

**AGREEMENT FOR DESIGN, FABRICATION AND INSTALLATION
OF ART WORK AT _____
BY AND BETWEEN
THE CITY OF MORGAN HILL
AND**

TO DESIGN, FABRICATE AND INSTALL A WORK OF ART

This Agreement for Design, Fabrication and Installation of Art Work ("Agreement") is made and entered into as of this _____ day of _____, 2015, by and between the CITY OF MORGAN HILL, a California municipal corporation ("City"), and _____, a _____ ("Artist"). City and Artist may be collectively referred to herein as "Parties" and individually as a "Party."

RECITALS

- A. City desires to commission a public art project to be located in the City of Morgan Hill at _____ (the "Site") and has received art work proposals pursuant to that certain Request for _____ issued by City; and
- B. Artist submitted that certain art work proposal entitled, " _____ " which art work proposal was selected by City to be installed at the Site (the "Artwork"); and
- C. Artist represents to City that Artist has the necessary professional expertise and qualifications to provide the Artwork to City at the Site and that the Artwork's reasonable life span is anticipated to be _____ years after its completion and understands that City is relying upon Artist's representations; and
- D. City will manage the development of the Artwork in consultation with _____; and

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which is hereby acknowledged, and in view of the above recitals, the Parties agree as follows:

SECTION 1. SCOPE OF SERVICES.

1.0 Artist shall timely and professionally perform those services specified in detail and in the location specified in EXHIBIT A, entitled "ARTIST'S SERVICES," attached hereto and incorporated herein by this reference and which services are referred to in this Agreement as "Artist's Services."

SECTION 2. SCHEDULE OF PERFORMANCE.

2.0. GENERAL. Artist shall complete Artist's Services in accordance with the schedule set forth in EXHIBIT B, entitled "SCHEDULE OF PERFORMANCE," attached hereto and incorporated herein by this reference.

2.1. TIME IS OF THE ESSENCE. The Parties agree 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 EXHIBIT C, entitled "COMPENSATION," attached hereto and incorporated herein by this reference. The rate, schedule and method of payment also are set forth in said EXHIBIT C. Such payment shall constitute full and complete compensation for all work performed and services rendered pursuant to this Agreement, including, but not limited to, the Artist's Services, all other professional services and reimbursable expenses, and all supervision, labor, supplies, materials, equipment or use thereof, taxes, and all other necessary incidentals.

B. In the performance of the work to be fabricated and/or installed at 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 to the extent required by applicable law.

3.1. **COST OVERRUN.** In the event Artist incurs costs in excess of the maximum compensation set forth in EXHIBIT C, Artist shall pay and be responsible for 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. **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 for that work. 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 and Artist shall meet and make reasonable efforts to resolve the dispute; provided, however, that 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.

3.3. **NO WAIVER OF RIGHTS.** No payment to Artist for any work performed or services rendered under or pursuant to this Agreement 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 or work 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 those 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 design of the Artwork (the "Artwork Design") so that the Artwork can be fabricated, constructed and installed at the Site without exceeding the total design, fabrication, and installation budget of _____ Thousand Dollars (\$_____) inclusive of a contingency amount of \$_____ which contingency amount 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 at the Site. 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 Services or other Artist work performed pursuant to this Agreement.

5.1. PERSONNEL. Artist has or will secure and supervise at Artist's expense all personnel required to perform and complete Artist's Services. Artist shall require that any and all persons retained by Artist shall possess the requisite licenses and permits necessary to perform the work designated by Artist to be performed by such persons.

5.2. COORDINATION. Artist acknowledges that it is an essential element of the Artist's Services to coordinate with City, as well as other persons who may be involved with the development of the Artwork Design, fabrication and installation at the Site, and City agrees that it and such other 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. COMPLIANCE WITH LAWS. Artist agrees to apply with all applicable laws of the federal, state and local governments in Artist's performance of Artist's Services and all other work performed by Artist pursuant to this Agreement.

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.

6.1. SUPERVISION. City is under no obligation to supervise the Artist's performance of Artist Services or other work by Artist described under this Agreement, but City shall reasonably cooperate with Artist as needed and requested by Artist to facilitate timely completion and fulfillment of Artist's obligations under this Agreement.

6.2. ARTWORK IDENTIFICATION. City will work with Artist to allow Artist to design and install an identification marker for the completed Artwork, which will include the following information: Artist's name, year in which the Artwork is completed, and Artwork title. Identification may be in the form of a plaque, brochure or other method that City determines is consistent with safe operation of the remainder of the Site.

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 City in any manner.

SECTION 8. ASSIGNABILITY.

