreement

The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. If any provision of this Agreement is held by an arbitrator or court of competent jurisdiction to be unenforceable, void, illegal or invalid, such holding shall not invalidate or affect the remaining covenants and provisions of this Agreement. No covenant or provision shall be deemed dependent upon any other unless so expressly provided here. As used in this Agreement, the masculine or neuter gender shall be deemed to include the feminine gender, and a singular or plural number shall be deemed to include the other, whenever the context so indicates or requires. Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision contained herein and any present or future statute, law, ordinance or regulation contrary to which the parties have no right to contract, then the latter shall prevail and the provision of this Agreement which is hereby affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law.

The original of this Agreement and one or more copies hereto have been prepared and signed in counterparts as duplicate originals, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original. Each duplicate original shall be deemed an original instrument as against any party who has signed it.

21. Immigration

Wholesaler shall be responsible for full compliance with the immigration and naturalization laws of the United States and shall, in particular, comply with the provisions of the United States Code regarding employment verification.

22. Legal Services Subcontracting Prohibited

Wholesaler and City agree that City is not liable for payment of any legal services expenses incurred by Wholesaler and that such legal services are expressly outside the scope of services contemplated hereunder. Wholesaler understands that the City Attorney is the exclusive legal counsel for City.

23. Confidentiality

Wholesaler recognizes that in the performance of its duties under this Agreement, it must conduct its activities in a manner designed to protect information of a sensitive nature from improper use or disclosure. Wholesaler warrants that it will use reasonable efforts consistent with customary practices in performing its Services in order to achieve this result. In the furtherance of this, Wholesaler agrees, at the request of the City, to require its employees to execute written undertakings to comply with the foregoing confidentiality provision.

#### 24. Discrimination

Wholesaler shall not discriminate because of race, color, creed, religion, sex, marital status, sexual orientation, age, national origin, ancestry, or disability, as defined and prohibited by applicable law, in the recruitment, selection, training, utilization, promotion, termination or other employment related activities. Wholesaler affirms that it is an equal opportunity employer and shall comply with all applicable federal, state and local laws and regulations.

#### 25. Jurisdiction - Venue

This Agreement and all questions relating to its validity, interpretation, performance, and/or enforcement shall be governed and construed in accordance with the laws of the State of California. Solano County, California, shall be the venue for any action or proceeding that may be brought or arise out of, in connection with, or by reason of this Agreement.

#### 26. Licenses

Wholesaler shall throughout the term of this Agreement maintain all necessary licenses, permits, approvals, waivers, and exemptions necessary for the provision of the Services hereunder and required by the laws and regulations of the United States, the State of California, the City of Suisun City and all other governmental agencies. Wholesaler shall notify the City immediately and in writing of inability to obtain or maintain such permits, licenses, approvals, waivers and exemptions. Said inability shall be cause for termination of this Agreement.

#### 27. Attorney's Fees

In the event suit is brought by either party to construe, interpret and/or enforce the terms and/or provisions of this Agreement or to secure the performance hereof, each party shall bear its own attorney's fees, such that the prevailing party shall not be entitled to recover its attorney's fees from the nonprevailing party.

#### 28. Survival

Terms and conditions of this Agreement, which by their sense and context survive the expiration or termination of this Agreement, shall so survive.

#### 29. Governing Law

This Agreement shall be governed and construed in accordance with the laws of the State of California.

#### 30. Signatories

Each undersigned represents and warrants that its signature below has the power, authority and right to bind its respective party to each of the terms of this Agreement, and shall indemnify City fully for

any injuries or damages to City in the event that such authority or power is not, in fact, held by the signatory or is withdrawn.

31. Entirety:

(a) The parties acknowledge and agree that they are entering into this Agreement freely and voluntarily following extensive arm's length negotiation, and that each has had the opportunity to consult with legal counsel prior to executing this Agreement. The parties also acknowledge and agree that no representations, inducements, promises, agreements or warranties, oral or otherwise, have been made by that party or anyone acting on that party's behalf, which are not embodied in this Agreement, and that that party has not executed this Agreement in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstance not expressly set forth in this Agreement

(b) All Exhibits referenced herein and attached hereto shall be incorporated as if fully set forth in the body of this Agreement

32. Effective Date

This Agreement shall be effective on \_\_\_\_\_2012 and shall expire when terminated as provided herein.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their authorized officers.

## **EXHIBIT A**

### **A. SERVICES:**

Pursuant to the terms and conditions defined in Agreement (which includes this Exhibit A), for each Non-Profit Group (NPG) that selects Wholesaler as its supplier of “safe and sane” fireworks for sale in the City of Suisun City, AT ITS SOLE COST AND EXPENSE, WHOLESALER shall provide the services as set forth below:

### **B. WHOLESALER'S DUTIES AND RESPONSIBILITIES:**

1. Secure all permits.
2. Schedule meetings with NPG's.
3. Execute contracts with NPG's and calendar training for NPG's and volunteers.
4. Secure city-approved locations for firework stands.
5. Prepare and provide training material and conduct training for NPG's and volunteers.
6. Provide a "Sales Aid Kit" to each location.
7. Provide fire extinguishers pre-approved by the Fire Department to each location.
8. Provide fireworks stands and Fire Department-approved metal containers for nightly storage of fireworks.
9. Deliver “safe and sane” fireworks and related approved product to stand locations.
10. Set up and tear down stands. Return leased property to its preleased condition.
11. Market fireworks using local advertising.
12. Provide required insurance.
13. Prepare and provide one-page consumer safety education material in sufficient quantities to provide one copy with each retail sale, including information on city-approved sites for the use of “safe and sane” fireworks.
14. Provide wireless credit card equipment for use by NPG's.
15. Work with City officials, in particular City oversight departments including;
  - a. Administration
  - b. Fire
  - c. Police
  - d. Building
  - e. Public Works
  - f. Community Development
  - g. Recreation
16. Schedule "kick-off" meeting with City Manager to discuss implementation plan.
17. Assist in end-of-season audit and analysis.
18. Schedule meetings with City oversight departments to discuss logistics, including but not limited to scheduling, stand locations, traffic, parking, etc.
19. Negotiate and enter into lease(s) for city-approved stand locations.
20. Provide Services Information Packets that include applications, licenses, insurance documents, site plans, etc. to City oversight departments for review.
21. Meet with and review the training course materials with the Fire Department.
22. Coordinate fireworks delivery dates with NPG's.

