

AN ORDINANCE      **2012-03-15-0197**

**AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT  
BETWEEN THE CITY OF SAN ANTONIO, TEXAS AND SRO  
ASSOCIATES, INC. FOR THE HISTORIC MISSION DRIVE-IN  
MARQUEE MURAL PROJECT.**

\* \* \* \* \*

**WHEREAS**, the City of San Antonio previously authorized a Memorandum of Agreement with the Texas Historical Commission and received funding from Tax Notes and Community Development Block Grant in Council District 3 to address the rehabilitation of the former Mission Drive-In Marquee; and

**WHEREAS**, City Council finds that it is in the best interest of the City, its citizens and visitors to enhance and enliven the City public's spaces through the design, fabrication and installation of approved mural components by SRO Associates, Inc., which was selected from respondents to a Request for Proposals; **NOW, THEREFORE:**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** A Professional Services Agreement with SRO Associates, Inc., in the amount of \$160,000.00 for the design, fabrication and installation of a marquee at the former Mission Drive-In (the "Project") is approved. The City Manager or her designee is authorized to execute the Agreement, a copy of which is attached to this Ordinance as **Exhibit 1**. No funds associated with this Project shall be used on culturally insensitive or offensive aspects of the historic mural as determined by City after conducting public outreach.

**SECTION 2.** Payment in the amount not to exceed \$160,000.00 in SAP Fund 43099000, Certificates Of Obligation Capital Projects, SAP Project Definition 40-00198, Mission Drive-In Marquee, is authorized to be encumbered and made payable to SRO Associates, Inc for professional services.

**SECTION 3.** The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

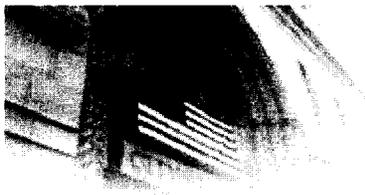
**SECTION 4.** This Ordinance shall be effective immediately upon passage by eight affirmative votes; otherwise, it shall be effective on the tenth day after passage.

**PASSED AND APPROVED** on this 15<sup>th</sup> day of March, 2012.

  
M A Y O R  
Julián Castro

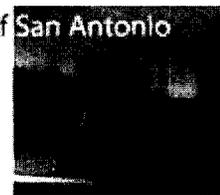
ATTEST:   
Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:   
Michael D. Bernard, City Attorney



Request for  
**COUNCIL**  
ACTION

City of San Antonio



### Agenda Voting Results - 17

<b>Name:</b>	5, 6, 7, 9, 10, 12, 13, 14, 15, 16A, 16B, 16C, 16D, 16E, 16F, 16G, 16H, 17						
<b>Date:</b>	03/15/2012						
<b>Time:</b>	09:26:13 AM						
<b>Vote Type:</b>	Motion to Approve						
<b>Description:</b>	An Ordinance authorizing the negotiation and execution of a professional services agreement with SRO Associates, Inc. not to exceed \$160,000.00 for the City of San Antonio's Historic Mission Drive-In Marquee Mural Project, a previously authorized Tax Notes and Community Development Block Grant (CDBG) funded project in Council District 3. [Peter Zanoni, Assistant City Manager; Mike Frisbie, Director, Capital Improvements Management Services]						
<b>Result:</b>	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Diego Bernal	District 1		x				
Ivy R. Taylor	District 2		x				
Leticia Ozuna	District 3		x				
Rey Saldaña	District 4		x				x
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Cris Medina	District 7	x					
W. Reed Williams	District 8		x				
Elisa Chan	District 9		x			x	
Carlton Soules	District 10		x				

# **EXHIBIT 1**

STATE OF TEXAS	§	PROFESSIONAL SERVICES
COUNTY OF BEXAR	§	DESIGN, FABRICATION,
CITY OF SAN ANTONIO	§	& INSTALLATION AGREEMENT

This Agreement ("Agreement") is made and entered into in San Antonio, Bexar County, Texas, between the CITY of San Antonio, a Municipal Corporation in the State of Texas ("CITY") and **SRO Associates, Inc.** ("ARTIST"), said Agreement being executed by the CITY pursuant to the Ordinance No. \_\_\_\_\_ passed by CITY Council on \_\_\_\_\_, and by the ARTIST, for design, fabrication and installation services for CITY's **Historic Mission Drive-In Marquee Mural Re-Creation Project—40-00198-01-06.**

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ATTACHMENTS:  
EXHIBIT A-1 PLANS AND SPECIFICATIONS  
EXHIBIT B-1 SCHEDULE OF PERFORMANCE  
EXHIBIT C-1 PAYMENT SCHEDULE

## SECTION 1. DEFINITIONS

The following terms in this Agreement shall have the meanings set out below:

1.0. "ACCEPTANCE NOTICE" means notice by CITY to ARTIST that the completed ARTWORK is installed at the SITE and meets the requirements of this Agreement.

1.1. "ARTWORK" means the art fabricated and installed consistent with ARTIST'S final proposal and described in **EXHIBIT A-1**.

1.2. "ARTIST" means **SRO Associates, Inc.**

1.3. "CITY" means the CITY of San Antonio, Texas, a home-rule, Texas Municipal Corporation located in Bexar County, Texas.

1.4. "PASA" means PUBLIC ART SAN ANTONIO, which is in the CITY's Office of Cultural Affairs Department and is responsible for public art.

1.5. "COMPENSATION SCHEDULE" means the values allocated to services associated with various portions of the public art design, fabrication and installation services, prepared in such form, and supported by such data to substantiate its accuracy as City may require.

1.6. "COMPLETION NOTICE" means notice by ARTIST to CITY that ARTWORK has been installed at the SITE.

1.7. "CONSTRUCTION DOCUMENTS/PLANS" mean the drawings, specifications, and addenda for the ARTWORK which were developed and approved by PASA and the CIMS Director.

1.8. "DEFECTS NOTICE" means notice by CITY to ARTIST that the ARTWORK does not meet the requirements of this Agreement.

1.9. "DESIGN CONSULTANT" means the individual or firm engaged by CITY to design a facility or project.

1.10. "DIRECTOR" means Capital Improvements Management Services (CIMS) Department Director.

1.11. "NOTICE TO COMMENCE" means notice by CITY to ARTIST to begin design, fabrication and installation of the ARTWORK.

1.12. "OFF-SITE ELEMENT" means an element of the ARTWORK fabricated away from the SITE for later installation as a component of the ARTWORK.

1.13. "OFF-SITE DEFECTS NOTICE" means notice by CITY to ARTIST that defects or deficiencies of an OFF-SITE element do not meet the CITY's requirements for formal approval.

1.14. "PROJECT" means the capital improvement/public art development undertaking of CITY for which Artist's services, as stated in the Scope of Services, are to be provided pursuant to this Agreement.

1.15. "PROPOSAL" means Artist's Proposal to provide public art design services for this Project.

1.16. "SCHEDULE OF PERFORMANCE" means the schedule for performance of the design, fabrication and installation of the ARTWORK set out in **EXHIBIT B-1**.

1.17. "SITE" means the physical place located at **Mission Drive-In Theatre / 3100 Roosevelt Avenue, San Antonio, Texas 78214** where the ARTWORK will be installed.

1.18. "SUBCONTRACTOR" means a person or entity hired by ARTIST to fabricate or install a portion of the ARTWORK.

1.19. "TRANSPORTATION NOTICE TO PROCEED" means a notice issued by CITY to ARTIST approving the transportation of an OFF-SITE element of the ARTWORK to the SITE.

## **SECTION 2. ARTIST'S GENERAL RESPONSIBILITIES**

2.0. The ARTWORK is to be an artistic product, which represents the creative talents of ARTIST and satisfies the specifications set forth in the Final Proposal and the Construction Documents for the ARTWORK. ARTIST shall fabricate the ARTWORK consistent with the Final Proposal, including without limitation, supervising all aspects of the fabrication of the ARTWORK to ensure proper fabrication of the ARTWORK. As more particularly provided below, ARTIST shall be responsible for the transportation and delivery of the ARTWORK to the SITE. ARTIST shall be responsible for the installation of the ARTWORK at the SITE consistent with the construction documents for the ARTWORK which were developed and approved by CITY as set forth in the Final Proposal and the Construction Documents. ARTIST's responsibilities under this subsection are collectively referred to as "ARTIST's Services."

2.0.1 Design Within Budget Constraints. ARTIST shall be responsible for developing the Artwork Design so that the ARTWORK can be constructed without exceeding the total compensation. ARTIST shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in ARTWORK.

2.0.2 ARTIST warrants that the Artwork, including the Artwork Design, is a unique work of art. Artist warrants that he/she will not replicate the same Artwork as displayed at the City facility pursuant to this Agreement. Artist acknowledges that City desires that the Artwork be unique. Artist agrees to not duplicate the Artwork or Artwork Design without the express written consent of City.

2.0.3 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. Artist shall notify City of any change in Artist's Tax Identification Number.

2.0.4. ARTIST's opinions of probable project cost or construction cost are to be made on the basis of ARTIST's experience and qualifications representing ARTIST's best judgment as a design professional familiar with the construction industry.

2.1. DEVIATIONS FROM PROPOSAL. The goal of the Parties for the ARTWORK is an artistic product, which represents the creative talents of ARTIST and satisfies the specifications set forth in the Final Proposal and the Construction Documents for the ARTWORK. The Parties shall closely consult with each other during all stages of fabrication and installation of the ARTWORK in order to accomplish these goals. It is understood that changes from the Final Proposal may become desirable as the ARTWORK is fabricated.

