

## Standard City of San José Consultant Agreement

(Non-Capital Projects)

This Agreement is between the City of San José, a municipal corporation ("City"), and Todd Andrews, an individual ("Consultant").

This Agreement is made and entered into this 3rd day of January 2022 ("Contract Date").

THE CITY AND CONSULTANT AGREE AS FOLLOWS:

### 1. AGREEMENT SCOPE

- 1.1 General:** This Agreement sets forth the terms and conditions under which the Consultant will provide professional consulting services to the City.
- 1.2 Exhibits:** This Agreement consists of this agreement form and the following exhibits, which are incorporated herein by reference:
- Exhibit A:** Scope of Basic Services
  - Exhibit B:** Compensation
  - Exhibit C:** Insurance Requirements
  - Exhibit D:** Waiver of Proprietary Rights for Artwork Placed Upon CITY PROPERTY under VARA and CAPA
- 1.3 Director:** "Director" means the Director of the Office of Economic Development or the Director's designee.
- 1.4 Business Days:** "Business Day" and "Business Days" means the day(s) on which City Hall is open to conduct business.
- 1.5 Entire Agreement:** This Agreement is the final, complete and exclusive understanding of the parties as to the matters contained herein. It supersedes all prior communications and understandings regarding such matters.
- 1.6 Amendments:** This Agreement may be modified only by a written amendment executed by the parties.

### 2. AGREEMENT TERM

The Agreement term is from the Contract Date to December 31, 2022, inclusive, unless terminated earlier pursuant to Section 19 below.

### 3. SCOPE OF SERVICES

- 3.1 Basic Services:** "Basic Services" means the services set forth in **Exhibit A**. The Consultant must perform the Basic Services to the Director's satisfaction.
- 3.2 Additional Services:** "Additional Services" means the following: (a) services that are included in the Basic Services but exceed the specified level of the Basic Services, or (b) services that relate but are not included in the Basic Services.
- 3.2.1 Authorization:** The City will not compensate Consultant for any Additional Services without the Director's prior written authorization.

**3.2.2 Director's Authorization:** The Director may authorize the Consultant to perform Additional Services up to the cumulative, maximum amount set forth in **Exhibit B** for such services. The Director must authorize the Consultant to perform Additional Services through a written amendment executed by both parties. The written amendment must set forth the scope of the Additional Services, the schedule for completing such services, and the amount and method of compensating the Consultant for such services. The Director is authorized to execute the amendment for Additional Services for the City.

**4. INTENTIONALLY OMITTED**

**5. CITY'S CONTRACT MANAGER**

The City's contract manager for this Agreement is:

Name: Mary Rubin	Phone No.: 408 793-4340
Department: Office of Cultural Affairs	E-mail: <a href="mailto:mary.rubin@sanjoseca.gov">mary.rubin@sanjoseca.gov</a>
Address: 200 East Santa Clara Street, 12 <sup>th</sup> Floor San José, CA 95113	

The Director can change the above contract manager by giving the Consultant written notice.

**6. CONSULTANT'S STAFFING**

**6.1 Consultant's Contract Manager and Other Staffing:** Identified below are the following: (a) the Consultant's contract manager, and (b) the Consultant(s) and/or employee(s) of the Consultant who will be principally responsible for providing the Basic Services. If any individual identified below is required to file a Statement of Economic Interests, Form 700 ("Form 700"), and the individual does not have a current Form 700 on file with the City Clerk for a separate agreement with the City, the Consultant must comply with the requirements of Subsection 17.2 below.

		<u>Required to File Form 700?</u>		
		Yes Already Filed (Insert Date Filed)	Yes Need to File	No
<b><u>Consultant's Contract Manager</u></b>				
Name: Todd Andrews	Phone No.: 530 272-7612			X
Address: 1631 Indian Springs Ranch Road Grass Valley, CA 95949	E-mail: todd- sculptor@att.net			
<b><u>Other Staffing</u></b>				
<u>Name:</u>	<u>Assignment:</u>			
1.				

- 6.2 Contract Manager's Authority:** The Consultant's contract manager is authorized to act on behalf of the Consultant.
- 6.3 Staffing Changes:** The Director's prior written approval is required for the Consultant to remove, replace or add to any of its staffing identified in this provision.

## 7. USE OF SUBCONSULTANTS

**7.1 Authority to Use:** Whichever of the following is marked applies to this Agreement:

- The Consultant can **not** use any subconsultants without the Director's prior written approval.
- The Consultant will use the following subconsultants for the specified areas of work. The Consultant cannot remove, replace or add to any of the subconsultants identified in this provision without the Director's prior written approval.

Subconsultant's Name	Area of Work
1.	
2.	

**7.2 Subconsultant Work:** The Consultant warrants all services and deliverables provided by any subconsultants it uses, and represents that each such subconsultant is specially trained, experienced, and competent to perform its portion of the work.

## 8. INDEPENDENT CONTRACTOR

- 8.1 General:** The Consultant has complete control over its operations and employees, and is an independent contractor. The Consultant is not an agent or employee of the City, and shall not represent or act as the City's agent or employee. The Consultant does not have any rights to retirement benefits or other benefits accruing to City employees, and expressly waives any claim it may have to any such rights.
- 8.2 Subcontractors:** As an independent contractor, the Consultant has complete control over its subconsultants, subcontractors, suppliers, agents and any other person or entity with whom the Consultant contracts in furtherance of this Agreement (collectively "Subcontractors"). Subject to the requirements of Section 7 of this Agreement, the Consultant is solely responsible for selecting, managing and compensating its Subcontractors, and for ensuring they comply with this Agreement.
- 8.3 Indemnity:** The Consultant shall place in each Subcontractor agreement indemnity obligations in favor of the City in the exact form and substance of those contained in Section 11 below.

