

**AGREEMENT BETWEEN
THE CITY OF SAN JOSE,
THE SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
AND
ARTIST
TO DESIGN, FABRICATE AND INSTALL A WORK OF ART
at EASTRIDGE TO BART REGIONAL CONNECTOR - EASTRIDGE STATION**

This agreement ("**Agreement**") is made and entered into this 8th day of March, 2022, by and between the CITY OF SAN JOSE ("**City**"), a municipal corporation, SANTA CLARA VALLEY TRANSPORTATION AUTHORITY ("**VTA**") and Haddad Drugan, LLC ("**Artist**"), a LLC Artist Partnership of Laura Haddad and Thomas Drugan, (individually referred to as "party" and collectively referred to as "parties").

RECITALS

- A. VTA is the lead agency undertaking the design associated with the development of the Eastridge to BART Regional Connector - Eastridge Station, to be located in San José, California (hereinafter the "**Site**").
- B. VTA wishes to commission a public art project (hereinafter "**Artwork**") which is to be located at the Site, which Artwork will be wholly owned and controlled by VTA.
- C. VTA has engaged services of City by and through its Public Art Program to provide public art management services for the Artwork.
- D. On August 11, 2021, a panel of arts professionals and project stakeholders recommended Artist as the most qualified to design and implement the Artwork ("**Artwork Design**").
- E. City will oversee the development of the Artwork as a consultant to VTA. City will be responsible for the management of artwork design, fabrication and installation including all notices to Artist, and payment approvals as set forth in this Agreement.

In view of the above recitals, the parties agree as follows:

SECTION 1. SCOPE OF SERVICES.

Artist shall perform to the satisfaction of VTA and City those services specified in detail in the attached EXHIBIT A, entitled "ARTIST'S SERVICES", and referred to in this Agreement as "**Artist's Services**", in accordance with the schedule further described in Section 2, below.

SECTION 2. SCHEDULE OF PERFORMANCE: ARTIST SERVICES

2.0. GENERAL. Artist will begin work after execution of agreement in accordance with the schedule set out in the attached EXHIBIT B, entitled "Schedule of Performance"

2.1. TIME IS OF THE ESSENCE. It is understood that time is of the essence in the performance of Artist's Services under this Agreement.

2.2 FORCE MAJEURE.

A. For purposes of this Agreement, the term "Force Majeure" shall mean earthquake, fire, or other casualty, flood, landslide, epidemic, unforeseeable adverse weather, "acts of God," war, civil

disturbance, court ordered injunction, intervention by civil or military authorities or government, strikes, lockouts, boycotts, or other labor disputes, to the extent any of the foregoing are beyond the reasonable control of either City or Artist and which cause such party to be delayed or hindered in or prevented from the performance of any covenant or obligation under this Agreement other than the payment of money.

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

2.3. TERM. The Agreement term is from the Contract Date to the earlier day of either Notice of Final Acceptance (Part 14 of Exhibit A) or December 31, 2027.

SECTION 3. COMPENSATION AND METHOD OF PAYMENT.

3.0 COMPENSATION. The maximum compensation to be paid to Artist (“**Total Price**”) is set forth in the attached EXHIBIT C, entitled “COMPENSATION.” The rate, schedule and method of payment also are set out in EXHIBIT C. Such payment shall constitute full and complete compensation for work performed and services rendered, including, but not limited to, professional services and reimbursable expenses, all supervision, labor, supplies, required permits, materials, equipment or use thereof, taxes, and for all other necessary incidentals.

3.1. COST OVERRUN. In the event Artist incurs costs in excess of the maximum compensation set forth in EXHIBIT C, due to changes or miscalculations made by Artist, Artist shall pay such excess from Artist’s own funds. Neither City nor VTA shall be required to pay any part of such excess and Artist shall not have any claim against either City or VTA on account of any cost overruns to the extent that such cost overruns are due to the actions of the Artist.

3.2. COST SAVINGS. If, after City issues the Notice to Proceed to Artist directing Artist to proceed with fabrication of the Artwork as set forth in EXHIBIT A, City or VTA approves any modification of the Artwork Proposal or the Construction Documents (as defined in Exhibit A, Part 11), which results in cost savings such as, but not limited to, the deletion of an element of the Artwork, the substitution of lesser quality, quantity and/or cost materials with no offsetting upgrade of other materials, or the reduction in the Artwork’s size, the cost savings attributable to the modification will not be paid to the Artist.

3.4. RIGHT TO WITHHOLD PAYMENT. In the event that City or VTA determines that work for which it has been invoiced does not meet the terms of this Agreement, payment to Artist may be withheld. In the event payment is withheld, City shall provide detailed written notice to Artist within fifteen (15) calendar days of receipt of Artist’s invoice, specifying the failure of performance for which City intends to withhold payment. Within fifteen (15) calendar days of Artist’s receipt of said notice, Artist shall cure the objection or if objections are not capable of cure within fifteen (15) calendar days, Artist shall commence to cure objections and then promptly proceed to complete the cure. If Artist disputes City’s or VTA’s determination that the Agreement’s specifications have not been met, within fifteen (15) calendar days of Artist’s receipt of notice, Artist shall notify City in writing. In such event, City and VTA shall make reasonable efforts to resolve the dispute; however, the final determination as to whether Artist has complied with the terms of this Agreement will remain with VTA. Any payments not in dispute shall be promptly paid to Artist. If Artist fails to cure the objections set forth in this Section 3.4, VTA may then choose to terminate this agreement by providing Artist with a Notice of Termination as set forth in Section 12 below. However, notwithstanding the provisions of Section 12, said

Termination Notice shall not be required to provide Artist with an additional period in which to cure the default.

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

SECTION 4. CHANGES IN SCOPE.

No services for which additional compensation will be charged shall be provided by Artist without prior written amendment to this Agreement signed by authorized officers of City and VTA.

SECTION 5. RESPONSIBILITIES OF THE ARTIST.

5.0. COMPLIANCE WITH BUDGET CONSTRAINTS. Artist shall be responsible for providing services described in EXHIBIT A including, but not limited to, the quality and timely completion of the services without exceeding the total budget for the Artwork as set forth in EXHIBIT A.

Artist shall be responsible for developing the Artwork Design so that the Artwork can be designed, constructed and installed without exceeding the total budget of Four Hundred Twenty Thousand Dollars (\$420,000.00). In addition, the Budget may be increased, at the discretion of the CITY by up to Thirty Thousand Dollars (\$30,000.00) (the “**Contingency Fund**”), some or all of these funds may be paid to the Artist where unforeseeable and unavoidable circumstances cause an increase in the costs incurred by Artist in the fabrication (under Artist’s direct control) and installation of the Artwork. CITY (in consultation with VTA) shall not approve a draw from the Contingency Fund to make corrections to the extent that those corrections are the responsibility of the Artist or Artist’s subcontractors, nor to pay for any costs that Artist could have reasonably avoided. Artist shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in Artist’s work.

5.1. PERSONNEL. Artist has, or will secure at Artist’s expense, all personnel required to perform Artist’s Services. Work under this Agreement shall be performed only by competent personnel with the necessary license, training, and skills, under the supervision, or in the employment, of Artist. All persons retained by Artist shall possess the requisite licenses, insurance and permits necessary to perform the work.

5.2. COORDINATION. Artist acknowledges that it is an essential element of the Artist’s Services to coordinate with City, as well as VTA and its consultants, contractors and other persons who may be involved with the development of the Artwork design, fabrication and installation. City and VTA agree that such persons will be made reasonably available to Artist for coordination and communication. Artist agrees to accept responsibility for the coordination with persons designated by City and/or VTA to be necessary to complete Artist’s Services. Artist also agrees to meet and communicate with other persons involved with the Artwork as required by City or VTA to ensure proper coordination of the Artwork Design.

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

SECTION 6. SITE INFORMATION /ARTWORK IDENTIFICATION.

6.0. SITE INFORMATION. City and VTA shall be responsible for providing Artist, at no cost to Artist, copies of existing designs, drawings, reports, and other relevant existing data reasonably required by

Artist in order to perform Artist's Services, upon which Artist may reasonably rely. Notwithstanding the foregoing, Artist shall be responsible for field measurements.

6.1. ARTWORK IDENTIFICATION. VTA will cause and install identification for the completed Artwork, which will include the following information: Artist's name, year in which Artwork is completed, Artwork title, sponsorship partners (if any) and such other information as determined by VTA. Identification may be in the form of a plaque, brochure, audio identification, or other method that is consistent with identification throughout the remainder of the VTA property.

SECTION 7. INDEPENDENT CONTRACTOR.

It is understood and agreed that Artist's relationship with City and VTA is strictly and solely that of an independent contractor, and not as an agent or an employee of City or VTA; and, as an independent contractor, Artist shall obtain no rights to retirement benefits or other benefits which accrue to City's or VTA's employees. Artist hereby expressly waives any claim Artist may have to any such rights. Artist further agrees to acknowledge and accept sole responsibility for determining the method and means by which Artist will fulfill Artist's obligations under this Agreement. Neither City nor VTA is under any obligation to supervise the Artist's performance of services that are described under this Agreement. Nothing contained in this Agreement shall be construed to place City, VTA or Artist in the relationship of partners. Artist acknowledges and agrees that Artist shall not hold himself/ herself/ itself out as an authorized agent of City or VTA with power to bind in any manner.

