

STATE OF TEXAS

COUNTY OF BEXAR

CITY OF SAN ANTONIO

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PUBLIC ART

INSTALLATION AGREEMENT

This Agreement ("Agreement") is made and entered into in San Antonio, Bexar County, Texas, between the City of San Antonio, a Municipal Corporation in the State of Texas ("CITY"), by and through the Executive Director of the Department of Arts & Culture, and \_\_\_\_\_ ("CONTRACTOR"), said Agreement being executed by the CITY pursuant to Ordinance No. \_\_\_\_\_ passed by City Council on \_\_\_\_\_ and by the CONTRACTOR, for the installation and installation services for CITY's \_\_\_\_\_.

**WHEREAS**, CITY issues an annual Call for Public Art Qualifications to create and pre-qualify an Artist Pool from which CONTRACTOR was chosen to complete public art improvements related to eligible capital improvement projects in accordance with all applicable laws of public funding and the authorizing instruments for the public funding; and

**WHEREAS**, CONTRACTOR has/will complete a for the ARTWORK that shall be approved by the San Antonio Arts Commission and upon approval proceed to installation and installation of the ARTWORK; and

**WHEREAS**, CITY finds that it is in the best interest of CITY, its citizens and visitors to enhance and enliven CITY's public spaces through the installation and installation of this ARTWORK on the terms and conditions in this Agreement;

**NOW THEREFORE**, in consideration of the mutual benefits, covenants and obligations herein, and for other good, fair and valuable considerations, the Parties agree as follows:

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## **SECTION 1. DEFINITIONS**

The following terms in this Agreement shall have the meanings set out below:

1.0. "Acceptance Notice" means notice by CITY to CONTRACTOR that the completed ARTWORK is installed at the Site and meets the requirements of this Agreement.

1.1. "ARTWORK" means the art fabricated and installed consistent with CONTRACTOR'S final proposal to be submitted for review and approval of CITY.

1.2. "CONTRACTOR" is the designer of the ARTWORK.

1.3. "CONTRACTOR" is the Fabricator and Installer of the ARTWORK\_\_\_\_\_.

1.4. "CITY" means the City of San Antonio, Texas, a home-rule, Texas Municipal Corporation located in Bexar County, Texas. CITY shall also designate one or more authorized representative who shall have the authority to represent and act for CITY. If no representative is specified, CITY's Manager or her authorized representative shall be deemed authorized to act.

1.5. "Public Art Division" means the CITY's Department of Arts & Culture's Public Art Division and is responsible for public art.

1.6. "Compensation Schedule" means the values allocated to services associated with the public art installation and installation services, prepared in such form, and supported by such data as required by CITY.

1.7. "Completion Notice" means notice by CONTRACTOR to CITY that ARTWORK has been installed at the Site.

1.8. "Construction Documents/Plans" mean the drawings, specifications, and addenda for the ARTWORK, which were developed by CONTRACTOR and approved by CITY.

1.9. "Defects Notice" means notice by CITY to CONTRACTOR that the ARTWORK does not meet the requirements of this Agreement.

1.10. "Design Consultant" means the individual or firm engaged by CITY to design a facility or project.

1.11. "Director" means the Director of the Department of Arts & Culture.

1.12. "Notice to Commence" means notice by CITY to CONTRACTOR to begin installation and installation of the ARTWORK.

1.13. "Off-Site Element" means an element of the ARTWORK fabricated away from the Site for later installation as a component of the ARTWORK.

1.14. "Off-Site Defects Notice" means notice by CITY to CONTRACTOR that defects or deficiencies of an Off-Site element do not meet CITY's requirements for formal approval.

1.15. "Project" means the capital improvement/public art development undertaking of CITY for which CONTRACTOR 's services, as stated in the Scope of Services, are to be provided pursuant to this Agreement.

1.16. "Proposal" means CONTRACTOR's Proposal to provide public art installation and installation services for this Project.

1.17. "Schedule of Performance" means the schedule for the installation and installation of the ARTWORK set out in **EXHIBIT A-1**, attached to and incorporated in this Agreement.

1.18. "Site" means the physical place located at \_\_\_\_\_ where the ARTWORK will be installed.

1.19. "Subcontractor" means a person or entity hired by CONTRACTOR to complete work arising from this Agreement.

1.20. "Transport Notice To Proceed" means a notice issued by CITY to CONTRACTOR approving the transportation of an Off-Site element of the ARTWORK to the Site.

## **SECTION 2. CONTRACTOR'S GENERAL RESPONSIBILITIES**

2.0. The ARTWORK is to be a product representing the creative talents of CONTRACTOR and satisfies the specifications to be set forth in the design and the Construction Documents for the ARTWORK. CONTRACTOR shall fabricate the ARTWORK consistent with CONTRACTOR'S Final Proposal and the CONTRACTOR'S Construction Documents, which were approved by CITY and include without limitation, supervising all aspects of the installation. CONTRACTOR shall be responsible for the transportation, delivery and installation of the ARTWORK to the Site consistent with the Final Proposal for the installation and installation of the ARTWORK. CONTRACTOR shall be responsible for performing work as follows: \_\_\_\_\_. \_\_\_\_\_ are out of the public art scope and are not a part of this Agreement.

2.0.1. Design Within Budget Constraints. CONTRACTOR is responsible for developing the ARTWORK so the ARTWORK can be constructed without exceeding the total compensation. CONTRACTOR shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in ARTWORK.

2.0.2. CONTRACTOR warrants that he/she will not replicate/duplicate the same ARTWORK or Artwork Design without the express written consent of City. This Clause shall survive termination of this Agreement.

2.0.3. CONTRACTOR is responsible for submitting the Final Proposal to CITY for approval at CITY's sole discretion. In the event of conflict between the Final Proposal and this Agreement as to any element of the Project unrelated to the size, scope and/or aesthetic of the ARTWORK itself, this Agreement will control.

2.0.4. CONTRACTOR's opinions of probable Project cost or construction cost are to be made on the basis of CONTRACTOR's experience and qualifications representing CONTRACTOR's best judgment as an installation professional familiar with the construction industry.

2.1. DEVIATIONS FROM DESIGN. It is understood that changes from the Design may become desirable as the ARTWORK is fabricated.

2.1.1. Certain specifications regarding the ARTWORK, including, but not limited to, the size, color and/or type or grade of material of some of the elements of the ARTWORK may not be identified in either the Design or the Construction Documents. To the extent that any ARTWORK specification remains unidentified, CONTRACTOR shall seek CITY's prior written approval of these specifications before commencing installation of the ARTWORK.

2.1.2. MATERIAL DEVIATIONS. Any material deviation from the Design or the Construction Documents in the scope, color, size, material, utility requirements, support requirements, texture and/or location of the ARTWORK must be approved in writing and in advance by CITY before CONTRACTOR proceeds with completion of the ARTWORK. Additionally, material deviation shall also include any change from the Design or the Construction Documents, which affects the installation, schedule of delivery or installation of the ARTWORK, preparation of the Site and/or maintenance of the ARTWORK.

2.2. ADDITIONAL SERVICE AUTHORIZATION. No services for which CONTRACTOR seeks additional compensation will be provided nor charged without CITY's prior written authorization.

2.3. PERSONNEL. CONTRACTOR is responsible for providing, at CONTRACTOR's expense, all personnel required by CONTRACTOR to fulfill the responsibilities and obligations in this Agreement. All persons retained by CONTRACTOR shall possess the requisite licenses and permits.

2.4. REPRESENTATIVES. Before starting installation, CONTRACTOR shall designate in writing an authorized representative who shall have the authority to represent and act for CONTRACTOR. CONTRACTOR's authorized representative shall be present at the Site of the work at such times as designated by CITY.

2.5. COORDINATION. The Parties shall closely consult with each other during all stages of installation and installation of the ARTWORK. CONTRACTOR agrees to meet with CITY, CONTRACTOR, Design Consultant, and others as reasonably directed by CITY to ensure coordination of CONTRACTOR's installation and installation of the ARTWORK.