2.1.1. Certain specifications regarding the ARTWORK, including, but not limited to, the size, color and/or type or grade of material of some of the elements of the ARTWORK may not be identified in either the Final Proposal or the Construction Documents. To the extent that any specification for the ARTWORK is not identified in the Final Proposal or in the Construction Documents, ARTIST shall seek CITY's prior written approval of these specifications before commencing with fabrication of the ARTWORK.

2.1.2. The Parties also recognize that the shift in scale from preliminary drawings and maquette 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 a change in design increase the ARTWORK budget without prior written approval by CITY. Additionally, ARTIST shall make no change in the design, which requires a modification of the Construction Documents without the prior written approval of CITY.

2.1.3. MATERIAL DEVIATIONS. Any material deviation from the Final Proposal or the Construction Documents in the scope, design, color, size, material, utility requirements, support requirements, texture and/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 scope of the foregoing, material deviation shall include any change from the Final Proposal or the Construction Documents which affects the fabrication, schedule of delivery or installation of the ARTWORK, preparation of the SITE and/or maintenance of the ARTWORK.

2.2. ADDITIONAL SERVICE AUTHORIZATION. No services for which additional compensation will be charged by ARTIST shall be provided without prior written authorization by CITY.

2.3. PERSONNEL. ARTIST shall be responsible for providing, at ARTIST's expense, all personnel required to perform ARTIST's services under this Agreement. All persons retained by ARTIST shall possess the requisite licenses and permits.

2.3.1. REPRESENTATIVES. Before starting installation, ARTIST shall designate in writing an authorized representative who shall have the authority to represent and act for ARTIST. ARTIST's authorized representative shall be present at the SITE of the work at such times as designated by the CITY.

2.4. COORDINATION. Artist acknowledges that an essential element of Artist's services is coordination with City staff and other persons who may be involved

with the Artwork Design, as designated by City. ARTIST agrees to meet with CITY and others as reasonably directed by CITY to ensure coordination of ARTIST's design, fabrication and installation of the ARTWORK. Artist is responsible for coordinating with persons designated by City as necessary to complete Artist's duties both as to design issues and budget issues.

## 2.5. PERMITS, FEES AND NOTICES.

2.5.1. PERMITS. Unless otherwise provided in the Agreement, the ARTIST shall give notices as required by law and secure and pay for the building permit and other permits and governmental fees, licenses, and inspections necessary for proper fabrication and installation of the ARTWORK, which are customarily secured after execution of this Agreement. CITY and Design Consultant shall assist ARTIST, when reasonably requested, in obtaining such permits and licenses.

2.5.2 If the ARTIST performs ARTWORK knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations, the ARTIST shall assume appropriate responsibility for such ARTWORK and shall bear the costs attributable to the correction thereof.

2.6. USE OF SITE. The ARTIST will abide by all applicable rules and regulations of the CITY with respect to conduct, including smoking, parking of vehicles, security regulations and entry into adjacent facilities owned by the CITY.

2.6.1. ARTIST shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall ARTIST subject any part of the ARTWORK or adjacent property to stresses or pressures that will endanger it.

2.6.2. ARTIST shall confine ARTIST's construction equipment, the storage of materials and equipment, and the operations of ARTIST's personnel to areas permitted by law, ordinances, permits, or the requirements of the Agreement Documents, and shall not unreasonably encumber the SITE with construction equipment or other materials or equipment.

2.6.3. The ARTIST shall provide reasonable access to residents and businesses affected by the fabrication and installation of the ARTWORK to the greatest extent possible.

2.6.4. During the progress of the ARTWORK, ARTIST shall keep the SITE and surrounding area free from accumulations of waste materials, rubbish, and other debris resulting from ARTIST's fabrication and/or installation of the ARTWORK. ARTIST shall clean, sweep, mop, brush and polish, as appropriate, the interior of the improvements or renovated areas, including but not limited to, any floors, carpeting, ducts, fixtures, and ventilation units, operated during construction, and shall clean exterior gutters, drainage, walkways, driveways and roofs of resulting debris. ARTIST shall be given three days notice to clean up the SITE as indicated in this section, otherwise the CITY may do so and the cost shall be charged to the ARTIST

2.6.5. Prior to Substantial Completion of the ARTWORK, ARTIST shall remove all waste materials, rubbish and debris from and about the SITE as well as all tools, appliances, excess materials, construction equipment and machinery, and shall leave the SITE clean and ready for acceptance by CITY. ARTIST shall restore to their original condition those portions of the SITE not designated for alteration by the Agreement. If the ARTIST fails to clean up the SITE as provided in the Agreement after three days' notice from CITY, the CITY may do so and the resulting cost shall be charged to the ARTIST.

2.7. REVIEW OF PROGRESS AND REPORTS. At reasonable times and with advance notice to ARTIST, CITY has the right to review the work in progress and to require and receive progress reports from ARTIST. CITY shall have the right to visit ARTIST's studio at all reasonable times to inspect and review the progress of the ARTWORK. ARTIST shall be responsible for arranging with ARTIST's subcontractors for reasonable access for review and inspection of the ARTWORK at any subcontractor's place of business.

2.8. RISK OF LOSS. Until the ARTWORK is formally accepted by CITY, which shall not be unreasonably withheld, 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.

2.9. PREVAILING WAGE. ARTIST shall pay or cause to be paid, prevailing wages for all work under this Agreement, if any, covered by the CITY's Wage and Hour Policy. Further information regarding prevailing wages that may apply to this Agreement may be obtained from the CITY. ARTIST shall 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 this Agreement may lead to termination.

### **SECTION 3. CITY'S RESPONSIBILITIES.**

3.0. Site Information. CITY shall be responsible for providing ARTIST, at no cost to ARTIST, copies of existing designs, drawings, reports, and other existing relevant site data, if any required to perform ARTIST's Services.

3.1. Supervision. CITY is under no obligation to supervise the ARTIST's performance of services under this Agreement.

### **SECTION 4. DESIGN DEVELOPMENT OF THE ARTWORK**

4.0. ARTIST shall perform the following design services to the satisfaction of CITY and within the deadlines set forth in Agreement Exhibit B-1:

4.1. Research. ARTIST shall meet with CITY staff in order to understand the programmatic uses of the Project and the facilities surrounding the Project for the purposes of defining goals for the ARTWORK that are appropriate to the general social and immediate physical environment of the ARTWORK. ARTIST shall also attend at least three individual meetings with local experts or other interested parties as

designated by CITY. The times and dates of these meetings shall be subject to the mutual Agreement of the Parties. Any required travel incurred by ARTIST above and beyond what is provided for in Exhibit B-1 "Schedule of Performance" shall be requested in writing and approved by both Parties and may be subject to a separate agreement.

#### 4.2. Concept and Schematic Designs.

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

4.2.2. Following CITY's approval of the Concept Design Proposal, ARTIST shall prepare one or more designs showing ARTIST's schematic design for the ARTWORK ("Schematic Design Proposal"). The Schematic Design Proposal will include form, scale, and proposed materials (samples to be provided where appropriate) as well as information on structural considerations, surface integrity, permanence, and protection against theft and vandalism.

4.2.3. ARTIST shall investigate and prepare preliminary cost estimates for the fabrication and installation of the ARTWORK proposed in the Schematic Design Proposal. The estimates shall indicate the feasibility of producing the proposed ARTWORK within the CITY's budget for the **Historic Mission Drive-In Theatre Marquee Mural Re-Creation / 40-00198-01-06** (the "Preliminary Cost Estimate") including a contingency equal to 10% of the fabrication and installation budget to cover unforeseen costs, which shall be retained by the CITY.

4.2.4. The Schematic Design Proposal shall include an outline of the proposed installation method, and a schedule for the ARTWORK fabrication and installation (collectively, the "Proposed Installation Method").

#### 4.3. Artwork Design Development Proposal.

4.3.1. Upon receipt of CITY's Notice to Proceed, ARTIST shall develop a final proposal for the ARTWORK ("Artwork Design Development Proposal") showing the details of the ARTWORK. The Artwork Design Development Proposal will include indication of form, scale, and proposed materials (samples to be provided where appropriate). The Artwork Design Development Proposal shall also include information on structural considerations, surface integrity, permanence, and protection against theft and vandalism (collectively, the "Artwork Design Specifications").

4.3.2. ARTIST shall develop a detailed budget estimate ("Artwork Budget Estimate") covering all estimated costs to fabricate and install the ARTWORK, including, but not limited to: itemized cost estimates for materials including applicable sales tax; off-site fabrication costs; itemized General Contractor and sub-contractor costs; permits or other fees; insurance; transportation of the ARTWORK to site; and itemized installation costs.

4.3.3. 10% of the Artwork Budget shall be set aside as a contingency to cover unforeseen costs, that may arise during the fabrication and installation.

4.3.4. The Artwork Design Development Proposal shall include a detailed written description of the fabrication and installation method ("Installation Specifications"), detailed fabrication and installation schedule ("Installation Schedule") and the description of any operational, maintenance and conservation requirements for the ARTWORK ("Maintenance Specifications").

#### 4.4. Artwork Design Development Proposal Review.

4.4.1. ARTIST shall provide presentation quality visual material of the Artwork Design Development Proposal in conjunction with the review by CITY staff, the Reviewing Body, and for release to the press. CITY shall dictate the specific types of materials to be used.

4.4.2. The Artwork Design Development Proposal, consisting of each of the elements described above, shall be submitted to the CITY for review and submittal to the Reviewing Body. CITY may require ARTIST to make modifications to the Artwork Design Development Proposal prior to submitting it to the Reviewing Body.

4.4.3. ARTIST, at CITY's option, shall be available to present the Artwork Design Development Proposal, in the form approved by the CITY, at one or more meetings of the Reviewing Body.