SECTION 8. ASSIGNABILITY.

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

8.1. VTA'S RIGHTS. VTA shall have the right to assign or transfer any and all of VTA's rights and obligations under this Agreement. In the event that VTA should cease employing City to provide public art management services, VTA may also assign the responsibilities and rights of City (with regard to the Artist) under this Agreement to another party. In the event of such assignment, VTA shall so inform Artist in writing, and the responsibilities and rights of City, hereunder, shall be transferred to the party so indicated by VTA.

8.2 BINDING ON SUCCESSORS. This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of VTA and Artist.

SECTION 9. INDEMNIFICATION BY ARTIST.

9.0. INDEMNIFICATION. Artist agrees to protect, defend, indemnify and hold harmless City and/or VTA and their respective Board of Directors, Board of Supervisors, Councils, individual board members, officers, agents, employees, and consultants (each "Indemnitee" and collectively, the "Indemnitees") from and against all claims, costs and damages (collectively, "**Liabilities**") arising out of negligent or willful acts or omissions in the performance of this Agreement by Artist, the Artist's agents or Artist's subcontractors. Artist's obligations to indemnify and hold City and/or VTA harmless under this subsection exclude only those Liabilities that are due to sole negligence or willful misconduct of City or VTA, their officers, agents and employees.

9.1. INFRINGEMENT. Artist also agrees to protect, defend, indemnify and hold City and/or VTA or any individual Indemnitee harmless from any action, claim, suit or liability based on an assertion that work performed under this Agreement by Artist, or Artist's agents or Artist's subcontractors constitutes an infringement of any patent, copyright, trademark, trade name or other proprietary right of any party. This section shall survive expiration or sooner termination under this Agreement.

SECTION 10. INSURANCE REQUIREMENTS.

Artist, at Artist's sole cost and expense for the full term of this Agreement or any renewal thereof, agrees to maintain the policies set forth in the attached EXHIBIT D, entitled "INSURANCE REQUIREMENTS." All policies, endorsements, certificates and/or binders shall be subject to the approval by the Risk Manager of the VTA as to form and content. These requirements are subject to amendments or waiver if so approved in writing by the VTA's Risk Manager. Artist agrees to provide City and VTA with copies of said policies, certificates and/or endorsements before work commences under this Agreement and to receive written approval from VTA prior to approving any changes thereto.

SECTION 11. INTENTIONALLY OMITTED

SECTION 12. TERMINATION.

12.0. TERMINATION WITHOUT CAUSE. City or VTA may terminate this Agreement without cause upon thirty (30) calendar days written notice to Artist. Termination shall be effective thirty (30) calendar days after Artist's receipt of termination notice.

12.1. TERMINATION WITH CAUSE. If Artist fails to perform any of Artist's material obligations under this Agreement (including a determination that work for which Artist has invoiced the City does not meet the terms of this Agreement), City or VTA may terminate this Agreement upon fifteen (15) calendar days written notice to Artist ("**Termination Notice**"). The Termination Notice must specify Artist's breach and provide Artist with an opportunity to cure the specified breach within the fifteen (15) calendar day notice period ("**Cure Period**"). In the event that Artist fails to cure the specified breach within the Cure Period, the termination of this Agreement will be effective. In instances where the specified breach is curable, but is incapable of being cured within fifteen (15) calendar days, Artist shall commence to cure the specified breach within the Cure Period and diligently execute the work necessary to complete the cure and the Cure Period shall be extended for as long as such work is being undertaken in an expeditious and good faith manner. In no event, however, shall the cure period exceed six (6) months, unless specifically permitted by City or VTA in writing. Artist shall inform City that such a cure has commenced in writing and keep City fully informed of the undertaking of such cure and provide continuing updates as to the expected date of completion of such cure. If at any time either City or VTA determines that such cure is not being prosecuted diligently and in good faith, City shall so inform Artist, and the Agreement shall be deemed immediately terminated.

12.2 COMPENSATION. In the event that City or VTA terminates this Agreement, City shall pay Artist for services performed and contractual commitments made by Artist, and previously approved by City or VTA in writing, with vendors and subcontractors pursuant to this Agreement that cannot be canceled, in a manner consistent with this Agreement and in a manner reasonably satisfactory to City and VTA to date of termination, consistent with the schedule of payment set forth in EXHIBIT C.

12.3 REMEDIES. City's and VTA's remedies under this Agreement are cumulative and are in addition to City's and VTA's rights available at law or in equity.

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

SECTION 13. COMPLIANCE WITH LAWS.

Artist shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments. Artist shall keep itself informed of, comply with, and shall cause all of its agents, employees, suppliers and subcontractors of any tier, to observe and comply with all applicable Federal, State, and local laws, regulations, and policies.

SECTION 14. NONDISCRIMINATION.

There shall be no discrimination against or segregation of any person, or group of, or persons, on account of race, color, religion, creed, national origin or ancestry, sex, actual or perceived sexual orientation or gender identity, age, marital or domestic partner status or disability (including HIV or AIDS status) in the performance of this Contract. Contractor will ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, creed, national origin or ancestry, sex, actual or perceived sexual orientation or gender identity, age, marital or domestic partner status or disability (including HIV or AIDS status) or other protected class status. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; selection for training, including apprenticeship; and provision of any services or accommodations to clients or the general public.

Artist will, in all solicitations or advertisements for employees placed by it or on its behalf, state it is an equal opportunity employer.

Artist will cause the foregoing provisions to be inserted in all subcontracts for any work covered by this Agreement so that such provisions will be binding upon each Subcontractor, provided that the foregoing provisions in this Section 14 shall not apply to contracts or subcontracts for standard commercial supplies or raw materials.

Artist agrees not to discriminate in the provision of benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees.

Artist shall provide all services to the public under this Agreement in facilities that are accessible to persons with disabilities as required by state and federal law.

SECTION 15. ARTIST'S WARRANTY.

Artist represents and warrants that:

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

B. Artist has not previously sold, assigned, licensed, granted, encumbered, or utilized the Artwork Design or any element thereof, in any manner which may affect or impair the rights granted pursuant to this Agreement including but not limited to, inhibiting the VTA's ability to show the work, reproduce the Artwork as defined in Section 18, or maintain/conservate the work into the future.

C. All Artwork created or performed by Artist under this Agreement, whether created by Artist alone or in collaboration with others, shall be wholly original. Artist shall not knowingly or negligently infringe upon or violate the rights of any third party.

D. Artist has acquired all rights to any third party software or other component of the Artwork necessary for the operation of Artwork.

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

F. All services performed hereunder shall be performed in accordance with City's Standard Specifications ("**City Standards and Specifications**") as described below in EXHIBIT A, Part 10E with all necessary care, skill, and diligence.

G. The Artwork is the result of the artistic efforts of Artist and will be delivered full and clear of any liens, claims and encumbrances of any type.

H. The design of the Artwork is an edition of one, and that neither Artist nor Artist's agent will execute, or authorize another to execute, another work of the same or substantially similar image, design, dimensions and materials as the Artwork. Nothing however, shall prevent Artist from making future works in their style and manner of expression. (This warranty shall continue in effect for the duration of the Artwork's copyright protected status and shall be binding on Artist and Artist's heirs and assigns. In the case where Artist is comprised of two or more individual persons or a group of people, the measuring life shall be the life of the last surviving individual person comprising Artist team. Recognizing that VTA has no adequate remedy at law for Artist's violation of this warranty, Artist agrees that, in the event Artist breaches this warranty, VTA shall be entitled to enjoin Artist's breach in addition to any other remedies it may have at law or in equity).

I. Except as otherwise set forth herein, the representations and warranties set forth in this Section 15 shall survive the termination or other extinction of this Agreement.

SECTION 16. PREVAILING WAGE

This project is a "public work" as defined in Sections 1720 through 1720.6 of the California Labor Code. This Agreement may be subject to prevailing wage.

If Artist's work involves fabrication and/or installation at the Site, without limitation of any other provision of this of the Agreement, Artist must pay or cause to be paid, prevailing wages for all work done under this Agreement as required by California law. All subcontractors hired by Artist in relation to this Agreement must be registered, pursuant to Section 1725.5 of the California Labor Code. This project is subject to compliance monitoring and enforcement by the Department of Industrial Relations ("DIR").

In the performance of the Agreement, employees of Artist and all subcontractors, engaged by the Artist carrying out covered work shall be responsible for compliance with California Labor Code Sections 1776 (Payroll records, retention, inspection, noncompliance penalties, rules and regulations) and 1777.5 (Employment of registered apprentices, wages, standards, number, apprenticeship or trade, exemptions, contributions), and submit weekly for each week in which any contract work is performed, a certified copy of all payrolls for its employees and a certified copy of all its subcontractor's payrolls directly to the California Labor Commissioner, Department of Industrial Relations and to VTA and City within one week following week when work is performed. Payrolls shall conform to the requirements of the Labor Code Section 1776 and shall be in the form acceptable to VTA and City.

Pursuant to appropriate sections of the Labor Code of the State of California, the Director of the DIR has ascertained the general prevailing rate of wages (which rate includes employer payments for health and welfare, vacation, pension, and similar purposes) applicable to the work provided by covered contractors for straight time, overtime, Saturday, Sunday and holiday work. Artist shall post a copy of the prevailing wage rates at the Site or material staging area.

