

**AGREEMENT  
BETWEEN  
THE CITY OF SAN JOSE  
AND  
MICHAEL AMESCUA  
TO DESIGN, FABRICATE AND INSTALL A WORK OF ART  
AT THE RIVER OAKS REGIONAL STORMWATER CAPTURE FACILITY**

This Agreement is made and entered into this 2nd day of February, 2023, by and between the CITY OF SAN JOSE, a municipal corporation ("City"), and Michael Amescua, an individual ("Artist").

**RECITALS**

WHEREAS, City desires to commission a public art project (the "Artwork") which is to be located at the new River Oaks Regional Stormwater Capture Facility, located along the Guadalupe River between River Oaks Parkway and Skytop Street in San José (the "Site"); and

WHEREAS, the Artwork will be cut metal art panels integrated into the perimeter fence of the facility; and

WHEREAS, City, through City's Public Art Program, will manage the development of the Artwork in consultation with the Artist, the City's Department of Environmental Services ("ESD"), Department of Parks, Recreation and Neighborhood Services ("PRNS") and the Department of Public Works ("DPW"); and

WHEREAS, the source of funds for the Artwork derives from funds made available through Title 22 of the San José Municipal Code; and

WHEREAS, Artist was selected by City from a pool of pre-qualified applicants as the most qualified to design the Artwork ("Artwork Design") and selection of this Artist for this project was reviewed by the Public Art Committee ("PAC") on December 6, 2022;

NOW, THEREFORE, the parties hereby agree as follows:

**SECTION 1. SCOPE OF SERVICES.**

1.0. Artist shall perform those services specified in detail and in the location specified in the attached EXHIBIT A, entitled "ARTIST'S SERVICES," and referred to in this Agreement as "Artist's Services."

**SECTION 2. SCHEDULE OF PERFORMANCE.**

2.0. GENERAL. Artist is to complete Artist's Services according to 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.

### **SECTION 3. COMPENSATION AND METHOD OF PAYMENT.**

3.0. COMPENSATION.

A. 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, for all supervision, labor, supplies, materials, equipment or use thereof, taxes, and for all other necessary incidentals.

B. In the performance of work to be fabricated and/or installed on the Site, without limitation of any other provision of this Agreement, Artist shall pay or cause to be paid, prevailing wages for all work under this Agreement, if any, covered by the City's Prevailing Wage Policy, as set forth in City Council Resolution No. 61144, as it may be amended from time to time. EXHIBIT C and EXHIBIT D, entitled "REMEDIES FOR BREACH OF PREVAILING WAGE PROVISIONS," sets forth additional requirements with respect to the payment of prevailing wages and the provisions. Further information regarding prevailing wages that may apply to this Agreement may be obtained from the City's Office of Equality Assurance.

3.1. COST OVERRUN. In the event Artist incurs costs in excess of the maximum compensation set forth in EXHIBIT C, Artist shall pay such excess from Artist's own funds. City shall not be required to pay any part of such excess and Artist shall not have any claim against City on account of any cost overruns.

3.2. COST SAVINGS. If, after City issues the Notice to Proceed to Artist to proceed with fabrication of the Artwork as set forth in EXHIBIT A, City approves any modification of the Artwork Proposal (as defined in EXHIBIT A), 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.

3.3. CITY'S RIGHT TO WITHHOLD PAYMENT. In the event that City determines that work for which it has been invoiced does not meet the terms of this Agreement, City may withhold payment to Artist. In the event City withholds any payment, City shall provide detailed written notice to Artist within fifteen (15) days of receipt of Artist's invoice, specifying the failure of performance for which City intends to withhold payment. Within fifteen (15) days of Artist's receipt of City's notice, Artist shall cure City's objection or if City's objections are not capable of cure within fifteen (15) days, Artist shall commence to cure City's objections and then promptly proceed to complete the cure. If Artist disputes City's determination that the Agreement's specifications have not been met, within fifteen (15) days of Artist's receipt of City's notice, Artist shall notify City in writing. In such event, City 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 City. Any payments not in dispute shall be promptly paid to Artist.

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

#### **SECTION 4. CHANGES IN SCOPE.**

4.0. ADDITIONAL SERVICE AUTHORIZATION. No services for which additional compensation will be charged shall be provided without prior written amendment to this Agreement signed by an authorized officer of City.

#### **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, without additional compensation, correct or revise any errors, omissions, or other deficiencies in Artist's work.

Artist shall be responsible for developing the Artwork Design so that the Artwork can be designed, constructed, and installed without exceeding the total design, fabrication, and installation budget of One Hundred Eighty-Five Thousand Dollars (\$185,000) inclusive of a contingency of \$15,000 which shall be retained by the City and shall be paid to the Artist pursuant to the terms in Exhibit C. City shall have no obligation to approve a Contingency Draw to make corrections for which the Artist or Artist's subcontractors are responsible, nor to pay for any costs that Artist could have reasonably avoided.. Artist shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in Artist's work.

5.1. PERSONNEL. Artist has, or will secure at Artist's expense, all personnel required to perform Artist's Services. All persons retained by Artist shall possess the requisite licenses and permits necessary 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 Construction Project Contractors and other persons who may be involved with the development of the Artwork design, fabrication and installation and City agrees 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 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 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.

5.4. ENVIRONMENTALLY PREFERABLE PROCUREMENT POLICY.

A. Artist agrees that, in the performance of this Agreement, Artist shall perform its obligations under the Agreement in conformance with City Council Policy 4-6, Environmentally Preferable Procurement Policy. A description for environmentally preferable procurement and the Policy can be found on the City's website at the following link:

<https://www.sanjoseca.gov/home/showdocument?id=12833>

B. Environmental procurement policies and activities related to the completion of work will include wherever practicable, but are not limited to:

1. Use of recycled and/or recyclable products in daily operations (i.e. 30, 50, 100% PCW paper, chlorine process free; triclosan free hand cleaner, etc.)
2. Use of Energy Star Compliant equipment.
3. Vehicles and vehicle operations (i.e. Alternative Fuel, Hybrid, etc.)
4. Internal waste reduction and reuse protocol(s).
5. Water and resource conservation activities within facilities, including bans on individual serving bottled water and the use of compostable food service products, etc.

## **SECTION 6. CITY'S RESPONSIBILITIES.**

6.0. SITE INFORMATION. City shall be responsible for providing Artist, at no cost to Artist, copies of existing designs, drawings, reports, and other relevant existing data needed by Artist in order to perform Artist's Services. City will also facilitate installation of Artist's Artwork in coordination with the City's DPW's River Oaks Regional Stormwater Capture Facility base project construction of perimeter fence at the Site.