2.6. PERMITS, FEES AND NOTICES. Unless otherwise provided in the Agreement, CONTRACTOR shall give notices as required by law, and secure and pay for the building permit and other permits and governmental fees, licenses, and inspections necessary for proper installation and installation of the ARTWORK, which are customarily secured after execution of this Agreement. CITY and Design Consultant shall assist CONTRACTOR, when reasonably requested, in obtaining such permits and licenses.

2.6.1. If CONTRACTOR provides ARTWORK that is contrary to laws, statutes, ordinances, building codes, and rules and regulations, CONTRACTOR shall assume appropriate responsibility for such ARTWORK and bear the costs attributable to the correction thereof.

2.6.2. CONTRACTOR shall also assist CITY in obtaining all permits and approvals, and pay all fees and expenses, if any, associated with National Pollutant Discharge Elimination System regulations, if applicable, that require completion of documentation and/or acquisition of a "Land Disturbing Activities Permit" for the ARTWORK. Any drainage alterations made by CONTRACTOR during the construction process, which require the issuance of a permit, shall be at CONTRACTOR's sole cost.

2.7. USE OF SITE. CONTRACTOR will abide by all applicable rules and regulations of CITY with respect to conduct, including smoking, parking of vehicles, security regulations and entry into adjacent facilities owned by CITY.

2.7.1. CONTRACTOR shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall CONTRACTOR subject any part of the ARTWORK or adjacent property to stresses or pressures that may endanger it.

2.7.2. CONTRACTOR shall confine CONTRACTOR's construction equipment, the storage of materials and equipment and the operations of CONTRACTOR s personnel to areas permitted by law, ordinances, permits and the requirements of the Agreement and shall not encumber the Site unreasonably.

2.7.3. CONTRACTOR shall provide reasonable access to residents and businesses affected by the installation and installation of the ARTWORK to the greatest extent possible.

2.7.4. During the progress of the ARTWORK, CONTRACTOR shall keep the Site and surrounding area free from accumulations of waste materials, rubbish, and other debris resulting from installation and/or installation of the ARTWORK. CONTRACTOR shall clean, sweep, mop, brush and polish, as appropriate, the interior of the improvements or renovated areas, including but not limited to, any floors, carpeting, ducts, fixtures, and ventilation units, operated during construction, and shall clean exterior gutters, drainage, walkways, driveways and roofs of resulting debris. CONTRACTOR shall be given three

days' notice to clean the Site, otherwise CITY may do so and the cost shall be charged to CONTRACTOR.

2.7.5. Prior to Substantial Completion of the ARTWORK, CONTRACTOR shall remove all waste materials, rubbish and debris from and about the Site as well as all tools, appliances, excess materials, construction equipment and machinery, and shall leave the Site clean and ready for acceptance by CITY. CONTRACTOR shall restore to their original condition those portions of the Site not designated for alteration by the Agreement. If CONTRACTOR fails to clean up the Site as provided in the Agreement after three days' notice from CITY, CITY may do so and the resulting cost shall be charged to CONTRACTOR.

2.8. REVIEW OF PROGRESS AND REPORTS. At reasonable times and with advance notice to CONTRACTOR, CITY has the right to review the work in progress and to require and receive progress reports from CONTRACTOR. CITY shall have the right to visit CONTRACTOR's studio at all reasonable times to inspect and review the progress of the ARTWORK. CONTRACTOR shall be responsible for arranging with CONTRACTOR's subcontractors for reasonable access for review and inspection of ARTWORK at any subcontractor's place of business.

2.9. RISK OF LOSS. Until the ARTWORK is formally accepted by CITY, any damage, theft, vandalism, or acts of God or nature affecting the ARTWORK are the responsibility of CONTRACTOR, including, but not limited to, any loss occurring during the installation, storage, transportation, delivery or installation of the ARTWORK.

2.10. WAIVER OF MORAL RIGHTS. CONTRACTOR agrees to the provisions of the Waiver of Moral Rights attached and incorporated into this Agreement as **Exhibit C-1**.

2.11. PREVAILING WAGE. The requirements of Chapter 2258 of the Texas Government Code, entitled "Prevailing Wage Rates," shall apply to this Agreement. CONTRACTOR shall pay, or cause to be paid, prevailing wages for all work under this Agreement and shall not accept affidavits.

2.11.1. In accordance with the provisions of Chapter 2258 and Ordinance No. 2008-11-20-1045, CONTRACTOR shall request and CITY will provide the appropriate wage determination which includes the general prevailing rate of per diem wages in this locality for each craft or type of workman needed to perform the construction work. CONTRACTOR is required, and shall require its construction contractor and all subcontractors to comply with each updated schedule of the general prevailing rates in effect at the time. CONTRACTOR is further required to cause the latest prevailing wage determination decision to be included in bids and contracts with any contractor and subcontractors for construction of ARTWORK. CONTRACTOR is responsible for and shall collect and monitor certified payrolls and perform Site visits to ensure the prevailing wage is paid to all workmen.

2.11.2. CITY may audit certified payroll records as needed. Upon audit of the records and certified payrolls, should there be any violations CONTRACTOR or CONTRACTOR's subcontractor shall forfeit as a penalty to CITY \$60.00 for

each laborer, workman, or mechanic employed, for each calendar day, or portion thereof, that such laborer, workman or mechanic is paid less than the stipulated rates for any work done under said contract, by the contractor or any subcontractor. The establishment of prevailing wage rates in accordance with Chapter 2258, Texas Government Code does not relieve CONTRACTOR from its obligation under any federal or state law regarding the wages to be paid to or hours worked by laborers, workmen or mechanics insofar as applicable to the work to be performed.

2.12. INTERNET-BASED PROJECT MANAGEMENT SYSTEMS. At its option, CITY may administer its design and construction management through an Internet-based management system. In such cases, CONTRACTOR shall communicate through this media and perform all ARTWORK, and installation related functions utilizing this database system. This includes correspondence, submittals, requests for information, vouchers, or payment requests and processing, Amendments, Change Orders and other administrative activities. When such systems are employed, the CITY shall administer the software, shall provide training to CONTRACTOR and CONTRACTOR's personnel, and shall make the software accessible via the Internet to CONTRACTOR and CONTRACTOR's personnel.

2.13. Tax Identification Number. No later than the date of CONTRACTOR's execution of this Agreement, CONTRACTOR shall provide City with CONTRACTOR's Tax Identification Number and any proof of CONTRACTOR's Tax Identification Number as requested by CITY. CONTRACTOR shall notify CITY of any change in CONTRACTOR's Tax Identification Number.

### **SECTION 3. CITY'S RESPONSIBILITIES.**

3.0. SITE Information. CITY shall be responsible for providing CONTRACTOR, at no cost to CONTRACTOR, copies of existing designs, drawings, reports, and other existing relevant Site data, if any are required by CONTRACTOR.

3.1. CITY is under no obligation to supervise CONTRACTOR's performance of services under this Agreement but may help facilitate meetings with the community.

### **SECTION 4. INSTALLATION DEVELOPMENT OF THE ARTWORK**

4.0. CONTRACTOR shall perform the following services to the satisfaction of CITY and within the deadlines set forth in **Exhibit A-1 Schedule of Performance**.

4.1. Research. CONTRACTOR shall meet with CITY staff in order to understand the uses of the Project and facilities surrounding the Project for the purposes of defining goals for the ARTWORK appropriate to the general social and immediate physical environment of the ARTWORK. CONTRACTOR shall also attend at least three individual meetings with local experts or other interested parties as designated by CITY. The times and dates of these meetings shall be subject to the mutual agreement of the Parties. Any required travel incurred by CONTRACTOR above and beyond what is provided for by this Agreement shall be requested in writing, will need to be approved by both Parties and may be subject to a separate agreement.

## **SECTION 5. INSTALLATION OF THE ARTWORK**

5.0. INSPECTION NOTICE. CITY and CONTRACTOR agree that various elements of the ARTWORK may 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 ARTWORK Design Development Proposal and Construction Documents. CONTRACTOR shall notify CITY in writing when each element of the ARTWORK is ready for inspection, prior to transporting the Off-Site Elements to the SITE ("Inspection Notice"). CITY has the right to inspect each of the Off-Site Elements and all other aspects of the construction of ARTWORK.