## 9. STANDARD OF PERFORMANCE

The Consultant represents that it possesses all necessary training, licenses and permits needed to perform the Basic Services. The Consultant represents that its performance of the Basic Services will conform to the standard of practice of a professional that specializes in performing professional services of a like nature and complexity.

## 10. COMPENSATION

- 10.1 Maximum Total Compensation:** The maximum amount the City will pay the Consultant for all professional fees, costs, charges and expenses related to performing Basic Services and any Additional Services is **\$19,000** (“Maximum Total Compensation”).
- 10.2 Intentionally Omitted.**
- 10.3 Exhibit B - Compensation:** The City will pay the Consultant up to the Maximum Total Compensation in accordance with **Exhibit B**.
- 10.3.1 Compensation Table:** **Exhibit B** sets forth a compensation table establishing the manner in which the City will pay the Maximum Compensation to the Consultant (“Compensation Table”). The Compensation Table is subject to the terms and conditions set forth below in Subsections 10.4 through 10.7.
- 10.3.2 Schedule of Rates and Charges:** If the City will compensate the Consultant for any Basic Services on a time-and-materials basis, then **Exhibit B** also sets forth a schedule of the Consultant’s rates and charges (“Schedule of Rates and Charges”). The Schedule of Rates and Charges is subject to the following requirements:
- 10.3.2.1 Premium Pay:** “Premium Pay” is a special pay rate for working during times that are less desirable, such as weekends, holidays or late shifts. The City will not pay Consultant Premium Pay.
- 10.3.2.2 No Increases:** The City will **not** increase the Schedule of Rates and Charges during the Agreement term.
- 10.3.2.3 Conflict:** In the event of a discrepancy between this Section and the Schedule of Rates and Charges, this Section governs.
- 10.4 Compensation Table – Part 1:** Part 1 of the Compensation Table addresses compensation for the various tasks included in the Basic Services. The following terms and conditions apply to Part 1 of the Compensation Table.
- 10.4.1 Task Numbers (Column 1):** Column 1 sets forth the task number(s) for which the City will compensate the Consultant. Each task number corresponds to the same task number in **Exhibit A**. If a task number included in **Exhibit A** is not included in the Compensation Table, then the City will not compensate the Consultant separately for that task, and payment for such task is deemed included in the other task(s) for which the Consultant is receiving compensation.
- 10.4.2 Basis of Compensation (Column 2):** Column 2 identifies whether the City will pay the Consultant for the task(s) on a time-and-materials basis or on a fixed-fee (lump-sum) basis.
- 10.4.3 Invoice Period (Column 3):** Column 3 identifies when the Consultant must submit its invoice for payment. If invoicing is monthly, the Consultant must submit its invoice to the City by the 10<sup>th</sup> Business Day of each month for work completed during the previous month. If invoicing is upon the completion of a task or group of tasks, the Consultant must submit its invoice to the Director within 20 Business Days following completion of the task(s) to the Director’s satisfaction. If invoicing is upon the completion of all work, the Consultant must submit its invoice to the Director within 20 Business Days following completion of all work to the Director’s satisfaction.
- 10.4.3.1 Invoice:** Each invoice must include sufficient information and supporting documents to establish to the Director’s satisfaction that the Consultant is entitled to the payment requested. The City will pay the undisputed portion of the invoice amount within 20 Business Days of the Director’s approval of such undisputed amount.

**10.4.3.2 Invoices Based on Time and Materials:** If time and materials is the basis of compensation, then the Consultant will base its invoice on the hours, professional fees, costs, and charges associated with the work completed during the invoice period. If the Consultant is entitled to reimbursable expenses and/or separate payment for subconsultant costs, the invoice will include such expenses and/or costs associated with the work completed during the invoice period. The City will compensate the Consultant in accordance with the Schedule of Rates and Charges included in **Exhibit B**.

**10.4.3.3 Monthly Invoices Based on Fixed Fee:** If the Consultant invoices monthly for a “fixed fee,” then the Consultant will base its monthly invoice on the percentage of work completed during the previous month. If the Consultant is entitled to reimbursable expenses and/or separate payment for subconsultant costs, the invoice will include such expenses and/or costs incurred during the previous month.

**10.4.4 Compensation (Column 4):** Column 4 sets forth the total compensation the City will pay the Consultant for completing the task(s).

**10.4.4.1 Time & Materials:** If time and materials is the basis of compensation, then the amount in Column 4 is a “not-to-exceed” or maximum amount. Any hours worked for which payment would result in a total exceeding the amount in Column 4 is at no cost to the City. If the Consultant completes the task(s) for less than the amount set forth in Column 4, the Director (in the Director’s sole discretion) *may* use the cost savings to increase the budget of another task. The Director must authorize such reallocation of cost savings in writing.

**10.4.4.2 Fixed Fee:** If “fixed fee” is the basis of compensation, then the Consultant must complete the task(s) for the amount set forth in Column 4. Any hours worked for which payment would result in a total exceeding the amount in Column 4 are at no cost to the City.

**10.5 Compensation Table – Part 2:** Part 2 of the Compensation Table indicates whether or not the City will reimburse the Consultant separately for expenses incurred in providing the work. The following terms and conditions apply if the City reimburses the Consultant separately for expenses.

**10.5.1 Subconsultants:** The cost of subconsultants is not treated as a reimbursable expense. Subsection 10.6 of this Agreement addresses payment for the cost of subconsultants.