6.1. SUPERVISION. City is under no obligation to supervise the Artist's performance of services which are described under this Agreement.

6.2. ARTWORK IDENTIFICATION. City 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 City. 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 City property.

## **SECTION 7. INDEPENDENT CONTRACTOR.**

7.0. ARTIST AS INDEPENDENT CONTRACTOR. It is understood and agreed that Artist's relationship with City is strictly and solely that of an independent contractor, and not as an agent or an employee of City; and as an independent contractor, Artist shall obtain no rights to retirement benefits or other benefits which accrue to City's employees, and 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. Nothing contained in this Agreement shall be construed to place City and Artist in the relationship of partners. Artist acknowledges and agrees that Artist shall not hold him, her or itself out as an authorized agent of City with power to bind in any manner.

## **SECTION 8. ASSIGNABILITY.**

8.0. ASSIGNABILITY OF CONTRACT. 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. 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 complete the Artist's Services.

8.1. CITY'S RIGHT TO ASSIGN CONTRACT. City shall have the right to assign or transfer any and all of City's rights and obligations under this Agreement. This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of City.

## **SECTION 9. INDEMNIFICATION BY ARTIST.**

9.0. INDEMNIFICATION. Artist agrees to protect, defend, indemnify and hold harmless City and its officers, agents and employees, 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, or the Artist's agents or Artist's subcontractors. Artist's obligations to indemnify and hold City harmless under this Subsection exclude only those Liabilities, which are due to sole negligence or willful misconduct of City, its officers, agents and employees.

9.1. INFRINGEMENT. Artist also agrees to protect, defend, indemnify and hold City, its officers, agents and employees harmless from any action, claim, suit or liability based on a claim 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.**

10.0. INSURANCE. 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 E, entitled "INSURANCE REQUIREMENTS." All policies, endorsements, certificates and/or binders shall be subject to the approval by the Risk Manager of the City of San José as to form and content. These requirements are subject to amendments or waiver if so approved in writing by the Risk Manager. Artist agrees to provide City copies of said policies, certificates and/or endorsements before work commences under this Agreement.

#### **SECTION 11. SURETY REQUIREMENTS.**

11.0 ADMITTED SURETY. Without limiting the generality of the provisions of this Agreement, the term "Admitted Surety" as used in this Section shall have the same meaning as set forth in the Standard Specifications. Each of the bonds required under this Section shall be issued by an Admitted Surety.

11.1 BONDING REQUIREMENT. The provisions of this Section and Sections 11.2 and 11.3 shall apply if work occurring at the Site for the Artwork exceeds \$25,000. In the event that the work at the Site exceeds \$25,000, Artist shall provide the bonds specified in Sections 11.2 and 11.3. Artist shall refrain from installation of any portion of the Artwork until Artist furnishes to City or causes Artist's contractor to furnish to City, the required bonds. Each of the bonds required in this Section must be furnished to City as condition for City's issuance of the Notice to Proceed. The form of each of the bonds required under this Section is subject to the approval of the City Attorney.

11.2 PERFORMANCE BOND. City must be furnished with a performance bond in the amount not less than the sum of One Hundred Percent (100%) of the cost estimate of the Artwork as approved by the Department of Public Works ("DPW") Director, conditioned upon the faithful performance of the installation of the Artwork within the time fixed by this Agreement, or such extension thereof as may be allowed. In the event that Artist fails to complete the Artwork within the time specified in this Agreement or such extension period as determined by City, City may terminate this Agreement for cause as specified in Section 12 and the Artist and Artist's surety shall be liable to City for all loss or damage which City may suffer by reason of Artist's failure to complete the Artwork on time.

PAYMENT BOND. Artist agrees submit a payment bond within ten (10) calendar days after award of an agreement for Artwork that include installation, on City property, involving an expenditure of over \$25,000. The payment bond must meet the

requirements of Part 1 of Chapter 27.24 of the San Jose Municipal Code. The bond shall be provided in a form that is approved by the City.

**SECTION 12. TERMINATION.**

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

12.1. TERMINATION WITH CAUSE. If Artist fails to perform any of Artist's material obligations under this Agreement, City may terminate this Agreement upon fifteen (15) 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) day notice period. In the event that Artist fails to cure the specified breach within the fifteen (15) day notice period, the termination of this Agreement will be effective. In instances where the specified breach is incapable of being cured within fifteen (15) days, Artist shall commence to cure the specified breach within the fifteen (15) day notice period and diligently execute the work necessary to complete the cure.

12.2. COMPENSATION. In the event that City terminates this Agreement, City shall pay Artist for services performed and contractual commitments made by Artist, and previously approved by City, 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 to date of termination, consistent with the schedule of payment set forth in EXHIBIT C.

12.3. REMEDIES. City's remedies under this Agreement are cumulative and are in addition to City'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.**

13.0. COMPLIANCE. Artist shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments.

**SECTION 14. NONDISCRIMINATION.**

14.0. NONDISCRIMINATION. Artist shall not discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, or national origin, in connection with or related to the performance of this Agreement.

**SECTION 15. ARTIST'S WARRANTY.**

15.0. Artist represents and warrants that:

A. Prior to transfer of title of the Artwork to the City, 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 without limited to, inhibiting the City's ability to show the work, reproduce the Artwork as defined in Section 16, 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 with Artist and shall not 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's Standards and Specifications") with all necessary care, skill, and diligence.

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

H. These representations and warranties shall survive the termination or other extinction of this Agreement.

15.1. Artist warrants that 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 his or her 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 City has no adequate remedy at law for Artist's violation of this warranty, Artist agrees that, in the event Artist breaches this warranty, City shall be entitled to enjoin Artist's breach.

**SECTION 16. INTELLECTUAL PROPERTY RIGHTS AND LICENSE,  
REPRODUCTION AND PUBLICITY RIGHTS.**

16.0. 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 City with a copy of the application for registration, the registration number and the effective date of registration.

#### 16.1. DISPLAY/DISPOSAL.

Artist grants City the following exclusive rights:

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

B. City shall have the right to move, remove, relocate or dispose of the Artwork as specified below in Section 20.

#### 16.2. REPRODUCTION AND DISTRIBUTION.

A. 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 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. Artist authorizes City 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.