Workers employed in work covered by prevailing wage must be paid at the rates at least equal to the prevailing wage rates as adopted. If Artist uses a craft or classification not shown on the prevailing

wage determinations, Artist may be required to pay the wage rate of that craft or classification most closely related to it as shown in the general determinations effective at the time of award of this Agreement. Failure to pay such prevailing wages shall subject the employer to the penalties set forth in Labor Code §1775.

If Artist requires the use of employees and/or subcontractors in order to perform any work related to the ARTIST'S SERVICES, ARTIST will contact VTA and CITY to set up a meeting to discuss the following:

- Project Registration with DIR
- Certified Payroll Upload into CA DIR eCPR
- Submission of Statement of Compliance with monthly invoice

SECTION 17. INTENTIONALLY OMITTED.

SECTION 18. INTELLECTUAL PROPERTY RIGHTS AND LICENSE, REPRODUCTION AND PUBLICITY RIGHTS.

18.0 COPYRIGHT.

A. Except as provided in this Agreement, Artist shall retain all copyrights in the Artwork. Artist's copyright shall not extend to predominantly functional aspects of the building or 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 Artist is comprised of two or more individual persons, the individual persons shall be deemed joint authors of the Artwork.

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

18.1 DISPLAY/LOAN/DISPOSAL.

Artist grants VTA the following exclusive rights:

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

B. VTA shall have the right to move, remove, relocate or dispose of the Artwork as specified below in Section 22.

18.2 REPRODUCTION AND DISTRIBUTION; INCIDENTAL IMAGE CAPTURE & MARKETING.

A. ARTIST'S SUBMITTALS. Artist retains all copyrights in any and all documents, studies, drawings and the like which were developed by Artist in the course of development of the Artwork Design ("**Artist's Submittals**"). Artist agrees that City and VTA may use Artist's Submittals for the purposes related to the development and consideration of the Artwork Design, including without limitation, obtaining any and all approvals of the Artwork Design and the Artwork.

B. NONCOMMERCIAL AND INCIDENTAL REPRODUCTIONS. Artist authorizes City and VTA to make, and to authorize the making of, photographs and other two-dimensional reproductions of the Artwork for educational, public relations, arts promotional and other noncommercial purposes. For

purposes of this Agreement, the following are deemed to be reproductions for noncommercial purposes: reproduction of the Artwork, where the depiction of the Artwork is incidental to the main focus of the reproduction (e.g. a photo of the general area that, incidentally, shows the Artwork as well); reproduction of the Artwork in catalogues, books, slides, photographs, postcards, posters and calendars; in news sections of newspapers; in general books and magazines not primarily devoted to art but of an educational, architectural, historical or critical nature; slides and film strips not intended for a mass audience; television from stations operated for educational purposes or on programs for educational purposes from all stations; filming and or broadcasting from the area where the Artwork is incidental to the purpose of the filming or broadcasting; reproductions in electronic newspapers, websites, blogs and other electronic formats for news, review or commentary. Artist shall also allow VTA to publish reproductions to provide information to the public on the VTA's public art or to otherwise promote the VTA's transit services, even if the publication occurs within art publications, on commercial television stations, in other commercial publications or on the Internet. Artist shall also allow City and/or VTA to publish reproductions to promote transit systems in the city, public art in the city, or other City promotional, reporting, planning, or other non-commercial printed or electronic documentation.

C. 3-D REPRODUCTIONS. The authorization in this Section does not include the right to create 3-dimensional reproductions on items such as tote-bags, T-shirts, coffee mugs and similar merchandise. Such reproductions may only be created pursuant to separate license agreements with Artist.

D. COPYRIGHT NOTICES. Where VTA controls a non-incidental reproduction of the Artwork, VTA shall place a copyright notice in the form and manner required to protect the copyrights in the works under the United States copyright law.

E. PUBLIC RECORDS. Any documents provided by Artist to City and VTA are public records and City and/or VTA may authorize third parties to review and reproduce such documents pursuant to public records laws and policies, including the San José Sunshine policies and California Public Records Act.

18.3 THIRD PARTY INFRINGEMENT. Neither City nor VTA is responsible for any third party infringement of Artist's copyright and not responsible for protecting the intellectual property rights of Artist.

SECTION 19. VARIABLE MEDIA ARTWORK GUIDELINES AND ADDITIONAL WARRANTIES

19.0 APPLICABILITY. The provisions of this Section 19 apply if the Artwork involves or incorporates electronic, digital, video, mechanical, living, variable, moving or other dynamic components ("**Variable Media Component**") and shall be in addition to and without limitation of, any warranties, rights otherwise provided to VTA by Artist herein.

19.1 VARIABLE MEDIA GUIDELINES. Artist shall also provide the VTA with written recommendations for translating the Artwork into new media or replacing elements of the Artwork in the event that the original medium, components and/or the Artists' installation plan become obsolete during the life of the Artwork ("**Variable Media Guidelines**"). Although the VTA is not required to comply with such Variable Media Guidelines, the VTA may take such Guidelines into account when maintaining the Artwork or trying to preserve the integrity of the Artwork.

19.2 WARRANTY AGAINST INFRINGEMENT. Artist warrants that the Artwork, including without limitation, any software included to operate or display the Artwork, does not violate or infringe upon any patent, copyright, trade secret, or other proprietary rights of any other person or entity. Artist agrees to hold the VTA and City harmless from any liability and to defend and indemnify the VTA and City, at Artist's sole expense, in the event that a claim is filed or a suit is brought against VTA or City or any of its officers, employees, or authorized agents, for the use or display of the Artwork due to a patent or

copyright infringement by Artist. Artist further agrees that if the Artwork or any component thereof is found to be infringing while on display. Artist shall promptly:

- A. Modify the Artwork, at Artist's expense, so that it becomes non-infringing, or
- B. Replace the infringing element of the Artwork including without limitation software, with equal non-infringing items, at Artist's expense, or
- C. Procure, at Artist's expense, the necessary licenses for the VTA to continue using and displaying the Artwork.

19.3 WARRANTY OF ACCEPTABLE STANDARD OF DISPLAY AND OPERATION FOR VARIABLE MEDIA COMPONENTS. Artist represents and warrants that during the applicable warranty period, the Artwork will conform with the design specifications approved by VTA and City and, where Artwork involves Variable Media Components, the Artwork will also operate, function or perform in accordance with Artist's representations to the VTA and City without any costs beyond the final Budget for the Artwork or any additional staff assistance beyond what has specifically been agreed to by VTA and City in the approved specifications, and including reasonable costs for electrical power for the Artwork.

19.4 THIRD PARTY WARRANTIES AND LICENSES. Artist shall procure, on VTA's behalf, all licenses and maintenance agreements from third party software developers or providers used in the Artwork and referred to as "**Third Party Software**" and required to operate or display the Artwork, in a form transferable to VTA and acceptable to VTA.

Artist shall transfer the license and maintenance agreements for the Third Party Software to VTA upon VTA's acceptance of the Artwork.

Artist shall obtain from all suppliers of the equipment and the Third Party Software used to design, fabricate and install the Artwork, all standard guarantees and warranties normally provided on all machinery, equipment, services, materials, supplies and other items used in connection with the Artwork, including all such machinery, equipment, materials and other items which are incorporated into the Artwork.

Artist shall obtain from each such supplier guarantees and warranties which are assignable to VTA and shall, upon request of VTA and/or City, obtain an option for VTA to purchase a guarantee or warranty from such suppliers covering a longer period than a one year warranty period if commercially available at VTA's expense.

Artist shall enforce all guarantees and warranties until such time as such guarantees or warranties expire or are, if applicable, transferred to VTA as contemplated by this Section. Such guarantees and warranties shall, to the extent they have been made assignable, be transferred to VTA upon acceptance of the Artwork.

Artist shall deliver to VTA copies of all such guarantees and warranties and relevant extracts from all related technical specifications. Nothing in this Section shall reduce the obligation of Artist to provide the VTA with the guarantees and warranties described in this Agreement, and to comply with the provisions of this Agreement.

SECTION 20. ARTIST'S BOOKS AND RECORDS.

20.0. MAINTENANCE OF RECORDS. Artist shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services, or expenditures and disbursements charged to the project for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to Artist pursuant to

this Agreement. Artist shall maintain all documents and records that demonstrate performance under this Agreement for a minimum period of three (3) years, or for any longer period required by law from the date of termination or completion of this Agreement.

20.1. AUDIT. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit, at any time during regular business hours, upon written request by City or VTA, or a designated representative of any of these offices. Copies of such documents shall be provided for inspection at mutually agreed upon location and time.

20.2. CUSTODY OF RECORDS. Where VTA or City has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of Artist's business, VTA or City may, by written request by any of the above-named officers, require that custody of the records be given to VTA or City and that the records and documents be maintained at VTA. Access to such records and documents shall be granted to any party authorized by Artist's, Artist's representatives, or Artist's successors-in-interest.

SECTION 21. ARTIST'S WAIVERS.

