

AN ORDINANCE

2009-10-29-0850

AUTHORIZING A FABRICATION CONTRACT BETWEEN THE CITY OF SAN ANTONIO, TEXAS AND REKNOWNED ARTIST ANN GARDNER FOR THE FABRICATION AND INSTALLATION OF THE “SUN” SCULPTURE, WHICH SHALL BE INSTALLED IN THE SAN ANTONIO INTERNATIONAL AIRPORT.

* * * * *

WHEREAS, City of San Antonio (“City”) selected Ann Gardner as the result of a national search to commissioning a suspended glass sculpture entitled the “Sun” (“Sculpture”) to be installed in the San Antonio International Airport in time for the grand opening of Terminal B in 2010; and

WHEREAS, in a meeting held May 6, 2005, the Public Arts Committee gave Ann Gardner final conceptual approval of the Sculpture and on March 28, 2008 approved the finished design and subsequently the Historic Design and Review Commission granted its final approval for the Sculpture on September 3, 2008; and

WHEREAS, the Sculpture will be sixteen feet in diameter with complex spiraling curves that are four feet in diameter and covered in glass creating a shimmering effect; and

WHEREAS, City staff recommends approval of the incorporation of this Sculpture into the San Antonio International Airport Terminal Expansion Program which is in keeping with City Council policy to include public art as part of the City’s Capital Improvement Program; and

WHEREAS, the City Council of the City of San Antonio 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 fabricate and install of this Sculpture on the terms and conditions in the Agreement; **NOW, THEREFORE:**

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

SECTION 1. The City of San Antonio hereby commissions the “Sun” Sculpture from artist Ann Gardner. The terms and conditions of a Fabrication and Installation Agreement between the City of San Antonio and Ann Gardner, a copy of which is attached to this ordinance in substantially final form as Exhibit 1, for the suspended glass sculpture entitled the “Sun” to be installed in the San Antonio International Airport are hereby approved and authorized.

SECTION 2. The amount of \$163,000.00 from previously appropriated funds in SAP Fund 51099000, Airport Capital Projects, SAP Project Definition 33-00151, NTE – Project – Terminal B, is authorized to be encumbered and made payable to Ann Gardner.

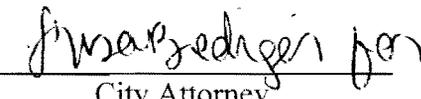
SECTION 3. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City manager, or the City Manager's designee, correct allocation to specific SAP Fund Numbers, SAP Project Definitions, 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 purposes of this Ordinance.

SECTION 4. This ordinance shall be effective on and after the tenth (10th) day after passage hereof.

PASSED AND APPROVED on this 29th day of October, 2009.


M A Y O R
JULIÁN CASTRO

ATTEST: 
City Clerk

APPROVED AS TO FORM: 
City Attorney

Agenda Item:	9 (in consent vote: 5, 6, 7, 8, 9, 11, 13A, 13B, 15, 16, 19, 22A, 22B, 22C, 22D, 22E, 22F, 22G, 22H, 22I, 22J, 22K, 23, 24, 25)						
Date:	10/29/2009						
Time:	09:38:59 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance authorizing a fabrication contract with Ann Gardner in the amount of \$163,000.00 for fabrication and installation of a public artwork project as part of the New Terminal Expansion - Project 4 - Terminal B Project at the San Antonio International Airport, funded by Airport Revenue Bonds. [Penny Postoak Ferguson, Assistant City Manager; Mike Frisbie, Director, Capital Improvements Management Services]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Julián Castro	Mayor		x				
Mary Alice P. Cisneros	District 1		x			x	
Ivy R. Taylor	District 2		x				
Jennifer V. Ramos	District 3		x				
Philip A. Cortez	District 4		x				x
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Justin Rodriguez	District 7		x				
W. Reed Williams	District 8		x				
Elisa Chan	District 9		x				
John G. Clamp	District 10		x				
Mary Alice P. Cisneros	District 1		x			x	
Ivy R. Taylor	District 2		x				
Jennifer V. Ramos	District 3		x				
Philip A. Cortez	District 4		x				x
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Justin Rodriguez	District 7		x				
W. Reed Williams	District 8		x				
Elisa Chan	District 9		x				
John G. Clamp	District 10		x				