5.1. NOTICE TO COMMENCE WORK. Within 15 business days of CITY's receipt of the Inspection Notice for each of the Off-Site Elements, CITY will inform CONTRACTOR in writing that either: (1) the OFF-SITE Elements have been completed in accordance with this Agreement and are formally approved in writing for transport to the Site ("Transport Notice To Proceed"); or (2) there are identified defects or deficiencies in the Off-Site Elements which prevent formal approval ("Off-Site Defects Notice"). In the event that an Off-Site Element is fabricated outside San Antonio, CITY may, at its sole discretion, 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 business days inspection period, the Transport Notice To Proceed will be deemed issued at the end of 15 business days. In the event that CITY issues an Off-Site Defects Notice, CONTRACTOR will promptly remedy any defects to the reasonable satisfaction of CITY.

5.2. DELIVERY. Upon issuance of the Transport Notice To Proceed, CONTRACTOR shall deliver the Off-Site Elements to the Site. CONTRACTOR shall coordinate with CITY regarding the time, place and manner of the ARTWORK delivery and installation. CITY shall have the right to inspect the Off-Site Elements at the time each arrives at the SITE to determine if there is any damaged from transit or any deviations from the Off-Site Element previously approved by CITY or from the terms of this Agreement. CONTRACTOR shall promptly remedy any deviation, defect or damage to the Off-SITE Elements to the reasonable satisfaction of the CITY.

5.3. PLANS. CONTRACTOR shall cause all labor and material incorporated in the ARTWORK to be furnished in accordance with the requirements and specifications approved by CITY (collectively, the "Plans"). The Plans, once approved by CITY, are final and, except as expressly provided in this Subsection, no revisions shall be permitted except with CITY's prior written approval.

5.3.1. CITY's approval of the Plans shall not release CONTRACTOR of the responsibility for the correction of CONTRACTOR's mistakes, errors or omissions in the Plans, including any mistakes, errors or omissions resulting from unforeseen circumstances. If public safety issues arise that, require any change to the Plans as determined at CITY's sole discretion, CITY can require CONTRACTOR to address the public safety issues. CONTRACTOR shall then propose modifications to CITY for review and approval provided such modifications do not increase the Total Price.

5.3.2. All completed drawings submitted by CONTRACTOR for final approval or issuance of a permit that require the seal and certification of a licensed engineer or architect shall bear the seal with signature and date of a Texas registered architect/engineer licensed to practice in Texas.

#### 5.4. WORK AT THE SITE

5.4.1. INSTALLATION. CONTRACTOR 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 CITY. The ARTWORK will not be formally accepted until CITY issues the ACCEPTANCE NOTICE approving the ARTWORK installation at the Site.

5.4.2. CITY'S ACCESS TO SITE. CITY's staff and designated representatives shall have free access to the ARTWORK for inspection purposes at all times during the progress of work on the ARTWORK at the Site. If CITY determines that all or any portion of the work done on the ARTWORK is not in compliance with the Plans, CITY shall notify CONTRACTOR of the same and CONTRACTOR shall promptly cure such defect to the reasonable satisfaction of CITY.

5.4.3. Whenever the CONTRACTOR or CONTRACTOR's authorized representative are not present on the Site and it becomes necessary to give direction for safety reasons, the Director or her designee shall have the right to give orders, which shall be obeyed by CONTRACTOR's subcontractor and/or employees. At CONTRACTOR's request, any order given by the Director or her designee will be confirmed in writing.

#### 5.5. COMPLETION OF SERVICES

5.5.1. COMPLETION NOTICE. CONTRACTOR shall notify CITY when the ARTWORK is fully installed at the SITE ("Completion Notice"). Within 30 days of CITY's receipt of the Completion Notice, CITY shall notify CONTRACTOR in writing that the ARTWORK as completed and installed meets the Agreement's requirements ("Acceptance Notice") or if the ARTWORK does not meet this Agreement's requirements, CITY shall notify CONTRACTOR in writing ("Defects Notice").

5.5.2. REMEDY OF DEFECTS. CONTRACTOR shall promptly remedy at CONTRACTOR's own cost any defects noted in CITY's Defects Notice to CITY's reasonable satisfaction.

5.5.3. MAINTENANCE INSTRUCTIONS. As a condition of CITY's acceptance of the ARTWORK, CONTRACTOR shall supply CITY with written maintenance instructions for the ARTWORK. These instructions shall include information in sufficient detail regarding the proper care, repair and maintenance of the ARTWORK.

5.5.4. FINAL DOCUMENTATION. As a condition of CITY's acceptance of the ARTWORK, CONTRACTOR shall supply CITY with at least three publication quality images of the installed ARTWORK in digital formats and other information on the ARTWORK requested by CITY for its registration files. Use of these images will be in accordance with Section 13.2 of this Agreement.

5.5.5. CONTRACTOR shall be available at such time or times as may be agreed upon between CITY and CONTRACTOR to attend an inauguration or presentation ceremonies relating to the transfer of the ARTWORK to CITY.

5.6. DEATH OR INCAPACITY OF CONTRACTOR. In the event of CONTRACTOR's physical incapacity or death prior to the completion of the ARTWORK, all payments made up to the point of incapacity or death will be retained by CONTRACTOR and all work performed to date of incapacity or death will be compensated. Upon payment, the incomplete ARTWORK and any materials paid for by CITY will become CITY property. However, if the ARTWORK is substantially designed and/or completed and it is feasible for the ARTWORK to be fully completed without undue delay while remaining faithful to the CONTRACTOR's design, integrity and reputation, CITY may elect to proceed, under this Agreement, with completion and/or installation by CONTRACTOR's REPRESENTATIVE. All remaining work to be completed in accordance with this Agreement will be delegated to: [NAME, ADDRESS, PHONE NUMBER] ("REPRESENTATIVE").

## **SECTION 6. SCHEDULE.**

6.0. This Agreement commences upon execution by all the Parties on \_\_\_\_\_, 20\_\_\_\_ and shall terminate upon completion of all services required by this Agreement unless either Party terminated this Agreement earlier in accordance with the terms of this Agreement.

6.1. CONTRACTOR is to complete the services required of CONTRACTOR in accordance with the schedule set out in the attached **EXHIBIT A-1**, entitled "Schedule of Performance".

6.1.1. Prior to commencement of the work, the Parties shall mutually agree to an inspection schedule, which may be adjusted from time to time by mutual written agreement.

6.1.2. When work is not in progress and/or suspended, arrangements acceptable to CITY shall be made for any required emergency work.

6.2. TIME. All limitations of time set forth in this Agreement are material and time is of the essence in the performance of CONTRACTOR's services under this Agreement.

6.3. FORCE MAJEURE. CITY or CONTRACTOR may grant temporary relief from any deadline for performance of any term of this Agreement if either Party is prevented from compliance and performance by an act of war, order of legal authority, act of God, terrorism, social unrest, strike, natural disaster, supply shortage, or other unavoidable cause not attributed to the fault or negligence of the Party. To obtain an

extension based upon Force Majeure, CONTRACTOR must provide written notice to CITY of the occurrence of the Force Majeure event within 10 days following the date that CONTRACTOR becomes aware of the event and the fact that it will delay CONTRACTOR's performance under this Agreement. CITY will not unreasonably withhold consent.

## **SECTION 7. CONTRACTOR'S COMPENSATION.**

7.0. COMPENSATION. CONTRACTOR's total compensation for full and timely completion of the services required by this Agreement is \$\_\_\_\_\_ (the "TOTAL PRICE"). Such payment shall be full and complete compensation for work performed and services rendered by or on behalf of CONTRACTOR, including, but not limited to, professional services and expenses, for all supervision, labor, supplies, materials, equipment or use thereof and for all other necessary incidentals. CITY is not obligated to compensate CONTRACTOR unless and until CITY accepts the ARTWORK.

7.0.1. Payment Schedule. CITY shall make interim payments to CONTRACTOR in the amounts and at the milestones as identified in the Payment Schedule, attached and incorporated as **Exhibit B-1**, as compensation to assist CONTRACTOR with financing the delivery and installation of the ARTWORK. The form of the invoice shall be subject to the reasonable approval of CITY. Within 30 days of CITY's receipt of CONTRACTOR's invoice indicating the appropriate milestone has been reached, CITY will pay CONTRACTOR amount allocated in the Payment Schedule.

