

**FIRST AMENDMENT TO  
AGREEMENT  
BETWEEN  
THE CITY OF SAN JOSE  
AND  
BRIAN BRUSH  
TO DESIGN, FABRICATE AND INSTALL A WORK OF ART  
AT THE MARKET/SAN PEDRO PARKING GARAGE**

This FIRST AMENDMENT TO AGREEMENT is entered into this \_\_\_\_ day of \_\_\_\_\_, 2019, by the CITY OF SAN JOSE, a municipal corporation ("City"), and BRIAN BRUSH, an individual doing business as BRUSH DESIGN LLC ("Artist").

**RÉCITALS**

WHEREAS, on August 7, 2018, City and Artist entered into an agreement entitled "AGREEMENT BETWEEN THE CITY OF SAN JOSE AND BRIAN BRUSH TO DESIGN, FABRICATE AND INSTALL A WORK OF ART AT THE MARKET/SAN PEDRO PARKING GARAGE" ("Agreement"); and

WHEREAS, City and Artist desire to amend the Agreement to expand the scope of work to create an illuminated façade enhancement that encompasses all exterior sides, North, South, East, and West of the facility including locations where tile panels have been removed;

NOW, THEREFORE, the parties agree to amend the Agreement as follows:

**SECTION 1.** SECTION 5.0, "COMPLIANCE WITH BUDGET CONSTRAINTS" is amended to read as follows:

“Artist shall be responsible for providing services described in EXHIBIT A including, but not limited to, the quality and timely completion of the services without exceeding the total budget for the Artwork as set forth in EXHIBIT A. Artist shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in Artist’s work.

Artist shall be responsible for developing the Artwork Design so that the Artwork can be constructed and installed, without exceeding the total design, fabrication, and installation budget of One Million Nine Hundred and Seventy Thousand dollars (\$1,970,000) inclusive of a contingency of One-Hundred Seventy Thousand dollars (\$170,000) 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. 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. Artist shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in Artist’s work.”

**SECTION 2.** EXHIBIT A, “ARTIST’S SERVICES” is amended and restated as shown in REVISED EXHIBIT A, attached and incorporated into this First Amendment.

**SECTION 3.** EXHIBIT B, “SCHEDULE OF PERFORMANCE” is amended and restated as shown in REVISED EXHIBIT B, attached and incorporated into this First Amendment.

**SECTION 4.** EXHIBIT C, “COMPENSATION” is amended and restated as shown in REVISED EXHIBIT C, attached and incorporated into this First Amendment.

**SECTION 5.** All of the terms and conditions of the original Agreement not modified by this First Amendment shall remain in full force and effect.

WITNESS THE EXECUTION HEREOF on the day and year first written above.

"CITY"

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal  
corporation

*Arlene Silva 7/16/2019*  
ARLENE SILVA  
Deputy City Attorney

By \_\_\_\_\_  
Leland Wilcox  
Chief of Staff, Office of the City  
Manager

"Artist"

BRIAN BRUSH, an individual doing  
business as BRUSH DESIGN LLC

By *Brian Brush*  
Name: *BRIAN BRUSH*  
Title: *OWNER*

**REVISED EXHIBIT A**

**ARTIST'S SERVICES**

Artist shall perform the following services to the satisfaction of City and within the deadline set forth in EXHIBIT B.

**Part 1. SITE SELECTION.**

Artist is to work in collaboration with City staff, and Construction Project architectural consultant (if applicable) as required, identifying appropriate areas as potential sites for Artwork.

**Part 2. RESEARCH.**

Artist shall meet with City staff in order to understand the programmatic uses of the Site and the facilities surrounding the Site for the purposes of defining goals for the Artwork that are appropriate to the general social and immediate physical environment of the Artwork. Artist 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.

**Part 3. CONCEPT DESIGN.**

Artist shall prepare two or more concept designs showing Artist's idea(s) for the Artwork (the "Concept Design Proposal"). The Concept Design Proposal will include the general intent of the artwork, the proposed form and indication of location, scale and proposed materials.

**Part 4. CONCEPT DESIGN REVIEW.**

- A. The Concept Design Proposal shall be submitted to the City's Public Art Program Officer ("Program Officer" or alternatively, "City's Program Officer"). Artist acknowledges that one or more reviewing bodies (collectively, "the Reviewing Body") may be assembled to review and make recommendations on the Concept Design Proposal.
- B. Artist shall provide presentation quality visual material for presentation of the Concept Proposal to the Reviewing Body, and for release to the press. The specific types of presentation materials shall be as required by City's Program Officer.
- C. The Concept Design Proposal may be reviewed by City staff before submission to the Reviewing Body. Artist recognizes and agrees that the Concept Design Proposal shall respond to the review and comments given by City staff. Artist also acknowledges that the Program Officer

may require Artist to make modifications to the Concept Design Proposal before permitting the proposal to be submitted to the Reviewing Body.

