

PUBLIC ART PROGRAM AGREEMENT

THIS AGREEMENT is made and entered into this _____ day of _____, 2008, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, hereinafter referred to as the “City,” and _____ whose address is _____ hereinafter referred to as the “Artist.”

RECITALS

1. The City has allocated funds to include artwork to be integrated into the construction of the _____ project as part of the City’s Public Art Program under D.R.M.C. §§ 20-85 through 20-88.

2. The Artist has been selected by the City to design, execute, fabricate, deliver and install a work of art consisting of _____ (the “Work”), such Work to be integrated into the _____ (the “Site”), after consultation with the Denver Arts and Venues (DAV), Site designers, Department of Public Works and Department of _____ personnel.

3. Both parties wish to reasonably promote and maintain the integrity and clarity of the Artist’s ideas and statements as represented by the Work.

4. The Artist was selected via an open Call for Entry by an independent expert panel.

5. The City believes the Artist to be well able to undertake and perform such services for the City and County of Denver, and desires to contract with the Artist for the performing of such services.

6. The Artist is ready, willing and able to render such services as an independent contractor.

AGREEMENTS

In consideration of the premises and the mutual covenants herein contained, and subject to the terms and conditions hereinafter stated, the parties hereto hereby agree as follows:

1. **WORK TO BE PERFORMED:**

1.1 General.

a. As used in this Agreement, unless the context otherwise requires: “Work” means the work of art as ultimately conceived, designed, fabricated, transported, delivered, engineered for installation, and ultimately installed by the Artist, after consultation with

the Site designers and others. The Work includes all physical components of the complete artwork including but not limited to associated foundations, landscaping material and hardscape, bases, or mounting brackets or devices, electronic components, video components and all other miscellaneous components necessary to complete the fabrication and installation of the artwork.

b. The Artist shall perform all services and furnish all supplies, material and equipment as necessary for the design, execution and fabrication of the Work, including but not limited to, payments for all necessary taxes, insurance, small tools, Artist consultants, rental equipment, and all other items incidental to producing a complete and acceptable Work, and shall, either directly or through qualified sub-consultants, undertake the transportation and installation of the Work at the Site.

c. The Artist shall determine the artistic expression, scope, design, color, size, material, texture, and location on the Site of the Work, subject to review and acceptance by the City as set forth in this Agreement.

1.2 Artist's Proposal and Preliminary Design.

The Artist will submit an initial proposal and develop the design for the Work, in accordance with the proposal letter to the City, a copy of which is attached hereto and incorporated herein as Exhibit A. The Artist will, under this Agreement, prepare the final design and perform the other services specified herein.

1.3 Preliminary Design Review.

a. Within sixty (60) days after receipt by the Artist of Notice to Proceed issued to the Artist by the Director of DAV, the Artist shall prepare and submit to the City detailed preliminary working drawings of the Work and the Site, together with such other graphic material as may reasonably be requested by the City in order to permit the City to carry out preliminary design review and to certify the compliance of the Work with the finally approved preliminary design of the Work. Upon request by the Artist, the City shall promptly furnish all readily available information and assistance required by the Artist in connection with said submission. However, the City does not guarantee its information, materials and assistance, and assumes no liability therefore. The Artist shall be solely responsible for designing the Work in compliance with all applicable City, State and/or Federal statutes, ordinances, and/or regulations.

b. During the preliminary design review, the City may also require the

Artist to make such revisions to the design as are necessary for the Work to comply with the finally approved conceptual design of the Work.

c. The City may also request revisions for other practical and/or non-aesthetic reasons.

d. After its receipt of the Artist's submission(s) pursuant to this Section 1.3, the City shall notify the Artist of its approval (or disapproval) of such submission and budget and of all revisions made in the initial proposal as a result thereof. The City's approval shall be in its sole discretion. Revisions made pursuant to this Section 1.3 become a part of the Preliminary Design. The Preliminary Design Proposal ("Proposal") will be incorporated herein as Exhibit B.

1.4 Final Design Review.

a. Within sixty (60) days after the date of approval of the preliminary design by the City, the Artist shall prepare and submit to the City detailed working drawings of the Work and the Site, together with such other graphic material as may reasonably be requested by the City in order to permit the City to carry out final design review and to certify the compliance of the Work with applicable statutes, ordinances, and regulations. Upon request by the Artist, the City shall promptly furnish all readily available information and assistance required by the Artist in connection with said submission. However, the City does not guarantee its information, materials and assistance, and assumes no liability therefore. The Artist shall be solely responsible for designing, fabricating, constructing, delivering and installing the Work in compliance with all applicable city, state and/or federal statutes, ordinances, and/or regulations. It is expressly understood that the Artist shall have his or her final design reviewed and stamped as approved as to structural integrity by a professional engineer licensed to practice in the State of Colorado.

b. The submission shall also include a budget, not to exceed _____ Dollars (\$_____.00), as described herein, that includes all costs for design, engineering, execution, fabrication, transportation, delivery, installation, insurance, contingencies, consultant fees, fees and permits, and any other costs associated with the Work, and the Artist's fee.

c. The submission shall also include a written statement detailing anticipated regular and routine maintenance, such maintenance to be provided by the City in its sole discretion, as appropriate to maintain the Work in its intended condition.

d. During the final design review, the City may also require the Artist to make such revisions to the design as are necessary for the Work to comply with applicable statutes, ordinances, or regulations of the City, the State of Colorado, or the U. S. Government.

e. The City may also request revisions for other practical and/or non-aesthetic reasons.

f. After its receipt of the Artist's submission(s) pursuant to this Section 1.4, the City shall notify the Artist of its approval (or disapproval) of such submission and budget and of all revisions made in the initial proposal as a result thereof. The City's approval shall be in its sole discretion. Revisions made pursuant to this Section 1.4 become a part of the Final Design. The Final Design Proposal (the "Proposal") will be incorporated herein as Exhibit C.