21.0 Without limitation of any other provision hereof, Artist expressly agrees to waive (to the extent waivable) any and all rights Artist may have pursuant to title 17 U.S.C. Section 106A, (commonly known as the "Visual Artists Rights Act of 1990", herein the "**Act**") as Artist's rights under the Act apply, if at all, to the following uses of Artwork:

(i). VTA shall have the right to reproduce Artwork as provided in this Agreement.

(ii). VTA shall have the right to move, relocate or remove Artwork from the intended location and to store or dispose of Artwork in accordance with Section 22.2.

(iii). VTA shall have the right to loan the Artwork as VTA deems appropriate as further provided in Section 18.1 above.

21.1. Artist further agrees that to the extent California Civil Code Section 987 has force or effect with respect to Artist's rights to the Artwork, Artist expressly waives such rights to the extent that they may be waived.

SECTION 22. REPUTATION AND CREDIT.

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

22.1. ARTIST'S COMMITMENT. Artist agrees that all formal references to the Artwork made or authorized to be made by Artist shall include the following credit: "Collection of the VTA" or other language agreed to by Artist and VTA.

22.2. FUTURE MODIFICATION OR RELOCATION.

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

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

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

D. To the extent possible, VTA shall make good faith efforts to notify Artist (at Artist's last known address) and, if it can make contact with the Artist, consult with the Artist in good faith before intentionally modifying, moving, relocating or removing Artwork. If, within thirty (30) calendar days after VTA's initial notification to Artist of VTA's intent to modify, move, relocate or remove the Artwork, Artist and VTA do not reach a mutually agreeable decision regarding relocation or modification of an Artwork (and/or VTA cannot otherwise make contact with Artist), VTA may take such actions as VTA deems necessary in management of its Artwork, and no further agreement with Artist will be required prior to such move, relocation, modification or removal.

Notwithstanding the foregoing, whether or not VTA notified or consulted with Artist, if VTA removes, relocates, or modifies the Artwork without Artist's prior written consent, VTA shall not be liable to Artist for damages. Under such circumstances, if Artist objects to the modification or new location, then (i) VTA may restore the Artwork or replace the Artwork to its original location, or (ii) if the VTA does not restore the Artwork or to relocate the Artwork to the original location, Artist may request that Artist's association with Artwork be severed. In either event, VTA shall have no further obligation or liability to Artist.

E. If VTA moves the Artwork from its originally installed location or modifies Artwork without Artist's oversight, Artist shall not be held responsible for the structural integrity, durability, or safety of the Artwork to the extent that VTA's action impaired the structural integrity, durability, or safety of the Artwork, nor shall Artist be held responsible for code compliance of the Artwork to the extent that VTA's action rendered the Artwork non-compliant with applicable codes.

F. Artist's rights under this Agreement cease with both Artists' death and do not extend to Artist's heirs, successors or assigns. In case of the death of one Artist Partner before the other, the remaining living Artist will continue with all rights and obligations under this agreement until their death.

SECTION 23. DEFECTS IN MATERIAL, WORKMANSHIP AND INHERENT VICE.

23.0. Artist warrants that the Artwork and workmanship will be free of defects in workmanship, including Inherent Vice, and that the Artist will, at the Artist's own expense, remedy any defects due to faulty workmanship, or Inherent Vice, which appear within a period of two (2) year from the date the Artwork is formally accepted. If the Artwork should deteriorate because of defects in workmanship within two (2) year from the date the Artwork is formally accepted, Artist will: (i) repair or replace the Artwork without charge for Artist's services (including the services of supervising the work of others); (ii) pay for the cost of materials and supplies required for such repair or replacement; and (iii) pay for labor rendered by persons other than the Artist in conducting the repair. The term "**Inherent Vice**" means any quality within the material or materials incorporated into the Artwork, which either alone or in combination, results in the deterioration of the Artwork. Inherent Vice does not include any potential for deterioration that is specifically identified in the Final Proposal,

23.1. **NO THREAT.** Artist further warrants that the Artwork shall not constitute any threat to the safety of persons or property when used in the manner for which it is designed. Artist agrees to cooperate with VTA in making or permitting adjustments to the Artwork if necessary to eliminate hazards that become apparent after the Artwork is accepted by VTA.

23.2. SURVIVAL. The representations and warranties set forth in this Section shall survive the termination of this Agreement.

SECTION 24. MAINTENANCE

24.0. MAINTENANCE, REPAIRS AND RESTORATION. VTA shall have the right to determine when and if repairs, maintenance, and restoration to the Artwork will be made. In the event that VTA does not maintain the Artwork consistent with the maintenance instructions provided by Artist and/or makes repairs or restoration not approved by Artist, Artist shall have the right, at Artist's sole option, to have Artist's association with Artwork severed.

24.1. STANDARDS OF REPAIR AND RESTORATION. All repairs and restorations, whether performed by Artist, VTA, or by third parties responsible to Artist or VTA, shall be made in accordance with professionally recognized principles of conservation of artworks and in accordance with the maintenance instructions provided to VTA by Artist pursuant to EXHIBIT A.

SECTION 25. CONFLICT OF INTEREST.

Artist shall avoid all conflict of interest or appearance of conflict of interest in performance of this Agreement. (For purposes of this Section, the term "Artist" also includes the employees, officers (including board members), agents and subcontractors of the Artist.)

Except for approved eligible administrative or personnel costs, no employee, agent, contractor, officer or official of the VTA or City who exercises any functions or responsibilities with respect to this Agreement or who is in a position to participate in a decision making process or gain inside information with regard to it, shall obtain a personal or financial interest in or benefit from any contract, subcontract or agreement with respect thereto, or the proceeds thereunder, either for himself or herself or for those with whom they have family or business ties, during his or her tenure or for two years thereafter.

In order to carry out the purposes of this Section, Artist shall incorporate, or cause to be incorporated, in all contracts and subcontracts relating to activities pursuant to this Agreement, a provision similar to that of this Section.

SECTION 26. GIFTS.

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

SECTION 27. WAIVER.

Artist agrees that waiver by VTA or City of any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term or condition. The acceptance by VTA or City of the performance of any work or services by Artist shall not be deemed to be a waiver of any term or condition of this Agreement.

SECTION 28. SPECIAL PROVISIONS.

Special provisions, if any, to this Agreement are specified in the attached EXHIBIT F, entitled, "SPECIAL PROVISIONS."

SECTION 29. NOTICES.

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

To VTA: Santa Clara Valley Transportation Authority
Att: Hassan Basma
3331 North First Street, Building A
San Jose, CA 95134

Email: Hassan.Basma@vta.org

For the City: City of San José
Office of Cultural Affairs
Public Art Program
200 E. Santa Clara Street, 14th Floor.
San José, CA 95113

Email: mary.rubin@sanjoseca.gov

For the Artist: Tom Drugan & Laura Haddad
Haddad Drugan, LLC
315 28th Avenue S.
Seattle, WA USA
98144

laura@haddad-drugan.com

tom@haddad-drugan.com

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

29.1 Artist agrees for the duration of Artist's life to provide VTA with Artist's current mailing and email address in the event Artist's physical or email address should change. If Artist fails to provide VTA with timely updates on changes to Artist's contact information, Artist shall be considered to have waived Artist's rights to notice under this Agreement.

SECTION 30. VENUE/GOVERNING LAW.

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

30.1. GOVERNING LAW. The laws of the State of California shall govern this Agreement. Except to the extent that federal law is applicable, this Agreement must be construed - and its performance enforced - under California law.

SECTION 31. CAPTIONS.

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

SECTION 32. ENTIRE AGREEMENT.

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

SECTION 33. SEVERABILITY.

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

SECTION 34. REFERENCE TO VTA and CITY.

Where this Agreement requires or permits City to act and no officer of the City is specified, City's Manager or the authorized representative of City's Manager shall be deemed authorized to act of City's behalf.

Where this Agreement requires or permits VTA to act and no officer of the VTA is specified, the VTA's General Manager or the authorized representative of the General Manager shall be deemed authorized to act on VTA's behalf.

SECTION 35. NO RELIGIOUS OR POLITICAL ADVOCACY.

Artist agrees that work or services funded by this Agreement shall neither promote nor denigrate any religion or religious viewpoint or advocate for any political candidate or party. Any portion of the compensation used in contradiction to the provisions of this Section shall be deemed a disallowed cost.

SECTION 36. EXECUTION IN COUNTERPARTS

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.

SECTION 37. 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.

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

APPROVED AS TO FORM:



Email: jpropp@sloansakai.com

VTA Counsel

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, a public agency (VTA)



Email: carolyn.gonot@vta.org

By _____
Carolyn M. Gonot
General Manager and CEO

APPROVED AS TO FORM:

City Attorney's Signature Block:

Approved as to Form:

Attorney
Arlene Silva


J
DV

Email: arlene.silva@sanjoseca.gov

ARLENE SILVA
Deputy City Attorney

CITY OF SAN JOSE, a municipal corporation (City):



Email: sarah.zarate@sanjoseca.gov

SARAH ZARATE
Director

Haddad Drugan, LLC ARTIST



Email: laura@haddad-drugan.com

Partner

EXHIBIT A
ARTIST'S SERVICES

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

Part 1. SITE SELECTION.

Artist is to work in collaboration with City, and VTA as required, to identify appropriate areas as potential sites for Artwork. The final selection of the Site shall be at VTA's sole discretion.

Part 2. RESEARCH.