B. For purposes of this Agreement, the following are deemed to be reproductions for noncommercial purposes: reproduction of the site, where the Artwork is incidental; 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; and television from stations operated for educational purposes or on programs for educational purposes from all stations; and in electronic newspapers, websites, blogs and other electronic formats for news, review or commentary. Artist shall also allow City to publish reproductions to provide information to the public on the City's public art or to otherwise promote the City's public art program, even if the publication occurs within art publications, on commercial television stations, in other commercial publications or on the internet.

C. On any and all such reproductions, City shall place a copyright notice (if the Artist has the work copyrighted) in the form and manner required to protect the copyrights in the works under the United States copyright law.

D. Public Records Requests. Any documents provided by Artist to City are public records and City 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.

16.3. THIRD-PARTY INFRINGEMENT. City is not responsible for any third-party infringement of Artist's copyright and not responsible for protecting the intellectual property rights of Artist.

**SECTION 17. VARIABLE MEDIA ARTWORK GUIDELINES AND ADDITIONAL WARRANTIES**

17.0. APPLICABILITY. The provisions of this Section 17 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 City by Artist herein.

17.1. VARIABLE MEDIA GUIDELINES. Artist shall also provide the City 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 City is not required to comply with such Variable Media Guidelines, the City may take such Guidelines into account when maintaining the Artwork or trying to preserve the integrity of the Artwork.

17.2. 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 City harmless from any liability and to defend and indemnify the City, at Artist's sole expense, in the event that a claim is filed or a suit is brought against 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. 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 City to continue using and displaying the Artwork.

17.3. WARRANTY OF ACCEPTABLE STANDARD OF DISPLAY AND OPERATION FOR VARIABLE MEDIA COMPONENTS.

Artist represents and warrants that during the warranty period set forth in Section 21, the Artwork will conform with the design specifications approved by City and, where Artwork involves Variable Media Components, the Artwork will also operate, function or perform in accordance with Artist's representations to the City without any costs beyond the final Budget for the Artwork or any additional staff assistance beyond what has specifically been agreed to by City in the approved specifications, and including reasonable costs for electrical power for the Artwork.

17.4. THIRD-PARTY WARRANTIES AND LICENSES. Artist shall procure, on City'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 City and acceptable to City.

Artist shall transfer the license and maintenance agreements for the Third-Party Software to City upon City'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 City and shall, upon request of City, obtain an option for City to purchase a guarantee or warranty from such suppliers covering a longer period than a one-year warranty period if commercially available at City's expense.

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

Artist shall deliver to City 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 City with the guarantees and warranties described in this Agreement, and to comply with the provisions of this Agreement.

## **SECTION 18. ARTIST'S BOOKS AND RECORDS.**

18.0. 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 City 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 which 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.

18.1. 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 the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to City for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Artist's address indicated for receipt of notices in this Agreement.

18.2. CUSTODY OF RECORDS. Where 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, City may, by written request by any of the above-named officers, require that custody of the records be given to City and that the records and documents be maintained in City Hall. 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 19. ARTIST'S WAIVERS.**

A. Without limitation of any other provision hereof, Artist expressly agrees to waive 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") as Artist's rights under the Act apply, if at all, to the Artwork. In addition:

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

(ii). City shall have the right to move, relocate or remove Artwork from the intended location and to store or dispose of Artwork as City deems appropriate.

(iii). City shall have the right to loan the Artwork as City deems appropriate as further provided in Section 16.1 above, and in Section 20.2 below.

B. Without limitation of any other provision hereof, Artist expressly agrees to waive any and all rights Artist may have, including, without limitation, any moral or other rights pursuant to the California Art Preservation Act, California Civil Code Section 987, and California Civil Code Section 989, to the extent that such provisions have any force or effect with respect to Artist's rights to the Artwork.

## **SECTION 20. REPUTATION AND CREDIT.**

20.0. COMMITMENT BY CITY. City 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.

20.1. 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 City of San José Public Art Program," or other language agreed to by all parties.

## 20.2. FUTURE MODIFICATION OR RELOCATION.

A. City 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, City has the right to remove the element posing the public safety hazard.

B. Except to the extent permitted by Subsection A above, City agrees not to intentionally modify the Artwork without first attempting to obtain Artist's written consent.

C. City shall have the right to donate, sell or dispose of the Artwork at any time. Without limiting these City's rights, before exercising this ability, City, by written notice to Artist at Artist's last known address, agrees to attempt to provide Artist the opportunity to purchase the Artwork for the greater of the Total Price or the amount of any offer which City has received for the purchase of the Artwork, plus all costs associated with the removal of the Artwork from the Site, clean-up of the Site and delivery to Artist. Artist shall have thirty (30) days from the date of City's notice to exercise the option to purchase the Artwork. Artist shall not be entitled for any compensation in the event Artist does not receive such notice.

D. Without limitation of City's rights under this Agreement, it is City's practice to notify and consult with the Artist before intentionally moving, relocating or removing artwork. If, after the initial discussion, Artist and City do not reach a mutually agreeable decision regarding relocation or modification of an Artwork, or do not agree upon compensation to Artist for providing Artist's input on proposed relocation or modification, City may take such actions as City deems necessary in management of its Artwork, and no further agreement or compensation is due to Artist.

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

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

F. Artist's rights under this Agreement cease with Artist's death and do not extend to Artist's heirs, successors or assigns.

## **SECTION 21. DEFECTS IN MATERIAL, WORKMANSHIP AND INHERENT VICE.**

21.0. 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 three years from the date the Artwork is formally accepted. If the Artwork should deteriorate because of Inherent Vice within three years from the date the Artwork is formally accepted, Artist will repair or replace the Artwork without charge for Artist's services in supervising the work of others or for repairing the work that they originally performed on the Artwork and Artist will pay for the cost of labor rendered by persons other than the Artist, materials and supplies. 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.

21.1. 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 City in making or permitting adjustments to the Artwork if necessary to eliminate hazards which become apparent after the Artwork is accepted by City.

21.2. SURVIVAL. These representations and warranties shall survive the termination or other extinction of this Agreement.

## **SECTION 22. MAINTENANCE**

22.0. REPAIRS AND RESTORATION. City shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Artwork will be made. It is the policy of City to consult with Artist regarding repairs and restoration which are undertaken during Artist's lifetime when that is practicable. In the event that City 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.

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

## **SECTION 23. CONFLICT OF INTEREST.**

23.0. Artist shall avoid all conflict of interest or appearance of conflict of interest in performance of this Agreement.