1.5 Execution of Work.

a. After written approval by the City of the Final Design, the Artist shall furnish to the City a schedule for the completion of fabrication and installation of the Work, including a schedule for the submission of progress reports, if any. After written approval of the schedule by the City, the Artist shall fabricate, transport and install the Work in accordance with such schedule. Such approval schedule shall be incorporated into this Agreement by reference as Exhibit D and may be amended by written agreement between the City and the Artist.

b. The City shall have the right to review the Work at reasonable times during the fabrication hereof. The Artist shall submit to the City progress reports acceptable to the City.

c. The Artist shall complete the fabrication, transportation and installation of Work in conformity with the Proposal.

d. The Artist shall present to the City in writing for further review and approval any significant changes in the scope, design, color, size, material or texture of the Work. The City shall in its sole discretion determine whether a significant change exists.

1.6 Delivery and Installation.

a. The Artist shall notify the City in writing when fabrication of the Work is completed and it is ready for delivery and installation at the Site.

b. The Artist shall deliver and install the completed Work at the Site in compliance with the schedule approved pursuant to Section 1.5.

c. The City shall endeavor to prepare the Site for the timely installation of the Work, including public access, and area lighting of the Work, but shall not be responsible for any utility provision or expense, or for any physical alteration of the Site surface.

1.7 Post Installation.

a. Within thirty (30) days after the installation of the Work, the Artist at his sole expense shall furnish the City with the following thirteen (13) digital photographs:

(i) Ten (10) images taken from different viewpoints and distances. At least three (3) of these images should be suitable for reproduction and print use of the Work as installed. Utilizing uncompressed .tiff files at least 300 dpi in 8"x10" is recommended.

(ii) Three (3) images taken of the Site prior to the installation of the Work.

b. The Artist shall provide a plaque at the Site, according to specifications set out in Exhibit E attached hereto and incorporated herein by reference.

c. The Artist shall be available at such time or times as may be agreed between the City and the Artist to attend an inauguration or presentation ceremony(s) relating to the transfer of the Work to the City. The City shall endeavor to arrange for publicity for the completed Work in such art publications and otherwise as may be determined between the City and the Artist as soon as practicable following installation.

d. Upon installation of the Work, the Artist shall provide to the City written recommendations for appropriate maintenance and preservation of the Work.

e. Artist shall further attend and participate in a dedication or other event for outreach to the Denver community for at least one hour at a date mutually agreed upon by the parties. Artist further agrees to participate in the discussions or question sessions at such community event.

1.8 Final Acceptance.

a. The Artist shall advise the City in writing when all services required prior to those described in Section 1.7. c. have been completed in conformity with the Proposal. The Artist shall, prior to final acceptance of the Work, provide the City with lien and/or claim releases from contractor, subcontractors, and suppliers on the Project and shall otherwise comply

with the provisions of C.R.S. §38-26-107.

b. The City shall notify the Artist in writing of its final acceptance of the Work.

1.9 Risk of Loss. The risk of loss or damage to the Work shall be borne by the Artist until installation of the Work and final acceptance thereof by the City, and the Artist shall take such measures as are necessary to protect the Work from loss or damage until such final acceptance. The parties recognize that the City is self-insured and possesses immunities pursuant to C.R.S. §24-10-101, *et seq.*

1.10 Ownership of Work Products. The City, at its option, may retain all plans, drawings, slides, photographs, submittals, studies, designs, maquettes and models, and other documents submitted to the City by the Artist. These items, when submitted, become and are the property of the City, and the City may, without restriction, make use of such documents for educational, public relations, arts promotional and other non-commercial purposes. The Artist shall not be liable for any damage which may result from any use of said documents for purposes other than those described in this Agreement.

2. **COORDINATION AND LIAISON:** The Director of Denver Arts and Venues (“Director”) orders and directs all services under this Agreement and, until otherwise notified by the Mayor, is designated as the authorized representative of the City through whom services performed under this Agreement shall be coordinated. The Director may from time to time direct, in writing, with copy to the Artist, that the authority to coordinate certain day-to-day matters shall be exercised by other City employees, including but not limited to those in the Department of Public Works and the Department of _____. The Artist agrees that during the term of this Agreement he or she shall fully coordinate all work hereunder as directed by the City, including coordination with the City’s Department of Public Works, the Department of _____, other City agencies or departments and other consultants or contractors to the City.

3. **TERM OF AGREEMENT AND TIME OF PERFORMANCE:**

3.1 Term. The term of the Agreement shall commence on the date of execution hereof and terminate on completion of the services to be performed by the Artist hereunder, or on _____, 200__, whichever is earlier.

3.2 Duration. The services to be required of the Artist, as set forth in Article 1,

shall be completed in accordance with the schedule for completion of the Work as set out in this Agreement; provided that such time limits may be extended or otherwise modified by written agreement between the Artist and the City.

3.3 Early Completion of Artist Services. The Artist shall bear any transportation and storage costs resulting from the completion of his or her services hereunder prior to the time provided in the schedule for installation.