Artist shall meet with City, VTA and its consultants in order to understand the programmatic uses, constraints and opportunities of the Site and the facilities surrounding the Site for the purposes of defining goals for the Artwork that are appropriate to the general social and immediate physical environment of the Artwork. Artist shall also attend up to three individual meetings with local experts or other interested parties as designated by City with input by VTA. The times and dates of these meetings shall be subject to the mutual agreement of the parties.

Part 3. DESIGN REVIEW AND APPROVAL

All design submittals required to be submitted by Artist for review must be reviewed and approved by VTA prior to issuance of any notices of approval and/or notices to proceed. City will manage this review on behalf of Artist. VTA may direct City to amend review procedure outlined in this Exhibit to combine design review phases. City will communicate such requests to Artist. Such a request shall not shorten the Schedule of Performance, as set forth in Exhibit B, for design development (Part 4 – Part 9 of Exhibit A) unless mutually agreed to by Artist.

Part 4. CONCEPT DESIGN.

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

Part 5. CONCEPT DESIGN REVIEW.

- A. The Concept Design Proposal shall be submitted to City for review by VTA. Artist acknowledges that one or more reviewing bodies (collectively, the "**Reviewing Body**") may be assembled to review and make recommendations on the Concept Design Proposal.
- B. Artist shall provide quality visual material suitable for presentation of the Concept Proposal to the Reviewing Body and for release to the press. The specific types of presentation materials shall be as required by City and VTA, with the advisement of the Artist in order to best convey Concept.
- C. The Concept Design Proposal may be reviewed by City and VTA staff before submission to the Reviewing Body. Artist recognizes and agrees that the Concept Design Proposal shall respond to the review and comments given by staff. Artist also acknowledges that the staff may require Artist to make modifications to the Concept Design Proposal before permitting the proposal to be submitted to the Reviewing Body.

- D. Artist shall be available to present the Concept Design Proposal to the Reviewing Body for approval.
- E. The Reviewing Body may recommend approval, approval with minor changes or disapproval. In the event that the Reviewing Body recommends disapproval, or approval with minor changes to the Concept Design Proposal, Artist, upon written notification by the City, shall respond to the Reviewing Body's comments within two (2) weeks, or other reasonable time as agreed to by all parties, and submit the revised Concept Design Proposal to the City for review. Artist recognizes and agrees that the Reviewing Body may review the Concept Design Proposal as revised and make additional recommendations regarding the revised Concept Design Proposal.
- F. In the event that all approvals are secured, City will issue a notice of acceptance of the Concept Design Proposal to Artist.
- G. Artist shall not proceed with the proposal for the Artwork Schematic Design until City issues a notice to proceed to Artist. The notice to proceed will identify the approved Concept Design for the Artwork.

Part 6. SCHEMATIC DESIGN.

- A. Following approval by the City of Concept Design Proposal, Artist shall prepare one or more designs showing Artist's Schematic Design Proposal for the Artwork (the "**Schematic Design Proposal**"). The Schematic Design Proposal will include form, indication of the scale, and proposed materials (samples to be provided where appropriate). The Schematic Design Proposal shall also include information on structural considerations, surface integrity, permanence, and protection against theft and vandalism.
- B. Artist shall investigate costs and prepare preliminary cost estimates related to the fabrication and installation of the Schematic Design Proposal. The estimates shall indicate the feasibility of producing the proposed Artwork within the budget (the "**Preliminary Cost Estimate**").
- C. The Schematic Design Proposal shall include an outline of the proposed installation method, and a schedule for the Artwork fabrication and installation (collectively, the "**Proposed Installation Method**").

Part 7. SCHEMATIC DESIGN PROPOSAL REVIEWS.

- A. The Schematic Design Proposal, including the Proposed Installation Method and Preliminary Cost Estimate, shall be submitted to the City and VTA. Artist acknowledges that the Reviewing Body may be assembled to review and make recommendations on the Schematic Design Proposal. Artist shall provide presentation quality visual material for presentation of the Schematic Design Proposal to the Reviewing Body, and for release to the press. The specific types of presentation materials shall be as required by City and VTA.
- B. The Schematic Design Proposal may be reviewed by VTA and City staff before its submission to the Reviewing Body. Artist recognizes and agrees that the Schematic Design Proposal shall respond to the review and comments given by staff. Artist also acknowledges that the staff may require Artist to make modifications to the Schematic Design Proposal before permitting this proposal to be submitted to the Reviewing Body.

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

Part 8. DESIGN DEVELOPMENT PROPOSAL.

- A. Upon receipt of City Notice to Proceed, Artist shall develop a final proposal for the Artwork ("**Artwork Design Development Proposal**") showing the details of the Artwork. The Artwork Design Development Proposal will include indication of form, scale, and proposed materials (samples to be provided where appropriate). The Design Development Proposal shall also include information on structural considerations, surface integrity, permanence, and protection against theft and vandalism (collectively, the "**Artwork Design Specifications**").
- B. Artist shall develop a detailed budget (the "**Artwork Budget**"), not to exceed Four Hundred Twenty Thousand Dollars (\$420,000.00) which shall cover all costs related to the engineering, fabrication and installation oversight directly under the control of the Artist of the Artwork, including, but not limited to: professional engineering fees; itemized costs for materials including applicable sales tax; off-site fabrication costs; costs for labor of assistants; Artist's time for coordination, fabrication, supervision and installation; insurance; studio and operation expense; other consultants' fees; communications; Artist's travel; transportation of the Artwork to site; and installation costs not borne by the VTA General Contractor.
- C. Thirty Thousand Dollars (\$30,000) of the Artwork Fabrication and Installation Budget shall be set aside as a contingency to cover unforeseen costs that may arise during the course of the fabrication, and installation, work that is directly under the control of the Artist.
- D. The Design Development Proposal shall include a detailed written description of the fabrication and installation method (the "**Installation Specifications**").
- E. The Design Development Proposal shall include detailed fabrication and installation schedule (the "**Installation Schedule**").
- F. The Design Development Proposal shall include the description of any operational, maintenance and conservation requirements for the Artwork (the "**Maintenance Specifications**").

Part 9. DESIGN DEVELOPMENT PROPOSAL REVIEW.

- A. Artist shall provide presentation quality visual material of the Design Development Proposal in conjunction with the review of the Design Development Proposal by VTA and City staff and the Reviewing Body, and for release to the press. The specific types of materials shall be as required by City.
- B. The Design Development Proposal, consisting of each of the elements described above in Part 7, shall be submitted to City for VTA review and submittal to the Reviewing Body. Artist acknowledges that the Artist may be required to make modifications to the Design Development Proposal prior to submitting the Design Development Proposal to the Reviewing Body.
- C. Artist, at VTA's option, shall be available to present the Artwork Design Development Proposal, in the form approved by the VTA at one or more meetings of the Reviewing Body.
- D. The Reviewing Body may recommend approval, approval with minor changes or disapproval. In the event that the Reviewing Body recommends disapproval, or approval with minor changes to the Design Development Proposal, Artist, upon written notification by the City, shall respond to the recommended changes in writing and submit a revised Design Proposal to City for review. Artist recognizes and agrees that the Reviewing Body may review the Design Development Proposal as revised and make additional recommendations regarding the revised Design Development Proposal.
- E. In the event that the Design Development Proposal is accepted, the Design Development Proposal at VTA's option may be submitted to VTA Board of Directors for approval.
- F. Should the final design proposal be disapproved and the Artist has performed the services set out in Exhibit A, Parts 1-9, to the satisfaction of the VTA and City, Artist may be requested to submit a modified design proposal as specified by the City for additional design compensation. Additional design compensation will reduce the fabrication budget as stated in Exhibit A, Part 8 and the fabrication budget will be amended accordingly. VTA and City retain the right to terminate per Section 12 of this Agreement.

Part 10. NOTICE OF DESIGN DEVELOPMENT ACCEPTANCE.

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

Part 11. CONSTRUCTION DOCUMENTS.

- A. If additional drawings are required for the fabrication or installation of the Artwork ("**Construction Documents**"), Artist shall be responsible for producing them to VTA and City. Artist shall be responsible for obtaining and verifying any and all

information necessary for preparation of the Construction Documents, including without limitation, any field measurements of the proposed site.

- B. To the extent required by law, 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 VTA. The Construction Documents for the Artwork must be designed in accordance with City's standard specifications as described below in subpart E ("**City's Standard Specifications**") to the extent they apply. The Construction Documents and City's Standard Specifications shall collectively be referred to as the "**Plans.**" Once the Construction Documents are approved, City will notify Artist in writing.
- C. When seeking approval of the Construction Documents, Artist shall submit the following to City for VTA's review:
 - 1. the plans on reproducible sheets; and
 - 2. all engineering calculations associated with the submitted Construction Documents; and
 - 3. the specifications for the Artwork including a final budget estimate listing the quantities and unit prices for the fabrication and installation of the Artwork.
- D. VTA's and/or City's approval of the Plans shall not release Artist of the responsibility for the correction of mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved.
- E. City's Standard Specifications and Standard Details, dated July 1992, are on file with the City's Department of Public Works, Architectural Division.