7.0.2. Parties agree that the Payment Schedule may be modified only upon prior written authorization of CITY and CONTRACTOR. CITY's Public Art Division Capital Programs Manager may approve changes, which are not considered material by CITY.

7.1. COST OVERRUN. In the event CONTRACTOR incurs costs over the TOTAL PRICE, CONTRACTOR shall pay such excess at CONTRACTOR's sole cost. CITY is not responsible for any part of such excess.

7.1.1. In the event that work for which CITY has been invoiced does not meet the specifications required by this Agreement, CITY in its sole discretion shall have the right to withhold such payment until such deficiency is corrected. In such event, CITY shall provide detailed written notice to CONTRACTOR within 10 days of receipt of such invoice, specifying the failure of performance for which CITY intends to withhold payment. CONTRACTOR shall work to cure such failure in order to meet the Agreement standards to the reasonable satisfaction of CITY.

7.2. NO WAIVER OF RIGHTS. No payment to CONTRACTOR 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 CONTRACTOR under this Agreement or by law, nor shall such payment constitute a waiver by the CITY of any failure or fault of CONTRACTOR to perform satisfactorily under this Agreement. CONTRACTOR expressly acknowledges that approval of work to permit an interim payment is solely to permit CONTRACTOR to receive an interim payment. Unless and

until the CITY issues an Acceptance Notice for the ARTWORK, no interim approval shall constitute acceptance or approval of the ARTWORK by CITY nor is it a waiver of CITY's right to require that the ARTWORK conform strictly to the approved Construction Documents/Plans.

7.3. If CITY approves a modification of the Final Proposal or Plans resulting in cost savings such as but not limited to, the deletion of an element, substitution of lesser quality materials with no offsetting upgrade of other materials, or reduction in the size/scale, the cost savings from the modification will not be paid to CONTRACTOR.

7.4. If the Parties mutually agree in writing to a modification of the ARTWORK resulting in an increased cost to CONTRACTOR, including but not limited to the addition of an element, the substitution of more expensive materials, or the increase in size/scale, the resulting cost increases shall be paid to CONTRACTOR.

7.5. If work for which CITY has received a request for payment does not meet specifications required by this Agreement, CITY in its sole discretion shall have the right to withhold such payment until the deficiency is corrected. In such event, CITY shall provide detailed written notice to CONTRACTOR within 10 days of receipt of such request for payment, specifying the failure of performance for which CITY intends to withhold payment. CONTRACTOR shall cure such failure to the reasonable satisfaction of CITY.

## **SECTION 8. CONTRACTOR'S WARRANTIES.**

8.0. CONTRACTOR warrants that the services required by this Agreement will be performed with the same degree of professional skill and care that are typically exercised by similar professionals performing similar services. CONTRACTOR's installation services shall comply with the Construction Documents/Plans for the ARTWORK approved by CITY. Further CONTRACTOR represents and warrants the following.

8.0.1. CONTRACTOR 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.

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

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

8.0.4. The ARTWORK is a unique edition resulting from the efforts of CONTRACTOR. CONTRACTOR acknowledges that CITY desires that the ARTWORK be unique, and CONTRACTOR agrees not to duplicate the ARTWORK without CITY's written consent.

8.0.5. All services shall be performed in accordance with City's Standard Specifications if applicable, which are on file with the CITY's Public Works Department. To the extent that CITY's Standard Specifications conflict with the provisions set forth in this Agreement, this Agreement shall control.

8.0.6. ARTWORK will be delivered free and clear of any liens.

8.1. DEFECTS IN MATERIAL WORKMANSHIP AND INHERENT VICE. CONTRACTOR warrants that the ARTWORK will be free of defects in workmanship, including Inherent Vice, and that CONTRACTOR will, at CONTRACTOR's own expense, remedy any defects due to faulty workmanship, or Inherent Vice, which appear within a minimum period of 24 months one year from the date the ARTWORK is formally accepted. The term "Inherent Vice" means any quality within the material or materials incorporated into the ARTWORK that alone or in combination result in the unreasonable deterioration of the ARTWORK.

8.1.1. If the ARTWORK deteriorates due to Inherent Vice within one year from the date the ARTWORK is formally accepted, CONTRACTOR will repair or replace the ARTWORK without charge for CONTRACTOR's services in supervising the work of others or for repairing the work that they originally performed on the ARTWORK and CONTRACTOR will pay for the cost of labor rendered by persons other than CONTRACTOR, materials and supplies.

8.1.2. CONTRACTOR 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. CONTRACTOR agrees to cooperate with CITY in making or permitting adjustments to the ARTWORK if needed to eliminate hazards, which become apparent after the ARTWORK is formally accepted by CITY.

8.2. These representations and warranties survive the Agreement's termination.

8.2. MATERIALS WARRANTY. Contractor warrants materials and equipment furnished and installed under the Contract shall be new and of good quality, unless otherwise required or permitted by the CONTRACTOR, the Work shall be free from defects not inherent in the quality required or permitted and the Work shall conform to the requirements of the CONTRACTOR. Work not conforming to this warranty and these requirements, including substitutions not properly approved and authorized by CONTRACTOR and City, may be considered defective. Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, normal wear and tear and normal usage, and additional damage or defects caused by City's failure to promptly notify Contractor. If required by City, Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

All warranties shall be at minimum for twenty-four (24) months and shall be in form and content otherwise reasonably satisfactory to City. City and Contractor acknowledge the Project may involve construction work on more than one (1) artwork. While the overall Project shall have a single date for Substantial Completion of the Work and Final Completion of the Work, each artwork, section of infrastructure or approved phase of

each section of infrastructure may have its own separate and independent date of Substantial Completion or Final Completion.

Warranties shall become effective on the date of Substantial Completion of the entire Work, unless otherwise provided in any Certificate of Partial Substantial Completion approved by the Parties, except for Work to be completed or corrected after the date of Substantial Completion and prior to final. Warranties for Work to be completed or corrected after the date of Substantial Completion and prior to Final Completion shall become effective on the later of the date the Work is completed or corrected and accepted by City and CONTRACTOR or the date of final completion of the Work.

## **SECTION 9. MAINTENANCE.**

9.0. CITY shall have the right to determine, after consultation with CONTRACTOR or 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 CONTRACTOR regarding repairs and restoration, which are undertaken during CONTRACTOR's lifetime.

9.1. All repairs and restorations, whether performed by CONTRACTOR, CITY, or third parties, shall be made in accordance with professionally recognized principles of conservation of ARTWORK and in accordance with the maintenance instructions provided to CITY by CONTRACTOR pursuant to Section 5.5.3.

## **SECTION 10. CONTRACTOR IS INDEPENDENT CONTRACTOR.**

10.0. CONTRACTOR is an independent contractor and not an officer, agent, servant or employee of CITY and nothing herein shall be construed as creating the relationship of employer-employee, principal-agent, partners or joint ventures between CITY and CONTRACTOR. CONTRACTOR has no authority to bind CITY. CONTRACTOR shall have exclusive control of and exclusive right to control the details of the work performed under this Agreement and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants.

10.1. CITY shall not be liable for any third party claims, which may be asserted in connection with the performance of this Agreement. Nothing in this Agreement, whether express or implied, shall be construed to give any third party any legal or equitable right, remedy or claim under or in respect of this Agreement or any authority to enforce this Agreement.

## **SECTION 11. INDEMNIFICATION.**

**11.0. CONTRACTOR covenants and agrees to FULLY INDEMNIFY, DEFEND and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the CITY**

directly or indirectly arising out of, resulting from or related to CONTRACTOR'S activities under this Agreement, including any acts or omissions of CONTRACTOR, any agent, officer, director, representative, employee, contractor or subcontractor of CONTRACTOR, and their respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT CONTRACTOR AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW. In addition, CONTRACTOR agrees to indemnify, defend, and hold City harmless from any claim involving patent infringement, trademarks, trade secrets, and copyrights on goods supplied.

11.1. The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. CONTRACTOR shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or CONTRACTOR known to CONTRACTOR related to or arising out of CONTRACTOR'S activities under this AGREEMENT and shall see to the investigation and defense of such claim or demand at CONTRACTOR'S cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving CONTRACTOR of any of its obligations under this paragraph.