3.4 Time Extensions. The City shall grant a reasonable extension of time to the Artist in the event that there is a delay on the part of the City in performing its obligations under this Agreement or in completing the underlying capital project, or if conditions beyond the Artist's reasonable control or Acts of God render timely performance of the Artist's services impossible or unduly burdensome despite the exercise of best efforts by the Artist. Failure to fulfill contractual obligations due to conditions beyond either party's control in such circumstances will not be considered a breach of contract; provided that such obligations shall be suspended only for the duration of such conditions.

4. **PAYMENT:**

4.1 Fee. The Artist agrees to accept, and the City agrees to pay, as full and complete compensation for completion of all the items of work contained in this Agreement a fixed fee of _____ Dollars (\$ _____ .00), which shall constitute full compensation for all services and materials whatsoever to be performed and furnished by the Artist under this Agreement. It is agreed that the City has no obligations regarding commission, or any agreements with galleries or agents with whom the Artist may have contracted. **The fee shall be paid in the following installments, subject to receipt by the City of acceptable periodic invoices and supporting documentation from the Artist, each installment to represent full and final payment for all services and materials provided by the Artist prior to the submittal of such periodic invoice for the specific phase of performance:**

a.	Execution of Contract	(5%)	\$,000.00
b.	Preliminary Design Review	(10%)	\$,000.00
c.	Final Design Review	(30%)	\$,000.00
d.	Mid-Point Fabrication	(30%)	\$,000.00
e.	Installation	(20%)	\$,000.00
f.	Post-Installation and Final Acceptance	<u>(5%)</u>	<u>\$,000.00</u>

Total Contract Amount Not to Exceed (100%) \$,000.00

The Artist shall be responsible for the payment of all mailing or shipping charges on submissions to the City, the cost of all travel by the Artist and the Artist's agents and employees necessary for the proper performance of the services required under this Agreement and for all other miscellaneous charges hereunder. Nothing contained in this Agreement shall entitle the Artist to retain funds paid by the City hereunder in the event that the Artist fails to fabricate, transport and install a satisfactory Work in accordance with this Agreement, and nothing contained in this Agreement shall prevent or prohibit the City from seeking damages or reimbursement from the Artist in the event of the Artist's breach or default of this Agreement.

4.2 Appropriation. Notwithstanding any other term or condition of this Agreement, it is understood and agreed that the obligation of the City for all or any part of its payment obligation hereunder, whether direct or contingent, shall only extend: (i) as to bond funds, to payment of monies duly and lawfully appropriated by the people, received by the City from the sale of General Obligation Bonds, encumbered for the purpose of this Agreement by the Denver City Council and paid into the Treasury of the City; and (ii) as to other funds, to payment of monies duly and lawfully appropriated by the City Council for the purpose of this Agreement, and paid into the Treasury of the City. The Artist acknowledges that (i) the City does not by this Agreement irrevocably pledge present cash reserves for payments in future fiscal years, and (ii) this Agreement is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of the City.

4.3 Maximum Amount Payable. The maximum amount payable by the City under this Agreement shall not exceed _____ Dollars (\$ _____-.00).

5. **STATUS OF ARTIST:** It is understood and agreed by and between the parties that the status of the Artist shall be that of an independent contractor and of a person retained on a contractual basis to perform professional or technical services for limited periods of time as described in Section 9.1.1 (E)(x) of the Charter of the City and it is not intended, nor shall it be

construed, that the Artist or any employee or subcontractor of the Artist is an employee, officer, or agent of the City under Chapter 18 of the Denver Revised Municipal Code or for any purpose whatsoever.

Without limiting the foregoing, the parties hereby specifically acknowledge that the Artist is not entitled to unemployment insurance benefits unless unemployment compensation coverage is provided by the Artist or some other entity besides the City, that the Artist is not entitled to workers' compensation benefits from the City and that the Artist is obligated to pay federal and state income taxes on any monies earned pursuant to this Agreement.

6. **WARRANTIES:**

6.1 Warranties of Title. The Artist represents and warrants to the City that:

- a. The Work is solely the result of the artistic effort of the Artist;
- b. Except as otherwise disclosed in writing to the City prior to the time of execution hereof, the Work is unique and original and does not infringe upon any copyright;
- c. That neither the Work delivered hereunder, nor a duplicate thereof, has been accepted for sale elsewhere; and
- d. The Work is free and clear of any liens or claims from any source whatsoever.

6.2 Warranties of Quality and Condition. The Artist represents and warrants to the City that:

- a. The execution and fabrication of the Work will be performed in a workmanlike manner;
- b. The Work, as fabricated and installed, will be free of defects in material and workmanship, including any defects consisting of “inherent vice” or qualities which cause or accelerate deterioration of the Work; and
- c. Reasonable maintenance of the Work will not require procedures substantially in excess of those described in the maintenance recommendations to be submitted by the Artist to the City hereunder.

6.3 Duration of Warranties; Breach. The warranties described in this Article 6 shall survive for a period of two (2) years after the date of the City’s written notification to the

Artist of the final acceptance of the Work. The City shall give notice to the Artist of any observed breach with reasonable promptness. The Artist shall, at the request of the City, and at no cost to the City, cure reasonably and promptly the breach of any such warranty which is curable by the Artist utilizing artistic skill and which cure is consistent with professional conservation standards as determined solely by the City (including, for example cure by means of repair or refabrication of the Work).