## **SECTION 24. GIFTS.**

24.0. 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 City officer or designated employee any gift prohibited by said Chapter. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this Agreement by Artist. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for such breach as provided in Section 12 of this Agreement.

## **SECTION 25. WAIVER.**

25.0. Artist agrees that waiver by 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 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 26. SPECIAL PROVISIONS.**

26.0. Special provisions to this Agreement, if any, are specified in the attached EXHIBIT F.

**SECTION 27. NOTICES.**

27.0. 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 email to the email addresses set forth below.

For the City: San José Office of Cultural Affairs - Public Art Program  
Attn: Lynn Rogers  
200 E. Santa Clara Street, 12<sup>th</sup> Floor  
San José, CA 95113  
Email: lynn.rogers@sanjoseca.gov

For the Artist: Michael Amescua  
4407 ½ Van Horne Avenue  
Los Angeles, CA 90032  
Email: michaelnsteel@sbcglobal.net

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) days after deposit in the mail.

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

**SECTION 28. VENUE/GOVERNING LAW.**

28.0. 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.

28.1. 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 29. 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 30. PRIOR AGREEMENTS AND AMENDMENTS.**

30.0. 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 31. SEVERABILITY.**

31.0. 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 32. REFERENCE TO CITY.**

32.0. 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.

**SECTION 33. NO RELIGIOUS OR POLITICAL ADVOCACY.**

33.0. Artist agrees that no work or services funded by this Agreement shall inhibit or promote religion and furthermore that the work or services funded by this Agreement must not be used to convey a religious or political message. Any portion of the compensation used in contradiction to the provisions of this Section shall be deemed a disallowed cost.

**SECTION 34. EXECUTION IN COUNTERPARTS.**

34.0 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 35. USE OF ELECTRONIC SIGNATURES.**

35.0 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 written above.

<p><b>“CITY”</b></p> <p>Sarah Zarate</p>  <p><b>Email:</b> sarah.zarate@sanjoseca.gov <b>Date:</b> 02/03/2023 GMT</p> <p>Director, Office of the City Manager</p>	<p><b>“ARTIST”</b></p> <p>Michael Amescua</p>  <p><b>Email:</b> michaelsteel@sbcglobal.net <b>Date:</b> 01/31/2023 GMT</p>
--	--

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

Form Approved by the Office of the City Attorney.

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

Approved as to Form:  
Attorney  
Rosa Tsongtaatarii  
Chief Dep City Atty U



**Email:** rosa.tsongtaatarii@sanjoseca.gov  
**Date:** 01/31/2023 GMT

**EXHIBIT A**  
**ARTIST'S SERVICES**

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

**Part 1. SITE SELECTION.**

Artist will design, fabricate and provide oversight for installation of artistic fence panel elements to be integrated into the perimeter fence system at the of the City's new River Oaks Regional Stormwater Capture Facility located along the Guadalupe River between River Oaks Parkway and Skytop Street in San José.

**Part 2. RESEARCH.**

Artist shall meet with City staff and other key stakeholders identified by City staff which may include ESD and PRNS personnel, project designers, and other City staff, community members and others in order to understand the programmatic uses of the Site and the neighborhood around the Site for the purposes of aligning 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. Meetings may be held virtually at the City's discretion. The times and dates of these meetings shall be subject to the mutual agreement of the parties.

**Part 3. 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 4. CONCEPT DESIGN REVIEW.**

- A. The Concept Design Proposal shall be submitted to the City's Public Art Project Manager ("Project Manager" or alternatively, "City's Project Manager"). Artist acknowledges that one or more reviewing bodies (collectively, "the Reviewing Body") may be assembled to review and make recommendations on the Concept Design Proposal.
- B. Artist shall provide presentation quality visual material for presentation of the Concept Proposal to the Reviewing Body, and for release to the press. The specific types of presentation materials shall be as required by City's Project Manager.

- C. The Concept Design Proposal may be reviewed by City staff before submission to the Reviewing Body. Artist recognizes and agrees that the Concept Design Proposal shall respond to the review and comments given by City staff. Artist also acknowledges that the Project Manager 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 Project Manager, shall respond to the Reviewing Body's comments and submit the revised Concept Design Proposal to the Project Manager for review. Artist recognizes and agrees that the Reviewing Body may review the Concept Design Proposal as revised and make additional recommendations regarding the revised Concept Design Proposal.
- F. In the event that all approvals are secured, City's Project Manager will issue a notice of acceptance of the Concept Design Proposal to Artist.
- G. Artist shall not proceed with the proposal for the Artwork Schematic Design until City's Project Manager issues a notice to proceed to Artist. The notice to proceed will identify the approved Concept Design for the Artwork.

**Part 5. SCHEMATIC DESIGN.**

- A. Following approval by the City of Concept Design Proposal, Artist shall prepare one or more designs showing Artist's Schematic Design Proposal for the Artwork (the "Schematic Design Proposal"). The Schematic Design Proposal will include form, indication of the scale, and proposed materials (samples to be provided where appropriate). The Schematic Design Proposal shall also include information on structural considerations, surface integrity, permanence, and protection against theft and vandalism.
- B. Artist shall investigate costs and prepare preliminary cost estimates related to the fabrication and installation of the Schematic Design Proposal. The estimates shall indicate the feasibility of producing the proposed Artwork within the fabrication and installation budget of up to \$150,000 (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 6. SCHEMATIC DESIGN PROPOSAL REVIEWS.**

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

**Part 7. DESIGN DEVELOPMENT PROPOSAL.**

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

surface integrity, permanence, and protection against theft and vandalism (collectively, the "Artwork Design Specifications").