11.2 Defense Counsel - CITY shall have the right to select or to approve defense counsel to be retained by CONTRACTOR in fulfilling its obligation hereunder to defend and indemnify CITY, unless such right is expressly waived by CITY in writing. CONTRACTOR shall retain CITY-approved defense counsel within seven (7) business days of CITY's written notice that CITY is invoking its right to indemnification under this Agreement. If CONTRACTOR fails to retain counsel within such time period, CITY shall have the right to retain defense counsel on its own behalf, and CONTRACTOR shall be liable for all costs incurred by CITY. CITY shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.

11.3 Employee Litigation – In any and all claims against any party indemnified hereunder by any employee of CONTRACTOR, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for CONTRACTOR or any subcontractor under worker's compensation or other employee benefit acts.

## **SECTION 12. INSURANCE.**

12.0 Artist/Contractor agrees to accept responsibility for damages to their property and any claims that arises during the duration of the contact. ARTIST/CONTRACTOR shall obtain their own insurance coverage to protect their property and in the event of a claim. ARTIST/CONTRACTOR agrees to indemnify, defend, and hold the City harmless from any claim involving patent infringement, trademarks, trade secrets, and copyrights on goods supplied.

## **SECTION 13. COPYRIGHTS.**

13.0. CITY shall have ownership and possession of the Artwork Design upon acceptance of the final Artwork Design Proposal, approval of the Construction Documents and final payment by CITY. Upon completion of installation of the ARTWORK and full payment for the ARTWORK, CITY shall have ownership and possession of the ARTWORK including exclusive right to display the ARTWORK, subject to this Agreement. CITY may make any and all reproductions or derivatives in whatever form of the ARTWORK or Artwork Design for educational, public relations, arts promotional, commercial or any other purpose and such uses will not result in any additional payments to CONTRACTOR.

13.1. CONTRACTOR retains copyrights and intellectual property and/or patents related to the ARTWORK and the Artwork Design including potentially those patents, related to materials used in the f the ARTWORK. However, any use of the Artwork Design by CONTRACTOR or any third party must be approved, in advance, by CITY except that CONTRACTOR is expressly allowed to use reproductions of the Artwork Design and documentation of ARTWORK for self-promotion, presentation and portfolio use.

13.2. If CITY obtains a commercial benefit from the ARTWORK, or Artwork Design, by sale of reproductions or images of same, or by licensing same, revenues received by CITY from such commercial ventures shall be directed to long-term maintenance of the ARTWORK.

13.3. CITY has the exclusive right to display the ARTWORK and Artwork Design, including drawings, models, or any reproduction of the ARTWORK and to loan the ARTWORK, in whole or in part, including to other persons or institutions with authority to display it publicly. CITY acknowledges CONTRACTOR's co-right to display images of the ARTWORK and to display the Artwork Design or images or reproductions of the Artwork Design, and to display or exhibit such images and/or reproductions, including the Artwork Design itself, so long as such display or exhibition is consistent with attribution to CITY.

13.4. CONTRACTOR expressly consents to both the installation and removal from the Project of the ARTWORK and expressly waives his/her Moral Rights, as defined in the Visual Rights Act 17 U.S.C. § 106(A), to the ARTWORK, as more fully set forth in **Exhibit C-1**. Further, CONTRACTOR understands that the incorporation and installation of the ARTWORK into a CITY facility may subject the ARTWORK to destruction, distortion, mutilation, or other modification if and when removed. It is agreed that if the ARTWORK, or any portion thereof is removed causing destruction,

distortion, mutilation or modification in any significant way, the ARTWORK may no longer be referred to as “an Artwork by the CONTRACTOR”.

13.5. The clauses in Section 13 shall survive termination of this Agreement.

#### **SECTION 14. REPUTATION AND CREDIT.**

14.0. Unless CONTRACTOR requests to the contrary in writing, all references to the ARTWORK and all reproductions of the ARTWORK will credit the ARTWORK to CONTRACTOR.

14.1. CITY may fabricate and install an identification plaque for the completed ARTWORK, which will include the following information: CONTRACTOR's name, year in which ARTWORK is completed, ARTWORK title, funding agency and commissioning agency.

14.2. CONTRACTOR agrees that all formal references to the ARTWORK made or authorized to be made by CONTRACTOR shall include the following credit: “Collection of the City of San Antonio, Commissioned through Public Art San Antonio,” or other language agreed to by the Parties.

14.3. CONTRACTOR and CONTRACTOR's contractors and subcontracts shall coordinate any releases of information regarding the ARTWORK to the public and news media with CITY staff. In all communications to the public and news media, CONTRACTOR must fully and accurately identify the CONTRACTOR's relationship to CITY and credit CITY for its role in funding the Project.

14.4. FUTURE MODIFICATION OR RELOCATION. Removal or relocation of the ARTWORK, if practical and economically feasible as determined by CITY, in its sole discretion, will occur in conformity with the City's Public Art Policy. CITY's decisions regarding removal or relocation of the ARTWORK is final and may occur at any time.

14.4.1. 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 without prior written notice to CONTRACTOR.

14.4.2. CITY has the right to donate or sell the ARTWORK at any time. Before exercising this right, CITY shall give CONTRACTOR 30 days from issuance of written notice to CONTRACTOR to purchase the ARTWORK for the greater of the Total Price or market value, plus all costs associated with the removal of the ARTWORK from the Site, clean-up of the Site and delivery to CONTRACTOR.

14.4.3. CITY agrees to not intentionally modify the ARTWORK without providing CONTRACTOR prior written notice. Should the need arise; CITY may negotiate with CONTRACTOR to conduct or supervise ARTWORK restoration.

14.4.4. CONTRACTOR's rights under this Agreement cease with CONTRACTOR's death and do not extend to CONTRACTOR's heirs,

successors or assigns except that CONTRACTOR will still receive credit for the ARTWORK and in the case of death or incapacity of CONTRACTOR

## **SECTION 15. COMPLIANCE WITH LAWS.**

15.0. CONTRACTOR shall comply with all applicable federal, state and local laws, ordinances, codes and regulations and will use reasonable efforts to ensure compliance by any and all contractors and subcontractors that may work on the ARTWORK.

15.1. CONTRACTOR shall comply with all local, state and federal environmental requirements including all City applicable construction and development regulations as well as federal Environmental Protection Agency, Texas Department of State Health Services and Texas Commission on Environmental Quality rules and regulations and all other regulations and laws relating to the environment, Hazardous Substances or exposure to such.

15.2. Non-Discrimination. CONTRACTOR understands and agrees to comply with the *Non-Discrimination Policy* of the City of San Antonio contained in Chapter 2, Article X of the City Code and further, shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein.

15.3. None of CONTRACTOR's services shall involve, and no portion of the funds received by CONTRACTOR shall be used to support any sectarian or religious activity.

15.3. Government Code §2270.002 provides that a governmental entity may not enter into a contract with a company for goods or services, unless the contract contains a written verification from the company that it:

- (1) does not boycott Israel; and
- (2) will not boycott Israel during the term of the contract.

This section only applies to a contract that:

- (1) is between a governmental entity and a company with 10 or more full-time employees; and
- (2) has a value of \$100,000 or more that is to be paid wholly or partly from public funds of the governmental entity.

"Boycott Israel" means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

"Company" means a for-profit organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or business associations that exists to make a profit. This term does not include a sole proprietorship.

By submitting an offer to or executing contract documents with the City of San Antonio, Company hereby verifies that it does not boycott Israel, and will not boycott Israel during the term of the contract. City hereby relies on Company's verification. If found to be false, City may terminate the contract for material breach.

15.5. It is the policy of the City of San Antonio to provide a work environment to all employees and applicants free of **employment discrimination, harassment and sexual harassment**. In addition, any behavior, regardless of intent or severity, that could be deemed inappropriate workplace behavior, but may not legally constitute **employment discrimination, harassment, or sexual harassment**, is prohibited. **Harassment** and **sexual harassment** are forms of discrimination that violate Title VII of the Civil Rights Act of 1964, (as amended), the Civil Rights Act of 1991, the American with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and related State of Texas statutes. Retaliation against employees for opposing alleged **employment discrimination, harassment, or sexual harassment** or for filing a charge, testifying, assisting, or participating in any manner in an Equal Employment Opportunity (EEO) investigation, proceeding, or hearing is prohibited. CONTRACTOR shall comply with this policy in all interactions with CONTRACTOR'S employees, subcontractors, and volunteers, if any, under this Agreement.