7. **OWNERSHIP AND REPRODUCTION RIGHTS:**

7.1 Title. Title to the Work shall pass to the City upon final acceptance.

7.2 Waiver of Rights Under Visual Artists Rights Act of 1990 (“VARA”). The Artist understands and agrees that, as to his or her rights in the Work, the provisions of this Agreement shall supersede the provisions of the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. §101 et. seq., as amended, including but not limited to §106A(a) and §113, as to the Work, and that execution of this Agreement by the Artist shall constitute a waiver by the Artist, as permitted in 17 U.S.C. §106A(e), as amended, of any and all rights or protections in the Work, and any uses of the Work whatsoever, set out in or otherwise granted by 17 U.S.C. §101, et seq., as amended, including but not limited to §106A(a) or §113, or otherwise in the nature of "Droit Moral" under which artists claim an interest in their work. The Artist understands that, despite the City’s commitment not to intentionally damage, alter, or modify the Work without the prior written approval of the Artist, removal of the Work from the Site may subject the Work to destruction, distortion, mutilation, or other modification, by reason of its removal.

7.3 Artist’s Remaining Retained Rights in the Work. The Artist therefore retains: (i) all right, title and interest in the Work including all copyrights, but expressly excluding any rights in the Work under the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. §101 et. seq., as amended, including but not limited to §106A(a) and §113, or otherwise in the nature of "Droit Moral" under which artists claim a continuing interest in their products and in the maintenance or modification of their products; and (ii) all rights expressly granted in this Agreement. The Artist’s waived rights as described above are, insofar as such rights are transferable, assigned to the City. In view of the intention that the Work in its final dimension shall be unique, the Artist shall not make any additional exact duplicate, two or three-dimensional reproductions of the final Work, including but not limited to miniatures or jewelry applications,

nor shall the Artist grant permission to others to do so except with the written permission of the City. The City is unable to grant permission of any kind for political use of the Work. The restriction for duplication or reproduction shall not apply to the Artist's use of photographic reproductions of the Work in portfolio or in critical and scholarly writings. The Artist grants to the City and its assigns an irrevocable license to make two-dimensional reproductions of the Work for non-commercial purposes, in the sole discretion of the City and its assigns, including but not limited to reproductions used in advertising brochures, media publicity, and catalogues or other similar publications.

7.4 Notice. All reproductions by the City shall contain a credit to the Artist and a copyright notice substantially in the following form: _____(artist or studio name), date of publication.

7.5 Credit to City. The Artist shall give a credit reading substantially, "an original work owned and commissioned by the City and County of Denver," in any public showing under the Artist's control of reproduction of the Work.

7.6 Registration. The Artist shall at his or her expense cause to be registered, with the United States Register of Copyrights, a copyright of the Work in the Artist's name.

8. **ARTIST'S RIGHTS:**

8.1 Artist's Enumerated Contractual Rights in the Work. Subject to and consistent with the provisions of Article 7 above, the Artist understands and agrees that he or she is therefore granted the following rights in the Work pursuant to this Agreement.

8.2 Maintenance and Repair.

a. The City shall have the right to determine, in its sole discretion, after consultation with a professional conservator, selected by the City, when and if maintenance, repairs and restorations to the Work will be made. To the extent practical, the Artist, during the Artist's lifetime, shall be given the opportunity to make or personally supervise significant repairs or restorations and shall be paid a reasonable fee for any such services, provided that the City and the Artist shall agree in writing, prior to the commencement of any significant repairs or restorations, upon the Artist's fee for such services, and subject to appropriation by the City of such fee.

b. All repairs and restorations shall be made in accordance with

recognized principles of conservation.

8.3 Damage. Subject to 8.5 below, the City agrees that it will not intentionally damage, alter, or modify the Work without the prior written approval of the Artist.

8.4 Notification to Artist. The City shall endeavor to notify the Artist of any proposed alteration of the Site that would affect the intended character of the Work and shall endeavor to consult with the Artist in the planning and execution of any such alteration and shall make a reasonable effort to maintain the integrity of the Work.

8.5 Removal, Relocation, Sale, Donation or Destruction. Nothing in this Agreement shall preclude any right of the City, in its sole discretion, (i) to remove the Work from public display, (ii) to move or relocate the Work to another location selected solely by the City for public display, or (iii) to donate or sell the Work to a third person or entity, or (iv) to destroy the Work. In addition, the Artist will have the right of final refusal as to any sale of the Work. If the City decides to donate or sell the Work, the donee or buyer of the Work will assume all of the City's duties toward the Artist stated herein, will be obligated to defend and indemnify the City with respect to such duties, and will take the Work subject to all of the Artist's rights as stated herein, and the donee or buyer shall be given a copy of this executed Agreement at the time of donation or sale. The City will endeavor to notify the Artist of such donation and sale and of the identity of the donee or buyer. If the City shall at any time decide to destroy the Work, it shall by notice to the Artist offer the Artist a reasonable opportunity to recover the work at no cost to the Artist, except for an obligation of the Artist to indemnify and reimburse the City for the amount by which the cost to the City of such recovery exceeds the costs to the City of the proposed destruction as determined solely by the City. Without limiting the generality of Section 8.1, the Artist agrees that his or her rights in connection with the destruction of the Work are as described in this Section 8.5; as set out above, the Artist waives any rights which he or she might have in connection with the removal or destruction of the Work under the Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. §101 et. seq., as amended, including but not limited to §106A(a) and §113.

8.6 Record. The City shall maintain on permanent file in the Office of the Denver City Clerk, Ex-Officio Clerk and Recorder, a record of this Agreement and of the location and disposition of the Work.

8.7 Artist's Address. The Artist shall notify the City of changes in his or her address. The failure to do so, if such failure prevents the City from locating the Artist, shall be deemed a waiver by the Artist of the rights granted to the Artist in this Article 8, or otherwise retained by the Artist, the exercise of which requires response by the Artist. A mailing of notice by the City by certified mail with return receipt requested to the address of the Artist or of his or her attorney currently on file with the City at the time of such mailing, shall be deemed to be an adequate notification effort by the City hereunder.