4.4.4. 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, ARTIST, upon written notification by CITY, shall respond to the recommended changes in writing and submit a revised Artwork Design Development Proposal to the CITY for review. The Reviewing Body may assess the Artwork Design Development Proposal as revised and make additional recommendations.

4.4.5. At CITY's option, the Artwork Design Development Proposal may be submitted to City Council for approval.

4.4.6. Should the final design proposal be disapproved and the ARTIST has performed the services set out in Agreement to the satisfaction of the CITY, ARTIST will be compensated to submit a modified design proposal as specified by the PASA Program Manager.

#### 4.5. Construction Documents.

4.5.1. 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 Artwork Design Development Proposal ("Construction Documents"). ARTIST shall be responsible for obtaining any and all information

necessary to prepare the Construction Documents, including without limitation, any field measurements of the proposed site.

4.5.2. Upon request by CITY, any and all drawings must be certified by a qualified engineer, licensed by the State of Texas and must conform to all applicable federal, state and local laws and regulations.

4.5.3. When seeking approval of the Construction Documents, ARTIST shall submit the following to CITY:

- a) plans on reproducible sheets measuring 24 inches by 36 inches, and provided in digital PC-compatible format;
- b) all engineering calculations associated with the submitted Construction Documents; and
- c) specifications for ARTWORK including a final budget estimate listing the quantities and unit prices for fabrication and installation of ARTWORK.

4.5.4. The Construction Documents for the ARTWORK are subject to approval by CITY who will notify ARTIST in writing once the Construction Documents are approved. CITY's approval shall not release ARTIST of the responsibility for correcting mistakes, errors or omissions, proximately caused by ARTIST which may be the result of circumstances unforeseen when the Plans and Construction Documents were developed or approved.

4.6. Notice of Acceptance. Should all approvals be secured, the CITY will issue a written notice of acceptance of the Artwork Design Development Proposal to Artist. City's acceptance does not obligate the City to commission fabrication of the Artwork.

## **SECTION 5. FABRICATION AND INSTALLATION OF THE ARTWORK**

5.0. INSPECTION NOTICE. CITY and ARTIST agree that various elements of the ARTWORK may be fabricated at locations away from the SITE (collectively, "OFF-SITE ELEMENTS"). The OFF-SITE ELEMENTS, include, but are not limited to, the elements described in the attached **Exhibits A-1 and B-1**. ARTIST shall notify CITY in writing when each element of the ARTWORK is ready for inspection, prior to transporting the OFF-SITE ELEMENTS to the SITE ("Inspection Notice"). The parties acknowledge and agree that CITY has the right to inspect each of the OFF-SITE ELEMENTS and that CITY's inspection rights are not limited to the OFF-SITE ELEMENTS listed in **Exhibits A-1 and B-1**.

5.1. NOTICE TO COMMENCE WORK. Within 15 working days of CITY's receipt of the Inspection Notice for each OFF-SITE ELEMENT, CITY will inform ARTIST in writing that either: (1) the OFF-SITE ELEMENT has been completed in accordance with the terms of this Agreement and the OFF-SITE ELEMENT is formally approved in writing for purposes of transporting the OFF-SITE ELEMENT to the SITE ("TRANSPORT NOTICE TO PROCEED"); or (2) there are defects or deficiencies in the OFF-SITE ELEMENT which prevent formal approval, in which case the defects or deficiencies will be identified in writing to ARTIST("OFF-SITE DEFECTS NOTICE"). In the event that an OFF-SITE ELEMENT is fabricated at a place not located in the San

Antonio Area, CITY may, at its sole discretion, determine to delay inspection until the OFF-SITE ELEMENT is delivered to the SITE. If CITY fails to issue the Transport Notice to Proceed or the OFF-SITE DEFECTS NOTICE within the 15 working day inspection period, the TRANSPORT NOTICE TO PROCEED will be deemed to have been issued at the conclusion of the 15 working day inspection period. In the event that CITY issues an OFF-SITE DEFECTS NOTICE, ARTIST will promptly remedy any defects to the reasonable satisfaction of the CITY.

5.2. DELIVERY. Upon issuance of the TRANSPORT NOTICE TO PROCEED, ARTIST shall deliver the OFF-SITE ELEMENTS to the SITE. ARTIST shall coordinate with the CITY regarding the time, place and manner of delivery and installation of the ARTWORK. CITY shall have the right to inspect the OFF-SITE ELEMENTS at the time each OFF-SITE ELEMENT arrives at the SITE in order to determine whether it has been damaged in transit or whether it deviates in any way from the OFF-SITE ELEMENT approved by CITY prior to CITY's issuance of the 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 shall promptly 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 reasonable satisfaction of the CITY.

5.3. PLANS. ARTIST shall cause all labor and material incorporated in the ARTWORK to be furnished in accordance with the requirements and specifications approved by CITY (collectively, the "PLANS"). The Parties acknowledge that the PLANS, once approved by CITY, shall be final and, except as expressly provided in this subsection, no revisions to the PLANS shall be permitted except with the prior written approval of CITY.

5.3.1 CITY's approval of the Plans shall not release ARTIST of the responsibility for the correction of ARTIST's mistakes, errors or omissions contained in the PLANS, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the PLANS were developed or approved. If, during the course of installation of the ARTWORK, CITY determines in CITY's sole discretion that the public safety requires modification of, or the departure from, the PLANS, CITY shall have the authority to require ARTIST to address the public safety issues and to present ARTIST's proposed modifications to the CITY for review and approval of the engineering soundness of the proposed modifications provided such modifications do not result in an increase in the TOTAL PRICE.

5.3.2 All completed drawings submitted by ARTIST for final approval or issuance of a permit that require the seal and certification of a licensed engineer or architect shall bear the seal with signature and date of a Texas registered architect/engineer licensed to practice in Texas.

#### 5.4. WORK AT THE SITE

5.4.1. 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 ARTWORK with the CITY. The ARTWORK will not be formally accepted by CITY until CITY issues the ACCEPTANCE NOTICE approving the installation of the ARTWORK at the SITE.

5.4.2. 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 ARTIST's installation of the ARTWORK.

5.4.3. CITY'S ACCESS TO SITE. CITY's staff and 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 CITY 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 reasonable satisfaction of the CITY.

5.4.4. Whenever the ARTIST or ARTIST's authorized representative are not present on the SITE when it becomes necessary to give direction for safety reasons, the CIMS Director shall have the right to give orders, which shall be received and obeyed by the SITE superintendent or foreman. Any order given by the CIMS Director will, on request of the ARTIST, be given or confirmed by the CIMS Director in writing.

#### 5.5. COMPLETION OF SERVICES.

5.5.1. COMPLETION NOTICE. ARTIST shall notify CITY that the ARTWORK has been fully installed at the SITE ("COMPLETION NOTICE"). Within 30 days of CITY's receipt of the COMPLETION NOTICE, 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 in writing ("DEFECTS NOTICE").

5.5.2. REMEDY OF DEFECTS. ARTIST shall promptly remedy at ARTIST's own cost any defects noted in CITY's DEFECTS NOTICE to the reasonable satisfaction of the CITY.

5.5.3. 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 proper care, repair and maintenance of the ARTWORK.

5.5.4. FINAL DOCUMENTATION. As a condition of CITY's acceptance of the ARTWORK, ARTIST shall supply CITY with at least three (3) publication quality images of the installed ARTWORK in digital formats and other information

on the ARTWORK requested by CITY for its registration files. Use of these images will be in accordance with Section 12.2 of this Agreement.

5.5.5 ARTIST shall be available at such time or times as may be agreed between CITY and ARTIST to attend an inauguration or presentation ceremonies relating to the transfer of the ARTWORK to CITY.

5.6. DEATH OR INCAPACITY OF ARTIST. In the event of ARTIST's physical incapacity or death prior to the completion of the ARTWORK, all payments made up to the point of incapacity or death will be retained by ARTIST and all work performed to date of incapacity or death will be compensated. Upon payment to compensate ARTIST or ARTIST's estate for all work performed to the date of incapacity or death, the incomplete ARTWORK and any materials paid for by CITY will become the property of CITY. However, if the ARTWORK is substantially designed and/or completed and it is feasible for the work to be fully completed without undue delay while remaining faithful to the ARTIST's design, integrity and reputation, CITY may elect to proceed, under the terms of this Agreement, with completion and/or installation by ARTIST's REPRESENTATIVE and all remaining work to be completed in accordance with this Agreement will be delegated to: **[ARTIST declined to name a REPRESENTATIVE for this clause]**.

5.7. INTERNET-BASED PROJECT MANAGEMENT SYSTEMS. At its option, CITY may administer its design and construction management through an Internet-based management system. In such cases, ARTIST shall conduct communication through this media and perform all ARTWORK related functions utilizing this database system. This includes correspondence, submittals, requests for information, vouchers, or payment requests and processing, Amendments, Change Orders and other administrative activities. When such systems are employed, the CITY shall administer the software, shall provide training to ARTIST and ARTIST's personnel, and shall make the software accessible via the Internet to ARTIST and ARTIST's personnel.

## **SECTION 6. SCHEDULE**

6.0. SCHEDULE. ARTIST is to complete the services required of ARTIST herein in accordance with the schedule set out in the attached **EXHIBIT B-1**, entitled "Schedule of Performance".

6.0.1. 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 written agreement.

6.0.2. When work is not in progress and during periods when work is suspended, arrangements acceptable to the CITY shall be made for any emergency work that may be required.

6.1. TIME. It is understood that time is of the essence in the performance of ARTIST's services under this Agreement.

6.2. FORCE MAJEURE. 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. 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 prevented from the performance of any covenant or obligation under this Agreement.