8.0. ASSIGNABILITY OF CONTRACT. The Parties agree that the expertise and experience of Artist are material considerations inducing City to enter into 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 first given by City. However, nothing in this section shall be deemed to prevent Artist, at Artist's sole expense, from utilizing the services of such other consultant or contractor as Artist may supervise 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 the sole negligence or sole willful misconduct of City its officers, agents and employees. The provisions of this section shall survive expiration or sooner termination of this Agreement.

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 as to form and content. These requirements are subject to amendment 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. TERMINATION.

11.0. **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.

11.1. **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.

11.2 **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 cancelled, 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.

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

11.4 **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 12. COMPLIANCE WITH LAWS.

12.0. **COMPLIANCE.** Artist shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments in the performance of this Agreement.

SECTION 13. NONDISCRIMINATION.

13.0. **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 14. ARTIST'S WARRANTY.

14.0. 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 herein, 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 those certain _____ Standard Specifications ("City's Standard Specifications") as described below in EXHIBIT A, Part 10E with all necessary care, skill, and diligence.

G. Artist warrants that the Artwork is the result of the artistic efforts of Artist and that Artist will deliver and transfer the Artwork to City 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.

14.1 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 15. INTELLECTUAL PROPERTY RIGHTS AND LICENSE, REPRODUCTION AND PUBLICITY RIGHTS.

15.0 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.

15.1 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.

15.2 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 California Public Records Act.

15.3 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 16. ARTIST'S BOOKS AND RECORDS.

16.0. 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.

16.1. 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 Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to City for inspection at City's 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.

16.2. 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 17. 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 Act apply, if at all, to the following uses of Artwork:

- (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 herein. .

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

SECTION 18. REPUTATION AND CREDIT.

18.0. 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.

18.1. 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 Morgan Hill," or other language agreed to by the Parties.

18.2. 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 obtaining Artist's written consent.

C. City shall have the right to donate or sell the Artwork at any time. Before exercising this right, City, by written notice to Artist at Artist's last known address, agrees to give Artist the opportunity to purchase the Artwork for the greater of the Total Price 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.

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 19. DEFECTS IN MATERIAL, WORKMANSHIP AND INHERENT VICE.

19.0. 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 (defined below), which appear within a period of three (3) years from the date the Artwork is formally accepted. If the Artwork should deteriorate because of Inherent Vice within three (3) 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 of the Artwork from Artist.

19.1. 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.

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

SECTION 20. MAINTENANCE

20.0. REPAIRS AND RESTORATION. City shall have the right to determine, 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.

20.1. 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 21. CONFLICT OF INTEREST.

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

SECTION 22. GIFTS.

22.0. Artist shall not accept nor offer any gift to a City officer or employee that is prohibited by federal, state or local law or by written policy of the City. The offer, giving or acceptance of any gift by Artist that is prohibited by such law or written policy 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 11 of this Agreement.

SECTION 23. WAIVER.

23.0. 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 24. SPECIAL PROVISIONS.

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

SECTION 25. NOTICES.

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

For the City: City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037
Attention: Edith Ramirez
Email: edith.ramirez@morganhill.ca.gov

For the Artist: _____

Email: _____

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.

25.1 Artist agrees for the duration of Artist's life to provide City with Artist's current mailing address and facsimile number in the event Artist's address or facsimile number, 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 26. VENUE/GOVERNING LAW.

26.0. 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.

26.1. 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 27. 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 28. PRIOR AGREEMENTS AND AMENDMENTS.

28.0. 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 be modified only by a written amendment duly executed by the Parties to this Agreement.

SECTION 29. SEVERABILITY.

29.0. 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 30. REFERENCE TO CITY.

30.0. Where this Agreement requires or permits City to act and no officer of the City is specified, City's City Manager (or the City Manager's delegate if City Manager determines to delegate an action that has been delegated to the City Manager hereunder) shall be deemed authorized to act on City's behalf.

SECTION 31. NO RELIGIOUS OR POLITICAL ADVOCACY.

31.0 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 message. Any portion of the compensation used in contradiction to the provisions of this Section shall be deemed a disallowed cost.

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

APPROVED AS TO FORM:

CITY OF MORGAN HILL, a municipal corporation:

Renee A. Gurza
City Attorney

Steve Rymer
City Manager

ATTEST:

ARTIST

CITY CLERK

EXHIBIT A
ARTIST' 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 shall work in collaboration with City staff, identifying appropriate areas as potential sites for Artwork.

Part 2. RESEARCH.

Artist shall meet with City staff in order to understand the programmatic uses of the Site and the facilities surrounding the Site for the purposes of defining goals for the Artwork that are appropriate to the general social and immediate physical environment of the Artwork.

Part 3. FINAL CONCEPT DESIGN.

Artist shall revise the concept design showing Artist's idea for the Artwork (the "Final Concept Design Proposal") based on the selected location and finalization of the City's contribution for the foundation and electrical work.

Part 4. FINAL CONCEPT DESIGN REVIEW.