8.8 Surviving Covenants. The covenants and obligations set forth in this Article shall be binding upon the parties, their heirs, legatees, executors, administrators, assigns, transferees and all their successors in interest, and the City's covenants do attach and run with the Work and shall be binding to and until twenty (20) years after the death of the Artist. However, the obligations imposed upon the City by Sections 8.2 through 8.5 shall terminate on the death of the Artist. The City shall give any subsequent owner of the Work notice in writing of the covenants herein providing such owner with an executed copy of this Agreement.

9. **TERMINATION OR SUSPENSION OF AGREEMENT:**

9.1 Termination for Default or Convenience. In addition to the City's rights of termination during Work design and fabrication as set out above, the City may terminate this Agreement at any time on ten (10) days notice if the Artist's services become unsatisfactory to it or if the Project is canceled. The City may also by written Notice of Default to the Artist terminate the whole or part of this Agreement in the event that the Artist or any of the Artist's officers or employees are convicted, plead nolo contendere, enter into a formal agreement in which they admit guilt, enter a plea of guilty, or otherwise admit culpability to criminal offenses of bribery, kickbacks, collusive bidding, bid-rigging, antitrust, fraud, undue influence, theft, racketeering, extortion or any offense of a similar nature, in connection with the Artist's business. The City may otherwise terminate the Agreement without cause, for its convenience, upon thirty (30) days notice to the Artist. If the Artist's services are terminated, Artist shall be paid only for that portion of work or services satisfactorily completed at the time of notice of such action.

9.2 Event of Artist's Default or Incapacity. In the event of default by the Artist, all finished and unfinished drawings, sketches, photographs, and other work products prepared and submitted or prepared for submission by the Artist under this Agreement shall at

the City's sole option become its property, including the right to fabricate or execute the Work. Notwithstanding the previous sentence, the Artist shall not be relieved of liability to the City for damages sustained by the City by virtue of any breach of this Agreement by the Artist, and the City may reasonably withhold payments to the Artist until such time as the exact amount of such damages due the City from the Artist is determined, or exercise all of its other rights hereunder.

In the event of incapacity or death of the Artist, such will not be deemed a breach of this Agreement or a default on the part of the Artist. Artist has the right to appoint a successor artist to complete the Work in the event of incapacity or death. The successor artist is subject to approval of the City at the time of the signing of the contract and shall be bound to complete the Work under the same terms, including the budget, herein; however, the successor artist shall be automatically given an extension of sixty (60) days added to the timeline. Artist shall be paid only for that portion of work or services satisfactorily completed at the time of incapacity or death with remaining payments to be made to the successor artist. The Work shall pass to the City and all copyright described under this Agreement shall remain with the original Artist. Artist shall provide a copy of this Agreement to the successor artist and the successor artist shall provide a written acknowledgement to the City of the successor artist's agreement to abide by the terms of this Agreement.

In the event of incapacity or death of the Artist, where no successor artist has been appointed or where an appointed successor artist does not complete the Work, all finished and unfinished drawings, sketches, photographs, and other work products prepared and submitted or prepared for submission by the Artist under this Agreement shall at the City's sole option become its property. If the Work was at mid-point of fabrication or beyond at time of death or incapacity, and no successor is appointed, the City retains the rights to select a successor artist to finish the Work at the City's expense. If the artwork was not at mid-point of fabrication or beyond at time of death or incapacity, and no successor is appointed, the City retains possessory rights to the Work as then in existence and to exhibit the Work with the designation that it is "unfinished." Artist shall be paid only for that portion of work or services satisfactorily completed at the time of incapacity or death. In the event of incapacity or death, where no successor artist has been appointed, all copyright described under this Agreement shall remain with the original Artist.

9.3 Suspension. The Director may, in his or her sole discretion, suspend performance of this Agreement by both parties until full compliance by the Artist with the insurance requirements set out in Article 16.

10. **WHEN RIGHTS AND REMEDIES NOT WAIVED:** In no event shall any payment by the City hereunder constitute or be construed to be a waiver by the City of any breach of term, covenant, or condition or any default which may then exist on the part of the Artist, and the making of any such payment when any such breach or default shall exist shall not impair or prejudice any right or remedy available to the City with respect to such breach or default. No assent, expressed or implied, to any breach of any one or more covenants, terms, or conditions of the Agreement shall be construed as a waiver of any succeeding or other breach.

11. **EXAMINATION OF RECORDS:** The Artist agrees that any duly authorized representative of the City, including the City auditor or his representative, shall, until the expiration of six (6) years after the final payment under this Agreement, have access to and the right to examine any directly pertinent books, documents, papers and records of the Artist involving transactions related to this Agreement.

12. **SUBJECT TO LOCAL LAWS; VENUE:** Each and every term, provision or condition herein is subject to and shall be construed in accordance with the provisions of Colorado law, the Charter of the City and County of Denver and the ordinances, regulations, Executive Orders and/or fiscal rules enacted and/or promulgated pursuant thereto. The Charter, Revised Municipal Code, regulations and Executive Orders of the City and County of Denver, as the same may be amended from time to time, are hereby expressly incorporated into this Agreement as if fully set out herein by this reference. Venue for any action arising hereunder shall be in the City and County of Denver, Colorado.