## **SECTION 16. DEFAULT/TERMINATION AND/OR SUSPENSION**

16.0. TERMINATION WITH CAUSE. Right of Either Party to Terminate for Default.

16.0.1. This Agreement may be terminated by either Party for substantial failure by the other Party to perform (through no fault of the terminating Party) in accordance with this Agreement and a failure to cure as provided in this Section.

16.0.2. The Party not in default must issue a signed, written notice of default and intent to terminate (citing this paragraph) to the other Party declaring the other Party to be in default and stating the reason(s) why they are in default. Upon receipt of such written notice of default, the party in receipt shall have a period of 10 days to cure any default. Upon the completion of such 10-day cure period, if such Party has not cured any failure to perform, such termination shall become effective without further written notice.

16.1. RIGHT OF CITY TO TERMINATE. CITY reserves the right to terminate this Agreement for reasons other than substantial failure by the CONTRACTOR to perform by issuing a signed, written notice of termination (citing this paragraph) which shall take effect upon effective notice to CONTRACTOR and/or upon the scheduled completion date of the performance phase in which CONTRACTOR is currently working, whichever occurs first. In the event of termination by CITY without cause, CONTRACTOR shall be entitled to payment for all work performed by or on behalf of CONTRACTOR to date, together with reimbursement for all legitimate expenses incurred by CONTRACTOR up to CONTRACTOR's receipt of such notice.

16.2. RIGHT OF CITY TO SUSPEND GIVING RISE TO RIGHT OF CONTRACTOR TO TERMINATE. CITY reserves the right to suspend this Agreement at the end of any phase for CITY's convenience by issuing a signed, written notice of suspension (citing this paragraph) outlining the reasons for the suspension and the expected duration of the suspension. Such expected duration shall in no way be a guarantee of the length of the suspension. Such suspension shall take effect immediately upon receipt of said notice of suspension by CONTRACTOR.

16.2.1. CONTRACTOR has the right to terminate if such suspension extends for more than 120 days. CONTRACTOR may exercise this right by issuing a signed, written notice of termination (citing this paragraph) to CITY after 120 days have passed from the effective date of the suspension. Termination shall be effective upon receipt of said written notice by CITY. In the event of termination by CONTRACTORS after such suspension, CONTRACTOR shall be entitled to payment for all work performed by or on behalf of CONTRACTOR, together with reimbursement for all legitimate expenses incurred by CONTRACTOR prior to CONTRACTOR's suspension.

16.3. PROCEDURES CONTRACTOR TO FOLLOW UPON RECEIPT OF NOTICE OF TERMINATION WITH CAUSE. Upon receipt of a notice of termination with cause and prior to the effective date of termination, unless the notice otherwise directs or CONTRACTOR immediately takes action to cure under the set cure period, CONTRACTOR shall immediately discontinue all services performed in connection with this Agreement and promptly cancel all existing orders and contracts chargeable to this Agreement. Within 30 days after receipt of such notice of termination (unless CONTRACTOR has successfully cured a failure to perform), CONTRACTOR shall submit a statement showing in detail the services performed under this Agreement prior to the effective date of termination. CITY shall have the option to grant an extension to the time period for submittal of such statement.

16.3.1. Copies of all completed or partially completed specifications and all reproductions of all completed or partially completed designs, plans and exhibits prepared under this Agreement prior to the effective date of termination shall be delivered to CITY, in the form requested by CITY as a pre-condition to final payment, subject to the restrictions of this Agreement.

16.3.2. CITY has a duty to document the use of public funds. To this end, CONTRACTOR understands that failure to comply with the submittal of the statement and documents shall constitute a waiver by CONTRACTOR of any and all rights or claims to payment for services performed under this Agreement by CONTRACTOR.

16.3.3. Upon the above conditions being met, CITY shall pay CONTRACTOR that proportion of the compensation, which the services actually performed bear to the total services called for under this Agreement, less any previous payments.

16.4. PROCEDURES CONTRACTOR TO FOLLOW UPON RECEIPT OF NOTICE OF SUSPENSION. Upon the effective date of suspension, CONTRACTOR shall, immediately phase-out and discontinue all services associated with the performance of this Agreement including promptly suspending all existing orders and contracts chargeable to this Agreement, unless the notice directs otherwise.

16.4.1. CONTRACTOR shall prepare a statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

16.4.2. Copies of all completed or partially completed designs, plans and specifications prepared prior to the effective date of suspension shall be prepared for possible delivery to the CITY but shall be retained by the CONTRACTOR until such time as CONTRACTOR may exercise the right to terminate.

16.4.3. CONTRACTOR shall promptly cancel or suspend all existing orders and contracts chargeable to this Agreement. If CONTRACTOR is terminating, CONTRACTOR is responsible for submitting to CITY the above mentioned statement showing in detail the services performed prior to the effective date of suspension within thirty 30 days after receipt by CITY of CONTRACTOR's notice of termination.

16.4.4. Any documents prepared in association with this Agreement shall be delivered to CITY as a pre-condition to final payment.

16.4.5. CONTRACTOR's failure to comply with this Section may constitute a waiver by CONTRACTOR of any portion of the fee for which CONTRACTOR did not supply such necessary statements and/or documents.

16.4.6. Upon the above conditions being met, CITY shall promptly pay CONTRACTOR that proportion of the prescribed fee, which the services actually performed bear to the total services called for by this Agreement, less any previous payments, together with reimbursement for legitimate expenses incurred by CONTRACTOR up to CONTRACTOR's receipt of such notice.

16.5. COMPENSATION. If CITY terminates, CITY shall pay CONTRACTOR for services performed up to date of termination consistent with this Agreement.

16.6. REMEDIES. The remedies under this Agreement are cumulative and are in addition to the rights available to the Parties at law or in equity. Nevertheless, if CONTRACTOR breaches this Agreement, CITY has the right to exercise its termination rights as described herein and at its option proceed with the installation of the ARTWORK without utilizing CONTRACTOR's services. If CITY exercises its option to proceed, then CITY, upon CONTRACTOR's written request will refrain from referencing the ARTWORK as the work of CONTRACTOR.

## **SECTION 17. ASSIGNMENT**

17.0. The expertise and experience of CONTRACTOR are material considerations for this Agreement; therefore, CONTRACTOR shall not assign or transfer any interest in this Agreement nor the performance of any of CONTRACTOR's obligations. Any attempt by CONTRACTOR to assign this Agreement or any rights, duties or obligations arising under this Agreement shall be void unless prior written consent is given by CITY. This Section does not prevent CONTRACTOR, at CONTRACTOR's sole expense, from relying on or utilizing the services of such other consultant or CONTRACTOR as CONTRACTOR may require to complete the ARTWORK.

## **SECTION 18. SUBCONTRACTS.**

18.0. Prior to entering into any subcontractor agreements, CONTRACTOR shall notify CITY in writing of the names of all proposed first-tier Subcontractors.

18.1. CONTRACTOR shall not employ any Subcontractor, person or organization (including those who are to furnish the primary materials or equipment), whether initially or as a substitute, against whom CITY may have reasonable objection. A Subcontractor other person or organization identified in writing to CITY prior to the Notice of Award and not objected to in writing by CITY will be deemed acceptable to CITY. However, acceptance by CITY is not a waiver of any right of CITY to reject defective Work. If CITY, after due investigation, has reasonable objection to any Subcontractor, person or organization proposed by CONTRACTOR after the Notice of Award, CONTRACTOR will be required to submit an acceptable substitute. The TOTAL PRICE will be equitably adjusted for any change in the price of the subcontract work resulting from such substitution. CONTRACTOR is not required to employ any Subcontractor, person, or organization against whom CONTRACTOR has a reasonable objection.