EXHIBIT 1

PROFESSIONAL SERVICES AGREEMENT
PUBLIC ART FABRICATION AND INSTALLATION SERVICES
STATE OF TEXAS
COUNTY OF BEXAR
CITY OF SAN ANTONIO

AGREEMENT FOR PUBLIC ART FABRICATION AND INSTALLATION SERVICES

New Terminal Expansion- Public Artwork-Project 4-Terminal B – 33-00151-06-02

This 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, hereinafter termed "CITY" and

**Ann Gardner
4136 Meridian Avenue N.
Seattle, Washington 98103**

hereinafter termed "ARTIST", said Agreement being executed by the CITY pursuant to the CITY Charter, Ordinances, and Resolutions of the CITY Council, and by the ARTIST for public art fabrication and installation services hereinafter set forth in connection with the above designated Project for the CITY of San Antonio.

<u>SECTION</u>	<u>TITLE</u>	<u>INDEX</u>	<u>PAGE</u>
1.	DEFINITIONS		2
2.	ARTISTS GENERAL RESPONSIBILITIES		3
3.	FABRICATION AND INSTALLATION OF THE ARTWORK		6
4.	SCHEDULE		9
5.	ARTIST'S COMPENSATION		9
6.	ARTIST'S WARRANTIES		10
7.	MAINTENANCE		11
8.	RELATIONSHIP OF PARTIES;ASSIGNMENT		11
9.	INDEMNIFICATION		12
10.	INSURANCE		13
11.	COPYRIGHTS		15
12.	REPUTATION AND CREDIT		16
13.	COMPLIANCE WITH LAWS		17
14.	DEFAULT/TERMINATION AND/OR SUSPENSION OF WORK		17
15.	CLAIMS AND DISPUTES		20
16.	AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE ARTWORK		22
17.	PROTECTION OF PERSONS AND PROPERTY		24
18.	OFFICERS OF EMPLOYEES OF CITY NOT TO HAVE FINANCIAL INTEREST IN ANY CONTRACT OF THE CITY		28
19.	GIFTS TO PUBLIC SERVANTS		29
20.	VENUE		29
21.	RIGHT TO AUDIT CONTRACTOR'S RECORDS		29
22.	MISCELLANEOUS		30

SECTION 1. DEFINITIONS

As used in this AGREEMENT, the following terms shall have the meanings as 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 consistent with ARTIST'S final proposal and described in EXHIBIT A.

1.2. "ARTIST" means _____ (**Ann Gardner**).

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.

1.5. "PUBLIC ART SAN ANTONIO (PASA)" means the CITY'S office responsible for public art.

1.6. "PUBLIC ART SAN ANTONIO DIRECTOR" means PASA Director.

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

1.8. "CONSTRUCTION DOCUMENTS/PLANS" mean the drawings, specifications, and addenda issued prior to the execution of this Agreement for Fabrication and Installation services.

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

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

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

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

1.13. "OFF-SITE ELEMENT" means an element of the ARTWORK fabricated away from the SITE for the ARTWORK.

1.14. "OFF-SITE DEFECTS NOTICE" means notice to ARTIST that defects or deficiencies of an OFF-SITE element prevent the CITY'S formal approval.

1.15. "SCHEDULE OF PERFORMANCE" means the schedule set out in EXHIBIT C.

1.16. "SITE" means the place the ARTWORK will be displayed (See EXHIBIT A).

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

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

SECTION 2. ARTIST'S GENERAL RESPONSIBILITIES

2.0. GENERAL.

2.0.1. The parties agree that the Final Proposal is on file with Public Art SAN ANTONIO (PASA). In the event of conflict between the Final Proposal and this Agreement, this Agreement will control. The location of the ARTWORK is described in the attached **EXHIBIT A**.

2.0.2 ARTIST shall fabricate the ARTWORK consistent with the Final Proposal, including without limitation, supervising all aspects of the fabrication of the ARTWORK to ensure proper fabrication of the ARTWORK. As more particularly provided below, ARTIST shall be responsible for the transportation and delivery of the ARTWORK to the SITE. ARTIST shall be responsible for the installation of the ARTWORK at the SITE consistent with the construction documents for the ARTWORK which were developed and approved by PASA and the CIMS Director as set forth in the agreement entitled: "Agreement Between the CITY of San Antonio and **Ann Gardner** entitled, AGREEMENT FOR PUBLIC ART DESIGN SERVICES, **New Terminal Expansion-Public Artwork-Project 4-Terminal B – 33-00151-06-02**("Construction Documents"). ARTIST's responsibilities under this subsection are collectively referred to as "ARTIST's Services."

