

**AGREEMENT BETWEEN
THE CITY OF SAN JOSE
AND**

TO FABRICATE AND INSTALL AN ARTWORK

This agreement is made and entered into this _____ day of _____, 20 _____, by and between the City of San Jose ("City"), a municipal corporation, and _____ ("Artist"), an individual.

RECITALS

A. The City desires to commission a public art project associated with _____ (the "Project") which is to be located in San Jose, California (the "Artwork").

B. The source of funds for the Artwork derive from the two percent (2%) public art funds made available from the construction of the Project under City's Public Art Program.

C. City, through City's Public Art Program, will manage the development of the Artwork in consultation with the Department of Public Works ("DPW").

D. Artist was selected by a panel of art professionals, from a pool of qualified artists, as the most qualified to design the Artwork (the "Artwork Design").

E. The Artist's Artwork Design Proposal ("Final Proposal") was approved by the Arts Commission at its meeting of _____, and the Arts Commission recommended to the City Council that the Artist proceed with the fabrication and the installation of the Artwork as depicted in the Final Proposal.

In view of the above recitals, the parties agree:

ARTICLE 1
ARTIST'S GENERAL RESPONSIBILITIES

1.0. GENERAL.

A. The parties agree that the Final Proposal is on file in the City's Office of Cultural Affairs. In the event of conflict between the Final Proposal and this Agreement,

this Agreement will control. The location of the Artwork is described in the attached Exhibit A (the "Site").

B. Artist shall fabricate the Artwork consistent with the Final Proposal, including without limitation, supervising all aspects of the fabrication of the Artwork to ensure proper fabrication of the Artwork. As more particularly provided below, Artist shall be responsible for the transportation and delivery of the Artwork to the Site. Artist shall be responsible for the installation of the Artwork at the Site consistent with the construction documents for the Artwork which were developed and approved by City's Director of Public Works ("City's DPW Director" or "DPW Director") and City's Chief Development Officer ("City's CDO" or "Development Officer"), as set forth in the agreement entitled: "Agreement Between the City of San Jose and _____ to Design a Work of Art" ("Construction Documents"). Artist's responsibilities under this subsection B are collectively referred to as "Artist's Services."

1.1. DEVIATIONS FROM PROPOSAL.

A. The goal of the parties for the Artwork is a product which represents the creative talents of Artist and satisfies the specifications set forth in the Final Proposal and the Construction Documents for the Artwork. The parties recognize that they must consult closely during all stages of development of the Artwork, including without limitation, during fabrication and installation of the Artwork in order to accomplish these goals and that changes from the Final Proposal may become desirable as the Artwork is fabricated. Additionally, the parties recognize and agree that certain specifications regarding the Artwork, such as, but not limited to, the size, color, material (including grade of the material), of some of the elements of the Artwork are not identified in either the Final Proposal or the Construction Documents. To the extent that any specification for the Artwork is not identified in the Final Proposal or in the Construction Documents, Artist shall seek City's prior approval of these specifications before commencing with fabrication of the Artwork.

B. The parties also recognize that the shift in scale from preliminary drawings and maquette to a full-scale work may require artistic adjustments. Artist reserves the right to make minor adjustments to the Artwork as Artist deems aesthetically necessary. In no event, however, may the change in design increase the Artwork budget without prior written approval by City's Program Officer. Additionally, Artist shall make no change in the design which requires a modification of the Construction Documents without the prior written approval of City's DPW Director.

1.2. MATERIAL DEVIATIONS.

Any material deviation from the Final Proposal or the Construction Documents in the scope, design, color, size, material, utility and support requirements, texture or location of the Artwork must be approved in writing and in advance by City before Artist proceeds with completion of the Artwork. Without limiting the generality of the foregoing, material deviation also includes any change from the Final Proposal or the

Construction Documents which affects the fabrication, schedule of delivery or installation of the Artwork, preparation of the Site or maintenance of the Artwork.

1.3. ADDITIONAL SERVICE AUTHORIZATION.

No services for which additional compensation will be charged shall be provided without prior written authorization by City.

1.4. PERSONNEL.

Artist has, or will secure at Artist's expense, all personnel required to perform Artist's Services. All persons retained by Artist shall possess the requisite licenses and permits necessary.

1.5. COORDINATION.

Artist agrees to meet with City and others as reasonably directed by City to ensure coordination of Artist's Services with the installation of the Artwork.

1.6. THIRD PARTY CONTRACTORS.

A. Artist shall not unreasonably impede, hinder or delay any third party contractor in the performance of the contractor's work. Artist shall communicate with any third party contractor who will be performing work which may depend upon, or connect with the Artwork, and Artist agrees to attempt to resolve any disputes or coordination problems with any such third party contractors or others. Except as provided in subsection B, below, Artist is not responsible for the services of third party contractors. In the event of conflict between Artist and third party contractors, City will resolve the conflict.

B. If cost impacts result from Artist's work delaying or impacting any third party contractor resulting in additional charges from that contractor, Artist will be liable for these costs.