18.2. CONTRACTOR is fully responsible to CITY for all acts and omissions of his/her Subcontractors, persons and organizations directly or indirectly employed and of persons and organizations who may be liable to the same extent that CONTRACTOR is responsible for the acts and omissions of persons directly employed by CONTRACTOR. CITY shall in no event be obligated to any third party, including any sub-contractor of CONTRACTOR, for performance of or payment for work or services.

18.3. All ARTWORK performed for CONTRACTOR by a subcontractor will be pursuant to a written agreement between CONTRACTOR and the subcontractor, which specifically binds the Subcontractor to the applicable terms and conditions of this Agreement. Where appropriate, CONTRACTOR shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. CONTRACTOR shall make copies of the Agreement available to each proposed Subcontractor, prior to the execution of the subcontract agreement.

## **SECTION 19. NOTICE**

19.0. 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.

For CONTRACTOR:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For CITY:

City of San Antonio  
Department of Arts & Culture  
Contract Manager  
Department of Arts and Culture  
P.O. Box 839966  
San Antonio, Texas 78283-3966

19.1. 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 days after deposit in the mail.

19.2. CONTRACTOR agrees for the duration of CONTRACTOR's life, to provide CITY with CONTRACTOR's current mailing address and facsimile number in the event CONTRACTOR's address, as specified above, should change.

## **SECTION 20. PROTECTION OF PERSONS AND PROPERTY.**

20.0. CONTRACTOR shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss. CONTRACTOR shall adopt a reasonable safety program/policy applicable to the Site and to the ARTWORK, which shall be reviewed by CITY in advance of beginning the ARTWORK installation. While CITY has the right to inspect and verify CONTRACTOR's compliance, CONTRACTOR is responsible for initiating, maintaining and supervising all safety precautions and programs.

20.0.1. CONTRACTOR has adopted or will adopt its own policy to assure a drug and alcohol free Site. CONTRACTOR's employees, agents, and subcontractors shall not perform any service for CITY while under the influence of alcohol or any controlled substance. CONTRACTOR, its employees, agents, and subcontractors shall not use, possess, distribute, or sell illicit or unprescribed controlled drugs or drug paraphernalia, or misuse legitimate prescription drugs or alcoholic beverages while performing the ARTWORK. CONTRACTOR will remove any of its employees from performing the ARTWORK any time there is suspicion of alcohol and/or drug use, possession, or impairment involving such employee, and at any time an incident occurs where drug or alcohol use could have been a contributing factor. CITY has the right to require CONTRACTOR to remove employees any time cause exists to suspect alcohol or drug use or who either refuses to take, or tests positive in, any alcohol or drug test.

20.1. EMERGENCIES. In an emergency affecting safety of persons or property, the CONTRACTOR shall exercise best efforts to act to prevent or minimize threatened damage, injury or loss. CONTRACTOR shall also notify CITY immediately, by telephone with prompt confirmation in writing, of all injuries and fatalities, including but not limited to copies of all reports and other documents filed or provided to CONTRACTOR's insurers and the State of Texas in connection with such injuries or fatalities.

20.2. A breach or violation of this Section by CONTRACTOR will be a material and substantial breach of this Agreement. If CITY reasonably determines the CONTRACTOR has breached or violated this Section, then CITY shall notify CONTRACTOR whether such breach shall necessitate a suspension or termination of the Agreement. If the ARTWORK is suspended, the ARTWORK shall not recommence until CITY is satisfied that the safety breach or violation will not occur again.

20.3. The CONTRACTOR shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

a. Employees and other persons who may be impacted;

b. The ARTWORK and materials and equipment to be incorporated therein, whether in storage on or off the SITE, under the care, custody or control of the CONTRACTOR or the CONTRACTOR's Subcontractors or Sub-subcontractors; and

c. Other property at the Site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of Construction or Installation of the ARTWORK.

20.3.1. CONTRACTOR shall erect and maintain, as required by existing conditions and performance of the Agreement, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying CITY and users of adjacent sites and utilities.

20.3.2. When use or storage of explosives or other Hazardous Materials or equipment or unusual methods are necessary for the execution of the ARTWORK, CONTRACTOR shall exercise extraordinary care and shall carry on such activities under the direct supervision of properly qualified personnel.

20.3.3. CONTRACTOR shall not load or permit any part of the construction or Site to be loaded so as to endanger its safety or that of others.

20.4. Notwithstanding these provisions, CITY does not warrant nor represent to CONTRACTOR, CONTRACTOR's employees or agents, any subcontractors, or any other third party that CONTRACTOR's safety policy meets the requirements of any applicable law, code, rule, or regulation, nor that the proper enforcement will insure that no accidents or injuries occur. In addition, any action by CITY under these provisions in no way diminishes CONTRACTOR's obligations.

20.5. PUBLIC CONVENIENCE AND SAFETY. CONTRACTOR shall, at all times, place materials stored at the SITE and shall fabricate and install the ARTWORK in a manner that causes no greater obstruction to the public than is reasonably considered necessary by CITY.

20.5.1. Sidewalks or streets shall not be obstructed, except by special permission of CITY. Materials excavated and construction materials or plants used in the performance of the ARTWORK shall be placed in a manner that does not endanger the ARTWORK or prevent free access to public infrastructure. CONTRACTOR shall, when directed by CITY, keep any street or streets in condition for unobstructed use by CITY departments.

20.5.2. CITY reserves the right to remedy any neglect by CONTRACTOR regarding public convenience and safety, which may come to the CITY's attention, after 24 hours' notice in writing to the CONTRACTOR. In case of an emergency, CITY shall have the right to immediately remedy any neglect without notice. In either case, the cost incurred by or for CITY to remedy the CONTRACTOR's neglect shall be deducted from the Total Price due CONTRACTOR.

20.6. If the ARTWORK is carried on, in, or adjacent to any street, alley or public place, CONTRACTOR shall, at CONTRACTOR's own cost and expense, furnish, erect and maintain sufficient barricades, fences, lights arrangements for crossing over ditches or around structures and danger signals, provide sufficient watchmen, and take other precautionary measures as necessary for the protection of persons, property and the ARTWORK. All barricades shall be painted in a color that will be visible at night, and shall be illuminated by lights (flares, flashers, or other illuminated devices) from sunset to sunrise. A sufficient number of barricades with adequate markings and directional devices shall also be erected to keep vehicles from driving on or into any ARTWORK under construction. CONTRACTOR is responsible for all damage to the ARTWORK due to failure to protect the ARTWORK. If evidence of such damage is found, CITY may order the damaged portion immediately removed and replaced by CONTRACTOR at CONTRACTOR's expense.

20.7. If it is necessary to change or move the property of CITY or of any telecommunications or public utility, such property shall not be removed or interfered with until cleared by CITY. CITY and any public or private utilities have the right to enter the Site to make such changes or repairs. CITY reserves the right of entry upon the Site for any purpose and at any time.

20.8. If CONTRACTOR encounters materials reasonably believed to be a Hazardous Substance at the Site, CONTRACTOR shall immediately stop work in the affected area and report such in writing to CITY. Work in the affected area shall not be resumed except by written order of CITY and consent of CONTRACTOR, and until the material is determined not to be a Hazardous Substance or is remediated. If the Hazardous Substance is in the affected area due to the fault or negligence of CONTRACTOR, or CONTRACTOR's subcontractor or supplier, CONTRACTOR shall be responsible for remediating at CONTRACTOR's sole expense.

## **SECTION 21. CONFLICT OF INTEREST.**

21.0. The Charter of the City of San Antonio and its Ethics Code prohibit a CITY officer or employee, as defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as city owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the CITY or in the sale to CITY of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

- (i) a CITY officer or employee;
- (ii) His/her parent, child or spouse;
- (iii) a business entity in which the officer or employee, or his/her parent, child or spouse owns (i) 10% or more of the voting stock or shares of the business entity, or (ii) 10% or more of the fair market value of the business entity;
- (iv) a business entity in which any individual or entity above listed is a (i) subcontractor on a CITY contract, (ii) a partner, or (iii) a parent or subsidiary business entity.

21.1. CONTRACTOR warrants and certifies as follows:

- (i) CONTRACTOR and its officers, employees and agents are neither officers nor employees of CITY.
- (ii) CONTRACTOR has tendered to CITY a Contracts Disclosure Statement in compliance with CITY's Ethics Code.