- B. Artist shall develop a detailed budget (the "Artwork Budget"), not to exceed \$150,000 which shall cover all costs related to the fabrication and installation of the Artwork, including, but not limited to: itemized costs for materials including applicable sales tax; off-site fabrication costs; costs for labor of assistants; Artist's time for coordination, fabrication, supervision and installation; itemized General Contractor and sub-contractor costs; permits or other fees; insurance; studio and operation expense; consultants' fees; communications; Artist's travel; transportation of the Artwork to site; and itemized installation costs.
- C. \$15,000.00 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.
- 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 8. DESIGN DEVELOPMENT PROPOSAL REVIEW.**

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

- D. The Reviewing Body may recommend approval, approval with minor changes or disapproval. In the event that the Reviewing Body recommends disapproval, or approval with minor changes to the Design Development Proposal, Artist, upon written notification by the Program Officer, shall respond to the recommended changes in writing and submit a revised Design Proposal to the Project Manager 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 Project Manager accepts the Design Development Proposal, the Design Development Proposal will be presented to the San José Arts Commission for review and approval. At City's option, the Design Development Proposal may be submitted to City Council for approval.
- F. Should the final design proposal be disapproved, and the Artist has performed the services set out in Exhibit A, Parts 1-8, to the satisfaction of the Project Manager, Artist may be requested to submit a modified design proposal as specified by the Project Manager for additional design compensation. Additional design compensation will reduce the fabrication budget as stated in Exhibit A, Part 5 and Part 7 and the fabrication budget will be amended accordingly. City retains the right to terminate per Section 12 of this Agreement.

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

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

**Part 10. CONSTRUCTION DOCUMENTS.**

A. Artist, at City's option, shall be responsible for the preparation of any drawings depicting both the fabrication and installation of the Artwork as proposed by the Design Development Proposal (the "Construction Documents"). Artist shall be responsible for obtaining any and all information necessary for preparation of the Construction Documents, including without limitation, any field measurements of the proposed site.

B. Any and all drawings must be certified by a qualified engineer, licensed by the State of California and must conform to all applicable federal, state and local laws and regulations. The Construction Documents for the Artwork are subject to approval by City's Department of Public Works. The Construction Documents for the Artwork must be designed in accordance with City's standard specifications as described below in subpart E ("City's Standard Specifications"). The Construction Documents and City's Standard Specifications shall collectively be NVF:AFS:AHT 8/9/2022 Des/Fab/Inst Agreement A-6 referred to as the "Plans." Once the Construction Documents are approved, City's Program Officer will notify Artist in writing.

C. When seeking approval of the Construction Documents, Artist shall submit the following for City's Department of Public Works: 1. the plans on reproducible sheets measuring 24 inches by 36 inches or in one or more electronic formats, approved in advance by City, which may be reproduced on sheets measuring 24 inches by 36 inches; and 2. all engineering calculations associated with the submitted Construction Documents; and 3. the specifications for the Artwork including a final budget estimate listing the quantities and unit prices for the fabrication and installation of the Artwork.

D. City's approval of the Plans shall not release Artist of the responsibility for the correction of mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved.

E. City's Standard Specifications and Standard Details, dated July 1992, are on file with the City's Department of Public Works, Architectural Division.

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

F. Artist is responsible for all applicable Underwriters Laboratory (UL) approvals as they may apply.

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

City, in City's sole discretion, may decide to proceed or not to proceed with the Artwork. If City decides to proceed and all approvals are secured, City's Public Art Project Manager will issue a written Notice to Proceed with Fabrication and Installation to the Artist. Artist shall not commence fabrication and installation of Artwork until Project Manager has issued such Notice. If Notice to Proceed with Fabrication and Installation is issued such that City and Artist agrees that there is reason to anticipate a delay in the mutually agreed schedule of performance

through no fault of Artist, then City and Artist shall identify the revised Schedule of Performance in writing on the Notice to Proceed with Fabrication and Installation or on such other mutually executed amendment to the Schedule of Performance.

## **Part 12 FABRICATION AND INSTALLATION.**

### **A. General.**

1. The parties agree that the Final Proposal, consisting of the City-approved Design Development Proposal, is to be filed in the City's Office of Cultural Affairs. In the event of conflict between the Final Proposal and this Agreement, this Agreement will control. The location of the Artwork is described in Recital A on Page 1 of this Agreement.
2. Artist shall fabricate the Artwork consistent with the Final Proposal, including without limitation, supervising all aspects of the fabrication of the Artwork to ensure proper fabrication of the Artwork. As more particularly provided below, Artist shall be responsible for the transportation and delivery of the Artwork to the Site. Artist shall be responsible for the installation of the Artwork at the Site consistent with the Design Development Proposal for the Artwork which was developed and approved by the Reviewing Body.
3. Artist agrees that installation includes adequate training and explanation to City staff, to occur in San José unless otherwise agreed by the Project Manager, concerning the repair and maintenance of Artwork. Training includes those instructions which are required to operate, maintain, and perform basic repairs on the Artwork. Training is due no later than 10 business days after completion of the Artwork installation and is a pre-requisite for Acceptance.

### **B. Deviations from Proposal.**

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



in the Final Proposal. To the extent that any specification for the Artwork is not identified in the Final Proposal, Artist shall seek City's prior approval of these specifications before commencing with fabrication of the Artwork.

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

C. Material Deviations.

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

D. Personnel.

Artist has, or will secure at Artist's expense, all personnel required to perform Artist's Services. All persons retained by Artist shall possess the requisite licenses and permits necessary.

E. Third-party Contractors.

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

contractor, Artist will be liable for the costs solely attributable to Artist's (or Artist's Agents') delay or impact upon third parties.

3. If any part of Artist's work depends upon the work of any other person for proper execution or results, Artist shall, prior to proceeding with such work, promptly report to City in writing any discrepancies or defects in such other work which can be identified upon reasonable inspection that would render it unsuitable for proper execution and results. Failure to so notify City shall constitute the Artist's acceptance of such work as suitable.

F. Review of Progress and Reports.

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

G. Risk of Loss.

Until the Artwork is formally accepted by City, any damage to, theft or vandalism to, or acts of God or nature affecting the Artwork are the responsibility of Artist, including, but not limited to, any loss occurring during the fabrication, storage, transportation, delivery or installation of the Artwork.

H. Inspection and Transportation of Artwork

1. Inspection Notice.

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

2. Notice to Proceed.

Within fifteen working days (15) days of receipt of the Inspection Notice for each Off-Site Element, City's Project Manager will

inform Artist in writing either (1) the Off-Site Element has been completed in accordance with the terms of this Agreement and the Off-Site Element is formally accepted for purposes of transporting the Off-Site Element to the Site (“Transportation Notice to Proceed”) or (2) there are defects or deficiencies in the Off-Site Element which prevent formal acceptance, in which case the defects or deficiencies will be described (“Off-Site Defects Notice”). In the event that an Off-Site Element is fabricated at a place not located in the San Francisco Bay Area, City may, at its sole discretion, determine to delay inspection until the Off-Site Element is delivered to the Site. If City fails to issue the Transport Notice to Proceed or the Off-Site Defects Notice within the 15 working day inspection period, the Transport Notice to Proceed will be deemed to have been issued at the conclusion of the 15 working day inspection period. In the event that City issues an Off-Site Defects Notice, Artist will promptly remedy any defects to the satisfaction of City’s Project Manager.