C. If any part of Artist's work depends upon the work of any other person for proper execution or results, Artist shall, prior to proceeding with such work, promptly report to City in writing any discrepancies or defects in such other work which can be identified upon reasonable inspection that would render it unsuitable for proper execution and results. Failure to so notify City shall constitute the Artist's acceptance of such work as suitable.

1.7. REVIEW OF PROGRESS AND REPORTS.

At reasonable times and with advance notice to Artist, City has the right to review the work in progress and to require and receive progress reports from Artist. City shall have the right to visit Artist's studio at all reasonable times to inspect and review the progress of the Artwork. Artist shall be responsible for arranging with Artist's

subcontractors for reasonable access for review and inspection of the Artwork at any subcontractor's place of business.

1.8. RISK OF LOSS.

Until the Artwork is formally accepted by City, any damage to, theft or vandalism to, or acts of God or nature affecting the Artwork are the responsibility of Artist, including, but not limited to, any loss occurring during the fabrication, storage, transportation, delivery or installation of the Artwork.

1.9. TAX IDENTIFICATION NUMBER.

No later than the date of Artist's execution of this Agreement, Artist shall provide City with Artist's Tax Identification Number and any proof of Artist's Tax Identification Number as requested by City.

ARTICLE 2 **FABRICATION AND INSTALLATION OF THE ARTWORK**

2.0. INSPECTION AND TRANSPORT OF ARTWORK.

A. Inspection Notice.

City and Artist agree that various elements of the Artwork are to be fabricated at locations away from the Site (collectively, "Off-Site Elements"). The Off-Site Elements, include, but are not limited to, the elements described in the attached Appendix 1. Artist shall notify City in writing when each element of the Artwork is ready for inspection, prior to transporting the Off-Site Element to the Site ("Inspection Notice"). The parties acknowledge and agree that City has the right to inspect each of the Off-Site Elements and that City's inspection rights are not limited to the Off-Site Elements listed in Appendix 1.

B. Notice to Proceed.

Within fifteen working days (15) of receipt of the Inspection Notice for each Off-Site Element, City's Program Officer will inform Artist in writing either (1) the Off-Site Element has been completed in accordance with the terms of this Agreement and the Off-Site Element is formally accepted for purposes of transporting the Off-Site Element to the Site ("Transportation Notice to Proceed") or (2) there are defects or deficiencies in the Off-Site Element which prevent formal acceptance, in which case the defects or deficiencies will be described ("Off-Site Defects Notice"). In the event that an Off-Site Element is fabricated at a place not located in the San Francisco Bay Area, City may, at its sole discretion, determine to delay inspection until the Off-Site Element is delivered to the Site. If City fails to issue the Transport Notice to Proceed, or the Off-Site Defects Notice within the 15 working day inspection period, the Transport Notice to Proceed will

be deemed to have been issued at the conclusion of the 15 working day inspection period. In the event that City issues an Off-Site Defects Notice, Artist will promptly remedy any defects to the satisfaction of City's Program Officer.

C. Delivery.

Upon issuance of the Transport Notice to Proceed, Artist shall deliver the Off-Site Elements to the Site. Artist shall coordinate with City's Program Officer regarding the time, place and manner of delivery and installation of the Artwork. City's Program Officer shall have the right to inspect the Off-Site Elements at the time each Off-Site Element arrives at the Site in order to determine whether it has been damaged in transit or whether it deviates in any way from the Off-Site Element approved by City's Program Officer prior to City's issuance of the Transport Notice to Proceed, if the City elected to inspect off-site, or whether it meets the terms of this Agreement in the event City elected to delay its inspection of the Off-Site Element until it arrived at the Site. Artist promptly shall remedy any defect or damage to the Off-Site Element or any deviations from the Off-Site Elements as approved by City in the Transport Notice to Proceed to the satisfaction of City's Program Officer.

2.1. WORK AT THE SITE.

A. Plans.

1. Artist shall cause all labor and material incorporated in the Artwork to be furnished in accordance with the requirements and specifications set forth in the Construction Documents approved by City and the City's Standard Specifications as more specifically described in the attached Exhibit B (collectively, the "Plans").

2. City's approval of the Plans shall not release Artist of the responsibility for the correction of mistakes, errors or omissions contained in the Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved. If, during the course of installation of the Artwork, City determines in City's sole discretion that the public safety requires modification of, or the departure from, the Plans, City shall have the authority to require Artist to address the public safety issues and to present Artist's proposed modifications to the DPW Director for the Director's review and approval of the engineering soundness of the proposed modifications. The parties acknowledge that the Plans, once approved by City, shall be final and that, except as expressly provided in this subsection, no revisions to the Plans shall be permitted except with the prior written approval of City's DPW Director and Development Officer.

B. Installation.

Artist shall be responsible for installation of Artwork at the Site, including without limitation, supervising the work of any subcontractors and coordinating the inspection of the installation of Artwork with the DPW Director. The parties recognize and agree that the Artwork will not be formally accepted by City, unless the DPW Director approves the installation of the Artwork at the Site.