- A. The Final Concept Design Proposal shall be submitted to the City's Economic Development Manager. Artist acknowledges that one or more reviewing bodies related to the City organization (collectively, "the Reviewing Body") may be assembled to review and make recommendations on the Final Concept Design Proposal.
- B. Artist shall provide presentation quality visual material for presentation of the Final Concept Design Proposal to the Reviewing Body, and for release to the press. .
- C. The Final Concept Design Proposal shall respond to the review and comments given by City staff. Artist also acknowledges that the City's Economic Development Manager may require Artist to make modifications to the Final Concept Design Proposal before permitting the proposal to be submitted to 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 Final Concept Design Proposal, Artist, upon written notification by the City's Economic Development Manager shall respond to the Reviewing Body's comments and submit the revised Final Concept Design Proposal to the City's Economic Development Manager for review.
- F. In the event that all approvals are secured, the City's Economic Development Manager will issue a notice of acceptance of the Final Concept Design Proposal to Artist.
- G. Artist shall not proceed with the proposal for the Artwork Construction Documents until City's Economic Development Manager issues a notice to

proceed to Artist. The notice to proceed will identify the approved Final Concept Design for the Artwork.

Part 5. 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 Final Concept Design (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 (and related calculations and drawings) of the proposed site as deemed necessary by the City's Building Official and Director of Public Works.
- B. Any and all drawings must be certified by a qualified structural 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 Director of Public Works or City's Building Official, as appropriate. 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") and the Building Code. The Construction Documents and City's Standard Specifications shall collectively be referred to as the "Plans." Once the Construction Documents are approved, City's City Manager 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 and Building Department:
 - 1. the plans on reproducible 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. Artist shall comply with City's Standard Details to the extent such details are applicable to the Artwork. 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 shall comply with Traffic Controls and Traffic Guidelines when performing work in the public rights of way. City shall provide Artist with such applicable Traffic Controls or Traffic Guidelines.

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 Economic Development 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 City's Economic Development 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 City-approved construction drawings shall be filed in the City's Building Department. 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 Construction Documents, 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 approved Construction Documents..
3. Artist agrees that installation includes adequate training and explanation to City staff, to occur in Morgan Hill unless otherwise agreed by the City's Economic Development 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 by City of the Artwork.

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 Concept Design and Construction Documents 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 Construction Documents 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).
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 City Manager. Additionally, Artist shall make no change in the design that requires a modification of the Construction Documents without the prior written approval of City's Director of Public Works.

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. 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.

F. 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.

G. 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. Artist shall notify City in writing when each element of the Artwork is ready for inspection, prior to transporting Artwork to the Site. The Parties acknowledge and agree that City has the right to inspect each of the Elements.

2. 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 City Manager regarding the time, place and manner of delivery and installation of the Artwork. City's City 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 City 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 City 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 set forth in the Artwork Construction Documents 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 City's Director of Public Works 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 Director of Public Works and City Manager.

2. Installation.

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

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 City's Director of Public Works 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 City's Director of Public Works or City Manager. 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 City's Director of Public Works 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 City's Director of Public Works will on request of the Artist be given or confirmed by the City's Director of Public Works in writing.

Prior to commencement of work on the Artwork, Artist shall provide to the City 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 City 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 City 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 the provisions of this Agreement.

E. Completion and Transfer of Artwork.

The completion of the Artwork by Artist and Artist's transfer of ownership of the Artwork to City occurs upon City's acceptance of the Artwork.

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EXHIBIT B
SCHEDULE OF PERFORMANCE

Commencement of Work. Artist shall commence work upon full execution of this Agreement and shall proceed with work under and pursuant to this Agreement in a manner that meets the following schedule:

Final Concept Design

Complete all tasks in Parts 1-3 of Exhibit A and submit Concept Design Proposal to Staff for required reviews	July 15, 2015
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Complete all required reviews of Final Concept Design Proposal i	July 22, 2015
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Complete Construction Documents, Calculations & Final Budget (Parts 10 of Exhibit A)	September 1, 2015
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Fabrication and Installation (Part 12 of Exhibit A)	TBD pursuant to EXHIBIT A, Part 9.
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Notice of Completion (Part 13 of Exhibit A)	December 21, 2015
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2. Modification of Schedule. The Parties agree that the Schedule of Performance set forth above may be modified only upon prior written authorization of City's City Economic Development Manager.

The Parties agree that the Schedule of Performance set forth above also may, by mutual agreement of the Parties, be modified in writing by the Parties in any manner that does not increase costs or expenses to City or compensation owed by City under this Agreement.

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 Seventy Five Thousand Dollars (\$75,000) of which amount Dollars (\$) is allocated for design, including Construction Documentation, and an amount of Dollars (\$) 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 and research, and a contingency/holdback.

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.