- D. Artist shall be available to present the Concept Design Proposal to the Reviewing Body for approval.
- E. The Reviewing Body may recommend approval, approval with minor changes or disapproval. In the event that the Reviewing Body recommends disapproval, or approval with minor changes to the Concept Design Proposal, Artist, upon written notification by the Program Officer, shall respond to the Reviewing Body's comments and submit the revised Concept Design Proposal to the Program Officer for review. Artist recognizes and agrees that the Reviewing Body may review the Concept Design Proposal as revised and make additional recommendations regarding the revised Concept Design Proposal.
- F. In the event that all approvals are secured, City's Program Officer will issue a notice of acceptance of the Concept Design Proposal to Artist.
- G. Artist shall not proceed with the proposal for the Artwork Schematic Design until City's Program Officer issues a notice to proceed to Artist. The notice to proceed will identify the approved Concept Design for the Artwork.

**Part 5. SCHEMATIC DESIGN.**

- A. Following approval by the City of Concept Design Proposal, Artist shall prepare one or more designs showing Artist's Schematic Design Proposal for the Artwork (the "Schematic Design Proposal"). The Schematic Design Proposal will include form, indication of the scale, and proposed materials (samples to be provided where appropriate). The Schematic Design Proposal shall also include information on structural considerations, surface integrity, permanence, and protection against theft and vandalism.
- B. Artist shall investigate costs and prepare preliminary cost estimates related to the fabrication and installation of the Schematic Design Proposal. The estimates shall indicate the feasibility of producing the proposed Artwork within the \$1,464,000 fabrication and installation budget (the "Preliminary Cost Estimate"). This does not include a \$170,000 contingency budget to cover unforeseen costs that may be incurred during the course of fabrication and installation, 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.
- C. The Schematic Design Proposal shall include an outline of the proposed installation method, and a schedule for the Artwork fabrication and installation (collectively, the "Proposed Installation Method").

**Part 6. SCHEMATIC DESIGN PROPOSAL REVIEWS.**

- A. The Schematic Design Proposal, including the Proposed Installation Method and Preliminary Cost Estimate, shall be submitted to the City's Program Officer. Artist acknowledges that the Reviewing Body may be assembled to review and make recommendations on the Schematic Design Proposal. Artist shall provide presentation quality visual material for presentation of the Schematic Design Proposal to the Reviewing Body, and for release to the press. The specific types of presentation materials shall be as required by City's Program Officer.
- B. The Schematic Design Proposal may be reviewed by City staff before their submission to the Reviewing Body. Artist recognizes and agrees that the Schematic Design Proposal shall respond to the review and comments given by City staff. Artist also acknowledges that the Program Officer may require Artist to make modifications to the Schematic Design Proposal before permitting this proposal to be submitted to the Reviewing Body.
- C. Artist shall be available to present the Schematic Design Proposal to the Reviewing Body for approval.
- D. The Reviewing Body may recommend approval, approval with minor changes or disapproval. In the event that the Reviewing Body recommends disapproval, or approval with minor changes to the Schematic Design Proposal, Artist, upon written notification by the Program Officer, shall respond to the Reviewing Body's comments and submit the revised Schematic Design Proposal to the Program Officer for review. Artist recognizes and agrees that the Reviewing Body may review the Schematic Design Proposal as revised and make additional recommendations regarding the revised Schematic Design Proposal.
- E. In the event that all approvals are secured, City's Program Officer will issue a notice of acceptance of the Schematic Design Proposal to Artist.
- F. Artist shall not proceed with the proposal for the Artwork Design Development until City's Program Officer issues a notice to proceed to Artist. The notice to proceed will identify the approved Schematic Design for the Artwork.

**Part 7. DESIGN DEVELOPMENT PROPOSAL.**

- A. Upon receipt of City's Notice to Proceed, Artist shall develop a final proposal for the Artwork ("Artwork Design Development Proposal") showing the details of the Artwork. The Artwork Design Development Proposal will include indication of form, scale, and proposed materials (samples to be provided where appropriate). The Design Development Proposal shall also include information on structural considerations, surface integrity, permanence, and protection against theft and vandalism (collectively, the "Artwork Design Specifications").