C. Appearance of Site.

Artist shall maintain a neat appearance to the work at the Site. Artist shall be responsible for any clean-up of the Site made necessary by the installation of the Artwork, including without limitation, removal of equipment, materials and the repair of any portion of the Site or surrounding area damaged by the installation of the Artwork.

D. City's Access to Site.

City's designated representatives shall at all times during the progress of work on the Artwork at the Site have free access to the Artwork for inspection purposes. If either the DPW Director or the Development Officer determines that all or any portion of the work done on the Artwork is not in compliance with the Plans, City shall notify Artist of the same and Artist shall promptly cure such defect to the satisfaction of the DPW Director and Development Officer.

E. Representatives.

Artist shall designate in writing before starting work, an authorized representative who shall have the authority to represent and act for Artist. When work is not in progress and during periods when work is suspended, arrangements acceptable to the DPW Director shall be made for any emergency work which may be required.

City shall also designate one or more authorized representative who shall have the authority to represent City. Artist's authorized representative shall be present at the site of the work at such times as designated by either the DPW Director or Development Officer. Prior to commencement of the work, the parties shall mutually agree to an inspection schedule, which schedule may be adjusted from time to time by mutual agreement.

Whenever the Artist or Artist's authorized representative are not present on any particular part of the work where it becomes necessary to give direction for safety reasons, the DPW Director shall have the right to give orders which shall be received and obeyed by the superintendent or foreman who may have charge of the particular work in reference to which the orders are given. Any order given by the DPW Director will on request of the Artist be given or confirmed by the DPW Director in writing.

Prior to commencement of work on the Artwork, Artist shall provide to the Program Officer the names and telephone numbers of at least 2 persons in charge of or responsible for the work who can be reached personally in case of emergency 24 hours a day, 7 days a week.

City's rights under this Agreement shall not make the Artist an agent of the City, and the liability of the Artist for all damages to persons or to public or private property arising from Artist's execution of the work shall not be lessened because of the exercise by City of its rights.

2.2. COMPLETION OF SERVICES.

A. Completion Notice.

Artist shall notify City's Program Officer that the Artwork has been installed at the Site ("Completion Notice"). Within thirty (30) days of City's receipt of the Completion Notice, City shall notify Artist in writing that the Artwork as completed and installed meets the requirements of this Agreement ("Acceptance Notice") or if the Artwork does not meet this Agreement's requirements, City shall notify Artist of the defects ("Defects Notice").

B. Remedy of Defects.

Artist shall promptly remedy at Artist's own cost any defects noted in City's Defects Notice to the satisfaction of City's Program Officer.

C. Maintenance Instructions.

As a condition of City's acceptance of the Artwork, Artist shall supply City with written maintenance instructions for the Artwork. These instructions shall include information in sufficient detail regarding the care, repair and maintenance of the Artwork.

D. Final Documentation.

As a condition of City's acceptance of the Artwork, Artist shall supply City with at least three (3) publication quality images of the installed Artwork in both slide and digital formats. Use of these images will be in accordance with Section 9.2 of this Agreement.

ARTICLE 3 **SCHEDULE**

3.0. SCHEDULE.

Artist is to complete Artist's Services according to the schedule set out in the attached Exhibit C, entitled "Schedule of Performance."

3.1. TIME.

It is understood that time is of the essence in the performance of Artist's Services under this Agreement.

3.2. FORCE MAJEURE.

A. For purposes of this Agreement the term "Force Majeure" shall mean earthquake, fire or other casualty, flood, landslide, epidemic, unforeseeable adverse weather, "acts of God," war, civil disturbance, court ordered injunction, intervention by civil or military authorities or government, strikes, lockouts, boycotts or other labor disputes, to the extent any of the foregoing are beyond the reasonable control of either City or Artist and which cause such party to be delayed or hindered in or prevented from the performance of any covenant or obligation under this Agreement other than the payment of money.

B. If either Artist or City is delayed or prevented from the performance of any act required by this Agreement by reason of acts of Force Majeure, performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

ARTICLE 4 **ARTIST'S COMPENSATION**

4.0. COMPENSATION.

A. The compensation to be paid to Artist ("Total Price") is set forth in the attached Exhibit D, entitled "Compensation." The rate, schedule and method of payment also are set out in Exhibit D. Such payment shall constitute full and complete compensation for work performed and services rendered, including, but not limited to, professional services and expenses, for all supervision, labor, supplies, materials, equipment or use thereof, taxes, and for all other necessary incidentals. Without limitation of any other provision of this Agreement, Artist shall pay or cause to be paid, prevailing wages for all work under this Agreement, if any, covered by the City' Prevailing Wage Policy, as set forth in City Council Resolution No. 61144, as it may be amended from time to time. Exhibit D and Exhibit E "Prevailing Wages" sets forth additional requirements with respect to the payment of prevailing wages and the provisions. Further information regarding prevailing wages that may apply to this Agreement may be obtained from the City's Office of Equality Assurance.

