

**ORIGINAL**

**AGREEMENT BETWEEN  
THE CITY OF SAN DIEGO  
AND  
CHRISTIAN MOELLER STUDIO, LLC  
FOR  
PURE WATER NORTH CITY  
PUBLIC ART PROJECT  
CONTRACT NUMBER: H166774**

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**AGREEMENT BETWEEN**  
**THE CITY OF SAN DIEGO**  
**AND CHRISTIAN MOELLER STUDIO, LLC**  
**FOR PUBLIC ART SERVICES**

THIS Agreement H166774 (Consulting Agreement), and the incorporated Exhibits A-G, is made and entered into between the City of San Diego, a municipal corporation (City), and Christian Moeller Studio, LLC (Artist), for the Artist to provide consulting services to the City.

**ARTICLE I**  
**SCOPE OF SERVICES**

**1.1 Scope of Services.** At the direction of the City, the Artist shall provide services to the City, as described in Scope of Services (**Exhibit A**), for design, fabrication, transportation of artwork to site and consultation during installation of artwork to be installed by the City in connection with the Pure Water North City Public Art Project, the Project.

**ARTICLE II**  
**DURATION OF AGREEMENT**

**2.1 Term of Agreement.** This Consulting Agreement shall be effective on the date it is executed by the last party to sign the Consulting Agreement, and approved by the City Attorney in accordance with San Diego Charter Section 40. Unless otherwise terminated, it shall be effective until completion of the Scope of Services or December 1, 2021, whichever is the earliest but not to exceed five years unless approved by City ordinance.

**2.2 Time of Essence.** Time is of the essence for each provision of this Consulting Agreement, unless otherwise specified in this Consulting Agreement.

**2.2.1** Unless otherwise specified herein, time is of the essence for each and every provision of the Consulting Agreement. Artist must immediately notify City in writing if there is, or it is anticipated that there will be, a delay in performance. The written notice must explain the cause for the delay and provide a reasonable estimate of the length of the delay. City may terminate this Consulting Agreement as provided herein if City, in its sole discretion, determines the delay is material.

**2.2.2** If a delay in performance is caused by any unforeseen event(s) beyond the control of the parties, City may allow Artist to a reasonable extension of time to complete performance, but Artist will not be entitled to damages or additional compensation. Any such extension of time must be approved in writing by City. The following conditions may constitute such a delay: war; changes in law or government regulation; labor disputes; strikes; fires, floods, adverse weather or other similar condition of the elements necessitating cessation of the performance; inability to obtain materials, equipment or labor; or other specific reasons agreed to between City and Artist. This provision does not apply to a delay caused by Artist's acts or omissions. Artist is not entitled to an extension of time to perform if a delay is caused by Artist's inability to obtain materials, equipment, or labor unless City has received, in a timely manner, documentary proof satisfactory to City of Artist's inability to obtain materials, equipment, or labor, in which case City's approval must be in writing.

**2.3 City's Right to Terminate for Convenience.** The City may, at its sole option and for its convenience, terminate all or any portion of the Scope of Services agreed to pursuant to this Consulting Agreement by giving written notice of such termination to the Artist. Such notice shall be delivered by certified mail with return receipt for delivery to the City. The termination of the Scope of Services shall be effective upon receipt of the notice by the Artist. Artist will be entitled to fair and reasonable compensation for all services completed in compliance with this Consulting Agreement prior to the notice of termination. In the event that the City terminates this Consulting Agreement pursuant to this Section, the City shall have no right to use the Artist's work-product or services to complete and display the artwork absent the written consent of the Artist.

**2.4 City's Right to Terminate for Default.** If the Artist fails to satisfactorily perform any obligation required by this Consulting Agreement, the Artist's failure constitutes a default. A default includes the Artist's failure to adhere to the Schedule of Work given in **Exhibit D** attached hereto. If the Artist fails to satisfactorily cure a default within ten calendar days of receiving written notice from the City specifying the nature of the default, the City may immediately cancel and/or terminate this Consulting Agreement, and terminate each and every right of the Artist, and any person claiming any rights by or through the Artist under this Consulting Agreement. The rights and remedies of the City enumerated in this section are cumulative and shall not limit, waive, or deny any of the City's rights under any other provision of this Consulting Agreement. Nor does this section otherwise waive or deny any right or remedy, at law or in equity, existing as of the date of this Consulting Agreement or hereinafter enacted or established, that may be available to the City against the Artist.

### **ARTICLE III COMPENSATION**

**3.1 Amount of Compensation.** The City shall pay the Artist for performance of all Services rendered in accordance with this Consulting Agreement, including reasonably related expenses, a total contract amount not exceeding \$975,000.

**3.2 Manner of Payment.** The City shall pay the Artist according to the Compensation and Fee Schedule attached hereto as **Exhibit C**. For the duration of this

Consulting Agreement, the Artist shall not be entitled to fees, including fees for expenses, that exceed the amounts specified in 3.1. The Artist shall submit invoices in accordance with the Compensation and Fee Schedule, which shall include a description of completed services. The City will pay undisputed portions of the invoice within 30 calendar days of receipt.

#### **ARTICLE IV ARTIST'S OBLIGATIONS**

**4.1 Industry Standards.** The Artist agrees that the services rendered under this Consulting Agreement shall be performed in accordance with any standards, if such standards exist, customarily adhered to by an experienced and competent professional Artist using the degree of care and skill ordinarily exercised by reputable professionals practicing in the same field of service in the State of California. Where approval by the City Council, Mayor, or other representatives of the City is required, it is understood to be general approval only and does not relieve the Artist of responsibility for complying with all applicable laws, codes, and good consulting practices.

**4.2 Maintenance of Records.** The Artist shall maintain books, records, logs, documents and other evidence sufficient to record all actions taken with respect to the rendering of the Scope of Services, throughout the performance of the Scope of Services and for a period of 10 years following completion of the Professional Services for the Project. The Artist further agrees to allow the City to reasonably inspect, copy, and audit such books, records, documents and other evidence.

**4.3 Insurance.** The Artist shall not begin any work under this Consulting Agreement until the Artist has: (a) obtained, and upon the City's request provided to the City, insurance certificates reflecting evidence of all insurance required in below; however, the City reserves the right to request, and the Artist shall submit, copies of any policy upon reasonable request by the City; (b) obtained City approval of each insurance company or companies; and (c) confirmed that all policies contain the specific provisions required below. The Artist's liabilities, including but not limited to the Artist's indemnity obligations, under this Consulting Agreement, shall not be deemed limited in any way to the insurance coverage required herein. Maintenance of specified insurance coverage is a material element of this Consulting Agreement and the Artist's failure to maintain or renew coverage or to provide evidence of renewal during the term of this Consulting Agreement may be treated as a material breach of contract by the City. The Artist shall not modify any policy or endorsement thereto which increases the City's exposure to loss for the duration of this Consulting Agreement.

**4.3.1 Types of Insurance.** At all times during the term of this Consulting Agreement, the Artist shall maintain insurance coverage as follows:

**Commercial General Liability.** Commercial General Liability (CGL) Insurance written on an ISO Occurrence form CG 00 01 07 98 or an equivalent form providing coverage at least as broad which shall cover liability arising from any and all personal injury or property damage in the amount of \$ 1 million per occurrence and subject to an annual aggregate of \$2 million. There shall be no endorsement or modification of the CGL limiting the scope of coverage for either insured vs. insured

claims or contractual liability. All defense costs shall be outside the limits of the policy.

**Commercial Automobile Liability.** For all of the Artist's automobiles including owned, hired and non-owned automobiles, the Artist shall keep in full force and effect, automobile insurance written on an ISO form CA 00 01 12 90 or a later version of this form or an equivalent form providing coverage at least as broad for bodily injury and property damage for a combined single limit of \$1 million per occurrence. Insurance certificate shall reflect coverage for any automobile (any auto).

**Workers' Compensation.** For all of the Artist's employees who are subject to this Consulting Agreement and to the extent required by the applicable state or federal law, the Artist shall keep in full force and effect, a Workers' Compensation policy. That policy shall provide a minimum of \$1 million of employers' liability coverage, and the Artist shall provide an endorsement that the insurer waives the right of subrogation against the City and its respective elected officials, officers, employees, agents and representatives.

**4.3.2 Deductibles.** All deductibles on any policy shall be the responsibility of the Artist and shall be disclosed to the City at the time the evidence of insurance is provided.

**4.3.3 Acceptability of Insurers.** Except for the State Compensation Insurance Fund, all insurance required by this Consulting Agreement shall only be carried by insurance companies with a rating of at least "A-, VI" by A.M. Best Company, that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by the City. The City will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Approved Surplus Lines Insurers (LASLI list). All policies of insurance carried by non-admitted carriers are subject to all of the requirements for policies of insurance provided by admitted carriers described herein.

**4.3.4 Required Endorsements.** The following endorsements to the policies of insurance are required to be provided to the City before any work is initiated under this Consulting Agreement.