## **SECTION 7. ARTIST'S COMPENSATION.**

7.0. **COMPENSATION** ARTIST's total compensation for full and timely completion of the services required in by this Agreement for the ARTWORK is **\$160,000.00** (the "TOTAL PRICE"). Such payment shall constitute full and complete COMPENSATION for work performed and services rendered by or on behalf of ARTIST, including, but not limited to, professional services and expenses, for all supervision, labor, supplies, materials, equipment or use thereof, taxes (if any), and for all other necessary incidentals.

7.0.1 Payment Schedule for ARTIST's services. CITY shall make interim payments to ARTIST in the amounts and at the milestones as identified in the Payment Schedule, attached and incorporated herein as **EXHIBIT C-1**, as compensation to assist ARTIST with financing the fabrication, delivery and installation of the ARTWORK. The amounts will be paid by CITY to ARTIST within 30 days of CITY's receipt of ARTIST's invoice indicating the appropriate milestone has been reached. The form of the invoice shall be subject to the reasonable approval of the CITY.

7.0.2. Parties agree that the Schedule for Payment set forth above may be modified only upon prior written authorization of the CITY and ARTIST. CITY's PASA Program Manager may approve changes, which are not considered material by CITY.

7.1. **COST OVERRUN.** In the event ARTIST incurs costs in excess of the TOTAL PRICE, ARTIST shall pay such excess at ARTIST's sole cost. CITY is not responsible for any part of such excess.

7.2 In the event that work for which the CITY has received an invoice requesting 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 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 reasonable satisfaction of CITY.

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

ARTIST expressly acknowledges that approval of work to permit an interim payment is solely to permit ARTIST to receive an interim payment. 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 CONSTRUCTION DOCUMENTS/PLANS.

7.4. In the event that the CITY approves a modification of the Final Proposal or the Plans which results in cost savings such as but not limited to, the deletion of an element of the ARTWORK, the substitution of lesser quality materials with no offsetting upgrade of other materials, or the reduction in the ARTWORK's size, the cost savings attributable to the modification will not be paid to the ARTIST.

7.5. In the event the Parties mutually agree in writing to a modification of the Final Proposal or Plans that results in an increase cost to ARTIST for its services, including but not limited to the addition of an element to the ARTWORK, the substitution of a greater quantity of materials or more expensive materials, or the increase in the ARTWORK's size, the resulting cost increases shall be paid to ARTIST.

7.6. If work for which the CITY 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 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 reasonable satisfaction of CITY.

#### **SECTION 8. ARTIST'S WARRANTIES.**

8.0. ARTIST'S WARRANTIES. The ARTIST warrants that the services required under this Agreement will be performed with the same degree of professional skill and care that are typically exercised by similar professionals performing similar services. All services performed hereunder shall be performed in accordance with City's Standard Specifications. Further ARTIST represents and warrants that.

8.0.1. ARTIST has not previously sold, assigned, licensed, granted, encumbered, or utilized the ARTWORK, the ARTWORK'S design or any element thereof, in any manner, which may affect or impair the rights granted pursuant to this Agreement.

8.0.2. All work created or performed by ARTIST under this Agreement, whether created by ARTIST alone or in collaboration with others, is wholly original with ARTIST and will not infringe upon or violate the rights of any third party.

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

8.0.4. ARTIST warrants that the ARTWORK is the result of the artistic efforts of ARTIST and that it will be delivered free and clear of any liens.

8.0.5. All services performed hereunder shall be performed in accordance with City's Standard Specifications.

8.0.6. ARTIST warrants that the ARTWORK is a unique edition. ARTIST agrees not to duplicate the ARTWORK without CITY's express written consent.

8.1. DEFECTS IN MATERIAL WORKMANSHIP AND INHERENT VICE. ARTIST warrants that the ARTWORK and workmanship will be free of defects in workmanship, including Inherent Vice, and that the ARTIST will, at the ARTIST's own expense, remedy any defects due to faulty workmanship, or Inherent Vice, which appear within a period of one year from the date the ARTWORK is formally accepted. 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 unreasonable deterioration of the ARTWORK. Inherent Vice does not include any potential for deterioration that is specifically identified in the Final Proposal.

8.1.1. If the ARTWORK should deteriorate because of Inherent Vice within one year 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.

8.1.2. 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.

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

## **SECTION 9. MAINTENANCE.**

9.0. REPAIRS AND RESTORATION. CITY shall have the right to determine, after consultation with ARTIST or with a professional conservator, when and if repairs and restorations to the ARTWORK will be made. It is the policy of CITY to consult with ARTIST regarding repairs and restoration, which are undertaken during ARTIST's lifetime.

9.1. 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 ARTWORK and in accordance with the maintenance instructions provided to CITY by ARTIST pursuant to Section 5.2.3.

## **SECTION 10. ARTIST IS INDEPENDENT CONTRACTOR.**

10.0. INDEPENDENT CONTRACTOR ARTIST covenants and agrees that he or she is an independent contractor and not an officer, agent, servant or employee of CITY and nothing herein shall be construed as creating the relationship of employer-

employee, principal-agent, partners or joint venturers between CITY and ARTIST. ARTIST shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants. ARTIST has no authority to bind the CITY. The Parties agree that the CITY shall not be liable for any claims, which may be asserted by any third party occurring in connection with the services to be performed by the ARTIST under this Agreement. Nothing in this Agreement, whether express or implied, shall be construed to give any third party any legal or equitable right, remedy or claim under or in respect of this Agreement or any standing or authority to enforce the terms and provisions of this Agreement. 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.

#### **SECTION 11. INDEMNIFICATION.**

**11.0. The ARTIST, whose work product and services are the subject of this Agreement for professional services, agrees to INDEMNIFY AND HOLD CITY, ITS ELECTED OFFICIALS, OFFICERS, AGENTS AND EMPLOYEES HARMLESS against any and all claims by third parties, lawsuits, judgments, cost, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury (including death), property damage, or other harm for which recovery of damages is sought that may ARISE OUT OF OR BE OCCASIONED OR CAUSED BY ARTIST'S NEGLIGENT ACT, ERROR, OR OMISSION OF ARTIST, OR OF ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, ARTIST OR SUBARTIST OF ARTIST, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES while in the exercise of performance of the services, rights or duties under this AGREEMENT. The INDEMNITY provided for in this paragraph shall not apply to any liability resulting from the NEGLIGENCE of CITY, its officers or employees, in instances where such NEGLIGENCE causes personal injury, death, or property damage. IN THE EVENT ARTIST AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

11.1. ARTIST shall advise CITY in writing within 24 hours of any claim or demand against the CITY or the ARTIST that is known to ARTIST related to or arising out of ARTIST's activities under this Agreement.

11.2. The provisions of this section are solely for the benefit of the Parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

11.3. Acceptance of the final plans by the CITY shall not constitute nor be deemed a release of the responsibility and liability of the ARTIST, its employees, associates, agents or subcontractors for the accuracy and competency of their designs,

work drawings, Plans and Specifications or other documents and Work; nor shall such acceptance be deemed an assumption of responsibility or liability by the CITY for any defect in the designs, work drawings, Plans and Specifications or other documents and Work prepared by said ARTIST, its employees, sub-artists, and agents.

**11.4 THE ARTIST SHALL, AT ITS EXPENSE, INDEMNIFY CITY AND DEFEND ALL SUITS OR PROCEEDINGS INSTITUTED AGAINST THE CITY AND PAY ANY AWARD OF DAMAGES OR LOSS RESULTING FROM AN INJUNCTION, AGAINST THE CITY, TO THE EXTENT THAT THE ARTWORK PROVIDED UNDER THIS AGREEMENT CONSTITUTES AN INFRINGEMENT OF ANY PATENT, TRADE SECRET, TRADEMARK, COPYRIGHT OR OTHER INTELLECTUAL PROPERTY RIGHTS.**

**SECTION 12. INSURANCE.**

12.0. Prior to the commencement of any Services under this Agreement, ARTIST shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the CITY's Capital Improvement Management Services Department, which shall be clearly labeled "**SRO Associates, Inc./ Historic Mission Drive-In Theatre Marquee Mural Re-Creation / 40-00198-01-06**" in the Description of Operations block of the Certificate. The original Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept Memorandum of Insurance or Binders as proof of insurance. The original certificate(s) or form must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the CITY's Capital Improvements Management Services Department. No officer or employee other than the CITY's Risk Manager shall have authority to waive this requirement.

12.1. ARTIST's financial integrity is of interest to the CITY. Therefore, subject to the ARTIST's right to maintain reasonable deductibles in such amounts as are approved by the CITY, the ARTIST shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at the ARTIST's sole expense, insurance coverage written on an occurrence or claims made basis, as appropriate, by companies authorized and approved to do business in the State of Texas and with an A.M. Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed:

Commercial General Broad Form (Public) Liability Insurance to include coverage for the following: Premises Operations Independent contractors Products/completed operations Personal Injury Contractual Liability	For Bodily Injury and Property Damage of \$500,000 per occurrence
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All notices under this Article shall be given to CITY at the following address:

CITY of San Antonio  
Attn: \_CIMS Department - Public Art San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

12.2. The ARTIST agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following required provisions:

- c. Name the CITY and its officers, officials, employees, and elected representatives as an additional insured by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY;
- c. Provide for an endorsement that the "other insurance" clause shall not apply to the CITY where the CITY is an additional insured shown on the policy if such endorsement is permitted by law and regulations; and
- c. Provide 30 calendar days advance written notice directly to CITY of any suspension, cancellation or non-renewal or material change in coverage, and not less than 10 calendar days advance written notice for nonpayment of premium.

12.3. Within five calendar days of a suspension, cancellation or non-renewal of coverage, the ARTIST shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend the ARTIST's performance should there be a lapse in coverage at any time during this contract, and such suspension shall continue until cured. Failure to provide and to maintain the required insurance shall constitute a material breach of this contract.