- B. Artist shall develop a detailed budget (the "Artwork Budget"), not to exceed \$1,464,000 which shall cover all costs related to the fabrication and installation of the Artwork, including, but not limited to: itemized costs for materials including applicable sales tax; off-site fabrication costs; costs for labor of assistants; Artist's time for coordination, fabrication, supervision and installation; itemized General Contractor and sub-contractor costs; permits or other fees; insurance; studio and operation expense; consultants' fees; communications; Artist's travel; transportation of the Artwork to site; and itemized installation costs.
- C. A contingency of \$170,000 shall be set aside as a contingency to cover unforeseen costs that may arise during the course of the fabrication and installation.
- D. The Design Development Proposal shall include a detailed written description of the fabrication and installation method (the "Installation Specifications").
- E. The Design Development Proposal shall include detailed fabrication and installation schedule (the "Installation Schedule").
- F. The Design Development Proposal shall include the description of any operational, maintenance and conservation requirements for the Artwork (the "Maintenance Specifications").
- G. The Design Development Proposal shall include estimated cost for ongoing maintenance including preventative maintenance and recommended upkeep.

**Part 8. DESIGN DEVELOPMENT PROPOSAL REVIEW.**

- A. Artist shall provide presentation quality visual material of the Design Development Proposal in conjunction with the review of the Design Development Proposal by City staff and the Reviewing Body, and for release to the press. The specific types of materials shall be as required by City's Program Officer.
- B. The Design Development Proposal, consisting of each of the elements described above in Part 7, shall be submitted to City's Program Officer for the Program Officer's review and submittal to the Reviewing Body. Artist acknowledges that the Program Officer may require Artist to make modifications to the Design Development Proposal prior to submitting the Design Development Proposal to the Reviewing Body.
- C. Artist, at City's option, shall be available to present the Artwork Design Development Proposal, in the form approved by the Program Officer, at one or more meetings of the Reviewing Body.
- D. The Reviewing Body may recommend approval, approval with minor changes or disapproval. In the event that the Reviewing Body recommends disapproval, or approval with minor changes to the Design

Development Proposal, Artist, upon written notification by the Program Officer, shall respond to the recommended changes in writing and submit a revised Design Proposal to the Program Officer for review. Artist recognizes and agrees that the Reviewing Body may review the Design Development Proposal as revised and make additional recommendations regarding the revised Design Development Proposal.

- E. In the event that the Program Officer accepts the Design Development Proposal, the Design Development Proposal will be presented to the San José Arts Commission for review and approval. At City's option, the Design Development Proposal may be submitted to City Council for approval.
- F. Should the final design proposal be disapproved and the Artist has performed the services set out in Exhibit A, Parts 1-8, to the satisfaction of the Program Officer, Artist may be requested to submit a modified design proposal as specified by the Program Officer for additional design compensation. Additional design compensation will reduce the fabrication budget as stated in Exhibit A, Part 5 and Part 7 and the fabrication budget will be amended accordingly. City retains the right to terminate per Section 12 of this Agreement.

**Part 9. NOTICE OF DESIGN DEVELOPMENT ACCEPTANCE.**

In the event that all Design Development approvals are secured, City, in City's sole discretion, may decide to proceed or not to proceed with the Artwork. If City decides to proceed, City shall send a Notice of Design Development Acceptance to Artist which will specify milestone dates determined for project completion and fabrication/installation payment milestones. Upon mutual execution of an amendment to Exhibit B, Schedule of Performance and Exhibit C, Compensation, Artist may proceed with Construction Documents. City's Program Officer is authorized to execute amendments to Exhibit B and Exhibit C provided that the amendments do not reduce Artist's services provided to City nor increase compensation to be paid to Artist.

**Part 10. CONSTRUCTION DOCUMENTS.**

- A. Artist, at City's option, shall be responsible for the preparation of any drawings depicting both the fabrication and installation of the Artwork as proposed by the Design Development Proposal (the "Construction Documents"). Artist shall be responsible for obtaining any and all information necessary for preparation of the Construction Documents, including without limitation, any field measurements of the proposed site.
- B. Any and all drawings must be certified by a qualified engineer, licensed by the State of California and must conform to all applicable federal, state and local laws and regulations. The Construction Documents for the Artwork are subject to approval by City's Department of Public Works. The Construction Documents for the Artwork must be designed in accordance with City's standard specifications as described below in subpart E ("City's Standard Specifications"). The Construction



Documents and City's Standard Specifications shall collectively be referred to as the "Plans." Once the Construction Documents are approved, City's Program Officer will notify Artist in writing.