#### **Commercial General Liability Insurance Endorsements**

**ADDITIONAL INSURED.** To the fullest extent allowed by law including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include as an Additional Insured the City and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of (a) ongoing operations performed by the Artist or on the Artist's behalf, (b) the Artist's products, (c) the Artist's work, including but not limited to the Artist's completed operations performed by the Artist or on the Artist's behalf, or (d) premises owned, leased, controlled or used by the Artist.

**PRIMARY AND NON-CONTRIBUTORY COVERAGE** The policy or policies must be endorsed to provide that the insurance afforded by the Commercial General Liability policy or policies is primary to any insurance or self-insurance of the City

and its elected officials, officers, employees, agents and representatives as respects operations of the named insured. Any insurance maintained by the City and its elected officials, officers, employees, agents and representatives shall be in excess of the Artist's insurance and shall not contribute to it.

#### **Automobile Liability Insurance Endorsements**

**ADDITIONAL INSURED.** To the fullest extent allowed by law including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include as an Additional Insured the City and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of automobile owned, leased, hired or borrowed by or on behalf of the Artist.

#### **Workers' Compensation and Employer's Liability Insurance Endorsements**

**WAIVER OF SUBROGATION.** The Workers' Compensation policy or policies must be endorsed to provide that the insurer will waive all rights of subrogation against the City and its respective elected officials, officers, employees, agents and representatives for losses paid under the terms of this policy or these policies which arise from work performed by the named insured for the City.

**4.3.5 Reservation of Rights.** The City reserves the right, from time to time, to review the Artist's insurance coverage, limits, deductible and self-insured retentions to determine if they are acceptable to the City. The City will reimburse the Artist for the cost of the additional premium for any coverage requested by the City in excess of that required by this Consulting Agreement without overhead, profit, or any other markup.

**4.3.6 Additional Insurance.** The Artist may obtain additional insurance not required by this Consulting Agreement.

**4.3.7 Excess Insurance.** All policies providing excess coverage to the City shall follow the form of the primary policy or policies including but not limited to all endorsements.

**4.4 Drug-Free Workplace.** The Artist agrees to comply with the City's Drug-Free Workplace requirements set forth in Council Policy 100-17, adopted by San Diego Resolution R-277952 and incorporated into this Consulting Agreement by this reference.

**4.5 ADA Certification.** The Artist hereby certifies that the Artist agrees to comply with the City's Americans with Disabilities Act Compliance/City Contracts requirements set forth in Council Policy 100-04, adopted by San Diego Resolution R-282153 and incorporated into this Consulting Agreement by this reference.

**4.6 Compliance with the City's Equal Opportunity Contracting Program.** The Artist shall comply with the City's Equal Opportunity Contracting Program Consultant Requirements. The Artist shall not discriminate against any employee or applicant for employment on any basis prohibited by law. The Artist shall provide equal opportunity in all employment practices. The Artist shall ensure that its sub-

consultants comply with the City's Equal Opportunity Contracting Program Consultant Requirements. Nothing in this section shall be interpreted to hold the Artist liable for any discriminatory practice of its sub-consultants. The Artist's hiring or retaining of any sub-consultant to perform services is subject to prior written approval by the City. Should the Artist retain sub-consultants with the City's written approval, the Artist shall comply with all Equal Opportunity Contracting requirements. For applicable rules and forms see <http://www.sandiego.gov/eoc/index.shtml>.

**4.6.1 Non-Discrimination Ordinance.** The Artist shall not discriminate on the basis of race, gender, gender expression, gender identity, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring or treatment of sub-consultants, vendors or suppliers. The Artist shall provide equal opportunity for sub-consultants to participate in sub-consulting opportunities. The Artist understands and agrees that violation of this clause shall be considered a material breach of the contract and may result in contract termination, debarment, and other sanctions. This language shall be in contracts between the Artist and any Sub-consultants, vendors and suppliers.

**4.6.2 Compliance Investigations.** Upon the City's request, the Artist agrees to provide to the City, within 60 calendar days, a truthful and complete list of the names of all sub-consultants, vendors, and suppliers that the Artist has used in the past five years on any of its contracts that were undertaken within San Diego County, including the total dollar amount paid by the Artist for each subcontract or supply contract. The Artist further agrees to fully cooperate in any investigation conducted by the City pursuant to the City's Nondiscrimination in Contracting Ordinance contained in San Diego Municipal Code (SDMC) sections 22.3501-22.3517. The Artist understands and agrees that violation of this clause shall be considered a material breach of the Consulting Agreement and may result in remedies being ordered against the Artist up to and including contract termination, debarment, and other sanctions for violation of the provisions of the Nondiscrimination in Contracting Ordinance. The Artist further understands and agrees that the procedures, remedies and sanctions provided for in the Nondiscrimination Ordinance apply only to violations of said Nondiscrimination Ordinance.

**4.7 Product Endorsement.** The Artist shall conform to the City's Administrative Regulation 95.65 and Council Policy 000-41 concerning product endorsement which requires that any advertisement referring to the City as a user of a product or service will require the prior written approval of the Mayor.

**4.8 Compliance with the City's Contractor Standards.** The Artist shall comply with the City's Contractor Standards delineated in SDMC section 22.3004, the purpose of which is to ensure that the City of San Diego conducts business with firms that have the necessary quality, fitness and capacity to perform the work set forth in a given contract. To assist the City Manager in making this determination and to fulfill the requirements of SDMC section 22.3004(d), the Artist must complete and submit the *Contractor Standards Pledge of Compliance* attached hereto as **Exhibit G**. The submitted Pledge of Compliance is a public record and information contained therein will be available for public review for at least ten (10) calendar days, except to the extent that such information is exempt from disclosure pursuant to applicable law. If a change in circumstances occurs that would modify any response thereon, the Artist

must provide the City an updated Contractor Standards Pledge of Compliance within thirty (30) calendar days of such change.

**4.9 Conflict of Interest.** The Artist is subject to all federal, state and local conflict of interest laws, regulations, and policies applicable to public contracts and procurement practices, including but not limited to California Government Code sections 1090, et seq. and 81000, et seq., and the City of San Diego Ethics Ordinance, codified in the SDMC at sections 27.3501 to 27.3595.

**4.10 Business Tax License.** Any Artist doing business with the City is required to comply with Section 31.0301 of the SDMC regarding business tax. For more information, visit the City's website at <http://www.sandiego.gov/treasurer/> or call (619) 615-1500. The City requires the Artist to provide a copy of the Artist's business tax license, or a copy of the business tax license application receipt. Failure to provide the required documents with this Consulting Agreement may result in the Artist being declared non-responsive and rejected.

**4.11 Submittals.** Failure to provide the required submittals listed below with the Consulting Agreement shall delay the award of the Consulting Agreement, and therefore, commencement of the Scope of Services and payments to Artist.

- Complete insurance certificates with all endorsements per Section 4.3
- Completed Equal Opportunity Contracting Program Work Force Report per Section 4.6
- Completed Contractor Standards Pledge of Compliance per Section 4.8
- Business Tax License per Section 4.10
- Taxpayer Identification Number (W-9) as specified in City of San Diego General Provisions, Section C, Paragraph 15, if not currently on file.  
<http://www.irs.gov/pub/irs-pdf/fw9.pdf>
- Artist's Signature Authority Document

**4.12 Prevailing Wage Rates.** RESERVED.

## **ARTICLE V INDEMNIFICATION**

**5.1 Indemnification and Hold Harmless Agreement.** With respect to any liability, including but not limited to claims asserted or costs, losses, or payments for injury to any person or property caused or claimed to be caused by the acts or omissions of the Artist, or Artist's employees, agents, and officers, arising out of any services performed under this Consulting Agreement, the Artist agrees to defend, indemnify, protect, and hold harmless the City, its agents, officers, and employees from and against all liability. The Artist's duty to defend, indemnify, protect and hold

harmless shall not include any claims or liabilities arising from the sole negligence or sole willful misconduct of the City, its agents, officers or employees.

**5.2 Insurance.** The provisions of this article are not limited by the requirements of Section 4.3 related to insurance.

**5.3 Enforcement Costs.** The Artist agrees to pay any and all costs the City incurs enforcing the indemnity and defense provisions set forth in this article.

## **ARTICLE VI MISCELLANEOUS**

**6.1 Headings.** All article headings are for convenience only and shall not affect the interpretation of this Consulting Agreement.

**6.2 Independent Consultants.** The Artist and any Sub-consultants employed by the Artist shall be independent consultants and not agents of the City. Any provisions of this Consulting Agreement that may appear to give the City any right to direct the Artist concerning the details of performing the Scope of Services, or to exercise any control over such performance, shall mean only that the Artist shall follow the direction of the City concerning the end results of the performance.

**6.3 Jurisdiction and Venue.** The venue for any suit or proceeding concerning this Consulting Agreement, the interpretation or application of any of its terms, or any related disputes shall be in the County of San Diego, State of California.

**6.3.1 Governing Law.** The Contract shall be deemed to be made under, construed in accordance with, and governed by the laws of the State of California without regard to the conflicts or choice of law provisions thereof.