12.4. In addition to any other remedies the CITY may have upon the ARTIST's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order the ARTIST to stop performing services hereunder and/or withhold any payment(s) which become due to the ARTIST hereunder until the ARTIST demonstrates compliance with the requirements hereof.

12.5. Nothing herein contained shall be construed as limiting in any way the extent to which the ARTIST may be held responsible for payments of damages to persons or property resulting from the ARTIST's or its sub-artist's performance of the services covered under this Agreement.

12.6. It is agreed that the ARTIST's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the CITY for liability arising out of operations under this Agreement.

12.7. It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement as respects additional insureds.

12.8. ARTIST and any subcontractors are responsible for all damage to their own property and/or equipment.

### **SECTION 13. COPYRIGHTS.**

13.0. CITY shall have ownership and possession of the Artwork Design upon acceptance of the final Artwork Design Proposal, approval of the Construction Documents and final payment by CITY. Upon completion of fabrication and installation of the ARTWORK and full payment for the ARTWORK, CITY shall have ownership and possession of the ARTWORK including exclusive right to display the ARTWORK, subject to the terms of this Agreement. CITY may make any and all reproductions or derivatives in whatever form of the ARTWORK or Artwork Design for educational, public relations, arts promotional, commercial or any other purpose. As CITY has paid for the ARTWORK and Artwork Design, such reproductions or derivatives will not result in any additional payments to ARTIST.

13.1. ARTIST retains no copyrights and intellectual property and/or patents related to the ARTWORK and the Artwork Design excluding potentially those patents, related to materials used in the fabrication or installation of the ARTWORK. Any use of the Artwork Design by ARTIST or any third party must be approved, in advance, by CITY except that ARTIST is expressly allowed to use reproductions of the Artwork Design and documentation of ARTWORK for self-promotion, presentation and portfolio use.

13.2. If CITY obtains a commercial benefit from the ARTWORK, or Artwork Design, by sale of reproductions or images of same, or by licensing same, all revenues received by CITY from such commercial ventures shall be directed to long-term maintenance of the ARTWORK.

13.3. CITY has the exclusive right to display the ARTWORK and Artwork Design, including drawings, models, or any reproduction of the ARTWORK and to loan the ARTWORK, in whole or in part, including to other persons or institutions with authority to display it publicly. CITY acknowledges ARTIST's co-right to display images of the ARTWORK and to display the Artwork Design or images or reproductions of the Artwork Design, and to display or exhibit such images and/or reproductions, including the Artwork Design itself, so long as such display or exhibition is consistent with attribution to the CITY.

13.4. ARTIST expressly consents to both the installation and removal from the Project of the ARTWORK and expressly waives his/her Moral Rights, as defined in the Visual Rights Act 17 U.S.C. § 106(A), to the ARTWORK. Further, ARTIST understands that the incorporation and installation of the ARTWORK into a CITY facility may subject the ARTWORK to destruction, distortion, mutilation, or other modification if and when removed. It is agreed that if the ARTWORK, or any portion thereof is removed causing destruction, distortion, mutilation or modification in any significant way, the ARTWORK may no longer be referred to as "an Artwork by the Artist".

13.5. The clauses in Section 13 shall survive termination of this Agreement.

### **SECTION 14. REPUTATION AND CREDIT.**

14.0. 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.

14.1. ARTWORK PLAQUE. CITY will fabricate and install an identification plaque for the completed ARTWORK that documents the history of the ARTWORK project.

14.2. ARTIST'S COMMITMENT. ARTIST agrees that all formal references to the ARTWORK made or authorized to be made by ARTIST shall include the following credit: "Collection of the City of San Antonio, Commissioned through Public Art San Antonio," or other language agreed to by all parties.

14.3. MEDIA AND PUBLIC AFFAIRS. Artist and anyone Artist contracts with for this Project shall coordinate any releases of information regarding the Artwork to the public and news media with CITY staff. In all communications to the public and news media, the ARTIST must fully and accurately identify the ARTIST's relationship to the CITY and fully and accurately credit the CITY for its role in funding the Project.

14.4. FUTURE MODIFICATION OR RELOCATION. Removal or relocation of the ARTWORK, if practical and economically feasible as determined by CITY, in its sole discretion, will occur in conformity with the City's Public Art Ordinance #2011-09-08-0743 and any amendments thereto. CITY's decisions regarding removal or relocation of the ARTWORK is final and may occur at any time.

14.4.1. 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 only the element posing the public safety hazard without prior written notice to ARTIST.

14.4.2. 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 market value, 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 30 days from the date of receipt of CITY's notice to exercise the option to purchase the ARTWORK.

14.4.3. RESTORATION. CITY agrees to not intentionally modify the ARTWORK without providing ARTIST prior written notice. Should the need arise in the future; CITY may consider negotiating an agreement with ARTIST to conduct and supervise the restoration of the ARTWORK.

14.4.4. ARTIST's rights under this Agreement cease with ARTIST's death and do not extend to ARTIST's heirs, successors or assigns except that ARTIST will still receive credit for the ARTWORK and in the case of death or incapacity of the ARTIST as delineated in 5.2.4.

## **SECTION 15. COMPLIANCE WITH LAWS.**

15.0. GENERAL. ARTIST shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments.

15.1. 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.

15.2 None of the services rendered by ARTIST under this Agreement shall involve, and no portion of the funds received by ARTIST under this Agreement shall be used in support of, any sectarian or religious activity.

## **SECTION 16. DEFAULT/TERMINATION AND/OR SUSPENSION OF WORK**

16.0. TERMINATION WITH CAUSE. Right of Either Party to Terminate for Default

16.0.1. This Agreement may be terminated by either Party for substantial failure by the other Party to perform (through no fault of the terminating Party) in accordance with the terms of this Agreement and a failure to cure as provided in this Section.

16.0.2. The Party not in default must issue a signed, written notice of default and intent to terminate (citing this paragraph) to the other Party declaring the other Party to be in default and stating the reason(s) why they are in default. Upon receipt of such written notice of default, the party in receipt shall have a period of 10 days to cure any default under this Agreement. Upon the completion of such ten-day period commencing upon receipt of notice of default and intent to terminate, if such party has not cured any failure to perform, such termination shall become effective without further written notice.

16.1. RIGHT OF CITY TO TERMINATE. The CITY reserves the right to terminate this Agreement for reasons other than substantial failure by the ARTIST to perform by issuing a signed, written notice of termination (citing this paragraph) which shall take effect upon effective notice to ARTIST and/or upon the scheduled completion date of the performance phase in which ARTIST is then currently working, whichever effective termination date occurs first. In the event of any termination by CITY without cause, ARTIST shall be entitled to payment for all work performed by or on behalf of ARTIST to date, together with reimbursement for all expenses incurred by ARTIST up to ARTIST's receipt of such notice.

16.2. RIGHT OF CITY TO SUSPEND GIVING RISE TO RIGHT OF ARTIST TO TERMINATE. CITY reserves the right to suspend this Agreement at the end of any phase for the convenience of the CITY by issuing a signed, written notice of suspension (citing this paragraph) outlining the reasons for the suspension and the expected duration of the suspension. Such expected duration shall in no way be a guarantee of the total number of days of suspension. Such suspension shall take effect immediately upon receipt of said notice of suspension by the ARTIST.

16.3. ARTIST has the right to terminate this Agreement in the event such suspension extends for a period in excess of 120 days. ARTIST may exercise

this right to terminate by issuing a signed, written notice of termination (citing this paragraph) to the CITY after the expiration of 120 days from the effective date of the suspension. Termination (under this paragraph) shall become effective immediately upon receipt of said written notice by the CITY. In the event of any termination by ARTISTS after such suspension, ARTIST shall be entitled to payment for all work performed by or on behalf of ARTIST, together with reimbursement for all expenses incurred by ARTIST up to the effective date of ARTIST's suspension.

16.4. PROCEDURES ARTIST TO FOLLOW UPON RECEIPT OF NOTICE OF TERMINATION WITH CAUSE. Upon receipt of a notice of termination with cause and prior to the effective date of termination, unless the notice otherwise directs or ARTIST immediately takes action to cure a failure to perform under the cure period set herein, ARTIST shall immediately begin to discontinue all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts that are chargeable to this Agreement. Within 30 days after receipt of such notice of termination (unless ARTIST has successfully cured a failure to perform), the ARTIST shall submit a statement showing in detail the services performed under this Agreement prior to the effective date of termination. The CITY shall have the option to grant an extension to the time period for submittal of such statement.

16.4.1. Copies of all completed or partially completed specifications and all reproductions of all completed or partially completed designs, plans and exhibits prepared under this Agreement prior to the effective date of termination shall be delivered to the CITY, in the form requested by the CITY as a pre-condition to final payment. These documents shall be subject to the restrictions and conditions set forth herein.

16.4.2. ARTIST understands that the CITY, as a public entity, has a duty to document the expenditure of public funds. To this end, the ARTIST understands that failure to comply with the submittal of the statement and documents as required shall constitute a waiver by the ARTIST of any and all rights or claims to payment for services performed under this Agreement by the ARTIST.

16.4.3. Upon the above conditions being met, CITY shall promptly pay the ARTIST that proportion of the compensation, which the services actually performed bear to the total services called for under this Agreement, less any previous payments.

16.5 PROCEDURES ARTIST TO FOLLOW UPON RECEIPT OF NOTICE OF SUSPENSION.

16.5.1. Upon receipt of written notice of suspension, which date is also the effective date of the suspension, the ARTIST shall, immediately begin to phase-out and discontinue all services associated with the performance of this Agreement including promptly suspending all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement, unless the notice directs otherwise.