- C. When seeking approval of the Construction Documents, Artist shall submit the following for City's Department of Public Works:
1. the plans on reproducible sheets measuring 24 inches by 36 inches; and
  2. all engineering calculations associated with the submitted Construction Documents; and
  3. the specifications for the Artwork including a final budget estimate listing the quantities and unit prices for the fabrication and installation of the Artwork.
- D. City's approval of the Plans shall not release Artist of the responsibility for the correction of mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved.
- E. 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.
- F. Artist is responsible for all applicable Underwriters Laboratory (UL) approvals as they may apply.

**Part 11. NOTICE TO PROCEED WITH FABRICATION AND INSTALLATION.**

City, in City's sole discretion, may decide to proceed or not to proceed with the Artwork. If City decides to proceed and all approvals are secured, City's Public Art Program Officer will issue a written Notice to Proceed with Fabrication and Installation to the Artist. Artist shall not commence fabrication and installation of Artwork until Program Officer has issued such Notice. If Notice to Proceed with Fabrication and Installation is issued such that City and Artist agrees that there is reason to anticipate a delay in the mutually agreed schedule of performance through no fault of Artist, then City and Artist shall identify the revised Schedule of Performance in writing on the Notice to Proceed with Fabrication and Installation or on such other mutually executed amendment to the Schedule of Performance.

**Part 12 FABRICATION AND INSTALLATION.**

A. General.

1. The parties agree that the Final Proposal, consisting of City-approved construction drawings and the City-approved Design Development Proposal, is to be filed 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 Recital A on Page 1 of this Agreement.
2. 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 DPW Director.
3. Artist agrees that installation includes adequate training and explanation to City staff, to occur in San José unless otherwise agreed by the Program Officer, concerning the repair and maintenance of Artwork. Training includes those instructions which are required to operate, maintain and perform basic repairs on the Artwork. Training is due no later than 10 business days after completion of the Artwork installation and is a pre-requisite for Acceptance.

B. Deviations from Proposal.

1. The goal of the parties for the Artwork is a product that represents the creative talents of Artist and satisfies the specifications set forth in the Final Proposal 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 the Final Proposal. To the extent that any specification for the Artwork is not identified in the Final Proposal, Artist shall seek City's prior approval of these specifications before commencing with fabrication of the Artwork.

2. The parties also recognize that the shift in scale from preliminary drawings, maquettes and mock-ups 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 that requires a modification of the Construction Documents without the prior written approval of City's DPW Director.

C. Material Deviations.

Any material deviation from the Final Proposal 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 which affects the fabrication, schedule of delivery or installation of the Artwork, preparation of the Site or maintenance of the Artwork.

D. 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.

E. Third Party Contractors.

1. 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 2, 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.
2. 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 the costs solely attributable to Artist's (or Artist's Agents') delay or impact upon third parties.
3. 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.

F. 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 subcontractors' place of business.

G. 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.

H. Inspection and Transportation of Artwork

1. Inspection Notice.

City and Artist agree that various elements of the Artwork may be fabricated at locations away from the Site (collectively, "Off-Site Elements"). The Off-Site Elements, are to be defined per the Final Proposal. 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.

2. Notice to Proceed.

Within fifteen working days (15) days 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.

3. 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.

I. Work at the Site.

1. Plans.

- i. 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 Artwork Construction Documents approved by City and the City's Standard Specifications (collectively, the "Plans").
- ii. 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 and Chief Development Officer.

2. 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 the 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.

3. 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 caused by the negligence or willful acts or omissions of Artist or Artist's subcontractors.

4. 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 Chief 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 and Chief Development Officer.

5. 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(s) 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 or Chief 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 1 person 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.

**Part 13. NOTICES OF INSTALLATION AND COMPLETION.**

A. Notices.

Artist shall notify City's Program Officer that the Artwork has been installed at the Site ("Completion Notice"). Within seven (7) days of City's receipt of the Notice from the Artist, 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) professional images of the installed Artwork in

RD:AFS:LCP  
6/3/2019

digital format (in a format to be agreed upon with the City). Use of these images will be in accordance with Section 16 of this Agreement.



**REVISED EXHIBIT B**  
**SCHEDULE OF PERFORMANCE**

1. **Commencement of Work.** Artist shall commence work upon full execution of this Agreement. The following are milestone dates that must be met in accordance with this Agreement.