**10.5.2 Maximum Amount of Reimbursable Expenses:** The City will reimburse the Consultant for expenses up to the maximum amount set forth in the last column of Part 2. Any expenses that the Consultant incurs in excess of the stated maximum are at no cost to the City.

**10.5.3 Expenses That Are Reimbursable:** Any reimbursement to the Consultant is limited to the expenses set forth below in the Reimbursable Expense Schedule. The City will reimburse these expenses at actual cost only unless a markup is specified.

Reimbursable Expense Schedule		Mark Up
1.	The cost of mailing, shipping and/or delivery of any documents or materials.	No Markup
2.	The cost of photographing, printing, reproducing and/or copying any documents or materials.	No Markup
3.	Telephone and facsimile transmission charges.	No Markup

4.	The rental of any specialized equipment to the extent the City's contract manager has preapproved, in writing, the cost of such rental.	As specified, not to exceed 10%
5.	With the written pre-authorization of the City's contract manager, mileage and other travel-related expenses to the same extent that the City reimburses its employees pursuant to the Employee Travel Policy (City Policy Manual, Sections 1.8.2 and 1.8.3). The Consultant acknowledges that it has received a copy of Sections 1.8.2 and 1.8.3 and is familiar with these sections of the Employee Travel Policy.	No Markup
6.	Any other expenses expressly identified in <b>Exhibit B</b> as being reimbursable.	As specified, not to exceed 10%

**10.6 Compensation Table – Part 3:** Part 3 indicates whether the City will compensate the Consultant separately for subconsultant costs incurred in providing any part of the services. If the City will compensate the Consultant for subconsultant costs, the City will do so in accordance with the following terms and conditions.

**10.6.1 Actual Costs:** The Consultant can invoice the City for no more than the actual cost of each subconsultant plus a specified markup not to exceed 5 percent.

**10.6.2 Schedule of Rates and Charges:** Any subconsultant rates and charges set forth in the Schedule of Rates and Charges, if one is included in **Exhibit B**, must be the subconsultant's actual rates and charges exclusive of any markup. The City will compensate the Consultant in accordance with those rates and charges.

**10.6.3 Maximum Amount:** The City will compensate the Consultant for all subconsultants in a total amount not to exceed the amount set forth in the last column of Part 3. Any additional subconsultant costs that the Consultant incurs in excess of the specified maximum amount are at no cost to the City.

**10.7 Compensation Table – Part 4:** Part 4 sets forth the maximum compensation that the Director can authorize for Additional Services in accordance with Subsection 3.2 above. Any Additional Services performed by the Consultant that would result in compensation exceeding this maximum amount is at no cost to the City.

**10.8 Tax Forms Required:** The following are conditions on the City's obligation to process any payment pursuant to this Agreement:

**10.8.1 U.S. Based Person or Entity:** If the Consultant is a U.S. based person or entity, the Consultant acknowledges and agrees that the Consultant is required to provide the City with a properly completed Internal Revenue Service Form W-9 before the City will process payment. If the Consultant is a U.S. based person or entity, but has neither a permanent place of business in California nor is registered with the California Secretary of State to do business in California, the Consultant acknowledges and agrees that the Consultant is required to provide the City with a properly completed California Franchise Tax Board form related to nonresident withholding of California source income.

**10.8.2 Non-U.S. Based Person or Entity:** If the Consultant is not a U.S. based person or entity, the Consultant acknowledges and agrees that the Consultant is required to provide the City with the applicable Internal Revenue Service form related to its foreign status and a California Franchise Tax Board form related to nonresident withholding before the City will process payment.

## 11. INDEMNIFICATION

- 11.1 Obligation:** The Consultant shall defend, indemnify and hold harmless the City and its officers, employees and agents against all claims, losses, damages, injuries, expenses or liabilities that – directly or indirectly, or in whole or in part - arise out of, pertain to, or relate to any of the following:
- The Consultant’s negligent performance of all or any part of the Basic Services and any Additional Services; or
  - Any negligent act or omission, recklessness or willful misconduct of the Consultant, any of its Subcontractors, anyone directly or indirectly employed by either the Consultant or any of its Subcontractors, or anyone that they control; or
  - Any infringement of the patent rights, copyright, trade secret, trade name, trademark, service mark or any other proprietary right of any person(s) caused by the City’s use of any services, deliverables or other items provided by the Consultant pursuant to the requirements of this Agreement; or
  - Any breach of this Agreement.
- 11.2 Limitation on Obligation:** The obligation in Subsection 11.1 above shall not apply to the extent that any claim, loss, damage, injury, expense or liability results from the sole negligence or willful misconduct of the City or its officers, employees or agents.
- 11.3 Duty to Defend:** The Consultant’s obligation in Subsection 11.1 above applies to the maximum extent allowed by law and includes defending the City, its officers, employees and agents as set forth in Sections 2778 and 2782.8 of the California Civil Code. Upon the City’s written request, the Consultant, at its own expense, shall defend any suit or action that is subject to the obligation in Subsection 11.1 above.
- 11.4 Insurance:** The City’s acceptance of any insurance in accordance with Section 12 does not relieve the Consultant from its obligations under this Section 11. The Consultant’s obligations under this Section 11 apply whether or not the insurance required by the Agreement covers any damages or claims for damages.
- 11.5 Survival:** The Consultant’s obligations under this Section 11 survive the expiration or earlier termination of the Agreement.

## 12. INSURANCE REQUIREMENTS

- 12.1 General:** The Consultant shall comply with the insurance requirements set forth in **Exhibit C** for the Agreement term.
- 12.2 Documentation:** Before performing any services, the Consultant must submit to the City’s designated risk manager ("Risk Manager"), for the Risk Manager’s written approval, all documents demonstrating compliance with the requirements of **Exhibit C**.
- 12.3 Changes:** The Risk Manager may amend or waive, in writing, any of the requirements contained in **Exhibit C**.