16.5.2. ARTIST shall prepare a statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

16.5.3. Copies of all completed or partially completed designs, plans and specifications prepared under this Agreement prior to the effective date of suspension shall be prepared for possible delivery to the CITY but shall be retained by the ARTIST until such time as ARTIST may exercise the right to terminate.

16.5.4. If ARTIST terminates 120 days after the effective suspension date, ARTIST shall promptly cancel all existing orders and contracts chargeable to this Agreement and submit to CITY the above mentioned statement showing in detail the services performed prior to the effective date of suspension within thirty 30 days after receipt by the CITY of ARTIST's notice of termination.

16.5.5. Any documents prepared in association with this Agreement shall be delivered to the CITY as a pre-condition to final payment.

16.5.6. ARTIST's failure to substantially comply with the submittal of the statements and documents as required may constitute a waiver by the ARTIST of any portion of the fee for which ARTIST did not supply such necessary statements and/or documents.

16.5.7. Upon the above conditions being met, the CITY shall promptly pay the ARTIST that proportion of the prescribed fee, which the services actually performed bear to the total services called for under this Agreement, less any previous payments, together with reimbursement for expenses incurred by ARTIST up to ARTIST's receipt of such notice.

16.6 COMPENSATION. In the event that CITY terminates this Agreement, CITY shall pay ARTIST for services performed up to date of termination, consistent with Section 7 ARTIST'S COMPENSATION.

16.7. REMEDIES. The remedies under this Agreement are cumulative and are in addition to the rights available to the Parties at law or in equity. Nevertheless, if ARTIST breaches this Agreement, CITY has the right to exercise its termination rights as described in Section 17 and at its option proceed with the fabrication and installation of the ARTWORK as contemplated in the Final Proposal without utilizing the services of the ARTIST. If CITY exercises its option to proceed, then CITY, upon ARTIST's written request will refrain from referencing the ARTWORK as the work of ARTIST.

16.8. NO WAIVER. The Parties agree that any breach or violation of any term or condition of this Agreement shall not be deemed a waiver even if both Parties are aware of said breach or violation.

## **SECTION 17. CLAIMS AND DISPUTES.**

17.0. DEFINITION. A Claim is a demand or assertion by one of the Parties seeking, as a matter of right, adjustment or interpretation of the Agreement, payment or withholding of money, extension of time or other relief with respect to the terms of the Agreement. The term "Claim" also includes other disputes and matters in question between the CITY and ARTIST arising out of or relating to the Agreement. Claims must be initiated by written notice. Every Claim of the ARTIST, whether for additional compensation, time, or other relief shall be signed and sworn to by an authorized corporate officer (if not a corporation, then an official of the company authorized to bind the ARTIST) of the ARTIST, verifying the truth and accuracy of the Claim. The responsibility to substantiate Claims shall rest with the Party making the Claim.

17.1. TIME LIMIT ON CLAIMS. Claims must be initiated within 30 calendar days after occurrence of the event giving rise to such Claim. All claims must be initiated by written notice to the other Party.

17.2. CONTINUING CONTRACT PERFORMANCE. Pending final resolution of a Claim except as otherwise agreed in writing, the ARTIST shall proceed diligently with performance of the Agreement and the CITY shall continue to make payments in accordance with the Agreement.

17.3. CLAIMS FOR ADDITIONAL TIME. If the ARTIST wishes to make a Claim for an increase in the time for performance, written notice to CITY shall include an estimate of time needed, proposed schedule, and the likely impact of delay on performance of the Agreement. Only one Claim is necessary in the case of a continuing delay.

17.4. CLAIMS FOR DAMAGES. Except as otherwise provided, in calculating the amount of any Claim or any measure of damages for breach of contract (such provision to survive any termination following such breach), the following standards will apply both to claims by the ARTIST and to claims by the CITY.

- a) No consequential damages will be allowed.
- b) Damages are limited to extra costs specifically shown to have been directly caused by a proven wrong for which the other Party is claimed to be responsible.
- c) No profit will be allowed on any damage claim.

17.5. LIMITATIONS ON ADJUDICATION AWARDS. IN ACCORDANCE WITH SECTION 271.153 OF THE TEXAS LOCAL GOVERNMENT CODE, as amended, the ARTIST in an any adjudication for breach of this Agreement is limited to: (1) the balance due and owed under the Agreement;(2) the amount owed for change orders or additional work the contractor is directed to perform in connection with the Agreement;(3) reasonable and necessary attorney's fees that are equitable and just; and (4) interest as allowed by law.

17.6. NO WAIVER OF GOVERNMENTAL IMMUNITY. NOTHING IN THIS SECTION 17 SHALL BE CONSTRUED TO WAIVE THE CITY'S GOVERNMENTAL IMMUNITY FROM LAWSUIT, WHICH IMMUNITY IS EXPRESSLY RETAINED TO THE EXTENT IT IS NOT CLEARLY AND UNAMBIGUOUSLY WAIVED BY STATE LAW.

## 17.7. ALTERNATIVE DISPUTE RESOLUTION.

17.7.1. CONTINUATION OF WORK PENDING DISPUTE RESOLUTION. Each Party is required to continue to perform its obligations under the Agreement pending final resolution of any dispute arising out of or relating to this Agreement unless it would be impossible or impracticable under the circumstances.

17.7.2. REQUIREMENT FOR SENIOR LEVEL NEGOTIATIONS. Before invoking mediation or any other alternative dispute process set forth herein the Parties agree that they shall first try to resolve any dispute arising out of or related to this Agreement through discussions directly between those senior management representatives within their respective organizations who have overall managerial responsibility for similar projects. This step shall be a condition precedent to use of any other alternative dispute resolution process. If the Parties' senior management representatives cannot resolve the dispute within 30 calendar days after a Party delivers a written notice of such dispute, then the Parties shall proceed with mediation alternative dispute resolution process contained herein. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

17.7.3. MEDIATION. In the event that the CITY or ARTIST shall contend that the other has committed a material breach of this Agreement, the party alleging such breach shall, as a condition precedent to filing any lawsuit, request mediation of the dispute.

a). Request for mediation shall be in writing, and shall request that the mediation commence not less than 30 or more than 90 calendar days following the date of the request, except upon agreement of both Parties.

b). If the CITY or ARTIST are unable to agree to a date for the mediation or to the identity of the mediator or mediators within 30 calendar days following the date of the request for mediation, all conditions precedent in this article shall be deemed to have occurred.

c). The Parties engaging in the mediation shall share the mediator's fee and any filing fees equally. Venue for any mediation arising under this Agreement shall be in Bexar County, Texas. Any agreement reached in mediation shall be enforceable as a settlement agreement in any court having jurisdiction thereof. No provision of the Mediation Agreement or this Agreement shall waive any immunity or defense. No provision of the Mediation Agreement or of this Agreement is consent to suit.

## **SECTION 18. SUBCONTRACTS AND ASSIGNMENT.**

18.0. ARTIST shall, prior to entering into an agreement with such persons, notify the CITY in writing of the names of all proposed first-tier Subcontractors.

18.1. ARTIST shall not employ any Subcontractor, person or organization (including those who are to furnish the primary materials or equipment), whether initially or as a substitute, against whom CITY may have reasonable objection. A Subcontractor

other person or organization identified in writing to CITY prior to the Notice of Award and not objected to in writing by CITY will be deemed acceptable to CITY. Acceptance of any Subcontractor, other person, or organization by CITY shall not constitute a waiver of any right of CITY to reject defective Work. If CITY, after due investigation, has reasonable objection to any Subcontractor, other person or organization proposed by ARTIST after the Notice of Award, the ARTIST will be required to submit an acceptable substitute. The TOTAL PRICE may be equitably adjusted for any change in the price of the subcontract work resulting from such substitution. ARTIST shall not be required to employ any Subcontractor, other person, or organization against whom ARTIST has reasonable objection.

18.2. ARTIST shall be fully responsible to CITY for all acts and omissions of his Subcontractors and of persons and organizations directly or indirectly employed by them and of persons and organizations for whose acts any of them may be liable to the same extent that ARTIST is responsible for the acts and omissions of persons directly employed by ARTIST. Nothing in the Contract Documents shall create any contractual relationship between CITY and any Subcontractor or other person or organization having a direct contract with ARTIST, nor shall it create any obligation on the part of CITY to pay or to see to the payment of any moneys due any Subcontractor other person or organization, except as may otherwise be required by law. CITY may furnish to any Subcontractor other person or organization, to the extent practicable, evidence of amounts paid to ARTIST on account of specific Work done.

18.3. The divisions and sections of the Specifications and the identifications of any Drawings shall not control ARTIST in dividing the ARTWORK among Subcontractors or delineating the ARTWORK to be performed by any specific trade.

18.4. All ARTWORK performed for ARTIST by a Subcontractor will be pursuant to an appropriate agreement between ARTIST and the Subcontractor, which specifically binds the Subcontractor to the applicable terms and conditions of the Agreement and to assume toward the ARTIST all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work. Where appropriate, the ARTIST shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The ARTIST shall make copies of the Agreement available to each proposed Subcontractor, prior to the execution of the subcontract agreement, to which the Subcontractor will be bound. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

18.5. ASSIGNABILITY. The Parties agree that the expertise and experience of ARTIST are material considerations for this Agreement. Except as may be specifically authorized under this Agreement, ARTIST shall not assign or transfer any interest in this Agreement nor the performance of any of ARTIST's obligations. Any attempt by ARTIST to assign this Agreement or any rights, duties or obligations arising hereunder shall be void and of no effect unless prior written consent is given by CITY. However, nothing in this section shall be deemed to prevent ARTIST, at ARTIST's sole expense, from relying on or utilizing the services of such other consultant or ARTIST as ARTIST may require to complete the ARTWORK.