2.1. DEVIATIONS FROM PROPOSAL.

2.1.1 The goal of the parties for the ARTWORK is a 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 recognize that they must consult closely during all stages of development of the ARTWORK, including without limitation, during fabrication and installation of the ARTWORK in order to accomplish these goals and that changes from the Final Proposal may become desirable as the ARTWORK is fabricated. Additionally, the parties recognize and agree that certain specifications regarding the ARTWORK, such as, but not limited to, the size, color, material (including grade of the material), of some of the elements of the ARTWORK are not identified in 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 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 the change in design increase the ARTWORK budget without prior written approval by PASA Director and the CIMS Director. Additionally, ARTIST shall make no change in the design which requires a modification of the Construction Documents without the prior written approval of PASA Director and the CIMS Director.

2.2. MATERIAL DEVIATIONS. Any material deviation from the Final Proposal or the Construction Documents in the scope, design, color, size, material, utility and support requirements, texture or location of the ARTWORK must be approved in writing and in advance by CITY before ARTIST proceeds with completion of the ARTWORK. Without limiting the generality of the foregoing, material deviation also includes any change from the Final Proposal or the Construction Documents which affects the fabrication, schedule of delivery or installation of the ARTWORK, preparation of the SITE or maintenance of the ARTWORK.

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

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

2.5. COORDINATION. ARTIST agrees to meet with CITY and others as reasonably directed by CITY to ensure coordination of ARTIST's Services with the installation of the ARTWORK.

2.6. PERMITS, FEES AND NOTICES.

2.6.1. PERMITS. Unless otherwise provided in the Agreement Documents, the ARTIST shall secure and pay for the building permit and other permits and governmental fees, licenses, and inspections necessary for proper execution and completion of the ARTWORK which are customarily secured after execution of the Agreement. CITY and Design Consultant shall assist ARTIST, when necessary, in obtaining such permits and licenses.

2.6.2. The ARTIST shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities applicable to construction of the ARTWORK.

2.6.3 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 correction.

2.6.4 The ARTIST shall also assist CITY in obtaining all permits and approvals, and pay all fees and expenses, if any, associated with National Pollutant Discharge Elimination System (NPDES) regulations administered by the Environmental Protection Agency (EPA) and local authorities, if applicable, that require completion of documentation and/or acquisition of a "Land Disturbing Activities Permit" for the Project. ARTIST's obligations under this paragraph do not require it to perform engineering services during the pre-construction phase to prepare proper drainage for the SITE. However, any drainage alterations made by ARTIST during the construction process which require the issuance of a permit shall be at ARTIST's sole cost.

2.6.5 USE OF SITE. ARTIST shall confine construction equipment, the storage of materials and equipment and the operations of workers to areas permitted by law, ordinances, permits, or the requirements of the Agreement Documents, and shall not unreasonably encumber the premises with construction equipment or other materials or equipment.

2.6.6. 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.

2.6.7. 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.

2.6.8. The ARTIST shall provide access to residents and businesses affected by the construction of this ARTWORK to the greatest extent possible, including temporary base and asphalt.

2.6.11. 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 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 debris. ARTIST shall be given three (3) days notice to clean up SITE, otherwise the CITY may do so and the cost therefore shall be charged to the ARTIST

2.6.12. Prior to Substantial Completion of the ARTWORK, ARTIST shall remove all waste materials, rubbish and debris from and about the premises as well as all tools, appliances, construction equipment and machinery, and surplus materials, and shall leave the SITE clean and ready for acceptance, by CITY. 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 debris. ARTIST shall restore to their original condition those portions of the SITE not designated for alteration by the Agreement Documents. If the ARTIST fails to clean up as provided in the Agreement Documents, the CITY may do so and the cost therefore 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, 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.

SECTION 3. FABRICATION AND INSTALLATION OF THE ARTWORK

3.0. INSPECTION AND TRANSPORT OF ARTWORK.

3.0.1. INSPECTION NOTICE. CITY and ARTIST agree that various elements of the ARTWORK may be fabricated at locations away from the SITE (collectively, "OFF-SITE ELEMENTS"). The OFF-SITE ELEMENTS, include, but are not limited to, the elements described in the attached **Appendix 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 **Appendix 1**.