B. In the event that the City approves a modification of the Final Proposal or the Plans which results in cost savings such as but not limited to, the deletion of an element of the Artwork, the substitution of lesser quality materials with no offsetting

upgrade of other materials, or the reduction in the Artwork's size, the cost savings attributable to the modification will not be paid to the Artist.

4.1. COST OVERRUN.

In the event Artist incurs costs in excess of the Total Price, Artist shall pay such excess at Artist's sole cost. City is not responsible for any part of such excess.

4.2. NO WAIVER OF RIGHTS.

No payment to Artist for any work performed or services rendered shall constitute a waiver or release by City of any claims, rights or remedies City may have against Artist under this Agreement or by law, nor shall such payment constitute a waiver by the City of any failure or fault of Artist to satisfactorily perform the services as required under this Agreement.

ARTICLE 5 **ARTIST'S WARRANTIES**

5.0. ARTIST'S WARRANTIES.

Artist represents and warrants that:

A. Artist is the sole and absolute owner of the Artwork, the copyrights pertaining to it, and all the rights associated or relating to it.

B. Artist has not previously sold, assigned, licensed, granted, encumbered, or utilized the Artwork, the Artwork's design or any element thereof, in any manner which may affect or impair the rights granted pursuant to this Agreement.

C. All work created or performed by Artist under this Agreement, whether created by Artist alone or in collaboration with others, is wholly original with Artist and will not infringe upon or violate the rights of any third party.

D. Artist has the full power to enter into and perform this Agreement and to make the grant of rights contained in this Agreement.

E. Artist warrants that the Artwork is the result of the artistic efforts of Artist and that it will be delivered free and clear of any liens.

F. Artist warrants and covenants that the Artwork will be and will remain a unique edition.

5.1. DEFECTS IN MATERIAL WORKMANSHIP AND INHERENT VICE.

A. Artist warrants that the Artwork and workmanship will be free of defects in workmanship, including Inherent Vice, and that the Artist will, at the Artist's own expense, remedy any defects due to faulty workmanship, or Inherent Vice, which appear within a period of three years from the date the Artwork is formally accepted. If the Artwork should deteriorate because of Inherent Vice between one and three years from the date the Artwork is formally accepted, Artist will repair or replace the Artwork without charge for Artist's services in supervising the work of others or for repairing the work that they originally performed on the Artwork and Artist will pay for the cost of labor rendered by persons other than the Artist, materials and supplies. The term "Inherent Vice" means any quality within the material or materials incorporated into the Artwork which, either alone or in combination, results in the deterioration of the Artwork. Inherent Vice does not include any potential for deterioration that is specifically identified in the Final Proposal.

B. Artist further warrants that the Artwork shall not constitute any threat to the safety of persons or property when used in the manner for which it is designed. Artist agrees to cooperate with City in making or permitting adjustments to the Artwork if necessary to eliminate hazards which become apparent after the Artwork is accepted by City.

5.2. SURVIVAL.

These representations and warranties shall survive the termination or other extinction of this Agreement.

ARTICLE 6 **MAINTENANCE**

6.0. REPAIRS AND RESTORATION.

City shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Artwork will be made. It is the policy of City to consult with Artist regarding repairs and restoration which are undertaken during Artist's lifetime when that is practicable. In the event that City make repairs or restoration not approved by Artist, Artist shall have the right, at Artist's sole option, to have Artist's association with Artwork severed.

6.1. STANDARDS OF REPAIR AND RESTORATION.

All repairs and restorations, whether performed by Artist, City, or by third parties responsible to Artist or City, shall be made in accordance with professionally recognized

principles of conservation of artworks and in accordance with the maintenance instructions provided to City by Artist pursuant to Article 2.

ARTICLE 7
RELATIONSHIP OF PARTIES; ASSIGNMENT

7.0. ARTIST AS INDEPENDENT CONTRACTOR.

It is understood and agreed that Artist's relationship with City is strictly and solely that of independent contractor. Nothing contained in this Agreement shall be construed to place City and Artist in the relationship of partners. Artist acknowledges and agrees that Artist shall not hold Artist out as authorized agent of City with power to bind in any manner.

7.1. ASSIGNABILITY.

A. The parties agree that the expertise and experience of Artist are material considerations for this Agreement. Except as may be specifically authorized under this Agreement, Artist shall not assign or transfer any interest in this Agreement nor the performance of any of Artist's obligations hereunder, and any attempt by Artist to assign this Agreement or any rights, duties or obligations arising hereunder shall be void and of no effect unless prior written consent is given by City. However, nothing in this section shall be deemed to prevent Artist, at Artist's sole expense, from relying on or utilizing the services of such other consultant or contractor as Artist may require to complete the Artwork.

B. City shall have the right to assign or transfer any and all of City's rights and obligations under this Agreement. This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the City.