3. Delivery.

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

I. Work at the Site.

1. Plans.

i. Artist shall cause all labor and material incorporated in the Artwork to be furnished in accordance with the requirements and specifications approved by City and the City’s Standard Specifications (collectively, the “Plans”).

- ii. City's approval of the Plans shall not release Artist of the responsibility for the correction of mistakes, errors or omissions contained in the Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Plans were developed or approved. If, during the course of installation of the Artwork, City determines in City's sole discretion that the public safety requires modification of, or the departure from, the Plans, City shall have the authority to require Artist to address the public safety issues and to present Artist's proposed modifications to the DPW Director for the Director's review and approval of the engineering soundness of the proposed modifications. The parties acknowledge that the Plans, once approved by City, shall be final and that, except as expressly provided in this subsection, no revisions to the Plans shall be permitted except with the prior written approval of City's DPW and Chief Development Officer.

2. Installation.

City, under Artist's supervision, shall be responsible for installation of Artwork at the Site, including without limitation, supervising the work of any subcontractors and coordinating the inspection of the installation of the Artwork with the DPW Director. The parties recognize and agree that the Artwork will not be formally accepted by City, unless the DPW Director approves the installation of the Artwork at the Site.

3. Appearance of Site.

Artist shall maintain a neat appearance to the work at the Site. Artist shall be responsible for any clean-up of the Site made necessary by the installation of the Artwork, including without limitation, removal of equipment, materials and the repair of any portion of the Site or surrounding area damaged by the installation of the Artwork caused by the negligence or willful acts or omissions of Artist or Artist's subcontractors.

4. City's Access to Site.

City's designated representatives shall at all times during the progress of work on the Artwork at the Site have free access to the Artwork for inspection purposes. If either the DPW Director or the Chief Development Officer determines that all or any portion of the work done on the Artwork is not in compliance with the Plans, City shall notify Artist of the same and Artist shall promptly cure

such defect to the satisfaction of the DPW and Chief Development Officer.

5. Representatives.

Artist shall designate in writing before starting work, an authorized representative who shall have the authority to represent and act for Artist. When work is not in progress and during periods when work is suspended, arrangements acceptable to the DPW Director shall be made for any emergency work which may be required.

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

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

Prior to commencement of work on the Artwork, Artist shall provide to the Project Manager the names and telephone numbers of at least 1 person in charge of or responsible for the work who can be reached personally in case of emergency 24 hours a day, 7 days a week.

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

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

A. Notices.

Artist shall notify City's Project Manager that the Artwork has been installed at the Site ("Completion Notice"). Within seven (7) days of City's receipt of the Notice from the Artist City shall notify Artist in writing that the Artwork as completed and installed meets the requirements of this

Agreement (“Acceptance Notice”), or if the Artwork does not meet this Agreement’s requirements, City shall notify Artist of the defects (“Defects Notice”).

B. Remedy of Defects.

Artist shall promptly remedy at Artist’s own cost any defects noted in City’s Defects Notice to the satisfaction of City’s Project Manager.

C. Maintenance Instructions.

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

D. Final Documentation.

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

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

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

**Concept Design**

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

Week of January 23, 2023

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

February 7, 2023

**Schematic Design**

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

Week of January 23, 2023

Complete all required reviews of Schematic Design  
Proposal including Public Art Committee review (Part 6 of  
Exhibit A)

February 7, 2023

**Design Development**

Complete all tasks in Part 7 of Exhibit A and submit

Week of March 28, 2023

Design Development Proposal to staff for required reviews

Complete all required reviews of Design Development

April 5, 2023

Proposal including Public Art Committee review (Part 8 of  
Exhibit A)

**Construction Documents**

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

**Fabrication and Installation** (Part 11 of Exhibit A)

Start fabrication in  
May, 2023;  
complete installation by  
October, 2023 or as determined in  
coordination with DPW's River Oaks  
Regional Stormwater Capture Facility  
base project

Notice of Completion (Part 12 of Exhibit A)

December 31, 2025

2. Modification of Schedule. The parties agree that the Schedule set forth above, and the term of the Agreement, through the Notice of Completion, may, upon mutual agreement, be modified upon prior written authorization of the City’s Director of Economic Development, Public Art Director, or Project Manager without need of a formal amendment to this Agreement, through a Notice of Amended Schedule of Performance and Term in the form of this Exhibit.

**NOTICE OF AMENDED SCHEDULE OF PERFORMANCE AND TERM**

<b>AGREEMENT TITLE and DATE:</b>	AGREEMENT BETWEEN THE CITY OF SAN JOSE AND [ ] TO DESIGN, FABRICATE AND INSTALL A WORK OF ART AT [ ], dated [ ]
<b>ARTIST Name and Address:</b>	
<b>DATE OF OPTION:</b>	

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

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

**AMENDMENT NUMBER (e.g., FIRST, SECOND, ETC.) AMENDED SCHEDULE OF PERFORMANCE**

<b>Concept Design</b>	
Complete all tasks in Parts 1-3 of Exhibit A and submit Concept Design Proposal to Staff for required reviews	
Complete all required reviews of Concept Design Proposal including Public Art Committee review (Part 4 of Exhibit A)	
<b>Schematic Design</b>	
Complete all tasks in Part 5 of Exhibit A and submit Schematic Design Proposal to staff for required reviews	
Complete all required reviews of Schematic Design Proposal including Public Art Committee Review (Part 6 of Exhibit A)	



<b>Design Development</b>	
Complete all tasks in Part 7 of Exhibit A and submit	
Design Development Proposal to staff for required reviews	
Complete all review of Design Development Proposal	
including Public Art Committee Review (Part 8 of Exhibit A)	
<b>Construction Documents</b>	
Complete Construction Documents, Calculations & Final	
Budget (Parts 10 of Exhibit A)	
Fabrication and Installation (Part 11 of Exhibit A)	
Notice of Completion (Part 12 of Exhibit A)	

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

<p><b>“CITY”</b>          By _____</p>	<p><b>“ARTIST”</b>          By _____          Michael Amescua          Artist</p>
--	---

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

Form Approved by the Office of the City Attorney.