18.5.1. CONTINGENT ASSIGNMENT OF SUBCONTRACTS. Each subcontract agreement for a portion of the ARTWORK is conditionally assigned by the ARTIST to the CITY provided that:

- a. Assignment is effective only after termination of the Agreement by the CITY and only for those subcontract agreements, which the CITY accepts by notifying the Subcontractor and ARTIST in writing.
- b. Assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Agreement.
- c. Upon such assignment, if the ARTWORK has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increase in cost resulting from the suspension.

18.6. 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 the CITY.

**SECTION 19. NOTICE**

19.0. 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 ARTIST: **Karen L. Miller**  
**SRO Associates, Inc.**  
**21014 Great Navajo**  
**San Antonio, Texas 78257**

For CITY: CITY of San Antonio  
Attn: CIMS Department - Public Art San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

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

19.2. ARTIST agrees for five (5) years following completion of ARTWORK, 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.

**SECTION 20. PROTECTION OF PERSONS AND PROPERTY.**

**20.0. SAFETY PRECAUTIONS AND PROGRAMS.**

20.0.1 The ARTIST shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Agreement. ARTIST shall adopt a reasonable safety program applicable to the SITE and to the ARTWORK to be done, review such program with CITY in advance of beginning the ARTWORK, and enforce such

program at all times. Further, ARTIST shall comply with all applicable laws and regulations including but not limited to, the Occupational Safety and Health Act and any other legislation enacted for the safety and health of ARTIST employees. CITY shall have the right, but not the obligation, to inspect and verify ARTIST's compliance with ARTIST's responsibility for protecting the safety and health of its employees and subcontractor(s).

20.0.2. ARTIST has adopted or will adopt its own policy to assure a drug and alcohol free SITE while performing the ARTWORK. ARTIST's employees, agents, and subcontractors shall not perform any service for CITY while under the influence of alcohol or any controlled substance. ARTIST, its employees, agents, and subcontractors shall not use, possess, distribute, or sell illicit or unprescribed controlled drugs or drug paraphernalia, or misuse legitimate prescription drugs while performing the ARTWORK. ARTIST, its employees, agents, and Subcontractors shall not use, possess, distribute, or sell alcoholic beverages while performing the ARTWORK or while on the SITE of the ARTWORK. ARTIST will remove any of its employees from performing the ARTWORK any time there is suspicion of alcohol and/or drug use, possession, or impairment involving such employee, and at any time an incident occurs where drug or alcohol use could have been a contributing factor. CITY has the right to require ARTIST to remove employees from performing the ARTWORK any time cause exists to suspect alcohol or drug use. In such cases, ARTIST's employees may only be considered for return to ARTWORK after the ARTIST certifies, as a result of a for-cause test conducted immediately following removal, that said employee was in compliance with this Agreement. ARTIST will not use an employee to perform the ARTWORK who either refuses to take, or tests positive in, any alcohol or drug test.

20.0.3. The ARTIST shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss and all drug and alcohol related laws and regulations.

20.0.4. The presence of any firearms or other lethal weapons by any person is prohibited on the ARTWORK SITE, regardless of whether the ARTIST and their contractors and sub-contractors thereof have a permit for a concealed weapon.

20.1. ARTIST shall notify CITY immediately, by telephone with prompt confirmation in writing, of all injuries and fatalities, including but not limited to copies of all reports and other documents filed or provided to ARTIST's insurers and the State of Texas in connection with such injuries or fatalities.

20.2. Parties agree that these safety and health terms are of the highest importance, and that a breach or violation of any of the terms of this Section by ARTIST will be a material and substantial breach of this Agreement. In the event that CITY reasonably determines the ARTIST has breached or violated this Section, then CITY shall notify ARTIST whether such breach shall necessitate a suspension or termination of the Agreement. If the ARTWORK is suspended, the ARTWORK shall not recommence until CITY shall be satisfied that the safety provisions hereof shall not be

breached or violated again. If CITY terminates the Agreement as a result of such breach or violation, the CITY and ARTIST shall complete their obligations hereunder to one another in accordance with Section 16.1. "Termination by CITY."

20.3. SAFETY OF PERSONS AND PROPERTY. The ARTIST shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- a) Employees on the ARTWORK and other persons who may be affected thereby;
- b) The ARTWORK and materials and equipment to be incorporated therein, whether in storage on or off the SITE, under the care, custody or control of the ARTIST or the ARTIST's Subcontractors or Sub-subcontractors; and
- c) Other property at the SITE or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of Construction or Installation of the ARTWORK.

20.3.1 The ARTIST shall erect and maintain, as required by existing conditions and performance of the Agreement, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying CITY and users of adjacent sites and utilities.

20.3.2. When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for the execution of the ARTWORK, the ARTIST shall exercise extraordinary care and shall carry on such activities under the direct supervision of properly qualified personnel.

20.3.3. The ARTIST shall designate a responsible member of the ARTIST's organization at the SITE whose duty shall be the prevention of accidents. This person shall be the ARTIST unless otherwise designated by the ARTIST in writing to the CITY.

20.3.4. The ARTIST shall not load or permit any part of the construction or SITE to be loaded so as to endanger its safety.

20.3.5. EMERGENCIES. In an emergency affecting safety of persons or property, the ARTIST shall exercise its best efforts to act to prevent or minimize threatened damage, injury or loss.

20.4. Notwithstanding these provisions or whether CITY exercises its rights set forth herein, CITY does not warrant nor represent to ARTIST, ARTIST's employees or agents, any subcontractors, or any other third party that ARTIST's safety policy meets the requirements of any applicable law, code, rule, or regulation, nor does CITY warrant that the proper enforcement of ARTIST's policy will insure that no accidents or injuries will occur. In addition, any action by CITY under these provisions in no way diminishes any of ARTIST's obligations under applicable law or the Agreement documents.

20.5. PUBLIC CONVENIENCE AND SAFETY. ARTIST shall place materials stored at the SITE and shall conduct the ARTWORK at all times in a manner that causes no greater obstruction to the public than is reasonably considered necessary by the CITY.

20.5.1 Sidewalks or streets shall not be obstructed, except by special permission of the CITY. Materials excavated and construction materials or plants used in the performance of the ARTWORK shall be placed in a manner that does not endanger the ARTWORK or prevent free access to all fire hydrants, water mains and appurtenances, water valves, gas valves, manholes for the telephone, telegraph signal or electric conduits, wastewater mains and appurtenances, and fire alarm or police call boxes in the vicinity.

20.5.2. The CITY reserves the right to remedy any neglect on the part of the ARTIST in regard to public convenience and safety which may come to the CITY's attention, after 24 hours notice in writing to the ARTIST. In case of an emergency, the CITY shall have the right to immediately remedy any neglect without notice. In either case, the cost of any ARTWORK done by or for the CITY to remedy the ARTIST's neglect shall be deducted from the TOTAL PRICE due ARTIST.

20.5.3. The ARTIST shall notify the CITY and CITY's designated representative, when any street is to be closed or obstructed. The notice shall, in the case of major thoroughfares or street upon which transit lines operate, be at least 48 hours in advance. The CITY reserves the right to postpone or prohibit any closure or obstruction of any streets or thoroughfares to the extent necessary for the safety and benefit of the traveling public. The ARTIST shall, when directed by the CITY, keep any street or streets in condition for unobstructed use by CITY departments. When the ARTIST is required to construct temporary bridges or make other arrangements for crossing over ditches or around structures, the ARTIST's responsibility for accidents shall include the roadway approaches as well as the crossing structures.

20.6. BARRICADES, LIGHTS AND WATCHMEN. If the ARTWORK is carried on, in, or adjacent to any street, alley or public place, the ARTIST shall, at the ARTIST's own cost and expense, furnish, erect and maintain sufficient barricades, fences, lights and danger signals, shall provide sufficient watchmen, and shall take such other precautionary measures as are necessary for the protection of persons or property and of the ARTWORK. All barricades shall be painted in a color that will be visible at night, and shall be illuminated by lights from sunset to sunrise. The term "lights," as used in this Section, shall mean flares, flashers, or other illuminated devices. A sufficient number of barricades with adequate markings and directional devices shall also be erected to keep vehicles from being driven on or into any ARTWORK under construction. The ARTIST will be held responsible for all damage to the ARTWORK due to failure of barricades, signs, lights and watchmen to protect the ARTWORK. Whenever evidence is found of such damage, the CITY may order the damaged portion immediately removed and replaced by the ARTIST at ARTIST's expense.

20.7. PUBLIC UTILITIES AND OTHER PROPERTIES TO BE CHANGED. In case it is necessary to change or move the property of the CITY or of any

telecommunications or public utility, such property shall not be removed or interfered with until ordered to do so by the CITY. The CITY and any public or private utilities have the right to enter the SITE to make such changes or repairs to their property. . The CITY reserves the right of entry upon the SITE for any purpose, including repairing or relaying sewer and water lines and appurtenances, repairing structures, and for making other repairs, changes, or extensions to any of the CITY's property. The CITY's actions shall conform to the ARTIST's current and approved Schedule of Performance, provided ARTIST gives CITY proper notification of schedule requirements.

20.8. ENVIRONMENTAL COMPLIANCE. The CITY has developed an Environmental Management System (EMS), based upon International Standards Organization (ISO) Standard 14001. As part of the EMS, the CITY has adopted an environmental policy. The ARTIST acknowledges receipt of the environmental policy and shall adhere to the policy and provide information in the form and at the times requested by the CITY.