## 13. OWNERSHIP OF WORK PRODUCT

- 13.1 Ownership:** The City owns all rights in and to any of the following work product (including electronic equivalents) without restriction or limitation upon their use, and immediately when and as created by the Consultant or any other person engaged directly or indirectly by the Consultant to perform the Consultant’s services pursuant to this Agreement: reports, drawings, plans, data, software, models, documents or other materials developed or discovered (collectively “Work Product”).

### 13.2 **Copyright:**

A. Except as provided in this Agreement, Consultant shall retain all copyrights in the Artwork described in Exhibit A. Consultant's copyright shall not extend to predominantly functional aspects of the Site that may be incorporated into Artwork or which are in the area of the Artwork, such as the flooring, walls and other fixtures and features of the Site, furnishings, or other similar objects located at the Site. If Consultant is comprised of two or more individual persons, the individual persons shall be deemed joint authors of the Artwork.

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

### 13.3 **Intentionally Omitted.**

13.4 **Consultant's Reuse:** With the Director's prior written consent, the Consultant may retain and use copies of the Work Product for reference and as documentation of experience and capabilities.

## 14. DISCLOSURE OF WORK PRODUCT

14.1 **Prohibition:** Except as authorized by the Director or as otherwise required by law, the Consultant shall not disclose any of the following to a third party: (a) Work Product, (b) discussions between the City and Consultant, or (c) information prepared, developed or received by the Consultant or any of its Subcontractors in the course of performing services pursuant to this Agreement.

14.2 **Notification:** The Consultant will immediately notify the Director if it is requested by a third party to disclose any Work Product, discussions or information that the Consultant is otherwise prohibited from disclosing.

14.3 **Limit on Prohibition:** The prohibition in Subsection 14.1 above does not apply to disclosures between the Consultant and its Subcontractors that are needed to perform the Basic Services.

14.4 **Survival:** This Section 14 survives the expiration or earlier termination of this Agreement.

## 15. AUDIT/INSPECTION OF RECORDS

15.1 **Retention Period:** The Consultant shall retain the following records (collectively "Records") for a minimum of 3 years from the date of the City's final payment to the Consultant under this Agreement or for any longer period required by law:

- All ledgers, books of accounts, invoices, vouchers, canceled checks, and other records relating to the Consultant's charges for performing services, or to the Consultant's expenditures and disbursements charged to the City; and
- All Work Product and other records evidencing Consultant's performance.

15.2 **Producing Records:** At any time during the Agreement term or during the period of time that the Consultant is required to retain the Records, the City Manager, the Director, the City Attorney, the City Auditor, or a designated representative of any of these officers may request, in writing, production of all or a portion of the Records. The Consultant shall produce the requested Records at City Hall during normal business hours, or at any other location and time mutually agreed upon by the parties. The Consultant shall produce the requested Records at no cost to the City.



- 15.3 State Auditor:** In accordance with Government Code Section 8546.7, the Consultant may be subject to audit by the California State Auditor with regard to the Consultant's performance of this Agreement if the compensation under this Agreement exceeds \$10,000.

## **16. NON-DISCRIMINATION/NON-PREFERENCE**

- 16.1 Prohibition:** The Consultant shall not discriminate against, or grant preferential treatment to, any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. This prohibition applies to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing.
- 16.2 Intentionally Omitted.**
- 16.3 Subcontracts:** The Consultant shall include Subsection 16.1 of this Agreement in each subcontract that it enters into in furtherance of this Agreement.

## **17. CONFLICT OF INTEREST**

- 17.1 General:** The Consultant represents that it is familiar with the local and state conflict of interest laws, and agrees to comply with those laws in performing this Agreement. The Consultant certifies that, as of the Contract Date, it was unaware of any facts constituting a conflict of interest or creating an appearance of a conflict of interest. The Consultant shall avoid all conflicts of interest or appearances of conflicts of interest in performing this Agreement. The Consultant has the obligation of determining if the manner in which it performs any part of this Agreement results in a conflict of interest or an appearance of a conflict of interest, and shall immediately notify the City in writing if it becomes aware of any facts giving rise to a conflict of interest or the appearance of a conflict of interest.
- 17.2 Filing Form 700:** In accordance with the California Political Reform Act (Government Code Section 81000 et seq.), the Consultant shall cause each person performing services under this Agreement, and identified as having to file a Form 700 to do each of the following:
- Disclose the categories of economic interests in Form 700 as required by the Director;
  - Complete and file the Form 700 no later than 30 calendar days after the person begins performing services under this Agreement and all subsequent Form 700s in conformance with the requirements specified in the California Political Reform Act; and
  - File the original Form 700 with the City's Clerk with a copy submitted to the Director.
- 17.3 Future Services:** The Consultant acknowledges each of the following with regard to performing future services for the City:
- The Consultant's performance of the services required by this Agreement may create an actual or appearance of a conflict of interest with regard to the Consultant performing or participating in the performance of some related **future** services, particularly if the services required by this Agreement comprise one element or aspect of a multi-phase process or project;
  - Such an actual or appearance of a conflict of interest would be a ground for the City to disqualify the Consultant from performing or participating in the performance of such future services; and

- The Consultant is solely responsible for considering what potential conflicts of interest, if any, performing the services required by this Agreement might have on its ability to obtain contracts to perform future services.