ARTICLE 8
INDEMNIFICATION, INSURANCE AND BONDING

8.0. INDEMNIFICATION BY ARTIST.

A. Artist agrees to protect, defend, indemnify and hold harmless City, its officers, agents and employees, from and against all claims, costs and damages (collectively, "Liabilities") arising out of the negligent or willful acts or omissions in the performance of this Agreement by Artist, or Artist's agents or Artist's subcontractors. Artist's obligations under this subsection exclude only those Liabilities which are due to the sole negligence or willful misconduct of City, its officers, agents and employees.

B. Artist also agrees to protect, defend, indemnify and hold City, its officers, agents and employees harmless from any action, claim, suit or liability based on a claim that work performed under this Agreement by Artist, or Artist's agents or Artist's subcontractors constitutes an infringement of any patent, copyright, trademark, trade name or other proprietary right of any party.

C. The provisions under this Section are intended to apply to the fullest extent permitted by law.

8.1. INSURANCE REQUIREMENTS.

Artist, at Artist's sole cost and expense, agrees to maintain the policies set forth in the attached Exhibit F, entitled "Insurance Requirements" until City accepts the Artwork. All policies, endorsements, certificates and/or binders shall be subject to the approval by the City's Director of Finance or the Director's authorized designee ("Risk Manager") as to form and content. These requirements are subject to amendments or waiver if so approved in writing by the Risk Manager. Artist agrees to provide City copies of the required policies, certificates and/or endorsements before work commences under this Agreement.

8.2. SURVIVAL.

This Article shall survive expiration or other extinction of this Agreement.

ARTICLE 9 **COPYRIGHTS**

9.0. GENERAL.

A. Except as provided in this Agreement, Artist shall retain all copyrights in the Artwork.

B. Artist may, at Artist's option, place a copyright notice on the Artwork in the form and manner required to protect copyrights in the Artwork under United States copyright law. If the copyright is registered with the U.S. Copyright Office, Artist shall provide City with a copy of the application for registration, the registration number and the effective date of registration.

9.1. DISPLAY/DISPOSAL.

Artist grants City the following exclusive rights:

A. City shall have the right to display the Artwork and to loan the Artwork to others for the purpose of public display.

B. City shall have the right to dispose of the Artwork as specified below in Article 10.

9.2. REPRODUCTIONS.

A. Artist authorizes City to make, and to authorize the making of, photographs and other two-dimensional reproductions of the Artwork for educational, public relations, arts promotional and other noncommercial purposes.

B. For the purposes of this Agreement, reproductions for noncommercial purposes include but are not limited to the following: reproduction in exhibition catalogues; slides photographs, and electronic formats; postcards, posters, and calendars; in art magazines, art books, and art and news sections of print and electronic newspapers and websites; in general books and magazines not primarily devoted to art but of an educational, architectural, historical or critical nature; slides and film strips not intended for a mass audience; and television from stations operated for educational purposes or on programs for educational purposes from all stations.

C. On any and all such reproductions, City shall place a copyright notice in the form and manner required to protect the copyrights in the works under the United States copyright law.

ARTICLE 10 **REPUTATION AND CREDIT**

10.0. COMMITMENT BY CITY.

City agrees that unless Artist requests to the contrary in writing, all references to the Artwork and all reproductions of the Artwork will credit the Artwork to Artist.

10.1. ARTWORK PLAQUE.

City will fabricate and install an identification plaque for the completed Artwork, which will include the following information: Artist's name, year in which Artwork is completed, Artwork title, funding agency and commissioning agency. No other information will be included on the Artwork Plaque.

10.2. ARTIST'S COMMITMENT.

Artist agrees that all formal references to the Artwork made or authorized to be made by Artist shall include the following credit: "Collection of the City of San Jose Public Art Program," or other language agreed to by all parties.

10.3. FUTURE MODIFICATION OR RELOCATION.

A. City has the right to remove the Artwork from the Site at any time. In addition, in the event that any element of the Artwork constitutes a public safety hazard, City has the right to remove only the element posing the public safety hazard.

B. Except to the extent permitted by subsection A above, City agrees to not intentionally modify the Artwork without first obtaining Artist's written consent.

C. City shall have the right to donate or sell the Artwork at any time. Before exercising this right, City, by written notice to Artist at Artist's last known address, agrees to give Artist the opportunity to purchase the Artwork for the greater of the Total Price or the amount of any offer which City has received for the purchase of the Artwork, plus all costs associated with the removal of the Artwork from the Site, clean-up of the Site and delivery to Artist. Artist shall have thirty (30) days from the date of City's notice to exercise the option to purchase the Artwork.

D. Artist's rights under this Agreement cease with Artist's death and do not extend to Artist's heirs, successors or assigns.

E. To the extent that the provisions of this Agreement conflict with laws regarding authorship and destruction of art, including without limitation, California Civil Code Section 987 and Title 17 U.S.C. Section 106A et seq., this Agreement controls.

ARTICLE 11 **COMPLIANCE WITH LAWS**

11.0. GENERAL.

Artist shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments.

11.1. NONDISCRIMINATION.

Artist shall not discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, or national origin, in connection with or related to the performance of this Agreement.