**6.4 Conflicts Between Terms.** If an apparent conflict or inconsistency exists between the main body of this Consulting Agreement and the Exhibits, the main body of this Consulting Agreement shall control. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code and this Consulting Agreement, the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this Consulting Agreement, the Exhibits, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement shall control. Each party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Consulting Agreement.

**6.5 Notices.** In all cases where written notice is required under this Consulting Agreement, service shall be deemed sufficient if the notice is deposited in the United States mail, postage paid. Proper notice shall be effective on the date it is mailed, unless provided otherwise in this Consulting Agreement. For the purpose of this Consulting Agreement, unless otherwise agreed to in writing, notice to the City shall be addressed to: Christine E. Jones, Senior Public Art Manager, City of San Diego Commission for Arts and Culture, 1200 Third Ave., Suite 924, San Diego, CA 92101, (619) 236-6661, ChristineJ@sandiego.gov. Notice to the Artist shall be addressed to: Christian Moeller, Christian Moeller Studio, LLC, 2033 N. Gramercy Place, Los Angeles, CA 90068, (310) 435-9564, cmo@ucla.edu.

**6.6 Integration/Amendments.** This Consulting Agreement represents the entire understanding of the City and the Artist as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Consulting Agreement may not be modified or altered except in writing signed by both parties.

**6.7 Equal Benefits Ordinance.** Unless an exception applies, Artist shall comply with the Equal Benefits Ordinance (EBO) codified in the San Diego Municipal Code (§22.4304(f)). Failure to maintain equal benefits is a material breach of this Agreement. By signing this Agreement, Artist certifies that Artist is aware of, and will comply with, this City-mandated clause throughout the duration of the Agreement.

**6.8 Public Records.** This contract is a public document subject to the California Public Records Act, and as such may be subject to public review per **Exhibit F** (Regarding Information Requested under the California Public Records Act).

**6.9 Exhibits Incorporated.** All Exhibits referenced herein are hereby incorporated into this Consulting Agreement.

**6.10 Severability.** The unenforceability, invalidity, or illegality of any provision of this Consulting Agreement shall not render any other provision of this Consulting Agreement unenforceable, invalid, or illegal.

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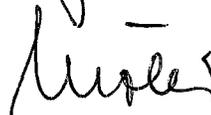
IN WITNESS WHEREOF, this Agreement is executed by the City of San Diego, acting by and through its Mayor, pursuant to SDMC section 22.3207, authorizing such execution, and by the Artist pursuant to the Artist's Signature Authority Document.

Dated this 26<sup>th</sup> day of January, 2017.

THE CITY OF SAN DIEGO  
Mayor or Designee

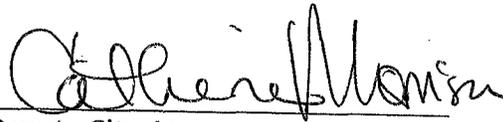
By:   
Cindy Crocker  
Principal Contract Specialist  
Public Works Contracts

I HEREBY CERTIFY I can legally bind Christian Moeller Studio, LLC and that I have read all of this Agreement, this 9<sup>th</sup> day of Jan, 2017.

By   
Christian Moeller  
Owner

I HEREBY APPROVE the form of the foregoing Agreement this 27<sup>th</sup> day of January, 2017.

MARA W. ELLIOTT, City Attorney

By:   
Deputy City Attorney

ORIGINAL

**ARTIST CONSULTING SERVICES**  
**AGREEMENT EXHIBITS**

## SCOPE OF SERVICES

**A.1 Notice to Proceed with the Services.** The Artist shall not proceed with work on the Scope of Services until Public Works Contracts issues the Artist a notice to proceed.

**A.2 Artwork Definition.** The Artist acknowledges and agrees that the artwork created by the Artist under this Consulting Agreement will meet the definition of "artwork" contained in SDMC section 26.0702. The City shall not be obligated to approve or accept artwork, which does not meet the City's definition of "artwork."

**A.3 Fulfillment of City's Collecting Mission.** The Artist acknowledges and agrees that the artwork created by the Artist under this Consulting Agreement will become part of the City's Civic Art Collection. The mission of the City's Civic Art Collection is to provide meaningful aesthetic and cultural experiences for San Diego's residents and visitors. The City collects artworks that demonstrate the creativity and innovation practiced in the arts; that stimulate discussion and the exchange of ideas; that balance urbanization and development with humanizing elements; that honor the history and heritage of San Diego and its citizens; and/or that reflect the character and diversity of San Diego's region while incorporating a global perspective. Therefore, the Artist shall be responsible for providing the Scope of Services described herein in a manner that meets the City's collecting mission.

**A.4 Public Process.** It is understood that the process of developing, reviewing and approving an artwork for the City is an open and transparent process which may include public participation and scrutiny. The Artist acknowledges and agrees that the City may reasonably require documents and other materials relating to the development of the artwork to be made available to the public.

**A.5 Coordination.** The Artist acknowledges and agrees that coordination with City staff and other persons designated by the City who may be involved with the artwork, or the project, is essential. The Artist agrees to cooperate with the City's designees in the completion of the Scope of Services under this Consulting Agreement. To facilitate this essential coordination, the Artist shall be available with reasonable advance notice for meetings, as necessary. The City shall provide the Artist at no cost to the Artist, copies of existing designs, drawings, reports, and other existing relevant data, if any, that the Artist needs in order to perform the Scope of Services under this Consulting Agreement.

**A.6 Meetings.** As determined by Christine E. Jones, the City's Project Manager, in consultation with the Artist, the Artist shall attend public information meetings with the general public, attend design and construction coordination meetings with City staff, architects, general contractors, and other parties working on the design and construction of the Project, and attend presentations to approval authorities to communicate about the artwork and to ensure successful design, fabrication, transport of the artwork and consultation during installation of the artwork.

**A.7 Authorizations.** The Artist shall secure any and all required licenses, permits and similar legal authorizations at the Artist's expense as may be necessary for completion of the Scope of Services.

**A.8 City's Right to Inspect.** The Artist acknowledges and agrees that the City has the right to inspect the artwork at any time and the City may issue the Artist a notice of defects if the Project Manager identifies discrepancies between the Artist's provision of the Scope of Services and the conditions in this Consulting Agreement.

**A.9 Remedy of Defects.** In the event that the City issues the Artist a notice of defects, the Artist shall promptly provide the Project Manager with a plan for remedying the defects. Upon the Project Manager's approval of the Artist's plan for remedying defects, the Artist shall promptly remedy the defects and issue the Project Manager a notice of completion for the defect remedy. The Artist shall not proceed with work on the Scope of Services until the Project Manager issues the Artist a notice of approval for the defect remedy.

**A.10 Preliminary Artwork Idea.** The Artist will present Artist's exploration of artwork ideas to Project Manager. Project Manager may request Artist to present artwork idea or ideas using presentation format of Artist's choice sufficient to provide a group or groups of people representing the City and/or its constituents (Reviewing Bodies) with a clear understanding of the proposed idea(s). Examples of acceptable presentation formats include drawings, image, photographs and brief written narratives.

**A.10.1 Notice of Approval for Preliminary Artwork Idea.** The Artist shall not proceed with work on the Scope of Services until the Project Manager has issued the Artist a notice of approval for preliminary artwork idea.

**A.11 Schematic Artwork Proposal.** The schematic artwork proposal is a depiction of the proposed artwork. The schematic artwork proposal includes, but is not limited to, information about the content, scale, location, context, relationship of components, and materials of the proposed artwork. The Artist shall develop at least one schematic artwork proposal.

**A.11.1 Site Selection.** The Artist shall work in collaboration with City staff to identify appropriate areas as potential locations for the artwork in the Project.

**A.11.2 Research and Outreach.** Throughout the development of the artwork, the Artist shall meet with City staff in order to understand the programmatic uses of the Project, to define goals appropriate to the immediate physical, social and cultural environment of the artwork and to develop and refine imagery in the artwork.

