

**FIRST AMENDMENT TO
AGREEMENT AMONG
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 First Amendment is made and entered into this 8th day of August, 2022, among the CITY OF SAN JOSE ("**City**"), a municipal corporation, SANTA CLARA VALLEY TRANSPORTATION AUTHORITY ("**VTA**"), a public agency organized as a special District under California law, and HADDAD DRUGAN, LLC ("**Artist**"), a Washington limited liability company and Artist Partnership of Laura Haddad and Thomas Drugan, (individually referred to as "party" and collectively referred to as "parties").

RECITALS

WHEREAS, on March 8, 2022, Artist, VTA, and City entered into an agreement entitled "Agreement between the City of San José, 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" ("Agreement"); and

WHEREAS, the parties desire to amend Exhibits B and C; and

WHEREAS; the parties desire to amend certain Sections of the Agreement to designate VTA as the party responsible for Artist's payment;

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

SECTION 1. SECTION 3.4 of the Agreement, "Compensation and Method of Payment", is amended to read as follows:

"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, VTA 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 VTA intend 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 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 and VTA 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."

SECTION 2. Section 5.0 of the Agreement, "Compliance with Budget Constraints", is amended to read as follows:

"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 VTA, in consultation with 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. VTA (in consultation with CITY) 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."

SECTION 3. EXHIBIT B, "SCHEDULE OF PERFORMANCE" is amended to read as shown in EXHIBIT B-1, attached and incorporated into this First Amendment.

SECTION 4. EXHIBIT C, "COMPENSATION" is amended and restated to read as shown in REVISED EXHIBIT C, attached and incorporated into this First Amendment.

SECTION 5. The title of the AGREEMENT is hereby amended to read "AGREEMENT AMONG 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 CONNECTION – EASTRIDGE STATION."

SECTION 6. Except as herein modified, all other provisions of the AGREEMENT, including any exhibits shall remain in full force and effect. All references to the Agreement

in this First Amendment shall refer to the Agreement as amended unless specifically set forth herein or otherwise indicated by context.

SECTION 7. Unless specifically defined herein, the capitalized terms used in this First Amendment shall have the meanings defined in the Agreement.

SECTION 8. In the event of any conflict between the provisions of this First Amendment and other provisions of the Agreement, the provisions of this First Amendment shall prevail. Whether or not specifically amended by this First Amendment, all of the terms and provisions of the Agreement are hereby amended to the extent necessary to give effect to the purpose and intent of the First Amendment.

SECTION 9. If any of the provisions of the Agreement, as amended by this First Amendment, is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall continue in force without being impaired or invalidated in any way.

SECTION 10. Execution in Counterparts: This First Amendment 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 11. 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.

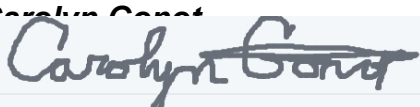
WITNESS THE EXECUTION HEREOF on the day and year first herein above written.

APPROVED AS TO FORM:


Email: jpropp@sloansakai.com
Date: 07/27/2022 GMT

JUDITH PROPP
VTA Counsel

SANTA CLARA VALLEY
TRANSPORTATION AUTHORITY, a
public agency organized as a special
District under California law (VTA)


Email: carolyn.gonot@vta.org
Date: 08/04/2022 GMT

By _____
CAROLYN M. GONOT
General Manager and CEO

APPROVED AS TO FORM:

City Attorney's Signature Block:

Approved as to Form:
Attorney
Arlene Silva
Deputy City Attorney, VTA


Email: arlene.silva@sanjoseca.gov
Date: 08/05/2022 GMT-07:00

ARLENE SILVA
Deputy City Attorney

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


Email: sarah.zarate@sanjoseca.gov
Date: 08/08/2022 GMT

SARAH ZARATE
Director, Office of the City Manager

ARTIST
HADDAD DRUGAN, LLC


Email: laura@haddad-drugan.com
Date: 07/26/2022 GMT

Partner: LAURA HADDAD

EXHIBIT B-1
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 January 20, 2023

Complete reviews of Concept Design Proposal
including by the Public Art Committee Reviewing Body
(Part 4 of Exhibit A) February 7, 2023

Complete all required Reviews
(This is a VTA Board review) **March 17, 2023**

Schematic Design

Complete all tasks in Part 6 of Exhibit A and submit
Schematic Design Proposal to City for required reviews May 15, 2023

Complete all required reviews of Schematic Design
Proposal including by Reviewing Body (Part 7 of Exhibit
A) June 6, 2023

Complete all required Reviews June 16, 2023

Design Development

Complete all tasks in Part 8 of Exhibit A and submit
Design Development Proposal to City for required
reviews September 13, 2023

Complete all review of Design Development Proposal
including by Reviewing Body (Part 9 of Exhibit A) October 3, 2023

Construction Documents

Complete Construction Documents, Calculations &
Final Budget (Parts 11 of Exhibit A) December 4, 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. in a form substantially similar to the following Notice of Amended Schedule of Performance and Term in this Exhibit.

NOTICE OF AMENDED SCHEDULE OF PERFORMANCE

AGREEMENT TITLE and DATE:	AGREEMENT AMONG 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
ARTIST Name and Address:	
DATE OF OPTION:	

Pursuant to Section 2 and Exhibit “B” of the Agreement referenced above, the City and VTA hereby exercises the option to amend the Schedule of Performance as follows:

EXHIBIT B- AMENDMENT NUMBER (e.g. 1, 2, etc.)

AMENDMENT NUMBER (e.g. FIRST, SECOND, ETC.) AMENDED 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

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

Complete all required Reviews
(This is a VTA Board review)

Schematic Design

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

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

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

Design Development

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

Complete all review of Design Development Proposal including by Reviewing Body (Part 9 of Exhibit A)

Construction Documents

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

Fabrication and Installation (Part 13 of Exhibit A)

Notice of Final Acceptance (Part 14 of Exhibit A)

SANTA CLARA VALLEY TRANSPORTATION
AUTHORITY, a public agency organized as a special
District under California law (VTA)

By:

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

By:

ARTIST

By:

REVISED 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. Upon City’s approval, VTA 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.

1. 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 11 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 14.C 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

4. Fabrication and Installation, Payment Schedule for Artwork. VTA shall pay Artist for the costs and expenses identified in the Artwork Budget as developed per EXHIBIT A, Part 11. Artist shall submit any documentation as reasonably required by VTA, in consultation with City. VTA may make incremental payments of budget line items to facilitate fabrication and installation, in consultation with City. The form of the invoice shall be subject to the approval of the VTA, in consultation with City. Artist may adjust the line items within the Fabrication budget with the prior written approval of VTA and 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 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, in consultation with City shall provide detailed written notice to Artist within ten (10) days of receipt of such request for payment, specifying the failure of performance for which 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 and City.

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.