11.2. GIFTS.

Artist is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San Jose Municipal Code. Artist agrees not to offer any City officer or designated employee any gift prohibited by said Chapter. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this Agreement by Artist. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for such breach as provided in Article 12 of this Agreement.

ARTICLE 12 **DEFAULT AND TERMINATION**

12.0. TERMINATION WITH CAUSE.

A. If Artist fails to perform any of Artist's material obligations under this Agreement, City may terminate this Agreement upon fifteen (15) days written notice to Artist ("Termination Notice"). The Termination Notice must specify Artist's breach and provide Artist with an opportunity to cure the specified breach within the fifteen (15) day notice period. In the event that Artist fails to cure the specified breach within the fifteen (15) day notice period, the termination of this Agreement will be effective. In instances where the specified breach is incapable of being cured within fifteen (15) days, Artist shall commence to cure the specified breach within the fifteen (15) day notice period and diligently prosecute the work necessary to complete the cure.

B. If City fails to perform any of its material obligations under this Agreement, Artist may terminate this Agreement upon fifteen (15) days written notice to City ("Artist's Termination Notice"). Artist's Termination Notice must specify the breach and provide City with an opportunity to cure the specified breach within the fifteen (15) day notice period. In the event that breach is not cured within the fifteen (15) day notice period, the termination of this Agreement will be effective. In instances where the specified breach is incapable of being cured within fifteen (15) days, City shall commence to cure the specified breach within the fifteen (15) day notice period and diligently prosecute the work necessary to complete the cure.

12.1. REMEDIES.

A. The remedies under this Agreement are cumulative and are in addition to the rights available to the parties at law or in equity.

B. Without limiting the generality of subsection A, above, if Artist breaches this Agreement, City has the right to exercise its termination rights as described in Section 12.0 and at its option proceed with the fabrication and installation of the Artwork as contemplated in the Final Proposal without utilizing the services of the Artist. If City

exercises its option to proceed, then City, upon Artist's written request will refrain from referencing the Artwork as the work of Artist.

12.2. WAIVER.

The parties agree that waiver by any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach of violation of the same or any other term or condition.

ARTICLE 13
MISCELLANEOUS

13.0. NOTICES.

A. Submittals, requests, notices and reports (collectively, "Notices") required under this Agreement shall be delivered personally or through the mail, postage prepaid, to the addresses stated below, or to any other address as may be noticed by a party. Notices may also be sent by facsimile to the facsimile numbers set forth below.

For Artist: _____

FAX _____

For City: San Jose Public Art Program
365 S. Market Street
San Jose, CA 95113
FAX (408) 277-3160

Notices will be deemed effective on the date personally delivered, faxed, or sent by courier service. Notices which are mailed will be deemed effective three (3) days after deposit in the mail.

B. Artist agrees for the duration of Artist's life, to provide City with Artist's current mailing address and facsimile number in the event Artist's address or facsimile number, as specified above, should change.

13.1. VENUE.

In the event that suit shall be brought by either party to this Agreement, the parties agree that venue shall be exclusively vested in the state court of the County of Santa Clara or if federal jurisdiction is appropriate, exclusively in a United States District Court for the Northern District of California, San Jose, California.

13.2. GOVERNING LAW.

Except to the extent that federal law is applicable, this Agreement must be construed - and its performance enforced - under California law.

13.3. CAPTIONS.

The captions to the sections or paragraphs of this Agreement are for convenience only. They are not to be used in construing this Agreement.

13.4. PRIOR AGREEMENTS AND AMENDMENTS.

This Agreement, including all of its attachments, represents the entire understanding of the parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Agreement may only be modified by a written amendment duly executed by the parties of this Agreement.

13.5. SEVERABILITY.

If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

13.6. SPECIAL PROVISIONS.

Special provisions, if any, to this Agreement are specified in the attached Exhibit F, entitled, "Special Provisions."

RD:BKJ:ED
2/8/05

APPROVED AS TO FORM:

“CITY”
CITY OF SAN JOSE, a municipal
corporation

BARBARA JORDAN
Senior Deputy City Attorney

DEANNA SANTANA
Deputy City Manager

Date: _____

“ARTIST”

Name: _____

Date: _____

RD:BKJ:ED
2/8/05

APPENDIX 1

OFF-SITE:

-
-
-

ON-SITE:

-
-
-

RD:BKJ:ED
2/8/05

**EXHIBIT A
LOCATION OF ARTWORK**

The Artwork is located _____

**EXHIBIT B
PLANS AND SPECIFICATIONS**

City's Standard Specifications and Standard Details, dated July, 1992, are on file with the City's Department of Public Works, Architectural Division.

Artist shall comply with City's Standard Details to the extent such details are applicable to the Artwork. Sections 1, 7 and the Technical Provisions of the City's Standard Specifications (Section 10 through and including Section 1501) shall be applicable to this Agreement. References in the Standard Specifications to "Contractor" shall be deemed to mean Artist, including without limitation, Artist's subcontractors. To the extent that the City's Standard Specifications conflict with the provisions set forth in this Agreement, this Agreement shall control.