23. Obtain all electrical permits. (All electric equipment including generators must be properly grounded and approved by City Building Department.)
24. Coordinate with the Community Development Director to identify city-approved advertisement locations and to coordinate advertising placement at stands and on city-approved sites.
25. Provide each NPG a 24-hour "one stop" telephone number to call for any issues that arise during the sales period.
26. Wholesaler account manager must visit each stand at least once per day and be available 24 hours/day during the sales period.
27. Meet with and coordinate with each NPG regarding the inventory, return of unsold products, and creation of a financial report to be submitted to the City.
28. As part of Wholesalers accounting duties pursuant to this agreement, the Wholesaler shall assure that each NPG properly accounts for all inventory.
29. Provide a return center for all damaged and undamaged merchandise.
30. Take responsibility for daily trash removal at all stand locations.
31. Not later than August 1<sup>st</sup> following the July 4th event, Wholesaler will pay to the City a minimum amount of 52% of gross receipts (equal to gross sales) allocated to the NPG after the wholesaler/NPG split as consideration for contracting with the City to put on the July 4th community event for the subsequent July 4th event. This contractual relationship between the Wholesaler and the City recognizes the importance of the July 4th Celebration to the sale of "safe and sane" fireworks." As an example, if the total gross sales equaled \$120,000 and the split between the wholesaler and the NPG was 50/50, the amount distributed to Wholesaler for future July 4<sup>th</sup> events would be 52% of \$60,000. This is after the regulatory fee payment under Section C(5) of this Exhibit A.

**C. CITY'S DUTIES AND RESPONSIBILITIES:**

1. Approve all firework stand locations prior to operation.
2. Select NPG's per the Municipal Code and require agreements with each NPG and Wholesaler assuring compliance with the Municipal Code and the terms and conditions contained herein.
3. Assist Wholesaler in obtaining City permits.
4. Wholesaler EXPRESSLY AGREES that the City will provide independent financial analysis of the entire fireworks sales operation as it pertains to the terms and conditions of this agreement and that of the Wholesaler and the NPG's. Wholesaler will provide all financial data requested by the City as it pertains to this agreement and that of the Wholesaler and the NPG's.
5. Pursuant to Suisun City Municipal Code Title 8, Chapter 8.4 *et seq.*, the City will charge each NPG a regulatory fee not to exceed 10.72% of gross sales of fireworks. As part of Wholesalers accounting duties pursuant to this agreement, the Wholesaler shall assure that each NPG properly accounts for the correct regulatory fee payable to the City.

**D. TIMELINE FOR PERFORMANCE:**

No later than May 18, 2012:

1. Schedule "kick-off" meeting with City Manager to discuss implementation plan.

No later than May 25, 2012:

2. Schedule and meet with non-profit organizers.
3. Schedule meetings with City oversight departments (Fire, Police, Public Works, Building, Community Development, and Recreation) to discuss logistics, including but not limited to scheduling, stand locations, traffic, parking, etc. Negotiate and enter into lease for stand locations no later than June 15, 2012.
4. Secure contracts with any or all randomly-chosen NPG's and calendar training.

No later than May 31, 2012:

5. Acquire all permits and approvals in accordance with local ordinance.
6. Provide Services Information Packets that include applications, licenses, insurance documents, site plans, etc. to City oversight departments for review.
7. Meet with and review the training course materials with the Fire Department.
8. Conduct training course for NPG's. City oversight departments must be invited to attend the trainings.

Prior to June 15, 2012:

9. Coordinate stand placement and advertising placement.
10. Coordinate fireworks delivery dates with NPG's.
11. Obtain all electrical permits. All electric equipment including generators must be properly grounded and approved by City Building Department.
12. Coordinate with the Community Development Director to identify advertisement locations and coordinate advertising placement at stands and on city-approved sites.
13. Provide each NPG a 24-hour "one stop" telephone number to call for any issues that arise during the sales period.

Immediately prior to June 28, 2012 and throughout sales period:

14. Supply each stand with "safe and sane" fireworks and related approved products.
15. Supply one-page consumer safety education material in sufficient quantities to provide one copy with each retail sale safety materials for distribution to customers. These materials will include approved places to use fireworks.
16. Wholesaler Account Manager must visit each stand at least once per day and be available 24 hours/day during the sales period.

Subsequent to sales period and not later than July 13, 2012:

17. Meet with and coordinate with each NPG regarding the inventory, return of unsold products, and creation of a financial report to be submitted to the City.
18. As part of Wholesalers accounting duties pursuant to this agreement, the Wholesaler shall assure that each NPG properly accounts for all inventory.

Not later than August 1, 2012:

19. Wholesaler will pay to the City a minimum amount of 52% of gross receipts (equal to gross sales) generated by each NPG as consideration for contracting with the City to put on the July 4th community event for the subsequent July 4th event. This contractual relationship between the Wholesaler and the City

recognizes the importance of the July 4th Celebration to the sale of "safe and sane" fireworks."