21.2. CONTRACTOR acknowledges that CITY's reliance on the above warranties and certifications is reasonable.

## **SECTION 22. GIFTS TO PUBLIC SERVANTS.**

22.0. CITY may terminate this Agreement immediately if CONTRACTOR has offered, conferred, or agreed to confer any benefit on a CITY employee or official that CITY employee or official is prohibited by law from accepting. For purposes of this Article, "benefit" means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct or substantial interest, but does not include a contribution or expenditure made and reported in accordance with law.

22.1. Notwithstanding other remedies, CITY may require CONTRACTOR to remove any employee from the Site who violates these restrictions or any similar law, and may obtain reimbursement for any expenditure made to CONTRACTOR because of the improper offer, agreement to confer, or benefit conferred to a CITY employee or official.

## **SECTION 23. VENUE.**

**23.0. THIS AGREEMENT IS CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.** Any legal action or proceeding brought or maintained, directly or indirectly, resulting from this Agreement shall be heard and determined in the City of San Antonio, Bexar County, Texas.

## **SECTION 24. RIGHT TO AUDIT CONTRACTOR'S RECORDS.**

24.0. CONTRACTOR grants CITY, or its designees, the right to audit, examine or inspect all of CONTRACTOR's records relating to CONTRACTOR's performance on the Agreement both during the term of the Agreement and retention period set below. The audit, examination or inspection may be performed by a CITY designee, which may include its internal auditors or an outside representative engaged by the CITY.

24.1. CONTRACTOR agrees to retain records relevant to this Agreement for a minimum of five years following completion of the ARTWORK and/or termination of the Agreement. CONTRACTOR's records include any and all information, materials and data of every kind and character generated as a result of the work under this Agreement. Example of CONTRACTOR's records include but are not limited to billings, books, general ledger, cost ledgers, invoices, production sheets, documents, correspondence, meeting notes, subscriptions, Agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers, memoranda, time sheets, payroll records, policies, procedures, federal and state tax filings for issue in question, and any and all other Agreements, sources of information and matters that may in CITY's judgment have any bearing on or pertain to any matters, rights, duties or obligations under or covered by this Agreement.

24.2. CITY will exercise the right to audit, examine or inspect only during regular business hours and with reasonable notice to CONTRACTOR. CONTRACTOR agrees to allow CITY's designee access to all of CONTRACTOR's Records, CONTRACTOR's facilities, and current or former employees of CONTRACTOR, deemed necessary by CITY or its designee(s), to perform such audit, inspection or examination. CONTRACTOR also agrees to provide adequate and appropriate work space necessary to CITY or its designees to conduct such audits, inspections or examinations.

24.3. CONTRACTOR must include this audit clause in any subcontractor, supplier or vendor contract.

24.4. If CITY has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of CONTRACTOR's business, CITY may, by written request require that custody of the records be given to CITY to maintain. Access to such records and documents shall be granted to any party authorized by CONTRACTOR, CONTRACTOR's representatives, or CONTRACTOR's successors-in-interest.

## **SECTION 25. MISCELLANEOUS.**

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

25.1. This Agreement, including **Exhibits A-1, B-1 and C-1** and any other attachments including the Final Proposal for the ARTWORK, represents the entire understanding of the Parties. No prior oral or written understanding shall be of any force or effect with respect to those matters covered herein. This Agreement may only be modified by a written amendment duly executed by the Parties.

25.2. If any term, covenant, condition or provision of this Agreement 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 shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

25.3. NO WAIVER. The Parties agree that any breach or violation of this Agreement is not a waiver even if both Parties are aware of said breach or violation.

25.4 CONTRACTOR agrees and understands that members of the media may be present during the fabrication and/or transportation and/or installation of the Project. Media can film, photograph, and conduct interviews at this time should they be present.

**EXECUTED and AGREED** to by the Parties on this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**CITY OF SAN ANTONIO**

**CONTRACTOR**

\_\_\_\_\_  
Krystal Jones  
Executive Director  
Department of Arts & Culture

\_\_\_\_\_  
Name  
Contractor

**APPROVED AS TO FORM**

\_\_\_\_\_  
City Attorney

EXHIBIT A-1 Schedule of Performance & Scope of Work  
EXHIBIT B-1 Payment Schedule  
EXHIBIT C-1 CONTRACTOR's Waiver of Moral Rights

## EXHIBIT A – 1

### SCHEDULE OF PERFORMANCE

CONTRACTOR shall not commence CONTRACTOR's services until this Agreement is fully executed and CITY issues a Notice to Commence Work. CONTRACTOR will install an original ARTWORK for \_\_\_\_\_ Public Art Project. ARTWORK will (list specifics). The CITY reserves the right to ask for changes and alterations. Under the direction of the Public Art Project Manager, CONTRACTOR will collaborate with CITY, including Department of Arts & Culture and other relevant Departments. CONTRACTOR shall perform work according to the following schedule for installation:

Execution of this Agreement / mobilization: **(X Days/Weeks)**

#### Installation Phase

(TBD) **(X Days/Weeks)**

(TBD) **(X Days/Weeks)**

(TBD) **(X Days/Weeks)**

(TBD) **(X Days/Weeks)**

#### Final Completion Date

The Schedule of Performance may be modified by mutual agreement only upon prior written authorization by CITY as evidenced by signature from the Director or her designee.

#### Scope of Work

Contractor shall perform the following scope of work:

[INSERT SCOPE OF WORK]



## EXHIBIT B – 1

### PAYMENT SCHEDULE

| PAYMENT SCHEDULE |          |
|------------------|----------|
| MILESTONE        | PAYMENT  |
| TBD:             | \$ _____ |
| TBD:             | \$ _____ |
| TBD:             | \$ _____ |
| TBD:             | \$ _____ |
| TBD:             | \$ _____ |
| TOTAL PRICE      | \$ _____ |

The Schedule for Payment shall occur in accordance with the milestones set forth. In the event that CITY accepts the ARTWORK, one or more payments may occur following the ARTWORK completion date.

EXHIBIT C – 1

CONTRACTOR'S WAIVER OF MORAL RIGHTS

WHEREAS, \_\_\_\_\_ contracted with \_\_\_\_\_  
("CONTRACTOR"), to create \_\_\_\_\_ ("ARTWORK"); and

WHEREAS, the ARTWORK is intended to be *permanently/temporarily (choose one)* located on *City property/private property (choose one)* at the \_\_\_\_\_ (address) in San Antonio, Texas ("Location"); **NOW THEREFORE:**

CONTRACTOR consents and agrees to the *temporary/permanent* placement of the Artwork on *City property/private property* at the Location. CONTRACTOR acknowledges that the incorporation and installation of the ARTWORK at the Location may subject the Artwork to destruction, distortion, mutilation, or other modification if and when removed. Removal or relocation of the ARTWORK, if practical and economically feasible as determined by the CITY in its sole discretion, will occur in conformity with the guidelines and review requirements listed in the CITY's Public Art San Antonio Policies and Guidelines. CONTRACTOR agrees that a CITY decision made under this paragraph regarding if, when and how to remove the Artwork is final.

CONTRACTOR expressly consents to both the installation into and removal from the Location of the ARTWORK and thereby expressly waives his/her Moral Rights to the Artwork. It is agreed that if the ARTWORK, or any portion thereof, is removed from the Location causing it or any part thereof to be destroyed, distorted, mutilated or modified in any way, the Artwork may not thereafter be referred to as "an ARTWORK by the CONTRACTOR".

*Only applicable to works located on City Property:* CONTRACTOR understands that to the extent CITY is required to move or relocate the ARTWORK and a suitable location on CITY Property cannot be located or in the event that the CITY no longer has the ability to display the ARTWORK, the ARTWORK shall be returned to CONTRACTOR, should it so desire, with the relocation costs at CONTRACTOR's sole cost and expense. CONTRACTOR further understands that if CITY is required to relocate or disassemble the ARTWORK, CITY will notify CONTRACTOR, or his/her descendants or assigns, immediately. Should CONTRACTOR, or his/her descendants or assigns, not want the ARTWORK, CITY may dispose of it in any manner CITY desires.

Executed to be effective this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

CONTRACTOR

\_\_\_\_\_  
Name