13. **ASSIGNMENT AND SUBCONTRACTING:** The City is not obligated or liable under this Agreement to any party other than Artist named herein. The Artist understands and agrees that he or she shall not assign or subcontract with respect to any of his or her rights, benefits, obligations or duties under this Agreement except upon prior written consent and approval of the City, which consent or approval may be withheld in the absolute discretion of the City; and in the event any such assignment or subcontracting shall occur, such action shall not be construed to create any contractual relationship between the City and such assignee or subcontractor, and the

Artist herein named shall remain responsible to the City according to the terms of this Agreement.

14. **PREVAILING WAGES:** Employees of the Artist or his subcontractors may be subject to the payment of prevailing wages pursuant to D.R.M.C. 20-76, depending upon the nature of the Work. By executing this Agreement, the Artist covenants that he or she is familiar with this Code Section and is prepared to pay or cause to be paid prevailing wages, if any, required by the scope of work of the Artist's or his subcontractor's employees. A schedule of prevailing wage is attached as Exhibit H. The schedule of prevailing wage is periodically updated and Artist is responsible for payment of then current prevailing wage. Exhibit H shall be deemed replaced by updated schedules with out amendment to this Agreement. The Artist may obtain an updated scheduled of prevailing wage at any time from the Auditor's Office.

15. **NO DISCRIMINATION IN EMPLOYMENT:** In connection with the performance of work under this Agreement, the Artist agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and further agrees to insert the foregoing provision in all subcontracts hereunder.

16. **INSURANCE:**

16.1 **General Conditions:** Artist agrees to secure, at or before the time of execution of this Agreement, the following insurance covering all operations, goods or services provided pursuant to this Agreement. Artist shall keep the required insurance coverage in force at all times during the term of the Agreement, or any extension thereof, during any warranty period, and for three (3) years after termination of the Agreement. The required insurance shall be underwritten by an insurer licensed to do business in Colorado and rated by A.M. Best Company as "A"VIII or better. Each policy shall contain a valid provision or endorsement stating "Should any of the above-described policies be canceled or should any coverage be reduced before the expiration date thereof, the issuing company shall send written notice to the Denver Risk Administrator, 201 West Colfax Avenue, Dept. 1105, Denver, Colorado 80202 by certified mail, return receipt requested. Such written notice shall be sent thirty (30) days prior to such cancellation or reduction unless due to non-payment of premiums for which notice shall be sent ten (10) days prior." If any policy is in excess of a deductible or self-insured retention, the City

must be notified by the Artist. Artist shall be responsible for the payment of any deductible or self-insured retention. The City reserves the right to require the Artist to provide a bond, at no cost to the City, in the amount of the deductible or self-insured retention to guarantee payment of claims. The insurance coverages specified in this Agreement are the minimum requirements, and these requirements do not lessen or limit the liability of the Artist. The Artist shall maintain, at its own expense, any additional kinds or amounts of insurance that it may deem necessary to cover its obligations and liabilities under this Agreement.

16.2 Proof of Insurance: Artist shall provide a copy of this Agreement to its insurance agent or broker. Artist further agrees to have its agent or broker provide proof of Artist's required insurance on www.Ins-Cert.com and link the information to the City. The City reserves the right to require the Artist to provide a certificate of insurance, a policy, or other proof of insurance as required by the City's Risk Administrator in his sole discretion.

16.3 Additional Insureds: For general liability and excess/umbrella liability, Artist's insurer shall name the City as an additional insured.

16.4 Waiver of Subrogation: For all coverages, Artist's insurer shall waive subrogation rights against the City.

16.5 Sub-consultants: All sub-consultants, subcontractors, independent contractors, suppliers or other entities providing goods or services required by this Agreement shall be subject to all of the requirements herein and shall procure and maintain the same coverages required of the Artist. Artist shall include all such sub-consultants, subcontractors, independent contractors, suppliers or other entities as insureds under its policies or shall ensure that all sub-consultants maintain the required coverages. Artist agrees to provide proof of insurance for all such subcontractors, independent contractors, suppliers or other entities upon request by the City.

16.6 Workers' Compensation/Employer's Liability Insurance: The parties recognize and agree that the Artist is engaged in an independent occupation and profession and is free from control and direction in the performance of the services contracted for herein consistent with that mandated by C.R.S. §8-40-202(2)(a). It is understood and agreed by the parties that the City does not (a) require the Artist to work exclusively for the City, provided that the Artist may have elected to work for exclusively for the City for the period of time specified in the term of this

Agreement; (b) establish a quality standard for the Artist, provided that the parties agree that while the City may provide plans regarding its expectancy of the Work to be performed by the Artist, the City will not oversee the actual work of the Artist or instruct the Artist as to how the Work will be performed; (c) pay a salary or hourly wage to the Artist instead of the fixed contract rate stated herein; (d) terminate the work of the Artist for cause during the term of this Agreement unless the Artist violates the terms of this Agreement or fails to produce the Work or result that meets the specific terms provided in the Agreement; (e) provide any training for the Artist other than minimal orientation to the site or other parameters of the Artist activity; (f) provide tools or benefits to the Artist; (g) dictate the time of performance, except that the Agreement completion date together with the range of negotiated and mutually agreeable work hours has been established herein; (h) pay the Artist personally instead of making City warrants payable to the professional name of the Artist, except that in this Agreement the Artist is an individual and sole proprietor; and (i) combine the regular operations of the City in any way with the professional or business operations of the Artist instead of maintaining office operations separately and distinctly. These provisions are separately stated in Exhibit G, constituting the writing mandated by C.R.S. §8-40-202(2)(b), which must be signed and notarized by the Artist and the Director.