**EXHIBIT C
SCHEDULE OF PERFORMANCE**

Artist shall perform work according to the following schedule. Artist shall not commence Artist's Services until this Agreement is fully executed and City issues a notice to commence work.

Fabrication of Off-Site Elements:

Completion of _____:

Completion of _____:

Completion of _____:

Final Completion:

The parties agree that the schedule of performance set forth above may, by mutual agreement, be modified in writing without the necessity of a formal amendment to this Agreement.

The schedule for payment set forth in Exhibit D will occur in accordance with the milestones set forth in Exhibit D. In the event that City accepts the Artwork, one or more payments set forth in Exhibit D may occur following the completion date for the Artwork as set forth above or as may be modified in writing by the parties.

The parties agree that the Schedule set forth above may be modified only upon prior written authorization of the Development Officer or his or her designee. Program Officer is expressly designated by OED Director Development Officer to approve a modification to the Schedule pursuant to this paragraph.

EXHIBIT D COMPENSATION

A. Artist's Compensation. Artist's compensation for the Artwork is _____ including a contingency as specified in the budget attached to this Exhibit (the "Budget").

B. Interim Payments. City is not obligated to pay any part of Artist's compensation unless and until the Artwork is finally accepted by City. City shall, however, make interim payments to Artist against the compensation to assist Artist with financing the fabrication, delivery and installation of the Artwork. The amount of the payments shall be made as described below.

C. Payment Schedule for Artist's Services. The following amounts will be paid to Artist within thirty (30) days of City's receipt of an invoice from Artist indicating that the appropriate milestone as described below has been reached:

1. Upon execution of the Agreement _____
2. Upon transportation of Off-site Elements to the Site for installation _____
3. Upon City's issuance of the Notice of Acceptance _____

D. Payment Schedule for Artwork. City shall pay Artist for the costs and expenses identified in the Budget. Artist shall submit any documentation required under the City's Standard Specifications regarding payment of prevailing wages ("Documentation Provision"). Artist's failure to pay or ensure payment of prevailing wages or to comply with the Documentation Provision is subject to the provisions of Exhibit E. The City may make incremental payments of budget line items to facilitate fabrication and installation, at the discretion of the City's Art Program Officer. The form of the invoice shall be subject to the approval of the City's Art Program Officer. Artist may adjust the line items with the prior written approval of City's Art Program Officer, which approval will not be unreasonably withheld.

E. Contingency Draw. Included in the Budget is an amount equal to 10% of the total fabrication and installation budget, which shall be retained by the City and shall not be paid to the Artist except where unforeseeable and unavoidable circumstances cause an increase in the costs incurred by Artist in the Fabrication and Installation of the Artwork. In the event Artist wishes to draw from the Contingency, Artist shall submit a written request ("Contingency Draw Request") specifying the reason for the request and providing reasonable documentation describing the unavoidable circumstances causing the request and the total amount of the request. No contingency draw shall be paid without the written approval of City's Public Art Director and City's Program Officer, which will not be unreasonably withheld. Without limitation of the foregoing, City shall

have no obligation to approve a Contingency Draw to make corrections for which the Artist or Artist's subcontractors are responsible, nor to pay for any costs that Artist could have reasonably avoided. In the event that any of the amount budgeted for contingencies remains upon City's acceptance of the Artwork, the remaining contingency will be retained by the City. In no event shall City be required to make payments in excess of the total budgeted amount.

F. In the event that the City determines that work for which it has received a request for payment does not meet specifications required under this Agreement, City in its sole discretion shall have the right to withhold such payment until such deficiency has been corrected. In such event, City shall provide detailed written notice to Artist within ten (10) days of receipt of such request for payment, specifying the failure of performance for which City intends to withhold payment. Artist shall work to cure such failure of performance in order to meet the Agreement standards to the satisfaction of City.

G. Notwithstanding the foregoing, Artist expressly acknowledges that approval of work to permit an interim payment is solely for the benefit of Artist. Unless and until the City issues a Notice of Acceptance for the Artwork, no interim approval shall constitute acceptance or approval of the Artwork by City nor shall it be construed as a waiver of City's right to require that the Artwork conform strictly to the Final Proposal and to the Plans.

H. Pursuant to California Revenue and Taxation Code Section 6365, the Artwork is exempt from sales taxes imposed under the California Revenue and Taxation Code.

I. The parties agree that the Schedule for Payment set forth above may be modified only upon prior written authorization of the Development Officer or Program Officer.

EXHIBIT E

REMEDIES FOR BREACH OF PREVAILING WAGE PROVISIONS

A. **General.** Artist acknowledges it has read and understands that, pursuant to the terms and conditions of this Agreement, that on at least a portion of the work covered by this Agreement, it is required to pay workers a prevailing wage ("Wage Provision") and to submit certain documentation to the City establishing its compliance with the Documentation Provision, as defined on Exhibit D. Artist further acknowledges the City has determined that the Wage Provision promotes each of the following (collectively "Goals"):

1. It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
2. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
3. Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose, because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.
4. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

B. **Withholding of Payment.** Artist agrees that the Documentation Provision is critical to the City's ability to monitor Artist's compliance with the Wage Provision and to ultimately achieve the Goals. Artist further agrees its breach of the Documentation Provision would result in the need for additional enforcement action to verify compliance with the Wage Provision.