**A.11.3 Elements of Schematic Artwork Proposal.** The Artist's submission of a schematic artwork proposal to the Project Manager for review and approval shall be of a quality appropriate for release to the press. The Artist agrees to supply any specific types of presentation materials required by the Project Manager. The schematic artwork proposal shall include, but not be limited to:

- a. A site plan;
- b. A photographic survey of the site to show context;

## EXHIBIT A

- c. Documentation of research and findings;
- d. Documentation of community and design team input, feedback and outcomes;
- e. A preliminary depiction of the proposed artwork in the form of a to-scale drawing accompanied by either a three-dimensional rendering or a three dimensional model;
- f. A written description of the proposed content, scale, location, context, and relationship of the components in the proposed artwork;
- g. Material samples;
- h. A preliminary ADA plan, which outlines proposed strategies for addressing ADA requirements;
- i. A preliminary budget, which demonstrates how the Artist proposes to expend the amount allocated for completion of the Scope of Services. The preliminary budget shall include, but not be limited to, the following items, as appropriate:
  - 1. Artist's fee
  - 2. Design development expenses including engineering services and/or construction documents
  - 3. Travel
  - 4. Insurance
  - 5. Subcontractors' fees (itemize all costs)
  - 6. Fee for art conservator's review
  - 7. Administrative expenses (including postage, presentation materials, copyright registration, etc.)
  - 8. Materials and supplies (itemize all anticipated aspects and components with per unit and total cost estimates including applicable sales tax)
  - 9. Fabrication costs (itemize all portions of subcontracted work and work to be completed by Artist)
  - 10. Site preparation (do not include costs covered by the City or others)
  - 11. Transportation of materials or finished work to the site, storage, etc.)
  - 12. Lighting (design, fixtures, bulbs )
  - 13. Permits and taxes (sales tax, use tax, City permits, etc.)
- j. A preliminary fabrication plan, which includes a proposed list of materials, methods of fabrication, and
- k. A preliminary transportation plan;
- l. A preliminary installation plan, which outlines the proposed installation method to be completed by City, includes a timeline for the artwork installation that coordinates with other construction events at the Project, and identifies a schedule of relevant tasks that should be completed prior to, during and after installation; and
- m. A preliminary maintenance plan, which includes descriptions of the Artwork's operational, routine maintenance and conservation requirements.

**A.11.4 Reviewing Bodies.** The Reviewing Bodies will be assembled by the Project Manager to review and approve the artwork proposal and its requirements at various stages of development. The Reviewing Bodies include, but are not limited to, the City of San Diego Commission for Arts and Culture (Commission), its Public

Art Committee, the City's Development Services Department and the City's Public Works Departments.

**A.11.5 Proposal Review Process.** The Project Manager and other members of City staff may review the schematic artwork proposal and require that the Artist make modifications to it before permitting its submission to the Reviewing Bodies. The Artist agrees to address the Project Manager's and City staff members' comments and modification requirements prior to submitting it to the Reviewing Bodies for approval. The Reviewing Bodies shall review and make recommendations about the schematic artwork proposal. The Reviewing Bodies may recommend approval, approval with conditions or disapproval of the schematic artwork proposal. In the event that the Reviewing Bodies recommend disapproval, or approval with conditions, the Artist, upon written notification from the Project Manager, shall respond to the Reviewing Bodies' comments in writing and submit a revised schematic artwork proposal to the Project Manager for review. The Reviewing Bodies shall review the revised schematic artwork proposal and make additional recommendations until the schematic artwork proposal is approved by the Reviewing Bodies.

**A.11.5.1 Notice of Approval for Schematic Artwork Proposal.**

The Artist shall not proceed with work on the Scope of Services until the Project Manager has issued the Artist a notice of approval for the schematic artwork proposal.

**A.12 Final Artwork Proposal.** The Artist shall develop the final artwork proposal which shall address feedback provided to the Artist by the Reviewing Bodies during the review of the schematic artwork proposal and which shall be of a quality appropriate for release to the press. The Artist agrees to supply any specific types of presentation materials required by the Project Manager. The final artwork proposal shall include, but not be limited to:

- a. A site plan;
- b. A photographic survey of the site to show context;
- c. Documentation of research and findings;
- d. Documentation of community and design team input, feedback and outcomes;
- e. A final depiction of the proposed artwork in the form of a to-scale drawing accompanied by either a three-dimensional rendering or a three dimensional model;
- f. A written description of the proposed content, scale, location, context, and relationship of the components in the proposed artwork;
- g. Materials samples;
- h. A final ADA plan, which outlines strategies for addressing ADA requirements;
- i. A final budget, which demonstrates how the Artist proposes to expend the amount allocated for completion of the Scope of Services. The completed budget shall include, but not be limited to, the following items, as appropriate:
  1. Artist's fee
  2. Design development expenses including engineering services and/or construction documents
  3. Travel

4. Insurance
  5. Subcontractors' fees (itemize all costs)
  6. Fee for art conservator's review
  7. Administrative expenses (including postage, presentation materials, copyright registration, etc.)
  8. Materials and supplies (itemize all anticipated aspects and components with per unit and total cost estimates including applicable sales tax)
  9. Fabrication costs (itemize all portions of subcontracted work and work to be completed by Artist)
  10. Site preparation (do not include costs covered by the City or others)
  11. Transportation of materials or finished work to the site, storage, etc.)
  12. Lighting (design, fixtures, bulbs )
  13. Permits and taxes (sales tax, use tax, City permits, etc.)
- j. A final fabrication plan, which includes a list of materials, methods of fabrication and material samples;
  - k. A final transportation plan;
  - l. A final installation plan, which outlines the installation method to be completed by City, includes a timeline for the artwork installation that coordinates with other construction events at the Project, and identifies a schedule of relevant tasks that should be completed prior to, during and after installation; and
  - m. A final maintenance plan, which includes descriptions of the artwork's operational, routine maintenance and conservation requirements that are based on recommendations from a qualified art conservator, and which includes the art conservator's report per Section A.12.1.

**A.12.1 Art Conservator's Review.** The Artist shall consult with a qualified art conservator to obtain recommendations for the proposed artwork's routine maintenance and conservation requirements prior to submitting the final artwork proposal to the Project Manager. At the Artist's request, the City will supply a list of qualified art conservators that the Artist may choose from. The Artist shall require the art conservator to provide a report assessing the longevity, safety and durability of materials, fabrication techniques, finishes and attachments along with recommendations for routine maintenance and conservation. As a result of the art conservator's assessment and recommendations, the Artist shall revise the preliminary fabrication plan, the preliminary installation plan, the preliminary budget and make any necessary design changes before submitting the final artwork proposal to the Project Manager.

**A.12.2 Proposal Review Process.** The Project Manager and other members of City staff may review the final artwork proposal and require that the Artist make modifications to it before permitting its submission to the Reviewing Bodies. The Artist agrees to address the Project Manager's and City staff members' comments and modification requirements prior to submitting it to the Reviewing Bodies for approval. The Reviewing Bodies shall review and make recommendations about the final artwork proposal. The Reviewing Bodies may recommend approval, approval with conditions or disapproval of the final artwork proposal. In the event that the Reviewing Bodies recommend disapproval, or approval with conditions, the

Artist, upon written notification from the Project Manager, shall respond to the Reviewing Bodies' comments in writing and submit revised final artwork proposal to the Project Manager for review. The Reviewing Bodies shall review the revised final artwork proposal and make additional recommendations until the final artwork proposal is approved by the Reviewing Bodies.

**A.12.2.1 Notice of Approval for Final Artwork Proposal.** The Artist shall not proceed with work on the Scope of Services until the Project Manager has issued the Artist a notice of approval for the final artwork proposal.

**A.13 Construction Documents.** If the final artwork proposal, which is approved by the City (Approved Artwork Proposal), is of the nature to require plans, structural engineering drawings and specifications to use in constructing the artwork (Construction Documents), the Artist shall create, or cause to be created, detailed Construction Documents. To the extent applicable, the Artist and/or the Artist's sub-consultants shall comply with the most current edition of the *Standard Specifications for Public Works Construction* (also referred to as "*The Green Book*") including the *Regional City of San Diego Supplement Amendments* and the *City of San Diego Standard Drawings* including all *Regional Standard Drawings*. (Copies of *The Green Book* and its supplements are available at the Artist's expense from the City Publications Center, Development Services Department.) References in *The Green Book* to "Contractor" shall be deemed to mean the Artist, including without limitation, the Artist's sub-consultants. To the extent that the information contained in *The Green Book* conflicts with the provisions set forth in this Consulting Agreement, this Consulting Agreement shall control.

**A.13.1 Consultation with City Departments.** The Artist and/or the Artist's sub-consultants shall work with the City's Development Services Department and the City's Public Works Departments, as directed by the Project Manager, in order to ensure that the Artist's Construction Documents comply with the standard specifications contained in *The Green Book* and/or meet the City's requirements for construction of the artwork at the Project.

**A.13.2 Certification.** When applicable, the Construction Documents 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.

**A.13.3 Review Process for Construction Documents.** The Project Manager and other members of City staff may review the Construction Documents and require that the Artist make modifications before permitting their submission to the Reviewing Bodies. The Artist agrees to address the Project Manager's and City staff members' comments and modification requirements prior to submitting it to the Reviewing Bodies for approval. The Reviewing Bodies shall review and make recommendations about the Construction Documents. The Reviewing Bodies may recommend approval, approval with conditions or disapproval of the Construction Documents. In the event that the Reviewing Bodies recommend disapproval, or approval with conditions, the Artist, upon written notification from the Project Manager, shall respond to the Reviewing Bodies' comments in writing and submit revised Construction Documents to the Project Manager for review. The Reviewing Bodies shall review the revised Construction Documents and make additional recommendations until the Construction Documents are approved by the Reviewing

Bodies.

**A.13.3.1 Notice of Approval for Construction Documents.** The Artist shall not proceed with work on the Scope of Services until the Project Manager has issued the Artist a notice of approval for the Construction Documents.

**A.14 Fabrication.** The Artist shall fabricate the artwork in substantial conformity with the Approved Artwork Proposal and the approved Construction Documents.