3.0.2. NOTICE TO COMMENCE WORK. Within fifteen (15) working days of receipt of the Inspection Notice for each OFF-SITE ELEMENT, CITY will inform ARTIST in writing either (1) the OFF-SITE ELEMENT has been completed in accordance with the terms of this Agreement and the OFF-SITE ELEMENT is formally 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 described ("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 fifteen (15) working day inspection period, the TRANSPORT NOTICE TO PROCEED will be deemed to have been issued at the conclusion of the fifteen (15) working day inspection period. In the

event that CITY issues an OFF-SITE DEFECTS NOTICE, ARTIST will promptly remedy any defects to the satisfaction of the CITY.

3.0.3. DELIVERY. Upon issuance of the TRANSPORT NOTICE TO PROCEED, ARTIST shall deliver the OFF-SITE ELEMENTS to the SITE. CITY agrees to allow ARTIST to deliver the ARTWORK directly to a designated staging area adjacent to the installation SITE. In addition, CITY will allow ARTIST a 7-day period for storage and installation of the ARTWORK and will provide ARTIST with confirmed dates no later than 30 days in advance of the scheduled storage and installation period. 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 promptly shall remedy any defect or damage to the Off-SITE Element or any deviations from the OFF-SITE ELEMENTS as approved by CITY in the TRANSPORT NOTICE TO PROCEED to the satisfaction of the CITY.

3.1. WORK AT THE SITE.

3.1.1. 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").

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

3.1.3. 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 parties recognize and agree that the ARTWORK will not be formally accepted by CITY, unless the PASA Program Director and the CIMS Director approve the installation of the ARTWORK at the SITE.

3.1.4. APPEARANCE OF SITE. ARTIST shall maintain a neat appearance to the work at the SITE. ARTIST shall be responsible for any clean-up of the SITE made necessary by the installation of the ARTWORK, including without limitation, removal of equipment, materials and the repair of any portion of the SITE or surrounding area damaged by the installation of the ARTWORK.

3.1.5. CITY'S ACCESS TO SITE. CITY's designated representatives shall at all times during the progress of work on the ARTWORK at the SITE have free access to the ARTWORK for inspection purposes. If either the PASA Program Director or the CIMS Director determines that all or any portion of the work done on the ARTWORK is not in compliance with the Plans, CITY shall notify ARTIST of the same and ARTIST shall promptly cure such defect to the satisfaction of the PASA Program Director and the CIMS Director.

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

3.1.7. CITY shall also designate one or more authorized representative who shall have the authority to represent CITY. ARTIST's authorized representative shall be present at the SITE of the work at such times as designated by either the CIMS Director or designee. Prior to commencement of the work, the parties shall mutually agree to an inspection schedule, which schedule may be adjusted from time to time by mutual agreement.

3.1.8. Whenever the ARTIST or ARTIST's authorized representative are not present on the SITE where 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 superintendent or foreman who may have charge of the particular SITE in reference to which the orders are given. Any order given by the CIMS Director will on request of the ARTIST be given or confirmed by the CIMS Director in writing.

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

3.2. COMPLETION OF SERVICES.

3.2.1. COMPLETION NOTICE. ARTIST shall notify CITY that the ARTWORK has been installed at the SITE ("COMPLETION NOTICE"). Within thirty (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 ("DEFECTS NOTICE").

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

3.2.3. 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 care, repair and maintenance of the ARTWORK.

3.2.4. 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. Use of these images will be in accordance with Section 9.2 of this Agreement.

SECTION 4. SCHEDULE.

4.0. SCHEDULE. ARTIST is to complete ARTIST's Services according to the schedule set out in the attached **EXHIBIT C**, entitled "Schedule of Performance".

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

4.2. FORCE MAJEURE.

4.1.1. For purposes of this Agreement the term "Force Majeure" shall mean earthquake, fire or other casualty, flood, landslide, epidemic, unforeseeable adverse weather, "acts of God," war, civil disturbance, court ordered injunction, intervention by civil or military authorities or government, strikes, lockouts, boycotts or other labor disputes, to the extent any of the foregoing are beyond the reasonable control of either CITY or ARTIST and which cause such party to be delayed or hindered in or prevented from the performance of any covenant or obligation under this Agreement other than the payment of money.

4.1.2. If either ARTIST or CITY is delayed or prevented from the performance of any act required by this Agreement by reason of acts of Force Majeure, performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

SECTION 5. ARTIST'S COMPENSATION.