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

- F. Artist is responsible for all applicable Underwriters Laboratory (UL) approvals as they may apply.
- G. Artist shall provide a Fabrication, Transportation and Installation Plan detailing designated scope of work for unique fabrication that will remain the responsibility of Artist and scope that will be accomplished under VTA's construction contract. VTA shall have the right to request a review of the proposed installation methods by VTA's contractor for construction to verify constructability.

Part 12. NOTICE TO PROCEED WITH FABRICATION AND INSTALLATION.

VTA, in VTA's sole discretion, may decide to proceed or not to proceed with the Artwork. If VTA decides to proceed and all approvals are secured, City will issue a written Notice

to Proceed with Fabrication and Installation to the Artist. Artist shall not commence fabrication and installation of Artwork until City has issued such Notice. If, at the time of issuance of the Notice to Proceed with Fabrication and Installation there is reason to anticipate a delay in the mutually agreed schedule of performance through no fault of Artist, then VTA, City and Artist shall identify the revised Schedule of Performance in writing on the Notice to Proceed with Fabrication and Installation or in a mutually executed amendment to the Schedule of Performance.

Part 13

FABRICATION, TRANSPORTATION AND INSTALLATION.

A. General.

1. The parties agree that the Final Proposal, consisting of VTA-approved construction drawings and the VTA-approved Design Development Proposal, is to be filed with VTA. In the event of conflict between the Final Proposal and this Agreement, this Agreement will control. The location of the Artwork is described in Recital A on Page 1 of this Agreement.
2. Installation Plan. Artist shall deliver an installation plan indicating the recommended staging and sequence of all aspects of the installation. The Installation Plan, must include a description of the estimated duration of installation, any special equipment or installation procedures required, and Artist's roles or responsibilities during the installation. Liability Insurance as specified in Exhibit D: Insurance.
3. Artist shall fabricate the Artwork consistent with the Final Proposal, including without limitation, supervising all aspects of the fabrication of the Artwork to ensure proper fabrication of the Artwork. As more particularly provided below, Artist shall be responsible for the transportation and delivery of the Artwork to the Site as scheduled in coordination with City and VTA's contractors.
4. If elements of the Artwork are to be installed by VTA contractors, Artist shall be available to observe and oversee such aspects of installation by VTA contractor in accordance with the Fabrication, Transportation and Installation Plan.

Artist shall consult with the City and VTA Contractor prior to and during the installation of the Artwork for any agreed to elements installed under management of Artist. Artist shall coordinate all Artist's activities on site with VTA's contractor. If a dispute arises during the installation of the artwork between the Artist and VTA Contractor, Artist shall immediately notify the City in writing. In such event, City and VTA shall make reasonable efforts to resolve the dispute; however, the VTA shall make the final determination as to the resolution of any such dispute.

5. Artist shall provide for the transportation of the Artwork to the Site. Artist shall not transport the Artwork until access to the Site has been approved and scheduled by VTA and VTA Contractor.

Artist shall prepare the Artwork for transportation in accordance with customary industry standards for the transportation of fine works of art. VTA shall not be responsible for any such costs if the Artist did not coordinate delivery schedules with VTA and VTA Contractor and did not deliver the Artwork when scheduled.

If for any reason the Artwork will not be installed within three (3) days of its scheduled delivery and it is necessary to store the Artwork for any period of time prior to installation, VTA must notify the Artist at least 10 days prior to delivery of the Artwork to the Site. Unless VTA determines to take control of the Artwork (as set forth below), storage of the Artwork will be at a safe and appropriately insured location determined by the Artist (with VTA's reasonable consent). If the Artwork is to be installed within three (3) days of its delivery to the Site and is to be stored temporarily on-Site, VTA shall be fully responsible for ensuring the safety of the Artwork from the time VTA accepts delivery of the Artwork until installation commences. In addition, if the Artwork cannot be installed within three (3) days after its delivery, VTA may have the Artwork stored at a location under its control; but if VTA exercises such right, it will be deemed liable for ensuring the safety of the Artwork from the time VTA accepts delivery until installation commence.

6. Artist agrees that installation includes adequate training and explanation to VTA staff, to occur in San José unless otherwise agreed by the VTA, concerning the repair and maintenance of Artwork. Training includes those instructions which are required to operate, maintain and perform basic repairs on the Artwork. Training is due no later than 10 calendar days after completion of the Artwork installation and is a pre-requisite for Acceptance.

B. Deviations from Proposal.

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

2. The parties also recognize that the shift in scale from preliminary drawings, maquettes and mock-ups to a full-scale work may require artistic adjustments. Artist reserves the right to make minor adjustments to the Artwork, as Artist deems aesthetically necessary. In no event, however, may the change in design increase the Artwork budget without prior written approval by City. Additionally, Artist shall make no change in the design that requires a modification of the Construction Documents without the prior written approval of VTA and City.

C. Material Deviations.

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

schedule of delivery or installation of the Artwork, preparation of the Site or maintenance of the Artwork.

D. Intentionally Omitted.

E. Third Party Contractors.

1. Artist shall not unreasonably impede, hinder or delay any third party contractor in the performance of the contractor's work. Artist shall communicate with any third party contractor who will be performing work which may depend upon, or connect with the Artwork, and Artist agrees to attempt to resolve any disputes or coordination problems with any such third party contractors or others. Except as provided in Subsection 2, below, Artist is not responsible for the services of third party contractors. In the event of conflict between Artist and third party contractors, VTA and City will resolve the conflict.

2. If cost impacts result from Artist's work delaying or impacting any third party contractor resulting in additional charges from that contractor, Artist will be liable for the costs solely attributable to Artist's (or Artist's Agents') delay or impact upon third parties.

3. The preparation of the Site for installation of the Artwork shall be the responsibility of VTA's contractor in accordance with a separate written agreement between VTA and its contractor. Where Artist's Work is associated with that of any contractor engaged by the VTA to do work on the Site, Artist shall examine the work of such other contractor and report in writing to the City and VTA any visible defect or condition preventing the proper execution of installation of Artwork. Artist must examine work of VTA contractor in a timely manner and be apprised by VTA of schedule no less than 10 days prior to completion of work requiring examination by Artist. If, due to Artist delay in examining work of VTA contractor, installation by VTA contractor proceeds without Artist review, the Artist shall (i) be held to have approved the work or material and the existing conditions (ii) be responsible for any defects in the Artwork caused by existing conditions at the Site that Artist could have reasonably discovered had Artist examined the VTA contractor's work and, and (iii) not be relieved of any obligation or any guarantee because of any such condition or imperfection.

VTA and/or its authorized representatives will require the party responsible for the defective work to make corrections so as to conform to its contract requirements, or if the defect is the result of a default or omission in the contract documents, may issue a change order. If Artist fails to measure, inspect and/or report defects that are reasonably discoverable, all costs of accomplishing the interface shall be borne by Artist. The foregoing does not apply to latent defects. Artist shall report to City and VTA any latent defects in another Contractor's work at any time such defects become known. City, VTA and/ or their authorized representatives shall promptly thereafter take such steps as may be appropriate. Any difference or conflict that may arise between Artist and the VTA Contractor, or other Contractors engaged by VTA to perform work on the Site, shall be adjusted as determined by VTA, its agents, or its authorized representatives when necessary to facilitate the work of Artist and/or other Contractors or workers. No damages or claims by Artist will be allowed other than an extension of time for the completion of Work. Such an extension will be for the period of time VTA shall consider Artist to have been delayed in the completion of Work by reason of the work of other Contractors or workers.

F. Review of Progress and Reports.

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

G. Risk of Loss.

1. At such time as any Off-Site Element (as defined in Subsection 13.H.1 below) is delivered to VTA's contractor for installation and VTA accepts that Off-Site Element in writing, the Artist shall no longer be liable for the accepted Off-Site Element.

2. Other than as specified in Paragraph 1 of this Subsection 13.G, until issuance of Notice of Final Acceptance of Artwork by VTA, any damage to, theft or vandalism to, or acts of God or nature affecting the Artwork are the responsibility of Artist, including, but not limited to, any loss occurring during the fabrication, storage, transportation, delivery or installation of the Artwork.

H. Inspection and Transportation of Artwork

1. Inspection Notice.

VTA, City and Artist agree that various elements of the Artwork may be fabricated at locations away from the Site (individually "**Off-Site Element**," collectively, "**Off-Site Elements**"). The Off-Site Elements are to be defined per the Final Proposal. Artist shall notify City in writing when each element of the Artwork is ready for inspection, prior to transporting the Off-Site Element to the Site ("**Inspection Notice**"). The parties acknowledge and agree that VTA has the right to inspect each of the Off-Site Elements and that VTA's inspection rights are not limited to the Off-Site Elements.

2. Notice to Proceed.

After receipt of the Inspection Notice for each Off-Site Element, City will inform Artist in writing either (1) the Off-Site Element has been completed in accordance with the terms of this Agreement and the Off-Site Element is formally approved for purposes of transporting the Off-Site Element to the Site ("**Transportation Notice to Proceed**") or (2) there are defects or deficiencies in the Off-Site Element which prevent formal approval, 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, VTA may, at its sole discretion, determine to delay inspection until the Off-Site Element is delivered to the Site. In the event that City or VTA issues an Off-Site Defects Notice, Artist will promptly remedy any defects to the satisfaction of VTA.