**A.14.1 Unidentified Design Specifications.** 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 its elements are not identified in either the Approved Artwork Proposal or the approved Construction Documents. To the extent that any specification for the artwork is not identified in the Approved Artwork Proposal or the approved Construction Documents, the Artist shall seek the Project Manager's prior approval of these specifications before commencing or continuing with fabrication of the artwork.

**A.14.1.1 Artist's Right to Make Adjustments.** The parties recognize that the shift in scale from drawings and models to a full-scale artwork may require adjustments. The Artist reserves the right to make minor adjustments to the artwork as the Artist deems necessary.

**A.14.1.1.1 Adjustments Requiring Approval.** In no event may an adjustment increase the amount allocated for completion of the Scope of Services without prior written approval by the Project Manager. Nor shall the Artist make an adjustment, which requires a modification of the approved Construction Documents without the prior written approval of the Project Manager.

**A.14.1.2 Material Deviation.** Any material deviation from the Approved Artwork Proposal or the approved Construction Documents in the scope, design, color, size, material, utility and support requirements, texture or location of the artwork must be approved in writing and in advance by the Project Manager before the Artist proceeds with completion of the artwork.

**A.14.1.2.1 Material Deviation Further Defined.** Without limiting the generality of the foregoing, material deviation also includes any change from the Approved Artwork Proposal or the approved Construction Documents, which affects the fabrication, schedule of delivery or installation of the artwork, preparation of the site, or maintenance and/or operation of the artwork.

**A.14.2 Notice of Fabrication Completion.** Upon completion of the artwork fabrication and prior to transportation of the artwork to the site for installation, the Artist shall issue the Project Manager a notice of fabrication completion. Within 15 days of receipt of the Artist's notice of fabrication completion, the Project Manager will issue the Artist either a notice of defects or a notice to proceed with transport.

**A.14.3 Notice to Proceed with Transport.** Upon receipt of the City's

notice to proceed with transport, the Artist shall transport the artwork to the site. The Artist shall coordinate with the Project Manager regarding the time and place for delivery of the artwork.

**A.14.4 Notice of Artwork Delivery.** The Artist shall issue the Project Manager a notice of artwork delivery when the artwork arrives at the site. Within 15 days of receipt of the Artist's notice of artwork delivery, the Project Manager will issue the Artist either a notice of defects or a notice to proceed with consultation during installation.

**A.15 Installation.** The Artist shall be responsible for consulting on the installation of the artwork by City at the site, including without limitation, consulting with other City consultants and contractors, when applicable.

**A.15.1 Site Visits.** The Artist shall make site visits during installation of the artwork as directed by the Project Manager.

**A.15.2 Personal Safety.** The Artist must wear all required personal protective equipment, as specified by the City, including safety vest, OSHA-approved hardhat and safety glasses.

**A.15.3 Public Safety.** If during the course of the artwork installation, the City determines, in its sole discretion, that the Artwork must be modified in order to preserve public safety, the City shall have the authority to require the Artist to consult on such modifications to address the public safety issues.

**A.15.4 Notice of Artwork Completion.** Upon completion of the artwork installation by the City, the Artist shall issue the Project Manager a notice of artwork completion.

**A.16 Maintenance Manual.** As soon as possible following the completion of the Artwork installation, the Artist shall supply the City with a written maintenance manual for the artwork. The maintenance manual shall be based on the final maintenance plan contained in the Approved Artwork Proposal and shall include the art conservator's report acquired by the Artist pursuant to Section A.12.1. The maintenance manual shall take into account any and all modifications made during the fabrication and installation of the artwork and shall include product data sheets and available warranties for any material or finish used. The parties agree that the maintenance manual will be placed on file with the Commission.

**A.17 Documentation.** As soon as possible following the completion of the artwork installation, the Artist shall supply the City with no fewer than 20 digital images of the artwork, measuring at least 300 dpi and in JPG or RAW format, which are accurate in color and detail and fully representative of each element of the artwork in its context. The parties agree that the digital images will be placed on file with the Commission.

**A.18 Transfer of Title.** As soon as possible following the completion of the artwork installation, the Artist shall provide the City with a transfer of title document in substantially the form attached to the Consulting Agreement as **Exhibit E**.

## EXHIBIT A

**A.19 Notice of Artwork Acceptance.** Upon the City's receipt and approval of the notice of artwork completion, the maintenance manual, the documentation and the transfer of title, the City will issue the Artist a notice of artwork acceptance. Following acceptance of the artwork, the City will provide and install signage on or near the artwork with a credit to the Artist.

**A.20 Risk of Loss.** Until the Artist receives an artwork acceptance notice from the City, any theft of, damage or vandalism to, or acts of God or nature affecting the artwork are the Artist's responsibility, including, but not limited to, any loss occurring during the fabrication, storage, transportation, delivery or installation of the artwork. Notwithstanding the foregoing, the Artist is not responsible for any damage to the artwork arising from the sole negligence or willful misconduct of the City, its agents, employees, representatives, and contractors.

**A.21 Errors and Omissions.** The City's acceptance of the artwork shall not release the Artist of the responsibility for the correction of errors or omissions the Approved Artwork Proposal, the approved Construction Documents or the artwork may contain, including any errors or omissions which arise from the Artist's errors or omissions, or the errors and omissions of the Artist's employees, agents, representatives or sub-consultants regardless of whether these errors or omissions were the result of circumstances unforeseen at the time these deliverables were developed or approved.

## ADDITIONAL PROVISIONS

**B.1 Incapacity or Death.** If the Artist becomes unable to complete this Consulting Agreement due to incapacitation or death, such incapacity or death will not be deemed a breach of this Consulting Agreement or a default on the part of the Artist. However, nothing in this section shall obligate the City to accept the artwork proposal or resulting artwork.

**B.1.1 Incapacity.** In the event of the Artist's incapacity, the City may elect to terminate this Consulting Agreement or the City shall assign the Artist's obligations and the Scope of Services under this Consulting Agreement to another Artist or consultant for completion, which shall be in accord with the designs and/or specifications previously approved by the City, if any, provided that the original Artist or the Artist's designee approves of the new Artist or consultant within a reasonable amount of time and the new Artist or consultant agrees in writing to comply with this Consulting Agreement. However, the artwork shall not be represented to be the completed artwork of the original Artist unless the City is otherwise directed by the original Artist or the Artist's designee. The original Artist shall retain all the Artist's rights under this Exhibit B.

**B.1.2 Death.** In the event of the Artist's death, this Consulting Agreement shall terminate effective the date of death. At the City's request, the Artist's executor shall deliver to the City the artwork proposal and/or the artwork in whatever form or degree of completion either may be at the time. If the artwork proposal and/or fabrication and installation of the artwork are incomplete at the date of the Artist's death, the City shall assign the Artist's obligations and the Scope of Services under this Consulting Agreement to another Artist or consultant for completion, which shall be in accord with the designs and/or specifications previously approved by the City, if any, provided that the original Artist's executor approves of the new Artist or consultant within a reasonable amount of time and the new Artist or consultant agrees in writing to comply with this Consulting Agreement. However, the artwork shall not be represented to be the completed artwork of the original Artist unless the City is otherwise directed by the original Artist's estate. The original Artist's heirs shall retain all the Artist's rights under Exhibit B. If the artwork is in unfinished stages of fabrication or installation by the City at the time of the Artist's death, the title to the artwork shall transfer to the City.

**B.1.3 Waiver of Claims.** The Artist agrees, for the Artist, the Artist's heirs, executors, administrators, successors, and assigns, and for all those claiming under or through the Artist, that the completion of the work by a new Artist as provided for herein shall not constitute a violation by the City of any rights held by the Artist under any California or Federal law. The Artist hereby waives any claims, known or unknown, against the City arising out of or related to the completion of the artwork.

**B.1.4 Credit for Completed Artwork.** However, the artwork shall not be represented to be the artwork of the original Artist unless the City is otherwise directed by the authorized representative of the Artist's estate.

**B.2 Artist's Representations and Warranties.** The Artist represents and

## EXHIBIT B

warrants that: The artwork is solely the result of the artistic effort of the Artist; except as otherwise disclosed in writing to the City, the artwork is unique, original, shall be and shall remain an edition of one and does not infringe upon any copyright or the rights of any person; the artwork has not been accepted for sale elsewhere; the Artist has not sold, assigned, transferred, licensed, granted, encumbered or utilized the artwork or any element thereof or any copyright related thereto which may affect or impair the rights granted pursuant to this Consulting Agreement; the artwork is free and clear of any liens from any source whatsoever; all artwork created or performed by the Artist under this Consulting Agreement, whether created by the Artist alone or in collaboration with others, shall be wholly original with the Artist and shall not infringe upon or violate the rights of any third party; the Artist has the full power to enter into and perform this Consulting Agreement and to make the grant of rights contained in this Consulting Agreement; and all services performed hereunder shall be performed in accordance with all applicable laws, regulations, ordinances, etc. and with all necessary care, skill, and diligence.