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

**EXHIBIT C**  
**COMPENSATION**

1. Fee. Artist's fee for Artwork Design, Fabrication and Installation, including all expenses relating thereto, shall not exceed the sum of One Hundred Eighty-Five Thousand Dollars (\$185,000.00) of which Thirty-Five Thousand Dollars (\$35,000.00) is allocated for design, including Construction Documentation, and an amount of up to One Hundred Fifty Thousand Dollars (\$150,000.00) is allocated for fabrication and installation. This fee includes but is not limited to the following costs: labor of assistants; materials, programming, communication, and other indirect costs; travel expenses of the Artist for site visits, mandatory public meetings and community meetings, and research, and includes a mandatory contingency/holdback of up to 10% of the final, approved budget for fabrication and installation.
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.	\$10,000
--	----------

Upon City's notice to proceed with the Artwork Design Development Proposal, which advance payment is for and contingent upon satisfactory completion of tasks identified in Part 5 and 6 of EXHIBIT A	\$10,000
---	----------

Upon issuance of City's Notice of Design Development Acceptance (Part 7 and 8 of EXHIBIT A) and <b>NOTICE OF DESIGN DEVELOPMENT ACCEPTANCE</b> (Part 9 of EXHIBIT A, and ) approval of Construction Documents (Part 10 of EXHIBIT A)	\$15,000
--	----------

Upon Issuance of Notice to Proceed as identified in Part 11 of EXHIBIT A.	TBD pursuant to Exhibit A, Part 6.
---	------------------------------------

**FABRICATION & INSTALLATION**

Payment Milestones for Fabrication TBD pursuant to Exhibit A, Part 6	TBD pursuant to Exhibit A, Part 6.
--	------------------------------------

Upon final completion	TBD pursuant to Exhibit A, Part 6.
-----------------------	------------------------------------

CONTINGENCY	\$15,000
-------------	----------

4. Fabrication and Installation, Payment Schedule for Artwork. City shall pay Artist for the costs and expenses identified in the Artwork Budget as developed per EXHIBIT A, Part 7. Artist shall submit invoices for the costs and expenses outlined in the Budget and shall also submit any documentation required under the City's Standard Specifications regarding payment of prevailing wages ("Documentation Provision"). Artist's failure to pay or ensure payment of prevailing wages or to comply with the Documentation Provision is subject to the provisions of EXHIBIT D. The City may make incremental payments of budget line items to facilitate fabrication and installation, at the discretion of the City's Art Project Manager. The form of the invoice shall be subject to the approval of the City's Art Project Manager. Artist may adjust the line items within the Fabrication and Installation budget with the prior written approval of City's Art Project Manager, which approval will not be unreasonably withheld.

City shall pay Artist for the costs and expenses identified in the Artwork Budget as developed per EXHIBIT A, Part 7. Artist shall submit invoices for the costs and expenses outlined in the Budget and shall also submit any documentation required under the City's Standard Specifications regarding payment of prevailing wages ("Documentation Provision"). Artist's failure to pay or ensure payment of prevailing wages or to comply with the Documentation Provision is subject to the provisions of EXHIBIT D. The City may make incremental payments of budget line items to facilitate fabrication and installation, at the discretion of the City's Art Project Manager. The form of the invoice shall be subject to the approval of the City's Art Project Manager. Artist may adjust the line items within the Fabrication and Installation budget with the prior written approval of City's Art Project Manager, which approval will not be unreasonably withheld.

5. Contingency/Holdback Draw. Included in the Budget is an amount up to 10% of the total approved fabrication and installation budget, which shall be retained by the City and shall not be paid to the Artist except where unforeseeable and unavoidable circumstances cause an increase in the costs incurred by Artist in the Fabrication and Installation of the Artwork. In the event Artist wishes to draw from the Contingency/Holdback, Artist shall submit a written request ("Contingency/Holdback Draw Request") specifying the reason for the request and the total amount of the request. No contingency/holdback draw shall be paid without the written approval of City's Public Art Director and City's Project Manager, which will not be unreasonably withheld. Without limitation of the foregoing, City shall have no obligation to approve a Contingency/Holdback Draw to make corrections for which the Artist or Artist's subcontractors are responsible nor to pay for any costs that Artist or Artist's subcontractors could have reasonably avoided. Any of the amounts budgeted for contingency/holdback that remain unpaid upon City's acceptance of the Artwork as satisfactory shall be retained by City. In no event shall City be required to make payments in excess of the total budgeted amount.
6. Contingency/Holdback Payout: Any unused, remaining contingency/holdback funds will be paid out as follows:
  - a. The remaining unused contingency/holdback funds will be retained by the City to oversee costs associated with construction, workmanship or performance of the Artwork or for any other warranty issues during the first thirty (30) days of operation, including, but not limited to verification of material and/or workmanship integrity, proper operation of any

mechanical/electrical components and fine tuning of any programming. Provided that City has not incurred any complaints or costs associated with the construction, workmanship or performance of the Artwork or other issues covered by Artist's warranty hereunder, the remaining Contingency/Holdback will be released by City to Artist three (3) months after City's Notice of Acceptance is issued.

The foregoing notwithstanding, if the City encounters any problems or claims in relation to the construction, workmanship or performance of the Artwork, the City may retain all or a portion of the Contingency/Holdback as necessary to cover such costs as reasonably determined by City as without limiting any other remedies City may have at law or in equity and this Agreement will remain in effect until resolution of those issues

7. Reimbursables: City will not make any additional payment for Artist's expenses.
8. In the event that the City determines that work for which it has received a request for payment does not meet specifications required under this Agreement, City in its sole discretion shall have the right to withhold such payment until such deficiency has been corrected. In such event, City shall provide detailed written notice to Artist within ten (10) days of receipt of such request for payment, specifying the failure of performance for which City intends to withhold payment. Artist shall work to cure such failure of performance in order to meet the Agreement standards to the satisfaction of City.
9. Notwithstanding the foregoing, Artist expressly acknowledges that approval of work to permit an interim payment is solely for the benefit of Artist. Unless and until the City issues a Notice of Acceptance for the Artwork, no interim approval shall constitute acceptance or approval of the Artwork by City nor shall it be construed as a waiver of City's right to require that the Artwork conform strictly to the Final Proposal and to the Plans.
10. Pursuant to California Revenue and Taxation Code Section 6365, the City's payment for the Artwork is exempt from sales taxes imposed under the California Revenue and Taxation Code.
11. The parties agree that the Schedule for Payment set forth above may be modified only upon prior written authorization of the Deputy City Manager or Project Manager.