20.8.1. The ARTIST and its Subcontractors are deemed to have made themselves familiar with and shall at all times comply with any and all applicable federal, state or local laws, rules, regulations, ordinances, and common law now in effect (including any amendments now in effect), relating to the environment, Hazardous Substances or exposure to Hazardous Substances, and any current judicial or administrative interpretation of thereof , including but not limited to any judicial or administrative order, consent decree, or judgment affecting the ARTWORK.

20.8.2. If the ARTIST encounters materials reasonably believed to be a Hazardous Substance at the SITE, and the removal of such materials is not a part of the scope of ARTWORK required under the Agreement Documents, the ARTIST shall immediately stop the ARTWORK in the affected area and report in writing the facts of such encounter to the CITY. ARTWORK in the affected area shall not thereafter be resumed except by written order of the CITY and written consent of the ARTIST, unless and until the material is determined not to be a Hazardous Substance or the Hazardous Substance is remediated. Unless removal of such materials is a part of the scope of the Agreement, the CITY shall remediate the Hazardous Substance with a separate contractor. If the Hazardous Substance exists in the affected area due to the fault or negligence of the ARTIST or any of its Subcontractors, the ARTIST shall be responsible for remediating the condition at the sole expense of the ARTIST.

20.8.3. The ARTIST shall be responsible for identification, abatement, cleanup, control, removal, remediation, and disposal of any Hazardous Substance brought into or upon the SITE by the ARTIST or any Subcontractor or Supplier to ARTIST. The ARTIST shall obtain any and all permits necessary for the legal and proper handling, transportation, and disposal of the Hazardous Substance and shall, prior to undertaking any abatement, cleanup, control, removal, remediation, and disposal, notify the CITY and the Design Consultant so that they may observe the activities.

## **SECTION 21. CONFLICT OF INTEREST.**

21.0. The Charter of the City of San Antonio and its Ethics Code prohibit a CITY

officer or employee, as defined in Section 2-52 of the Ethics Code, from having a financial interest in any contract with the CITY or any CITY agency such as CITY-owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the CITY or in the sale to the CITY of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

- a) a CITY officer or employee;
- b) his parent, child or spouse;
- c) a business entity in which the officer or employee, or his parent, child or spouse directly or indirectly owns 10% or more of the voting stock or shares of the business entity, or 10% or more of the fair market value of the business entity; or
- d) a business entity in which any individual or entity above listed is a subcontractor on a CITY contract, a partner, or a parent or subsidiary business entity.

21.1. Pursuant to the subsection above, ARTIST warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of the CITY. The ARTIST further warrants and certifies that it has tendered to the CITY a Discretionary Contracts Disclosure Statement in compliance with the CITY's Ethics Code. Any violation of this article shall constitute malfeasance in office, and any officer or employee of CITY guilty thereof shall thereby forfeit his office or position. Any violation of this section, with the knowledge, express or implied, of the person, persons, partnership, company, firm, association or corporation contracting with the CITY shall void the Agreement.

#### **SECTION 22. GIFTS TO PUBLIC SERVANTS.**

22.0. The CITY may terminate this Contract immediately if the ARTIST has offered, conferred, or agreed to confer any benefit on a CITY employee or official that the CITY employee or official is prohibited by law from accepting. For purposes of this Article, "benefit" means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct or substantial interest, but does not include a contribution or expenditure made and reported in accordance with law.

22.1. Notwithstanding any other legal remedies, the CITY may require the ARTIST to remove any employee of the ARTIST from the SITE who has violated the restrictions of this Article or any similar state or federal law, and may obtain reimbursement for any expenditures made to the ARTIST as a result of the improper offer, agreement to confer, or conferring of a benefit to a CITY employee or official.

#### **SECTION 23. VENUE.**

23.0. **THIS AGREEMENT IS CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.** Any legal action or proceeding brought or maintained, directly or indirectly, as

a result of this Agreement shall be heard and determined in the City of San Antonio, Bexar County, Texas.

#### **SECTION 24. RIGHT TO AUDIT CONTRACTOR'S RECORDS.**

24.0. The Artist grants the City, or its designees, the right to audit, examine or inspect, at the City's election, all of the Artist's records relating to Artist's performance on the Agreement both during the term of the Agreement and retention period herein. The audit, examination or inspection may be performed by a City designee, which may include its internal auditors or an outside representative engaged by the City.

24.1. ARTIST agrees to retain records relevant to this Agreement for a minimum of four years following completion of the ARTWORK or termination of the Agreement. Artist's records" include any and all information, materials and data of every kind and character generated as a result of the work under this Agreement. Example of ARTIST records include but are not limited to billings, books, general ledger, cost ledgers, invoices, production sheets, documents, correspondence, meeting notes, subscriptions, Agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers, memoranda, time sheets, payroll records, policies, procedures, federal and state tax filings for issue in question, and any and all other Agreements, sources of information and matters that may in the CITY's judgment have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any the Agreement.

24.2 The CITY agrees that it will exercise the right to audit, examine or inspect only during regular business hours and with reasonable notice to the ARTIST. The ARTIST agrees to allow the CITY's designee access to all of the ARTIST's Records, ARTIST's facilities, and current or former employees of ARTIST, deemed necessary by CITY or its designee(s), to perform such audit, inspection or examination. ARTIST also agrees to provide adequate and appropriate work space necessary to CITY or its designees to conduct such audits, inspections or examinations.

24.3. ARTIST must include this audit clause in any subcontractor, supplier or vendor contract.

24.4. 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, ARTIST's representatives, or ARTIST's successors-in-interest.

#### **SECTION 25. MISCELLANEOUS.**

25.0. CAPTIONS. The captions to the sections or paragraphs of this Agreement are for convenience only. They are not to be used in construing this Agreement.

25.1. PRIOR AGREEMENTS AND AMENDMENTS. This Agreement, including all of its attachments, represents the entire understanding of the parties as to those matters contained herein. No prior oral or written understanding shall be of any force or

effect with respect to those matters covered hereunder. This Agreement may only be modified by a written amendment duly executed by the parties of this Agreement.

25.2. SEVERABILITY. If any term, covenant, condition or provision of this Agreement 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 shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

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

25.4. INCORPORATION OF ATTACHMENTS. Each of the Attachments listed below is an essential part of the Agreement, which governs the rights and duties of the Parties.

- EXHIBIT A-1: PLANS AND SPECIFICATIONS
- EXHIBIT B-1: SCHEDULE OF PERFORMANCE
- EXHIBIT C-1: PAYMENT SCHEDULE

**EXECUTED and AGREED** to as of the \_\_\_\_ of \_\_\_\_\_, 2012.

**CITY OF SAN ANTONIO,**  
a Texas Municipal Corporation

**ARTIST,**  
SRO Associates, Inc.

\_\_\_\_\_  
Sheryl L. Sculley  
City Manager

\_\_\_\_\_  
Karen L. Miller  
Vice President, Design and Construction

**ATTEST:**

\_\_\_\_\_  
Leticia M. Vacek  
City Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Michael D. Bernard  
City Attorney

## EXHIBIT A – 1

### PLANS AND SPECIFICATIONS

CITY's Standard Specifications and Standard Details, dated July, 1992, are on file with the CITY's Department of Capital Improvements Management Services, Architectural Division.

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

ARTIST's installation and fabrication services shall further comply with the CONSTRUCTION DOCUMENTS/PLANS for the ARTWORK which were developed and approved by PASA and the CIMS Director as set forth in the Final Proposal and the Construction Documents which were developed and approved by PASA and the CIMS Director.

**EXHIBIT B – 1**

**SCHEDULE OF PERFORMANCE**

ARTIST shall not commence ARTIST's services until this Agreement is fully executed and CITY issues a Notice to Commence Work. ARTIST shall perform work according to the following schedule for design, fabrication and installation:

1. Commencement of Work. Artist shall commence work upon full execution of this Agreement. Parties are responsible for meeting the following milestone dates:
2. Conceptual Design Development
  - a. Research and propose components for review process, public input, and approvals **(DATE)**
3. Schematic Design
  - a. Submit schematic designs for review and approval **(DATE)**
  - b. HDRC review of schematic design proposal **(DATE)**
4. Design Development
  - a. Submit final design proposal for review and approval **(DATE)**
  - b. HDRC review of final design proposal **(DATE)**
  - c. All "other" Review of Artwork Design Proposal **(DATE)**
5. Construction Documents **(DATE)**
  - a. Construction Documents, & Final Budget Estimate
6. Fabrication and Installation Mobilization **(DATE)**
  - a. purchase of materials, rental of equipment
7. Electrical/Lighting Components Subcontracted **(DATE)**
8. Completion of Mural Painting **(DATE)**
9. Completion of Sign Lettering and Lighting **(DATE)**
10. Completion of Installation and Clean up of Site **(DATE)**

The Parties agree that the Schedule of Performance set forth above may be modified by mutual agreement only upon prior written authorization by the CITY. The Schedule for Payment set forth in the Agreement shall occur in accordance with the milestones set forth in Section 7 Artist Compensation. In the event that CITY accepts the ARTWORK, one or more payments may occur following the completion date for the ARTWORK.

EXHIBIT C – 1

PAYMENT SCHEDULE

PAYMENT SCHEDULE	
MILESTONE	PAYMENT
Upon execution of the agreement, start-up, mobilization and acquiring materials	\$ _____
Upon approval of Schematic Design	
Upon approval of Artwork Design and Construction Documents	\$ _____
Upon completion of Off-SITE ARTWORK	\$ _____
Upon transportation of ARTWORK to SITE, installation and clean up of SITE	\$ _____
Upon CITY's issuance of the Notice of Acceptance (10%)	\$ _____
<b>TOTAL PRICE</b>	<b>\$160,000.00</b>