The Artist and his or her subcontractors, if any, shall otherwise shall maintain the coverage as required by statute for each work location and shall maintain Employer's Liability insurance with limits of \$100,000 for each bodily injury occurrence claim, \$100,000 for each bodily injury caused by disease claim, and \$500,000 aggregate for all bodily injuries caused by disease claims. Artist expressly represents to the City, as a material representation upon which the City is relying in entering into this Agreement, that none of the Artist's officers or employees who may be eligible under any statute or law to reject Workers' Compensation Insurance shall effect such rejection during any part of the term of this Agreement, and that any such rejections previously effected, have been revoked as of the date Artist executes this Agreement.

16.7 General Liability: Artist shall maintain limits of \$1,000,000 for each occurrence claim, \$1,000,000 for each personal and advertising injury claim, \$1,000,000 products and completed operations for each occurrence, and \$1,000,000 policy aggregate.

16.8 Automobile Liability: Artist shall maintain limits of \$1,000,000 for bodily injury per person, \$1,000,000 for bodily injury for each accident, and \$1,000,000 for property

damage applicable to all vehicles operating on City property and elsewhere.

16.9 Additional Provisions:

(a) For all general liability and excess/umbrella liability, the policies must provide the following:

- (i) If any aggregate limit is reduced by twenty-five percent (25%) or more by paid or reserved claims, the Artist shall notify the City within ten (10) days and reinstate the aggregates required;
- (ii) Unlimited defense costs in excess of policy limits;
- (iii) Contractual liability covering the indemnification provisions of this Agreement;
- (iv) A severability of interests provision;
- (v) Waiver of exclusion for lawsuits by one insured against another;
- (vi) A provision that coverage is primary; and
- (vii) A provision that coverage is non-contributory with other coverage or self-insurance provided by the City.

(b) For all general liability and excess/umbrella liability, if the policy is a claims-made policy, then the retroactive date must be on or before the contract date or the first date when any goods or services were provided to the City, whichever is earlier.

16.10 Payment and Performance Bonds. The Artist shall procure payment and performance bonds, in an amount satisfactory to the City, in the form exemplified by Exhibit F attached hereto and incorporated, upon approval by the City of Artist's Final Design Proposal. The City may in its sole discretion, in writing, accept alternative security from the Artist to assure the faithful payment and performance of the obligations set forth in the Agreement or waive this bond obligation in its entirety.

17. **INDEMNIFICATION:** The Artist shall defend, release, indemnify and save and hold harmless the City against any and all damages to property or injuries to or death of any person or persons, including property and employees or agents of the City, and shall defend, release, indemnify, and save and hold harmless the City from any and all claims, demands, suits, liabilities, actions, causes of action, or legal or equitable proceedings of any kind or nature, including

workers' compensation claims, of or by anyone whomsoever, in any way resulting from or arising out of the Artist's activities in connection herewith, including acts or omissions of the Artist or his or her officers, employees, representatives, suppliers, invitees, licensees, subconsultants, contractors, and agents; provided, however, that the Artist need not indemnify and save harmless the City, its officers, agents, and employees from damages proximately resulting from the sole negligence of the City's officers, agents, and employees. This indemnity clause shall also cover payment of the City's defense costs in the event that the City, in its sole discretion, elects to provide its own defense. The insurance coverage specified herein constitutes the minimum requirements, and said requirements shall in no way lessen or limit the liability of the Artist under the terms of the Agreement. The Artist shall procure and maintain, at his or her own expense and cost, any additional kinds and amounts of insurance that, in his or her judgment, may be necessary for the Artist's proper protection in the prosecution of the services hereunder. This indemnity clause shall survive termination of this Agreement.

18. **CONFLICT OF INTEREST:** The parties agree that no official, officer or employee of the City shall have any personal or beneficial interest whatsoever in the services or property described herein and the Artist further agrees not to hire or contract for services any official, officer or employee of the City or any other person which would be in violation of the Denver Revised Municipal Code Chapter 2, Article IV, Code of Ethics, or Denver City Charter Sections 1.2.9 and 1.2.12.

19. **NO THIRD PARTY BENEFICIARY:** It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the Artist, and nothing contained in this Agreement shall give or allow any such claim or right of action by any other or third person on such Agreement. It is the express intention of the City and the Artist that any person or entity other than the City or the Artist receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

20. **DISPUTES:** All disputes of whatsoever nature between the City and Artist regarding this Agreement shall be resolved by administrative hearings pursuant to the procedure established by Denver Revised Municipal Code 56-106. For the purposes of that procedure, the City official rendering a final determination shall be the City representative identified in Article 2

hereof.

21. **TAXES, CHARGES, AND PENALTIES:** The City shall not be liable for the payment of taxes, late charges or penalties of any nature except as required by the City's Revised Municipal Code.

22. **NO EMPLOYMENT OF ILLEGAL ALIENS TO PERFORM WORK UNDER THE AGREEMENT.**

The Agreement is subject to Article 17.5 of Title 8, Colorado Revised Statutes, and as amended hereafter (the "Certification Statute") and the Artist is liable for any violations as provided in the Certification Statute.

The Artist certifies that:

- (1) At the time of its execution of this Agreement, it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement.
- (2) It will participate in either the E-Verify Program, as defined in § 8-17.5-101(3.7), C.R.S., or the employment verification program established by the Colorado Department of Labor and Employment under § 8-17.5-102(5)(c), C.R.S. (the "Department Program"), to confirm the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement.