In light of the critical importance of the Documentation Provision, the City and Artist agree that Artist's compliance with this Provision, as well as the Wage Provision, is an express condition of City's obligation to make each payment due to the Artist pursuant to this Agreement. The City is **not** obligated to make any payment due to Artist until Artist has performed all of its obligations under these provisions. Any payment by the City despite Artist's failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Agreement or a waiver of the right to withhold payment for any subsequent breach of the Wage Provision or the Documentation Provision.

C. **Liquidated Damages for Breach of Wage Provision.** Artist agrees its breach of the Wage Provision would cause the City damage by undermining the Goals, and City's

damage would not be remedied by Artist's payment of restitution to the workers who were paid a substandard wage. Artist further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid.

The City and Artist mutually agree that making a precise determination of the amount of City's damages as a result of Artist's breach of the Wage Provision would be impracticable and/or extremely difficult. Therefore, the parties agree that, in the event of such a breach, Artist shall pay to the City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the amount of wages that should have been paid.

D. **Audit Rights.** All records or documents required to be kept pursuant to this Agreement to verify compliance with the Wage Provision shall be made available for audit at no cost to City, 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 records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Artist's address indicated for receipt of notices in this Agreement.

The difference between such stipulated prevailing wage rates and the amount paid to each workman for each calendar day or portion thereof for which each workman was paid less than the stipulated prevailing wage rate shall be paid to each worker by the Artist pursuant to the requirements of Section 1775 of the Labor Code of the State of California.

E. **Adjustment.** The City will not recognize any claim for additional compensation because of the payment by the Artist of any wage rate in excess of the prevailing wage rate set forth in the Agreement. The possibility of wage increases is one of the elements to be considered by the Artist in determining his bid, and will not under any circumstances be considered as the basis of a claim against the City under this Agreement.

EXHIBIT F **INSURANCE**

ARTIST and/or its Contractor(s), at ARTIST'S sole cost and expense, shall procure and maintain for the duration of this AGREEMENT insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by ARTIST, its agents, representatives, employees or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001, including products and completed operations; and
2. The coverage described in Insurance Services Office Form Number CA 0001 covering Automobile Liability, Code 1 "any auto", or Code 2 "owned autos" and Endorsement CA 0025. Coverage shall also include Code 8 "hired autos" and Code 9 "non-owned autos"; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors and Omissions: ***If an engineer or architect is required to complete the Artist's design documents or to inspect the Artwork, the Artist must provide the City of San Jose Risk Management and Office of Cultural Affairs with a copy of the engineer's or architect's Professional Liability Errors and Omissions insurance endorsement***

B. Minimum Limits of Insurance

ARTIST and/or its Contractor shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and

3. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the California Labor and Employers Liability limits of \$1,000,000 per accident; and
4. Professional Liability Errors and Omissions \$1,000,000 Aggregate Limit.

C. **Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by CITY's Risk Manager. At the option of CITY, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officer, employees, agents and contractors; or ARTIST shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY's Risk Manager.

D. **Other Insurance Provisions**

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

1. Commercial General Liability and Automobile Liability Coverages

a. The City of San Jose, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, ARTIST; products and completed operations of ARTIST; premises owned, leased or used by ARTIST; and automobiles owned, leased, hired or borrowed by ARTIST. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.

b. ARTIST's insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents or contractors shall be excess of ARTIST's insurance and shall not contribute with it.

c. Any failure to comply with reporting provisions of the policies by ARTIST shall not affect coverage provided CITY, its officers, employees, agents, or contractors.

d. Coverage shall state that ARTIST's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. All Coverages

Each insurance policy required by this AGREEMENT shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to CITY.

E. **Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to CITY's Risk Manager.

F. **Verification of Coverage**

ARTIST shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this AGREEMENT. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

City of San José - Human Resources
Risk Management
200 East Santa Clara Street; 2nd Floor Wing
San José, CA 95113-1905
Fax: 408-286-6492

G. **Subcontractors**

ARTIST shall include all subcontractors as insured under its policies or shall obtain separate certificates and endorsements for each subcontractor.

Exception

If, however, the Artist does not have any employees and does not wish to cover himself/herself for WORKERS' COMPENSATION, the Artist shall sign the following statement as well as the contract itself to effect a fully initiated contract:

I, as the herein-designated Artist, do not have, nor intend to have for the full term of this agreement, any employees. Furthermore, I do not wish to obtain or be covered under any WORKERS' COMPENSATION insurance coverage and, therefore, am signing this statement in lieu of providing the above-required WORKERS' COMPENSATION COVERAGE.

Signature:

(Please print name of company/Artist)

Date

RD:BKJ:ED
2/8/05

**EXHIBIT G
SPECIAL PROVISIONS**