## 18. ENVIRONMENTALLY PREFERABLE PROCUREMENT POLICY

**18.1 General:** The Consultant shall perform its obligations under the Agreement in conformance with City Council Policy 1-19, entitled “Prohibition of City Funding for Purchase of Single Serving Bottled Water,” and City Council Policy 4-6, entitled “Environmentally Preferable Procurement Policy.”

**18.2 Prohibition of City Funding for Purchase of Single Serving Bottled Water:** The City’s policy is that City funds should not be used for the purchase of single-serving bottled water except for any of the following:

- Public safety emergencies, investigations and extended deployments or activation of the Office of Emergency Services;
- Situations where there is a high risk of cross-contamination with non-potable water; or
- Situations where there are no reasonable alternatives to bottled water, such as large public events and when large quantities of water need to be distributed for health and safety reasons.

An invoice seeking reimbursement from City for the cost of single-serving bottled water under one of the above exceptions must be accompanied by a waiver form provided by the City and signed by the Director.

**18.3 Environmentally Preferable Procurement Policy:** The Environmentally Preferable Procurement Policy, along with a brief policy description, is located on the City’s website at the following link: <https://www.sanjoseca.gov/your-government/environment/business-school-resources/for-schools/environmentally-preferable-procurement>. Environmental procurement policies and activities related to the completion of Consultant’s work will include, whenever practicable, but are not limited to:

- The use of recycled and/or recyclable products in daily operations (i.e. 30%, 50%, 100% PCW paper, chlorine process free, triclosan free hand cleaner, etc.);
- The use of Energy-Star Compliant equipment;
- The use of alternative fuel and hybrid vehicles, and implementation of protocols aimed at increasing the efficiency of vehicle operation;
- The implementation of internal waste reduction and reuse protocol(s); and
- Water and resource conservation activities within facilities, including bans on individual serving bottled water and the use of compostable food service products.

## 19. TERMINATION

**19.1 For Convenience:** The Director may terminate this Agreement at any time and for any reason by giving the Consultant written notice of the termination. The written notice must set forth the effective date of the termination, which must be at least 7 Business Days’ after the date of the written notice.

**19.2 For Cause:** The Director may terminate this Agreement immediately upon written notice for any material breach by the Consultant. If the Director terminates the Agreement for cause and obtains the same services from another consultant at a greater cost, the Consultant is responsible for such excess cost in addition to any other remedies available to the City.

**19.3 Delivery of Work:** If the Director terminates the Agreement – whether for convenience or for cause – the Director has the option of requiring the Consultant to provide to the City any finished

or unfinished Work Product prepared by the Consultant up to the date of Consultant's receipt of the written notice of termination.

- 19.4 Compensation:** The City will pay the Consultant the reasonable value of services satisfactorily rendered by the Consultant to the City up to the date of Consultant's receipt of the written notice of termination. For services to be "satisfactorily rendered," the Director must determine that the Consultant provided them in accordance with the terms and conditions of this Agreement. The Director will determine the reasonable value of satisfactorily rendered services based on the Compensation Table and any Schedule of Rates and Charges attached to this Agreement.
- 19.5 Receipt of Notice:** For purposes of this provision, the Consultant's receipt of the written notice of termination will be determined based on the date of actual receipt or based on Subsection 20.2 below, whichever occurs first.

## 20. NOTICES

- 20.1 Manner of Giving Notice:** All notices and other communications required by this Agreement must be in writing, and must be made via e-mail, personal service or United States mail, postage prepaid.
- 20.2 When Effective:** A notice or other communication that is e-mailed is effective when sent provided the sender receives an acknowledgement from the intended recipient (e.g. return receipt, return e-mail, or other written acknowledgement). A notice or other communication that is personally served is effective when personally delivered. A notice or other communication that is mailed is effective 3 calendar days after deposit in the United States mail.
- 20.3 To Whom Given:** All notices and other communications between the parties regarding the Agreement must be given to the individuals identified below using the appropriate contact information for giving notice:

To the City:                      City of San José  
Office of Cultural Affairs  
Attn: Mary Rubin  
200 East Santa Clara Street, 12th Floor  
San José, CA 95113  
408 793-4340  
[Mary.rubin@sanjoseca.gov](mailto:Mary.rubin@sanjoseca.gov)

To the Consultant:              Todd Andrews  
16311 Indian Springs Ranch Road  
Grass Valley, CA  
95949  
530 272-7612  
[todd-sculptor@att.net](mailto:todd-sculptor@att.net)

- 20.4 Changing Contact Information:** Either party may change its contact information for receiving written notices and communications regarding the Agreement by providing notice of such change to the other party pursuant to this Section 20.

## 21. MISCELLANEOUS

- 21.1 Gifts Prohibited:** The Consultant represents that it is familiar with Chapter 12.08 of the San José Municipal Code, which generally prohibits a City officer or designated employee from accepting any gift. The Consultant shall not offer any City officer or designated employee any gift prohibited by Chapter 12.08. The Consultant's violation of this Subsection 21.1 is a material breach.