**EXHIBIT D**  
**REMEDIES FOR BREACH OF PREVAILING WAGE PROVISIONS**

A. **General.** Artist acknowledges to have read and understands that, pursuant to the terms and conditions of this Agreement, that on at least a portion of the work covered by this Agreement, it is required to pay workers a prevailing wage (“Wage Provision”) and to submit certain documentation to the City establishing its compliance with the Documentation Provision, as defined on EXHIBIT C. Artist further acknowledges the City has determined that the Wage Provision promotes each of the following (collectively “Goals”):

1. It protects City job opportunities and stimulates the City’s economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
2. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
3. Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San José, because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San José.
4. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

B. **Withholding of Payment.** Artist agrees that the Documentation Provision is critical to the City’s ability to monitor Artist’s compliance with the Wage Provision and to ultimately achieve the Goals. Artist further agrees its breach of the Documentation Provision would result in the need for additional enforcement action to verify compliance with the Wage Provision.

In light of the critical importance of the Documentation Provision, the City and Artist agree that Artist’s compliance with this Provision, as well as the Wage Provision, is an express condition of City’s obligation to make each payment due to the Artist pursuant to this Agreement. The City is **not** obligated to make any payment due to Artist until Artist has performed all of its obligations under these provisions. Any payment by the City despite Artist’s failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Agreement or a waiver of the right to withhold payment for any subsequent breach of the Wage Provision or the Documentation Provision.

C. **Liquidated Damages for Breach of Wage Provision.** Artist agrees its breach of the Wage Provision would cause the City damage by undermining the Goals, and City’s damage would not be remedied by Artist’s payment of restitution to the workers who were paid a substandard wage. Artist further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid.

The City and Artist mutually agree that making a precise determination of the amount of City’s damages as a result of Artist’s breach of the Wage Provision would be impracticable and/or

extremely difficult. Therefore, the parties agree that, in the event of such a breach, Artist shall pay to the City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the amount of wages that should have been paid.

D. **Audit Rights.** All records or documents required to be kept pursuant to this Agreement to verify compliance with the Wage Provision shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Artist's address indicated for receipt of notices in this Agreement.

The difference between such stipulated prevailing wage rates and the amount paid to each workman for each calendar day or portion thereof for which each workman was paid less than the stipulated prevailing wage rate shall be paid to each worker by the Artist pursuant to the requirements of Section 1775 of the Labor Code of the State of California.

E. **Adjustment.** The City will not recognize any claim for additional compensation because of the payment by the Artist of any wage rate in excess of the prevailing wage rate set forth in the Agreement. The possibility of wage increases is one of the elements to be considered by the Artist in determining his bid, and will not under any circumstances be considered as the basis of a claim against the City under this Agreement.

**EXHIBIT E**  
**DESIGN PHASE INSURANCE**

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

**I. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

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

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

**II. Minimum Limits of Insurance**

Artist shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.

3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.
4. Professional Liability Errors & Omissions \$1,000,000 per claim/ aggregate limit.

Any limits requirement may be met with any combination of primary and excess coverage so long as the excess coverage is written on a "follow form" or umbrella basis.

### **III. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by, the City.

### **IV. Other Insurance Provisions**

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

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



2. Workers' Compensation and Employers' Liability

Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

3. Claims Made Coverages (Applies to Professional Liability coverage.)

If coverage is obtained on a "claims made" policy form, the retroactive date shall precede the date services were initiated with the City and the coverage shall be maintained for a period of three (3) years after termination of services under this Agreement.

4. All Coverages

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

**V. Acceptability of Insurance**

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

**VI. Verification of Coverage**

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

Proof of insurance shall be emailed in pdf format to: [Riskmgmt@sanjoseca.gov](mailto:Riskmgmt@sanjoseca.gov):

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

**VII. Subcontractors**

Artist shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor. If an engineer or architect is required to complete the Artist's design documents or to inspect the Artwork, the Artist may provide the City of San José Risk Management and Office of Cultural Affairs with a copy of the subcontractor's Professional Liability Errors and Omissions insurance certificate as evidence of meeting the Professional Liability Errors and Omissions requirement.

**VIII. Exception**

If Artist does not have any employees and/or under California law is not required to have Workers' Compensation coverage and does not wish to cover themselves for Workers' Compensation, the Artist shall sign the following statement, as well as the contract itself, to effect a fully initiated contract :

I, as designated Artist, do not have, nor intend to have, for the full term of this contract, any employees. Furthermore, I do not wish to obtain or be covered under any Workers' Compensation insurance coverage; and, therefore, am signing this waiver in lieu of providing Workers' Compensation, as outlined in the insurance requirements of this contract.

Signature: \_\_\_\_\_

---

Phone

**EXHIBIT E (CONT.)**

**FABRICATION AND INSTALLATION PHASE INSURANCE**

Artist shall procure and maintain for the duration of the contract 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 the Artist, his agents, representatives, employees or subcontractors. The cost of such insurance shall be included in the Artist's bid.

**I. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001) including products and completed operations; and
2. The coverage provided by Insurance Services Office form number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and

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

**II. Minimum Limits of Insurance**

Artist shall maintain limits no less than:

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

Any limits requirement may be met with any combination of primary and excess coverage so long as the excess coverage is written on a "follow form" or umbrella basis.

### **III. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by, the City.

### **IV. Other Insurance Provisions**

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

#### **1. Commercial General Liability and Automobile Liability Coverages**

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

#### **3. Workers' Compensation and Employers' Liability**

Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors.

3. All Coverages

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

V. Acceptability of Insurance

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

VI. Verification of Coverage

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

Proof of insurance shall be emailed in pdf format to: [Riskmgmt@sanjoseca.gov](mailto:Riskmgmt@sanjoseca.gov):

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

VII. Subcontractors

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

VIII. Exception

If Artist does not have any employees and/or under California law is not required to have Workers' Compensation coverage and does not wish to cover themselves for Workers' Compensation, the Artist shall sign the following statement, as well as the contract itself, to effect a fully initiated contract :

I, as designated Artist, do not have, nor intend to have, for the full term of this contract, any employees. Furthermore, I do not wish to obtain or be covered under any Workers' Compensation insurance coverage; and, therefore, am signing this waiver in lieu of providing Workers' Compensation, as outlined in the insurance requirements of this contract.

Signature: \_\_\_\_\_

**EXHIBIT F**  
**SPECIAL PROVISIONS**

This page is left intentionally blank