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

Upon issuance of City's Notice of Design Development \$
Acceptance (Part 7 and 8 of EXHIBIT A) and **NOTICE OF**
DESIGN DEVELOPMENT ACCEPTANCE (Part 9 of EXHIBIT A,
and) approval of Construction Documents (Part 10 of EXHIBIT A)
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
6 TBD pursuant to
Exhibit A, Part 6.

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

CONTINGENCY \$

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 City Manager. The form of the invoice shall be subject to the approval of the City's City Manager. Artist may adjust the line items within the fabrication and installation budget with the prior written approval of City's City Manager, which approval will not be unreasonably withheld.

5. Contingency/Holdback Draw. Included in the budget for this Agreement is an amount equal to 10% of the total 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 City 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. In the event that any of the amounts budgeted for contingency/holdback remain unpaid upon City's acceptance of the Artwork as satisfactory, the remaining contingency/holdback will be retained by the City or paid to Artist per the terms of Paragraph 6 below. In no event shall City be required to make payments in excess of the total budgeted amount under this Agreement.

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 3 months 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 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 City Manager.

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EXHIBIT D

REMEDIES FOR BREACH OF PREVAILING WAGE PROVISIONS

A. **General.** Artist acknowledges it has 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 Morgan Hill, 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 Morgan Hill.
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 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 for the full term of this Agreement and any renewal or extension thereof, shall obtain and maintain at least all of the following minimum insurance requirements prior to commencing any work or receiving payments therefore under this contract:

1. **Insurance Requirements.**

1.1. **Commencement of Work.** Artist shall not commence work under this Agreement until it has obtained City approved insurance. For general liability insurance policies, Artist shall provide City, prior to commencement of work, with a separate endorsement which states that the policy contains the following language:

- The City, its elected or appointed officials, boards, agencies, officers, agents, employees, and volunteers are named as additional insureds; and,
- the insurer waives the right of subrogation against City and City's elected or appointed officials, boards, agencies, officers, agents, employees, and volunteers; and,
- insurance shall be primary non-contributing.

Artist shall furnish City with copies of all policies or certificates subject to this Agreement, whether new or modified, promptly upon receipt. No policy subject to this Agreement shall be canceled or materially changed except after thirty (30) days' notice by the insurer to CITY.

1.2. **Workers' Compensation Insurance.** Artist and all subcontractors shall maintain Workers' Compensation Insurance, as required by law.

1.3. **Insurance Types and Amounts.** Artist shall maintain comprehensive general liability insurance; professional errors and omissions liability insurance (required for professional and technical service consultants only); and automobile insurance each with policy limits of at least \$1,000,000 per occurrence for general liability, \$1,000,000 per accident for automobile liability and \$1,000,000 per claim for professional errors or omissions (for professional and technical service consultants only).

1.4. **Acceptability of Insurers.** All insurance required by this Agreement shall be carried only by responsible insurance companies licensed and admitted, or otherwise legally authorized to carry out insurance business, in California with a current A.M. Best's rating of no less than A:VII.

EXHIBIT E (CONT.)
FABRICATION AND INSTALLATION PHASE INSURANCE

Artist and/or its Contractor(s), 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 services hereunder by ARTIST, its agents, representatives, employees or subcontractors.

1. Insurance Requirements.

1.1. Commencement of Work. Artist shall not commence work under this Agreement until it has obtained City approved insurance. For general liability insurance policies, Artist shall provide City, prior to commencement of work, with a separate endorsement which states that the policy contains the following language:

- The City, its elected or appointed officials, boards, agencies, officers, agents, employees, and volunteers are named as additional insureds; and,
- the insurer waives the right of subrogation against City and City's elected or appointed officials, boards, agencies, officers, agents, employees, and volunteers; and,
- insurance shall be primary non-contributing.

Artist shall furnish City with copies of all policies or certificates subject to this Agreement, whether new or modified, promptly upon receipt. No policy subject to this Agreement shall be canceled or materially changed except after thirty (30) days' notice by the insurer to CITY.

1.2. Workers' Compensation Insurance. Artist and all subcontractors shall maintain Workers' Compensation Insurance, as required by law.

1.3. Insurance Types and Amounts. Artist shall maintain comprehensive general liability insurance; professional errors and omissions liability insurance (required for professional and technical service consultants only); and automobile insurance each with policy limits of at least \$1,000,000 per occurrence for general liability, \$1,000,000 per accident for automobile liability and \$1,000,000 per claim for professional errors or omissions (for professional and technical service consultants only).

1.4. Acceptability of Insurers. All insurance required by this Agreement shall be carried only by responsible insurance companies licensed and admitted, or otherwise legally authorized to carry out insurance business, in California with a current A.M. Best's rating of no less than A:VII.

EXHIBIT F
SPECIAL PROVISIONS

There are no special provisions.

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