**B.2.1 Defects in Workmanship.** The Artist represents and warrants that all work by the Artist and/or sub-consultants will be performed in accordance with professional standards and free from defective or inferior materials and workmanship (including any defects consisting of "inherent vice," or qualities that cause or accelerate deterioration of the artwork) for one year after the date of final acceptance by the City under Exhibit E.

**B.2.2 Inherent Defects.** If within four years from the date the artwork is formally accepted, the City observes any breach of warranty that is curable by the Artist, the Artist shall, at the request of the City, cure the breach promptly, satisfactorily and consistent with professional conservation standards, at no expense to the City. The City shall give notice to the Artist of such breach with reasonable promptness.

**B.2.3 Breach of Warranty.** If within one year the City observes a breach of warranty that is not curable by the Artist, the Artist is responsible for reimbursing the City for damages, expenses and loss incurred by the City as a result of the breach. However, if the Artist disclosed the risk of this breach and the City, through the artwork proposal review and approval process outlined in Exhibit A, accepted that it may occur, it shall not be deemed a breach for purposes of this Consulting Agreement.

**B.2.4 Hazardous Materials.** The Artist represents and warrants that the artwork and the materials used are not currently known to be hazardous or potentially hazardous to any plant life, animal life, human life or natural ecosystem.

**B.2.5 Public Safety.** The Artist represents and 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.

**B.2.5.1 Adjustments to Eliminate Hazards.** The Artist agrees to cooperate with the City in making or permitting adjustments to the artwork if necessary to eliminate hazards which become apparent after the artwork is accepted by the City. The Artist shall be notified in writing when an adjustment is necessary and the City shall consult with the Artist in accordance with Section B.9 of this Exhibit.

**B.2.6 Maintenance.** The Artist represents and warrants that reasonable maintenance of the artwork will not require procedures substantially in excess of those described in the maintenance plan submitted by the Artist pursuant to Exhibit A.

**B.2.7 Acceptable Standard for Display.** Artist represents and warrants that: General routine cleaning and repair of the artwork and any associated working parts and/or equipment will maintain the artwork within an acceptable standard for public display; foreseeable exposure to the elements and general wear and tear will cause the artwork to experience only minor repairable damages and will not cause the artwork to fall below an acceptable standard for public display; with general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the artwork will not experience irreparable conditions that do not fall within an acceptable standard of public display, including mold, rust, fracturing, staining, chipping, tearing, abrading and peeling; and to the extent the artwork incorporates products covered by a manufacturer's warranty, the Artist shall provide copies of such warranties to the City.

**B.3 Ownership of Documents.** Copies of designs, plans, specifications, reports, documentation, and other informational materials, whether written or readable by machine, originated or prepared exclusively for the City pursuant to this Consulting Agreement shall become the property of the City and the Artist. The Artist shall deliver such documents to the City whenever reasonably requested to do so by the City.

**B.3.1 Use by City.** The Artist agrees that the City may use the documents and materials submitted by the Artist for purposes related to the development, review and approval of the artwork proposal.

**B.4 Copyright Ownership.** The Artist retains all rights under the Copyright Act of 1976, 17 U.S.C. § 101 et seq., as the sole Artist and Author of the artwork for the duration of the copyright. The Author is the person who exercises control over the artwork.

**B.4.1 Copyright Registration.** The Artist shall, at the Artist's expense, cause to be registered with the United States Register of Copyrights, a copyright in the artwork in the Artist's name.

**B.5 Reproduction Rights.** In view of the intention that the final artwork shall be unique, the Artist shall not make any additional exact duplicate two or three-dimensional reproductions of the final artwork, nor shall the Artist grant permission to others to do so except with the written permission of the City. However, nothing shall prevent the Artist from creating future artworks in the Artist's manner and style of artistic expression.

**B.5.1 City's License to Reproduce.** The Artist grants the City, and other parties duly authorized by the City, a nonexclusive irrevocable and royalty-free license to reproduce the artwork for all standard City educational, public relations, tourism and arts promotional purposes including, but not limited to, displaying artwork, lending the artwork, reproducing or preparing photographs, other two-dimensional reproductions, or digital reproductions of the artwork, and displaying,

## EXHIBIT B

distributing, transmitting such reproductions or images to the general public. Such reproductions and transmissions may be magazines, books, newspapers, journals, brochures and pamphlets, exhibition catalogues, films, television, video, websites, slides, negatives, prints and electronic media, DVD, CD, computerized retrieval systems, and by all means or methods now known or hereafter invented in connection with standard City activities. Any such authorized reproduction by the City or others under its control shall credit the Artist.

**B.5.2 Reproductions for Commercial Purposes.** If the City wishes to make reproductions of the artwork for commercial purposes, including, but not limited to, T-shirts, postcards or posters, the parties shall execute a separate agreement to address the terms of the license granted by the Artist and the royalty the Artist shall receive. The Artist, in the Artist's sole discretion, may decline to authorize any reproduction which the Artist believes harmful to the Artist's professional reputation.

**B.5.3 Credit for Reproductions.** The City agrees that, unless the Artist requests to the contrary in writing, all formal references to, and reproductions of the artwork shall credit the City and the Artist with © Artist's Name & Date of Completion.

**B.6 Acknowledging the City.** The Artist shall use the Artist's best efforts in any public showing or on a résumé to give acknowledgment to the City in substantially the following credit line: "An artwork commissioned by the City of San Diego for the Civic Art Collection."

**B.7 City Approval for Publicity.** The Artist shall not, during the performance of the Consulting Agreement, disseminate publicity or news releases regarding the Project, the Scope of Services or the artwork without prior written approval of the City.

**B.8 Intellectual Property Warranty and Indemnification.** The Artist represents and warrants that any materials or deliverables, including the artwork proposal and artwork, provided under this contract are either original, not encumbered and do not infringe upon the copyright, trademark, patent or other intellectual property rights of any third party, or are in the public domain. If the artwork proposal and artwork provided hereunder become the subject of a claim, suit or allegation of copyright, trademark or patent infringement, the City shall have the right, in its sole discretion, to require Artist to produce, at Artist's own expense, new artwork proposal and artwork as a means of remedying any claim of infringement in addition to any other remedy available to the City under law or equity. Artist further agrees to indemnify and hold harmless the City, its elected officials, officers, employees and agents from and against any and all claims, actions, costs, judgments or damages of any type alleging or threatening that any artwork proposals, materials, deliverables, supplies, equipment, services or artworks provided under this contract infringe the copyright, trademark, patent or other intellectual property or proprietary rights of any third party (Third Party Claims of Infringement). If a Third Party Claim of Infringement is threatened or made before the Artist receives payment under this contract, the City shall be entitled, upon written notice to the Artist, to withhold some or all of such payment.

## EXHIBIT B

**B.8.1 Enforcement Costs.** The Artist agrees to pay any and all costs the City incurs enforcing the indemnity and defense provisions set forth in this Consulting Agreement, including but not limited to, attorney's fees.

**B.9 City's Right to Repair and Conserve.** The City shall have the right to determine when and if repairs and restorative conservation to the Artwork will be made. Subject to Sections B.11- B.14 of this Exhibit, it is the policy of the City to consult with the Artist regarding repairs and restorative conservation which are undertaken up to five years after final payment has been made on this Consulting Agreement when practicable. In the event that the City makes repairs or restorative conservation not approved by the Artist, the Artist shall have the right to disown the artwork as the Artist's creation and request that all credits be removed from the artwork and reproductions thereof.

**B.9.1 Standards of Repair and Conservation.** All repairs and restorative conservation, whether performed by the Artist, the City, or by third parties responsible to the Artist or the City, shall be made in accordance with professional conservation standards and in accordance with the maintenance manual provided to the City by the Artist pursuant to Exhibit A.

**B.10 Sale or Donation of the Artwork by the City.** The City shall have the right to donate, sell, transfer or exchange the artwork. Before exercising this right, the City, by written notice to the Artist at the Artist's last known address, agrees to give the Artist the opportunity to purchase the artwork for the greater of the fair market value as determined by a qualified appraiser or the amount of any offer that the City has received for the purchase of the artwork plus all costs associated with the removal of the artwork from the site, clean-up of the site and delivery to the Artist. For the period of time that starts on the date the City issues the notice of artwork acceptance and ends 25 years after the date of the Artist's death, the Artist or the Artist's designee shall consult on and approve any new location(s) for the artwork. If the Artist does not approve of the new location(s) in the good faith belief that the relocation of the artwork will harm the Artist's reputation, the Artist shall have the right to disavow the artwork. In the event that the Artist disavows the artwork, the City shall have the right to donate, sell, transfer or exchange the materials that comprise the artwork and the City shall be prohibited from representing that the materials represent an artwork by the Artist. The Artist shall have 30 days from the date of the City's notice to exercise the Artist's option to purchase the artwork.