3. Delivery.

Upon issuance of the Transportation Notice to Proceed, Artist shall deliver the Off-Site Elements to the Site. Artist shall coordinate with City and VTA regarding

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

In case of delay in the installation of the Artwork due to a third-party contractor, the Artwork shall be stored at no additional cost to the Artist and Artist shall not be entitled to any compensation for "Installation Contingency" as described in Exhibit C.

I. Work at the Site.

1. Plans.

- i. Artist shall cause material incorporated in the Artwork to be furnished in accordance with the requirements and specifications set forth in the Plans.
- ii. City's approval of the Plans shall not release Artist of the responsibility for the correction of mistakes, errors or omissions having to do with public safety that are contained in the Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved. If, during the course of installation of the Artwork, it is determined by VTA or City that the public safety requires modification of, or the departure from, the Plans, Artist shall be required to address the public safety issues and to present Artist's proposed modifications to the City and VTA for their review and approval of the engineering soundness of the proposed modifications. The parties acknowledge that the Plans, once approved by City, shall be final and that, except as expressly provided in this subsection, no revisions to the Plans shall be permitted except with the prior written approval of City and VTA.

2. Installation.

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

3. Representatives.

Artist shall designate in writing before starting work, an authorized representative who shall have the authority to represent and act for Artist. When work is not in progress and during periods when work is suspended, arrangements acceptable

to the City and VTA shall be made for any emergency work which may be required.

VTA and City shall also designate one or more authorized representative(s) who shall have the authority to represent VTA and City. Artist's authorized representative shall be present at the site of the work at such times as agreed to. Prior to commencement of the installation of the Artwork, the parties shall mutually agree to an inspection schedule, which schedule may be adjusted from time to time by mutual agreement.

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

Prior to commencement of work on the Artwork, Artist shall provide to the City and VTA the names and telephone numbers of at least one (1) person in charge of or responsible for the work who can be reached personally in case of emergency twenty-four (24) hours a day, seven (7) days a week.

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

Part 14. TITLE TRANSFER, MAINTENANCE INSTRUCTIONS AND FINAL DOCUMENTATION.

A. Title Transfer.

Title to the Artwork shall transfer from Artist to VTA upon VTA's Issuance of Notice of Final Acceptance of the Artwork and Artist's receipt of final payment. Title transfer shall be self-executing upon VTA's Notice of Final Acceptance. Artist will cooperate in providing to VTA any title transfer documents (including a bill of sale), confirmation of payment of subcontractors, lien releases, and other documents as the VTA may request or require during or after the Term of this Agreement.

B. Maintenance Instructions.

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

C. Final Documentation.

As a condition of VTA's acceptance of the Artwork, Artist shall supply at least three (3) professional images of the installed Artwork in digital format (in a format to be agreed upon with the VTA). Use of these images will be in accordance with Section 16 of this Agreement.

EXHIBIT B
SCHEDULE OF PERFORMANCE

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

Concept Design

Complete all tasks in Parts 1-4 of Exhibit A and submit Concept Design Proposal to City for required reviews May 18, 2022

Complete reviews of Concept Design Proposal including by the Public Art Committee Reviewing Body (Part 4 of Exhibit A) **June 7, 2022**

Complete all required Reviews (This is a VTA Board review) **June 15, 2022**

Schematic Design

Complete all tasks in Part 6 of Exhibit A and submit Schematic Design Proposal to City for required reviews July 18, 2022

Complete all required reviews of Schematic Design Proposal including by Reviewing Body (Part 7 of Exhibit A) August 2, 2022

Complete all required Reviews (This is a VTA Board review – if do in Concept, don't need to repeat again in Schematic.) **September 14, 2022**

Design Development

Complete all tasks in Part 8 of Exhibit A and submit Design Development Proposal to City for required reviews Jan 17, 2023

Complete all review of Design Development Proposal including by Reviewing Body (Part 9 of Exhibit A) **Feb 2, 2023**

Construction Documents

Complete Construction Documents, Calculations & Final Budget (Parts 11 of Exhibit A) May 2023

Fabrication and Installation (Part 13 of Exhibit A)

TBD pursuant to EXHIBIT A, Part 9.

Notice of Final Acceptance (Part 14 of Exhibit A) September 30, 2027

2. Modification of Schedule. The parties agree that the Schedule set forth above may be modified only upon prior written authorization of the VTA and City.

EXHIBIT C
COMPENSATION

1. Fee. Artist’s fee for Artwork Design, Fabrication and delivery, including all expenses relating thereto, shall not exceed the sum of Four Hundred Twenty Thousand Dollars (\$420,000) of which amount Seventy Thousand Dollars (\$70,000) is allocated for design, including Construction Documentation, and an amount of Three Hundred Fifty Thousand Dollars (\$350,000) is allocated for the fabrication, transportation and installation oversight of the Artwork. This fee includes but is not limited to the following costs: labor of assistants; materials, programming, communication and other indirect costs; and travel expenses of the Artist for site visits and research. Also included is a Thirty Thousand Dollar (\$30,000) Fabrication/Installation contingency/holdback (“Contingency”).

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

3. Payment Schedule:

DESIGN	
Upon execution of this Agreement. Payment in advance is contingent upon satisfactory completion of tasks identified in Part 1 through Part 4 of EXHIBIT A.	\$20,000
Upon City's notice to proceed with Artwork Design Development Proposal, which advance payment is for, and contingent upon, satisfactory completion of tasks identified in Part 5 and 6 of EXHIBIT A	\$20,000
Upon issuance of City's Notice of Design Development Acceptance (Part 7 and 8 of EXHIBIT A) and NOTICE OF DESIGN DEVELOPMENT ACCEPTANCE (Part 9 of EXHIBIT A, and)	\$20,000
TOTAL SCHEMATIC DESIGN AND DESIGN PROPOSAL	\$60,000
CONSTRUCTION DOCUMENTS	
Approval of Construction Documents (Part 10 of EXHIBIT A)	\$10,000
FABRICATION & INSTALLATION	
Upon Issuance of Notice to Proceed for Fabrication and Installation, as identified in Part 12 of EXHIBIT A; and as determined by Payment Milestones for Fabrication and Installation pursuant to Exhibit A, Part 12; and City’s receipt of Final Documentation, as identified in Part 13.D of Exhibit A	Not to exceed \$350,000 TBD pursuant to Exhibit A, Part 6.
TOTAL DESIGN PROPOSAL, CONSTRUCTION DOCUMENTS AND FABRICATION & INSTALLATION	Not to exceed \$350,000 TBD pursuant to Exhibit A, Part 6.
FABRICATION & INSTALLATION CONTINGENCY	\$30,000

TOTAL COMPENSATION	Not to exceed \$450,000
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4. Fabrication and Installation, Payment Schedule for Artwork. City shall pay Artist for the costs and expenses identified in the Artwork Budget as developed per EXHIBIT A, Part 7. Artist shall submit any documentation required under the City’s Standard Specifications regarding payment of prevailing wages (“**Documentation Provision**”). The City may make incremental payments of budget line items to facilitate fabrication and installation, at the discretion of the City. The form of the invoice shall be subject to the approval of the City. Artist may adjust the line items within the Fabrication budget with the prior written approval of City, which approval will not be unreasonably withheld.

5. Contingency/Holdback Draw. Included in the Budget is an amount of \$30,000, which shall be retained by VTA and shall not be paid to the Artist except where unforeseeable and unavoidable circumstances cause an increase in the costs incurred by Artist in the Fabrication and Installation of the Artwork. In the event Artist wishes to draw from the Contingency, Artist shall submit a written request (“**Contingency Request**”) specifying the reason for the request and the total amount of the request. No contingency draw shall be paid without the written approval of VTA and City, which will not be unreasonably withheld. Without limitation of the foregoing, neither City nor VTA shall have any obligation to approve a Contingency Request to make corrections for which the Artist or Artist’s subcontractors are responsible or to pay for any costs that Artist or Artist’s subcontractors could have reasonably avoided. In the event that any of the amounts budgeted for contingency remain unpaid upon VTA’s acceptance of the Artwork as satisfactory, the remaining contingency funds will be retained by VTA. In no event shall City or VTA be required to make payments in excess of the total budgeted amount.

6. Reimbursables: VTA will not make any additional payment for Artist’s expenses.

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

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

9. Sales Tax: Pursuant to California Revenue and Taxation Code Section 6365, the VTA’s payment for the Artwork is exempt from sales taxes imposed under the California Revenue and Taxation Code. Should any sales or use taxes be determined to be due or owing on the purchase of the Artwork, VTA shall be responsible.

10. Modification of Schedule of Payment: The parties agree that the Schedule for Payment set forth above may be modified only upon prior written authorization of the VTA and City.

EXHIBIT D
INSURANCE

ARTIST'S ATTENTION IS DIRECTED TO THE INSURANCE REQUIREMENTS BELOW. IT IS HIGHLY RECOMMENDED THAT ARTIST CONFER WITH THEIR INSURANCE CARRIERS OR BROKERS IN ADVANCE OF PROPOSAL SUBMISSION TO DETERMINE THE AVAILABILITY OF INSURANCE CERTIFICATES AND ENDORSEMENTS REQUIRED BY THIS AGREEMENT.