- 21.2 Disqualification of Former Employees:** The Consultant represents that it is familiar with Chapter 12.10 of the City's Municipal Code, which generally prohibits a former City officer and a former designated employee from providing services to the City connected with his/her former duties or official responsibilities. The Consultant shall not use either directly or indirectly any officer, employee or agent to perform any services if doing so would violate Chapter 12.10. The Consultant's violation of this Subsection 21.2 is a material breach.
- 21.3 Waiver of a Violation:** The City's waiver of any violation of this Agreement by the Consultant is not a waiver of any other violation by the Consultant.
- 21.4 Acceptance of Services Not a Waiver:** The City's acceptance of any service or deliverable is not a waiver or release of any professional duty of care applicable to such service or deliverable, or of any right of indemnification, any insurance requirements, or any other term or condition of this Agreement.
- 21.5 Compliance with Laws:** The Consultant shall perform all services consistent with all applicable federal, state and local laws, ordinances, codes and regulations. This obligation is not limited in any way by the Consultant's obligation to comply with any specific law, ordinance, code or regulation set forth elsewhere in this Agreement.
- 21.6 Business Tax:** The Consultant represents and warrants that it currently has a City business tax certificate or exemption, if qualified, and will maintain such certificate or exemption for the Agreement term.
- 21.7 Assignability:** Except to the extent this Agreement authorizes the Consultant to use subconsultants, the Consultant shall not assign any part of this Agreement without the Director's prior written consent. The Director, at the Director's discretion, may void this Agreement if a violation of this provision occurs.
- 21.8 Governing Law:** California law governs the construction and performance of this Agreement.
- 21.9 Disputes:** Any litigation resulting from this Agreement will be filed and resolved by a federal or state court in California.
- 21.10 Survival of Provisions:** If a court finds any part of this Agreement unenforceable, all other parts shall remain enforceable.
- 21.11 Headings:** The section and exhibit headings are for convenience only and are not to be used in its construction.
- 21.12 Execution in Counterparts:** This Agreement may be executed in any number of counterparts and by each party in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same instrument.
- 21.13 Use of Electronic Signatures:** Unless otherwise prohibited by law or City policy, the parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term "electronic copy of a signed contract" refers to a writing as set forth in Evidence Code Section 1550. The term "electronically signed contract" means a contract that is executed by applying an electronic signature using technology approved by the City.

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**IN WITNESS WHEREOF**, the City and Consultant have caused this Agreement to be executed by their respective duly authorized representatives as follows.

**NOTE:** The Consultant must make one of the following representations by placing its initials in the space provided. **The City will not process this Agreement unless the Consultant has initialed one of the provisions.**

\_\_\_\_\_ The Consultant certifies that the Consultant has a permanent place of business in California or is registered with the California Secretary of State to do business in California. The Consultant will file a California tax return and withhold on payments of California source income to nonresidents when required. If the Consultant ceases to have a permanent place of business in California or ceases to do any of the above, the Consultant will promptly notify the City at the address specified in Subsection 20.3 of this Agreement.

Or

\_\_\_\_\_ If the Consultant is unable to make the above certification, the Consultant acknowledges and agrees to provide the City with the applicable tax forms issued by the Internal Revenue Service and California Franchise Tax Board, as applicable, as specified in Section 10.8 of this Agreement.

**City of San José**

*Sarah Zarate*

*Sarah zarate*

By \_\_\_\_\_ 12/27/21

Name: Sarah Zarate Date  
Title: Director

**Consultant**

*Todd Andrews*

*Todd Andrews*  
todd-sculptor@att.net (12/23/2021)  
Email: todd-sculptor@att.net

By \_\_\_\_\_

Name: Todd Andrews Date

**Approval as to Form (City Attorney):**

**Form Approved by the Office of the City Attorney**

(Maximum Total Compensation is \$100,000 or less, and standard provisions of the form are not altered.)

**Approved as to Form:**

*Arlene Silva*

*Sarah Zarate*  
Sarah Zarate (12/27/2021)  
Email: sarah.zarate@sanjoseca.gov

\_\_\_\_\_  
Arlene Silva Date  
Deputy City Attorney

## EXHIBIT A: SCOPE OF BASIC SERVICES

(Non-Capital Projects)

The Consultant shall provide services and deliverables as set forth in this **Exhibit A**. The Consultant shall provide all services and deliverables required by this **Exhibit A** to the satisfaction of the Director.

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### General Description of Project:

The City is seeking to restore "Hummingbirds," the Muwekma Ohlone tribute ("Artwork") located on the Park Avenue Bridge over the Guadalupe River (west of Almaden Blvd), in San José, CA ("Site").

The original "Hummingbirds" sculpture ("Artwork") was composed of four sculptures, each mounted on one of four 60' flagpoles. Each of the four sculptures was a composition that included four hummingbirds, each 15 lb., 15 inches tall, with wingspans of approximately 29". In 2017, one sculpture was damaged. As a matter of precaution, the three remaining sculptures were dismantled by the City and stored in a secure location.

City now wishes to shall retain the services of the Artwork's original artist, Todd Andrews ("Consultant"), for repairs. The scope includes the following: developing a design to reconfigure the three remaining sculptures (each with four figurative hummingbird elements) into four sculptures (each with three figurative hummingbird elements); preparing structural drawings depicting the fabrication and installation of Artwork and primary base structure ("Topper"), certified by a qualified engineer, licensed by the State of California, for approval by City's Department of Public Works; casting and welding of damaged parts; causing the fabrication (or procurement) of Topper; final sculptural assembly; transportation of Artwork to the site; and coordination with City's third-party contractor responsible for installation of Artwork on Flagpoles.

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### Task No. 1: Transportation and Assessment of Current Conditions

- A. **Services:** Consultant shall be responsible for transportation of Artwork, from its current location in storage at 95 N. 3<sup>rd</sup> Street Garage, San José, to Consultant's place of work in Grass Valley, CA. Consultant shall work with City Staff to schedule access to sculptures in storage. Consultant will conduct a written and photographic assessment of existing conditions and their required repair, which may include recasting certain small-scale elements.
- B. **Deliverable:** Written and photographic assessment of the sculptures' existing conditions and description of repairs needed.
- C. **Completion Time:** The Consultant must complete the services and deliverable for this task in accordance with whichever one of the following time is marked:
  - On or before the following date: January 31, 2022
  - On or before \_\_\_\_ Business Days from \_\_\_\_\_.