**B.11 Alterations, Modification or Removal of Artwork.** The City has the right to move, remove or otherwise alter or modify the artwork, except that the City will not move, remove, or otherwise alter or modify the artwork solely for aesthetic reasons or solely in response to changes in public taste. The Artist and the City acknowledge that the Artist may have certain rights under the federal Visual Artists Rights Act of 1990 (VARA). The Artist acknowledges and understands that the installation of the artwork may subject the artwork to destruction, distortion, mutilation, or other modification due to the acts of third parties. If the artwork can be removed without causing the artwork destruction, distortion, mutilation, or other modification, then the City agrees to give the Artist 90 days' notice of its intended action affecting the artwork except in cases where a threat to public safety requires immediate removal. In such case, the Artist shall be offered the opportunity to acquire the artwork for the cost of removal.

## EXHIBIT B

**B.11.1 Limited VARA Waiver.** In consideration of the mutual covenants and conditions in this Consulting Agreement, and except as otherwise provided for in this Consulting Agreement, the Artist agrees to waive any right that the Artist may have under VARA to prevent the removal of the artwork, or the destruction, distortion, mutilation, or other modification of the artwork which arises from, is connected with, or is caused or claimed to be caused by the removal, repair, conservation, maintenance or storage of the artwork by the City or its elected officials, officers, employees, agents, or representatives, or by the presence of the artwork at the site.

**B.11.2 California Civil Code Section 987 Waiver.** The Artist and the City acknowledge that the Artist may have certain rights under California Civil Code Section 987 which are not preempted by VARA. In consideration of the mutual covenants and conditions in this Consulting Agreement, the Artist waives any rights which the Artist or the Artist's heirs, beneficiaries, devisees, or personal representatives may have under California Civil Code Section 987 to prevent the removal, defacement, mutilation, alteration, or destruction of the artwork.

**B.12 Rights of Artist's Heirs, Successors and Assigns.** The Artist's VARA rights under this Consulting Agreement shall cease with the Artist's death and do not extend to the Artist's heirs, successors or assigns.

**B.13 Conflict.** This clause is intended to replace and substitute for the rights of the Artist under VARA and the California Civil Code Section 987 to the extent that any portion of this Consulting Agreement is in direct conflict with those rights. The parties acknowledge that this Consulting Agreement supersedes those laws to the extent that this Consulting Agreement is in direct conflict therewith.

**B.14 Sub-consultants: Ownership of Documents.** The Artist shall require each sub-consultant to agree that copies of designs, plans, specifications, reports, documentation, and other informational materials, whether written or readable by machine, originated or prepared exclusively for the City pursuant to this Consulting Agreement shall become the property of the City and the Artist. The Artist or sub-consultant shall deliver such documents to the City whenever reasonably requested to do so by the City. This language shall be in contracts between the Artist and any sub-consultants.

**B.15 Sub-consultants: Transfer of Title.** The Artist shall require each sub-consultant to agree that title to the artwork shall pass to the City upon the City's written final acceptance and payment for the artwork pursuant to Exhibit A. This language shall be in contracts between the Artist and any sub-consultants.

**B.16 Sub-consultants: Copyright Ownership.** The Artist shall require each sub-consultant to agree that the Artist retains all rights under the Copyright Act of 1976, 17 U.S.C. § 101 et seq., as the sole Artist and Author of the artwork for the duration of the copyright. The Author is the person who exercises control over the artwork. This language shall be in contracts between the Artist and any sub-consultants. If a sub-consultant's work is not deemed a work-for-hire, the Artist shall require said sub-consultant to assign all rights to the Artist.

## COMPENSATION AND FEE SCHEDULE

The following amounts shall be paid to the Artist within 30 days of the City's receipt of an invoice from the Artist indicating that the appropriate milestone as described below has been reached:

**Payment #1** - \$8,500.00 upon Artist's receipt of the City's Notice to Proceed with the Services (Exhibit A, Section A.1);

**Payment #2** - \$8,500.00 upon City's Notice of Approval for Preliminary Artwork Idea (Exhibit A, Section A.10.1.);

**Payment #3** - \$53,000.00 upon receipt of the City's Notice of Approval for the Schematic Artwork Proposal (Exhibit A, Section A.11.5.1.);

**Payment #4** - \$445,000.00 upon receipt of the City's Notice of Approval for the Final Artwork Proposal (Exhibit A, Section A.12.2.1);

**Payment #5** - \$360,000.00 upon Artist's receipt of City's Notice to Proceed with Transport (Exhibit A, Section A.14.3); and

**Payment #6** - \$100,000 upon Artist's receipt of City's Notice of Artwork Acceptance (Exhibit A, Section A.19).

## SCHEDULE OF WORK

The Artist agrees to adhere to the following schedule:

**Preliminary Artwork Idea.** Submit Preliminary Artwork Idea for the review process (Exhibit A, Section A.10): May 8, 2017

**Schematic Artwork Proposal.** Submit Schematic Artwork Proposal for the review process (Exhibit A, Section A.11): September 8, 2017

**Final Artwork Proposal.** Submit Final Artwork Proposal for the review process (Exhibit A, Section A.12): January 1, 2018

**Construction Documents.** Submit Construction Documents for the review process (Exhibit A, Section A.13): April 30, 2018

**Notice of Fabrication Completion.** Submit notice of fabrication completion to the Project Manager (Exhibit A, Section A.14.2): September 30, 2020

**Notice of Artwork Completion.** Submit a Notice of Artwork Completion (Exhibit A, Section A15.4): April 30, 2021

**ADJUSTMENT OF SCHEDULE OF WORK:** The City reserves the right, in its sole judgment and discretion, to make any reasonable adjustments to the Schedule of Work.

NOTE: All work must be completed by December 1, 2021.

TRANSFER OF TITLE

For valuable consideration, the receipt of which is hereby acknowledged, the undersigned Artist located at the address noted below does hereby sell, transfer and convey to the City of San Diego, its assigns and successors, all right, title and interest in the ownership of the artwork commissioned by Consulting Agreement and as described therein.

Artwork Title:

\_\_\_\_\_

Artwork Site:

\_\_\_\_\_

Dated: This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Artist Signature \_\_\_\_\_

APPROVED AS TO FORM AND LEGALITY

Signature \_\_\_\_\_ Title \_\_\_\_\_

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

On \_\_\_\_\_ before me, \_\_\_\_\_, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

REGARDING INFORMATION REQUESTED UNDER THE  
CALIFORNIA PUBLIC RECORDS ACT

The contents of this contract and any documents pertaining to the performance of the contract requirements/Scope of Services resulting from this contract are public records, and therefore subject to disclosure unless a specific exemption in the California Public Records Act applies.

If a Contractor submits information **clearly marked** confidential or proprietary, the City of San Diego (City) may protect such information and treat it with confidentiality only to the extent permitted by law. However, it will be the **responsibility of the Contractor** to provide to the City the specific legal grounds on which the City can rely in withholding information requested under the California Public Records Act, should the City choose to withhold such information.

General references to sections of the California Public Records Act will not suffice. Rather, the Contractor must provide a **specific and detailed legal basis, including applicable case law** that **clearly establishes** the requested information is exempt from the disclosure requirements of the California Public Records Act.

If the Contractor does not provide a specific and detailed legal basis for withholding the requested information within a time specified by the City, the City will release the information as required by the California Public Records Act and the **Contractor will hold the City harmless** for release of this information.

It will be the **Contractor's obligation to defend**, at Contractor's expense, any legal actions or challenges seeking to obtain from the City any information requested under the California Public Records Act withheld by the City at the Contractor's request. Furthermore, the Contractor shall **indemnify** the City and **hold it harmless** for any claim or liability, and **defend any action** brought against the City, resulting from the City's refusal to release information requested under the Public Records Act withheld at Contractor's request.

Nothing in this Consulting Agreement creates any obligation for the City to notify the Contractor or obtain the Contractor's approval or consent before releasing information subject to disclosure under the California Public Records Act.



Is your firm a publicly traded corporation?  Yes  No

If Yes, name those who own ten percent (10 %) or more of the corporation's stocks:

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

Limited Liability Company Date formed: 04/21/07 State of formation: CA

List names of members who own ten percent (10%) or more of the company:

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

Partnership Date formed: \_\_\_/\_\_\_/\_\_\_ State of formation: \_\_\_\_\_

List names of all firm partners:

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

Sole Proprietorship Date started: \_\_\_/\_\_\_/\_\_\_

List all firms you have been an owner, partner or officer with during the past five (5) years. Do not include ownership of stock in a publicly traded company:

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

Joint Venture Date formed: \_\_\_/\_\_\_/\_\_\_

List each firm in the joint venture and its percentage of ownership:

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

Note: To be responsive, each member of a Joint Venture must complete a separate *Pledge of Compliance*.

E. FINANCIAL RESOURCES AND RESPONSIBILITY:

1. Is your firm preparing to be sold, in the process of being sold, or in negotiations to be sold?  
 Yes  No

If Yes, use Attachment "A" to explain the circumstances, including the buyer's name and principal contact information.

2. In the past five (5) years, has your firm been denied bonding?  
 Yes  No

4. Is your firm currently involved in any lawsuit with a government agency in which it is alleged that your firm has defaulted on a contract, breached a contract, or committed fraud?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances.