Without limiting Artist's obligation to indemnify and hold harmless VTA, the City of San Jose, their directors, officers, officials, employees and volunteers, Artist must procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Work hereunder by Artist, its agents, representatives, or employees, or subcontractors. The cost of such insurance must be included in Total Price. In the event of any material change in the Artist's Services, VTA reserves the right to change the insurance requirements set forth herein. Artist must furnish complete copies of all insurance policies, within three (3) business days of any request for such by VTA.

A. Liability and Workers' Compensation Insurance

1. Minimum Scope of Coverage and Limits of Insurance – Design Phase

Coverage carried by the Artist must be at least as broad as:

- a. Insurance Services Office General Liability coverage ("occurrence" form CG 0001). General Liability insurance written on a "claims made" basis is not acceptable. Limits must be no less than \$1,000,000 per occurrence.
- b. Automobile Liability insurance. Auto Liability written on a "claims-made" basis is not acceptable. Limits must be no less than \$100,000 per person, \$300,000 per accident, \$100,000 for property damage.
- c. If Artist has any employees, Workers' Compensation insurance as required by the Labor Code of the State of California, and Employer's Liability insurance with at least \$1,000,000 of coverage. If Artist has no employees, Artist must submit a signed letter attesting to this fact.
- d. Professional Liability, including limited contractual liability coverage, covering liability arising out of any negligent act, error, mistake or omission in the performance of services by any engineer or architect who completes the Artist's design documents. This coverage must be continuously maintained for a minimum of two (2) years following completion of this Agreement. This coverage may be written on a "claims made" basis, if so, please see special provisions in Section B.

2. Minimum Scope of Coverage and Limits of Insurance – Fabrication and Installation Phase

Artist or Artist's contractor(s) must maintain limits no less than:

- a. Insurance Services Office General Liability coverage ("occurrence" form CG 0001). General Liability insurance written on a "claims made" basis is not acceptable. Limits must be no less than \$5,000,000 per occurrence. This requirement may be satisfied by a combination of General Liability with Excess or Umbrella insurance. Umbrella/Excess

policies must feature inception and expiration dates concurrent with the underlying policy, "Follow Form" coverage, and a "Drop Down" provision.

- b. Commercial Automobile Liability insurance, written on Insurance Services Office form number CA 0001, covering Automobile Liability, code 1 "any auto." Auto Liability written on a "claims-made" basis is not acceptable. Limits must be no less than \$1,000,000 per occurrence. This requirement may be satisfied by a combination of Automobile Liability with Excess or Umbrella insurance. Umbrella/Excess policies must feature inception and expiration dates concurrent with the underlying policy, "Follow Form" coverage, and a "Drop Down" provision.
- c. Workers' Compensation and Employer's Liability: Statutory Workers' Compensation limits and Employer's Liability limits of \$1,000,000 per accident.
- d. Professional Liability, including limited contractual liability coverage, covering liability arising out of any negligent act, error, mistake or omission in the performance of services by any engineer or architect who completes the Artist's design documents. This coverage must be continuously maintained for a minimum of two (2) years following completion of this Agreement. This coverage may be written on a "claims made" basis, if so, please see special provisions in Section B. Limits must be no less than \$1,000,000.

3. Self-Insured Retention

The certificate of insurance must disclose the actual amount of any deductible or self-insured retention, or lack thereof, for all coverages required herein. Any self-insured retention or deductible in excess of \$250,000 must be declared to and approved by VTA. To apply for approval for a level of retention or deductible in excess of \$250,000, Artist or Artist's contractor(s) must provide a current financial report including balance sheets and income statements for the past three years, so that VTA can assess Artist's or Artist's contractor's ability to pay claims falling within the self-insured retention or deductible. Upon review of the financial report, if deemed necessary by VTA in its sole discretion, VTA may elect one of the following options: to accept the existing self-insured retention or deductible; require the insurer to reduce or eliminate the self-insured retention or deductible as respects VTA, the City of San Jose, their directors, officers, officials, employees and volunteers; or to require Artist or Artist's contractor to procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses. Applicable costs resulting therefrom will be borne solely by Artist or Artist's contractor. Artist or Artist's contractor may request execution of a nondisclosure agreement prior to submission of financial reports.

B. Claims Made Provisions (not applicable to General Liability or Automobile Liability)

Claims-made coverage is never acceptable for General Liability or Auto Liability. Claims-made may be considered for Professional, Environmental/Pollution, or Cyber Liability. If coverage is written on a claims-made basis, the Certificate of Insurance must clearly state so. In addition to all other coverage requirements, such policy must provide that:

1. The policy must be in effect as of the date of this Agreement and the retroactive date must be no later than the date of this Agreement.
2. If any policy is not renewed or the retroactive date of such policy is to be changed, Artist must obtain or cause to be obtained the broadest extended reporting period coverage available in the commercial insurance market. This extended reporting provision must cover at least two (2) years.
3. No prior acts exclusion may be added to the policy during the Agreement period.
4. The policy allows for reporting of circumstances or incidents that might give rise to future claims.

C. Other Provisions

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

1. General Liability and Automobile Liability

- a. VTA, the City of San Jose, their directors, officers, officials, employees and volunteers are to be named as additional insureds as respects: liability arising out of activities performed by or on behalf of Artist, including VTA's general supervision of Artist; products and completed operations of Artist and its contractors and subcontractors; premises owned, occupied or used by Artist; or automobiles owned, leased, hired or borrowed by Artist. The coverage must contain no special limitations on the scope of protection afforded to VTA, the City of San Jose, their directors, officers, officials, employees, or volunteers. Additional Insured endorsements must provide coverage at least as broad as afforded by the combination of ISO CG 20 10 10 01 and CG 20 37 10 01.
- b. Any failure to comply with reporting provisions of the policies may not affect coverage provided to VTA, the City of San Jose, their directors, officers, officials, employees, or volunteers.
- c. Artist's and Contractor's insurance must 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.
- d. The General Liability General Aggregate limit must apply per project, not per policy.
- e. The General Liability policy must be endorsed to remove the exclusion for railroad liabilities, with coverage at least as broad as afforded by ISO CG 24 17.

2. All Coverages

- a. The insurer must agree to waive all rights of subrogation against VTA, the City of San Jose, their directors, officers, officials, employees, and volunteers for losses arising from work performed by Artist and its subcontractors for VTA.
- b. Artist's and contractor's insurance coverage must be primary insurance as respects VTA, the City of San Jose, their directors, officers, officials, employees, and volunteers. Self-insurance or insurance that may be maintained by VTA, the City of San Jose, their directors, officers, officials, employees, or volunteers may apply only as excess to Artist's insurance. Artist's and contractor's insurance must not seek contribution from VTA's insurance program.

3. Other Insurance Provisions

- a. The Certificate must disclose the actual amount of the Deductible or Self-Insured Retention

- b. If any coverage forms or endorsements required by this Agreement are updated by their publishers, whether they be the insurance carrier(s), the Insurance Services office, or the American Association of Insurance Services, during the duration of this Agreement, VTA reserves the rights to require Artist to procure said coverage forms or endorsements using the updated versions upon the next renewal cycle.

D. Acceptability of Insurers

Insurance and bonds must be placed with insurers with an A.M. Best’s rating of no less than A VII (financial strength rating of no less than A and financial size category of no less than VII), unless specific prior written approval has been granted by VTA.

E. Certificates of Insurance

Artist and Artist’s contractor must furnish VTA and City of San Jose with a Certificate of Insurance. The certificates for each insurance policy are to be signed by an authorized representative of that insurer. The certificates must be issued on a standard ACORD Form. Artist must instruct their insurance broker/agent to submit all insurance certificates and required notices electronically in PDF format to Insurance.certificates@vta.org. All endorsements must be attached to the ACORD certificate in a single PDF document.

The certificates must (1) identify the insurers, the types of insurance, the insurance limits, the deductibles and the policy term, (2) include copies of all the actual policy endorsements required herewith, and (3) in the “Certificate Holder” box include the recipient’s name and address as follows:

Santa Clara Valley Transportation Authority (“VTA”)
3331 North First Street
San Jose, CA 95134-1906

City of San José – Finance Department
Risk & Insurance
200 East Santa Clara St., 14th Floor
San Jose, CA 95113-1905

In the Description of Operations/Locations/Vehicles/Special Items Box, the VTA Agreement number must appear, the list of policies scheduled as underlying on the Umbrella/Excess policy must be listed, Certificate Holder must be named as additional insured, and Waiver of Subrogation must be indicated as endorsed to all policies as stated in the Agreement Documents.

It is a condition precedent to award of this Agreement that all insurance certificates and endorsements be received and approved by VTA before Agreement execution. No work may be performed until insurance is in full compliance. VTA reserves the rights to require complete, certified copies of all required insurance policies, at any time.

If Artist or Artist's contractor(s) receive notice that any of the insurance policies required by this Exhibit may be cancelled or coverage reduced for any reason whatsoever, Artist or Artist's contractor(s) must immediately provide written notice to VTA that such insurance policy required by this Exhibit is canceled or coverage is reduced.

F. Maintenance of Insurance

If Artist or Artist's contractor(s) fail to maintain insurance as required herein, VTA, at its option, may suspend payment for work performed and/or may order Artist to suspend work at Artist's expense until a new policy of insurance is in effect.

EXHIBIT E
SPECIAL PROVISIONS