### Task No. 2: Design Proposal

- A. **Services:** Consultant shall develop a Design Proposal, including dimensioned drawings of the proposed reconfigured Artwork and Topper; recommendation of parts requiring recasting (if any); a detailed description of any proposed alteration of existing flagpoles; and a summary of proposed fabrication and installation process. Consultant shall attend one meeting with City's third-party contractor responsible for flagpole alterations and installation, to coordinate pole attachment design and installation method.

- B. Deliverable:** Design Proposal will be submitted to City Staff for review and approval. Consultant recognizes that City Staff may make comments and require modifications.
- C. Completion Time:** The Consultant must complete the services and deliverable for this task in accordance with whichever one of the following time is marked:
- On or before the following date: February 9, 2022.
- On or before \_\_\_\_ Business Days from \_\_\_\_\_.

### Task No. 3: Construction Documentation

- A. Services:** Consultant shall cause the preparation of drawings depicting both the fabrication and installation of the Artwork as proposed by the Design Proposal (the "Construction Documents"). Consultant shall be responsible for obtaining any and all information necessary for preparation of the Construction Documents, including without limitation, any field measurements. 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. Once the Construction Documents are approved, City's Program Officer will notify Consultant in writing.
- B. Deliverables:** Submittal of Construction Documents, certified by a qualified engineer, licensed by the State of California, for review and approval by the City's Department of Public Works. Consultant will be responsible for any modifications required by the Department of Public Works for approval.
- C. Completion Time:** The Consultant must complete the services and deliverable for this task in accordance with whichever one of the following time is marked:
- On or before the following date: February 18, 2022.
- On or before \_\_\_\_ Business Days from \_\_\_\_\_.

### Task No. 4: Restoration

- A. Services:** Artist shall fabricate the Artwork consistent with the Construction Documents (as approved by the Department of Public Works), including without limitation, supervising all aspects of the fabrication of the Artwork to ensure proper fabrication of the Artwork and Topper. 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. Consultant reserves the right to make minor adjustments to the Artwork, as Consultant 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, Consultant shall make no change in the design that requires a modification of the Construction Documents without the prior written approval of City's Department of Public Works Director.
- B. Deliverables:** Restoration and reassembly of Artwork and fabrication of Topper.
- C. Completion Time:** The Consultant must complete the services and deliverable for this task in accordance with whichever one of the following time is marked:
- On or before the following date: May 6, 2022
- On or before \_\_\_\_ Business Days from \_\_\_\_\_.



### Task No. 5: Transportation and Installation Oversight

- A. Services:** City and Consultant agree that various elements of the Artwork may be fabricated at locations away from the Site (collectively, "Off-Site Elements"). Consultant 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. Within fifteen (15) business days of receipt of the Inspection Notice for each Off-Site Element, City's Program Officer will inform Consultant 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 ("Transport 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-business day inspection period, the Transport Notice to Proceed will be deemed to have been issued at the conclusion of the 15-business 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.

Upon issuance of the Transport Notice to Proceed, Consultant shall deliver the Artwork to the Site. Consultant shall coordinate with City's Staff and City's third-party contractor, regarding the time, place and manner of delivery and installation of the Artwork. City Staff shall have the right to inspect the Artwork when the Artwork arrives at the Site in order to determine whether it has been damaged in transit or whether it deviates in any way from the Artwork approved by City's Staff 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. Consultant 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.

Consultant, as the original artist, shall sign Waiver of Proprietary Rights for Artwork Placed Upon CITY PROPERTY under VARA and CAPA, attached to this agreement as Exhibit D.

Consultant shall be available to observe installation by City's third-party contractor.

- B. Deliverables:** 1) Consultant shall deliver the Artwork and Toppers to the Site. 2) Executed Waiver of Proprietary Rights for Artwork Placed Upon CITY PROPERTY under VARA and CAPA.
- C. Completion Time:** The Consultant must complete the services and deliverable for this task in accordance with whichever one of the following time is marked:

- On or before the following date: May 31, 2022
- On or before \_\_\_\_ Business Days from \_\_\_\_\_.

**EXHIBIT B: COMPENSATION**

**Section 1 – Compensation Table**

<b>Part 1 – Compensation for Basic Services</b>			
Column 1	Column 2	Column 3	Column 4
Task Nos.	Basis of Compensation	Invoice Period	Compensation
1	<input type="checkbox"/> Time & Materials <input checked="" type="checkbox"/> Fixed Fee	<input type="checkbox"/> Monthly <input checked="" type="checkbox"/> Completion of Task(s)	\$2,000
2	<input type="checkbox"/> Time & Materials <input checked="" type="checkbox"/> Fixed Fee	<input type="checkbox"/> Monthly <input checked="" type="checkbox"/> Completion of Task(s)	\$2,000
3	<input type="checkbox"/> Time & Materials <input checked="" type="checkbox"/> Fixed Fee	<input type="checkbox"/> Monthly <input checked="" type="checkbox"/> Completion of Task(s)	\$2,000
4	<input type="checkbox"/> Time & Materials <input checked="" type="checkbox"/> Fixed Fee	<input type="checkbox"/> Monthly <input checked="" type="checkbox"/> Completion of Task(s)	\$6,000
5	<input type="checkbox"/> Time & Materials <input checked="" type="checkbox"/> Fixed Fee	<input type="checkbox"/> Monthly <input checked="" type="checkbox"/> Completion of Task(s)	\$2,000
<b>Part 2 – Reimbursable Expenses</b>			
<input checked="" type="checkbox"/> No expenses are separately reimbursable. The amount(s) in Column 4 of Part 1 include(s) payment for all expenses.		<input type="checkbox"/> Expenses are separately reimbursable in accordance with Subsection 10.5 of this Agreement. The maximum amount of reimbursable expenses is:	
		\$0	
<b>Part 3 – Subconsultant Costs</b>			
<input checked="" type="checkbox"/> Subconsultant costs are <b>not</b> separately compensable. The amount(s) in Column 4 of Part 1 include(s) payment for subconsultants.		<input type="checkbox"/> Subconsultant costs are separately compensable in accordance with Subsection 10.6 of this Agreement. The maximum amount of compensation for subconsultant costs is:	
		\$0	
<b>Part 4 – Additional Services</b>			
<input type="checkbox"/> No money is budgeted for Additional Services, and the Director can not authorize any Additional Services.		<input checked="" type="checkbox"/> The Director may authorize the Consultant to perform Additional Services up to the following maximum amount:	
		\$5,000	