The Artist also agrees and represents that:

- (3) It shall not knowingly employ or contract with an illegal alien to perform work under the Agreement.
- (4) It shall not enter into a contract with a sub-consultant or subcontractor that fails to certify to the Artist that it shall not knowingly employ or contract with an illegal alien to perform work under the Agreement.
- (5) It has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under this Agreement, through participation in either the E-Verify Program or the Department Program.
- (6) It is prohibited from using either the E-Verify Program or the Department Program procedures to undertake pre-employment screening of job applicants while performing its obligations under the Agreement.
- (7) If it obtains actual knowledge that a sub-consultant or subcontractor performing work under the Agreement knowingly employs or contracts with an illegal alien, it will notify such sub-consultant or subcontractor and the City within three days. The Artist will also then terminate such

sub-consultant or subcontractor if within three days after such notice the sub-consultant or subcontractor does not stop employing or contracting with the illegal alien, unless during such three day period the sub-consultant or subcontractor provides information to establish that the sub-consultant or subcontractor has not knowingly employed or contracted with an illegal alien.

- (8) It will comply with any reasonable request made in the course of an investigation by the Colorado Department of Labor and Employment under authority of § 8-17.5-102(5), C.R.S.

23. **PARAGRAPH HEADINGS:** The captions and headings set forth herein are for convenience of reference only, and shall not be construed so as to define or limit the terms and provisions hereof.

24. **NOTICES:** All notices, requests, demands, and other communications which are required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon the delivery or receipt thereof, as the case may be, if delivered personally or sent by certified mail, return receipt requested, postage prepaid, as follows:

If to the City: Denver Arts and Venues
 1345 Champa Street
 Denver, CO 80204

If to the Artist: The address first above written.

25. **EXHIBITS:** The following documents, certain of which are attached hereto, are incorporated herein and made a part of this Contract:

- a. Exhibit "A", Artist's Proposal (attached hereto)
- b. Exhibit "B", Artist's Preliminary Design Proposal (incorporated herein by reference if accepted by City)
- c. Exhibit "C", Artist's Final Design Proposal (incorporated herein by reference if accepted by City)
- d. City and County of Denver Department of Public Works, Standard Specifications for Construction ("Orange Book"), 1999 Edition, incorporated herein by reference

- e. Exhibit “D”, Artist’s Schedule (incorporated herein by reference if accepted by City)
- f. Exhibit “E”, City Plaque Specification (attached hereto)
- g. Exhibit “F”, Payment and Performance Bond Form (if required)
- h. Exhibit “G”, Separate Declaration Regarding Independent Status (attached hereto)
- i. Exhibit “H”, Prevailing Wage Schedule (if required)

(The terms and conditions of Articles 1 through 29 and Exhibits “E”, “F”, “G” and “H” hereof shall control over any contradictory or inconsistent terms and conditions that may be found or contained in the above-referenced Exhibits “A”, “B”, “C” and “D” attached or incorporated documents. The order of precedence of control among those exhibits, from the controlling exhibit, shall be “G”, “H”, “F”, “E”, “D”, “C”, “B” and “A”.

26. **SEVERABILITY:** It is understood and agreed by the parties hereto that if any part, term, or provision of this Agreement is held by the Courts to be illegal or in conflict with any law of the State of Colorado, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular part, term, or provision held to be invalid.

27. **SURVIVAL OF CERTAIN AGREEMENT PROVISIONS:** The parties understand and agree that all terms, conditions and covenants of this Agreement, together with the exhibits and attachments hereto, if any, any or all of which, by reasonable implication, contemplate continued performance or compliance beyond the expiration or termination of this Agreement (by expiration of the term or otherwise), shall survive such expiration or termination and shall continue to be enforceable as provided herein for a period equal to any and all relevant statutes of limitation, plus the time necessary to fully resolve any claims, matters, or actions begun within that period.

28. **AGREEMENT AS COMPLETE INTEGRATION; AMENDMENTS:**

A. The Artist assures and guarantees that he or she possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement.

B. The person or persons signing and executing this Agreement on behalf of the Artist, do hereby warrant and guarantee that he/she or they have been fully authorized by the

Artist to execute this Agreement on behalf of the Artist and to validly and legally bind the Artist to all the terms, performances and provisions herein set forth.

C. The City shall have the right, at its option, to either temporarily suspend or permanently terminate this Agreement, if there is a dispute as to the legal authority of either the Artist or the persons signing the Agreement to enter into this Agreement. The City shall not be obligated to pay Artist for any performance of the provisions of this Agreement after the City has suspended or terminated this Agreement as provided in this Article.

29. **COUNTERPARTS OF THIS AGREEMENT:** This Agreement shall be executed in two (2) counterparts, each of which shall be deemed to be an original of this Agreement.

(Remainder of page intentionally left blank.)

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

ATTEST:

CITY AND COUNTY OF DENVER:

By: _____
STEPHANIE Y. O'MALLEY,
Clerk and Recorder, Ex-Officio
Clerk of the City and County of Denver

By: _____
M A Y O R

RECOMMENDED AND APPROVED:

By: _____
Director of Denver Arts and Venues

By: _____
Manager of Public Works

By: _____
Manager of (_____)

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

DAVID R. FINE, Attorney for the
City and County of Denver

By: _____
Manager of Finance
Contract Control No. _____ ()

By: _____
Assistant City Attorney

By: _____
Auditor

“CITY”

[ARTIST 'S NAME]
Taxpayer (IRS) I.D. No. _____

By: _____

Name: _____
(please print)

“ARTIST”

[Exhibits A-H]