**Concept Design**

Complete all tasks in Parts 1-3 of Exhibit A and submit Concept Design Proposal to Staff for required reviews October 31, 2019

Complete all required reviews of Concept Design Proposal including Public Art Committee review (Part 4 of Exhibit A) December 5, 2019

**Schematic Design**

Complete all tasks in Part 5 of Exhibit A and submit Schematic Design Proposal to staff for required reviews March 31, 2020

Complete all required reviews of Schematic Design Proposal including Public Art Committee Review (Part 6 of Exhibit A) April 7, 2020

**Design Development**

Complete all tasks in Part 7 of Exhibit A and submit Design Development Proposal to staff for required reviews July 31, 2020

Complete all review of Design Development Proposal including Public Art Committee Review (Part 8 of Exhibit A) August 4, 2020

**Construction Documents**

Complete Construction Documents, Calculations & Final Budget (Parts 10 of Exhibit A) October 2020

Fabrication and Installation (Part 12 of Exhibit A) TBD pursuant to EXHIBIT A, Part 9.

Notice of Completion (Part 13 of Exhibit A) January 2022

2. **Modification of Schedule.** The parties agree that the Schedule set forth above may be modified only upon prior written authorization of the Director of the Office of Economic Development or Program Officer.

**REVISED EXHIBIT C**  
**COMPENSATION**

1. **Fee.** The cost of Artwork Design, Fabrication and delivery, including all expenses relating thereto, shall not exceed the sum of One Million Nine Hundred and Seventy Thousand Dollars (\$1,970,000). Three Hundred and Thirty-Six Thousand Dollars (\$336,000) is allocated for design, including Construction Documentation, and an amount of One Million Four Hundred and Sixty Four Thousand Dollars (\$1,464,000) is allocated for the fabrication, transportation and installation of the Artwork, and One Hundred Seventy Thousand Dollars (\$170,000) is allocated as a Contingency Fund (which contingency fund may only be drawn upon pursuant to Section 5 of this Exhibit C). This fee includes but is not limited to the following costs: labor of assistants; materials, programming, communication and other indirect costs; and travel expenses of the Artist for site visits and research.

2. **Interim Payments.** City agrees to pay Artists in installments as set forth in the schedule below and in accordance with the terms of Section 3 of this Agreement.

3. **Payment schedule.**

<b>DESIGN</b>	
Upon execution of this Agreement. Payment in advance is contingent upon satisfactory completion of tasks identified in Part 1 through Part 4 of EXHIBIT A.	\$100,000
Upon City's notice to proceed with the Artwork Design Development Proposal, which advance payment is for and contingent upon satisfactory completion of tasks identified in Part 5 and 6 EXHIBIT A	\$100,000
Upon issuance of City's Notice of Design Development Acceptance (Part 7 and 8 of EXHIBIT A) and <b>NOTICE OF DESIGN DEVELOPMENT ACCEPTANCE</b> (Part 9 of EXHIBIT A), and approval of Construction Documents (Part 10 of EXHIBIT A)	\$136,000
Upon Issuance of Notice to Proceed as identified in Part 11 of EXHIBIT A.	TBD pursuant to Exhibit A, Part 11
<b>FABRICATION &amp; INSTALLATION</b>	
Upon 50% Completion of Fabrication	TBD pursuant to Exhibit A, Part 12
Completion of Fabrication, Inspection, and Transportation of Artwork to site	TBD pursuant to Exhibit A, Part 12
Upon Final Completion	TBD pursuant to Exhibit A, Part 13
<b>CONTINGENCY</b>	<b>\$170,000</b>

4. **Fabrication and Installation, Payment Schedule for Artwork.** City shall pay Artist for the costs and expenses identified in the Artwork Budget as developed per EXHIBIT A, Part 7. Artist shall submit invoices for the costs and expenses outlined in the Budget and shall also 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 D. 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 within the Fabrication and Installation budget with the prior written approval of City's Art Program Officer, which approval will not be unreasonably withheld.

5. **Contingency/Holdback Draw.** Included in the Budget is an amount of One Hundred and Seventy Thousand Dollars (\$170,000) for unforeseeable and unavoidable circumstances that 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, which shall not be unreasonably withheld. Without limitations of the foregoing, City shall have no obligation to approve a Contingency Draw to make corrections for which the Artist's subcontractors are responsible or to pay for any costs that Artist could have reasonably avoided. In the event that any of the amounts 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.

6. **Reimbursables.** City will not make any additional payment for Artist's expenses.

7. 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.

8. 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.

9. Pursuant to California Revenue and Taxation Code Section 6365, the City's payment for the Artwork is exempt from sales taxes imposed under the California Revenue and Taxation Code.

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