	<b>Maximum Total Compensation (sum of Parts 1 through 4):</b> \$19,000
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**Section 2 – Schedule of Rates and Charges**

- Omitted.** No Schedule of Rates and Charges is included because the City will not be compensating the Consultant for any Basic Services on a “time & materials” basis.
- The following is the Schedule of Rates and Charges applicable to this Agreement:

## EXHIBIT C: INSURANCE REQUIREMENTS

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

### A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and
2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors & Omissions for all professional services.

There shall be no endorsement reducing the scope of coverage required above unless approved by the CITY's Risk Manager.

### B. Minimum Limits of Insurance

Consultant shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident; and
4. Professional Liability Errors & Omissions \$1,000,000 per occurrence/ aggregate limit.

### C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager. At the option of City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officers, employees, agents and contractors; or Consultant shall procure a bond

guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City's Risk Manager.

**D. Other Insurance Provisions**

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

1. Commercial General Liability and Automobile Liability Coverages
  - a. The City of San José, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Consultant; products and completed operations of Consultant; premises owned, leased or used by Consultant; and automobiles owned, leased, hired or borrowed by Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, employees, agents and contractors.
  - b. Consultant's insurance coverage shall be primary insurance as respects City, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officers, employees, agents or contractors shall be excess of Consultant's insurance and shall not contribute with it.
  - c. Any failure to comply with reporting provisions of the policies by Consultant shall not affect coverage provided City, its officers, employees, agents, or contractors.
  - d. Coverage shall state that Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
  - e. Coverage shall contain a waiver of subrogation in favor of the City, its officers, employees, agents and contractors.
2. Workers' Compensation and Employers' Liability

Coverage shall contain waiver of subrogation in favor of the City of San José, its officers, employees, agents and contractors.

3. All Coverages

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, cancelled, or reduced in limits except after thirty (30) days' prior written notice has been given to City, except that ten (10) days' prior written notice shall apply in the event of cancellation for nonpayment of premium.

**E. Acceptability of Insurers**

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

**F. Verification of Coverage**

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

Proof of insurance shall be either emailed in pdf format to: [Riskmgmt@sanjoseca.gov](mailto:Riskmgmt@sanjoseca.gov), or mailed to the following postal address or any subsequent address as may be directed in writing by the Risk Manager:

City of San José—Finance Department  
Risk & Insurance  
200 East Santa Clara Street, 14th Floor Tower  
San José, CA 95113-1905

**G. Subcontractors**

Consultant shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor

**H. Exception**

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

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

Signature:

SEE WAIVER ON FILE

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Todd Andrews

Date

## **Exhibit D: Waiver of Proprietary Rights for Artwork Placed Upon CITY PROPERTY under VARA and CAPA**

Artist has designed a work of visual art to be placed on City property.

DESCRIPTION: Four (4) sculptures of figurative hummingbirds; composed of 3 birds, each 15 lb., 15 inches tall, with wingspans of approximately 29". The sculptures are displayed on poles of various heights.

TITLE, DATE: Hummingbirds, 2022

DIMENSIONS: Each of 4 sculptures is composed of 3 birds. The total dimension for each grouping is approximately 45" X 29".

ADDRESS/LOCATION: Park Avenue Bridge Park Ave Bridge over the Guadalupe River (west of Almaden Blvd), in San José, CA

In consideration of the City's approval of the Artist design of visual art ("the Work") for the City, artist agrees to waive and does hereby waive voluntarily all rights to attribution and integrity with respect to the Work and any and all claims as may arise under the Visual Artists Rights Act of 1990, 17 U.S.C. §§106A and 113(d) ("VARA"), the California Art Preservation Act (Cal. Civ. Code §§987 and 989) ("CAPA"), or any other local, state, foreign or international law, as currently drafted or as may be hereafter amended, that conveys the same or similar rights ("Moral Rights Laws"), with respect to the Work, its display, removal from display, exhibition, installation, conservation, storage, study, alteration and any other activities conducted by the City, its officers, employees, agents, contractors, licensees, successors or assigns. If the Work is incorporated into a building such that the Work cannot be removed from the building without physical defacement, mutilation, alternation, distortion, destruction, or other modification (collectively, "Modification") of the Work, artist waives any and all such claims under any Moral Rights Laws arising out of or against any current or future owners of the site, and its agents, officers and employees, for Modification of the Work.

The City has the absolute right to change, modify, destroy, remove, relocate, move, replace, transport, repair or restore the Work, in whole or in part, in City's sole discretion.

The City has no obligation to pursue claims against third parties for modifications or damage to the Work done without the City's authorization. However, the City may pursue claims against third parties for modifications or damage or to restore the Work if the work has been modified without the City's