5. In the past five (5) years, has your firm, or any firm with which any of your firm's owners, partners, or officers is or was associated, been debarred, disqualified, removed, or otherwise prevented from bidding on or completing any government or public agency contract for any reason?

Yes  No

If **Yes**, use *Pledge of Compliance Attachment "A"* to explain specific circumstances.

6. In the past five (5) years, has your firm received a notice to cure or a notice of default on a contract with any public agency?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances and how the matter resolved.

7. Performance References:

Please provide a minimum of three (3) references familiar with work performed by your firm which was of a similar size and nature to the subject solicitation within the last five (5) years.

Company Name: Metro Nashville Arts Commission

Contact Name and Phone Number: Caroline Vincent 615.880.2377

Contact Email: Caroline.Vincent@nashville.gov

Address: 800 2nd Ave S, Nashville, TN 37210

Contract Date: 2014

Contract Amount: 750,000.00 US\$

Requirements of Contract: \_\_\_\_\_

Company Name: 4 Culture / Plus Public Art

Contact Name and Phone Number: Cath Brunner 206.296.8680

Contact Email: Cath.Brunner@4culture.org

Address: 101 Prefontaine Pl. Seattle, WA 98104

Contract Date: 2010

Contract Amount: 566,347.66 US\$

Requirements of Contract: \_\_\_\_\_

If **Yes**, use Attachment "A" to explain specific circumstances; include bonding company name.

3. In the past five (5) years, has a bonding company made any payments to satisfy claims made against a bond issued on your firm's behalf or a firm where you were the principal?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances.

4. In the past five (5) years, has any insurance carrier, for any form of insurance, refused to renew the insurance policy for your firm?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances.

5. Within the last five years, has your firm filed a voluntary petition in bankruptcy, been adjudicated bankrupt, or made a general assignment for the benefit of creditors?
6. Please provide the name of your principal financial institution for financial reference. By submitting a response to this Solicitation Contractor authorizes a release of credit information for verification of financial responsibility.

Name of Bank: Bank of America

Point of Contact: \_\_\_\_\_

Address: 4510 Franklin Ave., LA, CA 90027

Phone Number: 323. 644. 6560

7. By submitting a response to a City solicitation, Contractor certifies that he or she has sufficient operating capital and/or financial reserves to properly fund the requirements identified in the solicitation. At City's request, Contractor will promptly provide to City a copy of Contractor's most recent balance sheet and/or other necessary financial statements to substantiate financial ability to perform.

#### F. PERFORMANCE HISTORY:

1. In the past five (5) years, has your firm been found civilly liable, either in a court of law or pursuant to the terms of a settlement agreement, for defaulting or breaching a contract with a government agency?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances.

2. In the past five (5) years, has a public entity terminated your firm's contract for cause prior to contract completion?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances and provide principal contact information.

3. In the past five (5) years, has your firm entered into any settlement agreement for any lawsuit that alleged contract default, breach of contract, or fraud with or against a public entity?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances.

Company Name: Lendrum Fine Art  
 Contact Name and Phone Number: Tiffany Lendrum 323.933.5550  
 Contact Email: tiffany@Lendrumfineart.com  
 Address: 717 N. Highland Ave, LA, CA 90038  
 Contract Date: 2014  
 Contract Amount: 740,000.00 US\$  
 Requirements of Contract: \_\_\_\_\_

**G. COMPLIANCE:**

1. In the past five (5) years, has your firm or any firm owner, partner, officer, executive, or manager been criminally penalized or found civilly liable, either in a court of law or pursuant to the terms of a settlement agreement, for violating any federal, state, or local law in performance of a contract, including but not limited to, laws regarding health and safety, labor and employment, permitting, and licensing laws?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances surrounding each instance. Include the name of the entity involved, the specific infraction(s) or violation(s), dates of instances, and outcome with current status.

2. In the past five (5) years, has your firm been determined to be non-responsible by a public entity?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances of each instance. Include the name of the entity involved, the specific infraction, dates, and outcome.

**H. BUSINESS INTEGRITY:**

1. In the past five (5) years, has your firm been convicted of or found liable in a civil suit for making a false claim or material misrepresentation to a private or public entity?

Yes  No

If **Yes**, use Attachment "A" to explain specific circumstances of each instance. Include the entity involved, specific violation(s), dates, outcome and current status.

2. In the past five (5) years, has your firm or any of its executives, management personnel, or owners been convicted of a crime, including misdemeanors, or been found liable in a civil suit involving the bidding, awarding, or performance of a government contract?

Yes  No

If **Yes**, use *Pledge of Compliance Attachment "A"* to explain specific circumstances of each instance; include the entity involved, specific infraction(s), dates, outcome and current status.

3. In the past five (5) years, has your firm or any of its executives, management personnel, or owners been convicted of a federal, state, or local crime of fraud, theft, or any other act of dishonesty?

Yes  No

If **Yes**, use *Pledge of Compliance Attachment "A"* to explain specific circumstances of each instance; include the entity involved, specific infraction(s), dates, outcome and current status.

**I. WAGE COMPLIANCE:**

In the past five (5) years, has your firm been required to pay back wages or penalties for failure to comply with the federal, state or local prevailing, minimum, or living wage laws? Yes  No  If Yes, use Attachment "A" to explain the specific circumstances of each instance. Include the entity involved, the specific infraction(s), dates, outcome, and current status.

**J. STATEMENT OF SUBCONTRACTORS:**

Please provide the names and information for all subcontractors used in the performance of the proposed contract, and what portion of work will be assigned to each subcontractor. Subcontractors may not be substituted without the written consent of the City. Use Attachment "A" if additional pages are necessary. If no subcontractors will be used, please write "Not Applicable."

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

Contact Name and Phone Number: \_\_\_\_\_

Contact Email: \_\_\_\_\_

Address: \_\_\_\_\_

Contract Date \_\_\_\_\_

Sub-Contract Dollar Amount: \_\_\_\_\_

Requirements of Contract: \_\_\_\_\_

What portion of work will be assigned to this subcontractor: \_\_\_\_\_

Is the Subcontractor a certified SLBE, ELBE, MBE, DBE, DVBE, or OBE? (Circle One) YES  NO

If YES, Contractor must provide valid proof of certification with the response to the bid or proposal.

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

Contact Name and Phone Number: \_\_\_\_\_

Contact Email: \_\_\_\_\_

Address: \_\_\_\_\_

Contract Date \_\_\_\_\_

Sub-Contract Dollar Amount: \_\_\_\_\_

Requirements of Contract: \_\_\_\_\_

What portion of work will be assigned to this subcontractor: \_\_\_\_\_

Is the Subcontractor a certified SLBE, ELBE, MBE, DBE, DVBE, or OBE? (Circle One) YES  NO

If YES, Contractor must provide valid proof of certification with the response to the bid or proposal.



**K. STATEMENT OF AVAILABLE EQUIPMENT:**

List all necessary equipment to complete the work specified. Use *Pledge of Compliance Attachment "A"* if additional pages are necessary. In instances where the required equipment is not owned by the Contractor, Contractor shall explain how the equipment will be made available before the commencement of work. The City of San Diego reserves the right to reject any response when, in its opinion, the Contractor has not demonstrated he or she will be properly equipped to perform the work in an efficient, effective manner for the duration of the contract period.

If no equipment is necessary to complete the work specified, please write "Not Applicable."

Equipment Description: \_\_\_\_\_

Owned  Rented  Other  (explain below)

If Owned, Quantity Available: \_\_\_\_\_

Year, Make & Model: \_\_\_\_\_

Explanation: \_\_\_\_\_

Equipment Description: \_\_\_\_\_

Owned  Rented  Other  (explain below)

If Owned, Quantity Available: \_\_\_\_\_

Year, Make & Model: \_\_\_\_\_

Explanation: \_\_\_\_\_

Equipment Description: \_\_\_\_\_

Owned  Rented  Other  (explain below)

If Owned, Quantity Available: \_\_\_\_\_

Year, Make & Model: \_\_\_\_\_

Explanation: \_\_\_\_\_

**L. TYPE OF SUBMISSION:** This document is submitted as:

Initial submission of *Contractor Standards Pledge of Compliance*.

Update of prior *Contractor Standards Pledge of Compliance* dated \_\_\_\_/\_\_\_\_/\_\_\_\_.

City of San Diego  
CONTRACTOR STANDARDS  
Pledge of Compliance Attachment "A"

Provide additional information in space below. Use additional Attachment "A" pages as needed. Each page must be signed. Print in ink or type responses and indicate question being answered.

[Empty rectangular box for providing additional information]

I have read the matters and statements made in this Contractor Standards Pledge of Compliance and attachments there to and I know the same to be true of my own knowledge, except as to those matters stated upon information or belief and as to such matters, I believe the same to be true. I certify under penalty of perjury that the foregoing is true and correct.

Christian Moeller, Owner  
Print Name, Title

[Signature]  
Signature

01/10/17  
Date