5.0. COMPENSATION.

5.0.1. The compensation to be paid to ARTIST ("TOTAL PRICE") is set forth in the attached **EXHIBIT D**, entitled "COMPENSATION". The rate, schedule and method of payment also are set out in Exhibit D. Such payment shall constitute full and complete COMPENSATION for work performed and

services rendered, including, but not limited to, professional services and expenses, for all supervision, labor, supplies, materials, equipment or use thereof, taxes, and for all other necessary incidentals. Without limitation of any other provision of this Agreement, ARTIST shall pay or cause to be paid, prevailing wages for all work under this Agreement, if any, covered by the CITY's Wage and Hour Policy. Further information regarding prevailing wages that may apply to this Agreement may be obtained from the CIMS Contract Services Division.

5.0.2. 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.

5.1. 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.

5.2. 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.

SECTION 6. ARTIST'S WARRANTIES.

6.0. ARTIST'S WARRANTIES. ARTIST represents and warrants that:

6.0.1. 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.

6.0.2. 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.

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

6.0.4. 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.

6.0.5. ARTIST warrants and covenants that the ARTWORK will be and will remain a unique edition.

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

6.1. DEFECTS IN MATERIAL WORKMANSHIP AND INHERENT VICE.

6.1.1. 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 (1) year from the date the ARTWORK is formally accepted. If the ARTWORK should deteriorate because of Inherent Vice within one (1) 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. The term "INHERENT VICE" means any quality within the material or materials incorporated into the ARTWORK which, either alone or in combination, results in the deterioration of the ARTWORK. Inherent Vice does not include any potential for deterioration that is specifically identified in the Final Proposal.

6.1.2. 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.

SECTION 7. MAINTENANCE.

7.0. REPAIRS AND RESTORATION. CITY shall have the right to determine, after consultation with ARTIST and/or 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.

7.1. 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 3.2.3.

SECTION 8. RELATIONSHIP OF PARTIES; ASSIGNMENT.

8.0. ARTIST AS INDEPENDENT ARTIST. It is understood and agreed that ARTIST's relationship with CITY is strictly and solely that of independent ARTIST. Nothing contained in this Agreement shall be construed to place CITY and ARTIST in the relationship of partners. ARTIST acknowledges and agrees that ARTIST shall not hold ARTIST out as authorized agent of CITY with power to bind in any manner.

8.1. INDEPENDENT CONTRACTOR In performing the ARTWORK under this Agreement, the relationship between the CITY and the ARTIST is that of an independent contractor. The ARTIST shall exercise independent judgment in performing the ARTWORK and is solely responsible for setting working hours, scheduling or prioritizing the Work flow and determining the means and methods of performing the ARTWORK, subject only to the requirements of the Agreement Documents. No term or provision of this Agreement shall be construed as making the ARTIST an agent, servant, or employee of the CITY, or making the ARTIST or any of the ARTIST's employees, agents, or servants eligible for the fringe benefits, such as retirement, insurance and worker's compensation, which the CITY provides to its employees.

8.2. ASSIGNABILITY.

8.2.1. The parties agree that the expertise and experience of ARTIST are material considerations for this Agreement. Except as may be specifically authorized under this Agreement, ARTIST shall not assign or transfer any interest in this Agreement nor the performance of any of ARTIST's obligations hereunder, and any attempt by ARTIST to 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.

8.2.2. 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 9. INDEMNIFICATION.

9.0. 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, 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.

9.1. The Artist shall advise the City in writing within 24 hours of any claim or demand against the City or the Artist, known to the Artist, related to or arising out of the Artist's activities under this Agreement.

9.2. 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.

9.3. 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.

SECTION 10. INSURANCE.

10.0. Prior to the commencement of any Services under this Agreement, the 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 "**New Terminal Expansion-Public Artwork -Project 4-Terminal B – 33-00151-06-02**" 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.

10.1. 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:

<p>Commercial General Broad Form (Public) Liability Insurance to include coverage for the following:</p> <ul style="list-style-type: none"> Premises Operations Independent contractors Products/completed operations Personal Injury Contractual Liability 	<p>For Bodily Injury and Property Damage of \$500,000 per occurrence</p>
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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

10.2. 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:

- o 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;
- o 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
- o Provide thirty (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 ten (10) calendar days advance written notice for nonpayment of premium.

10.3. Within five (5) 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. Failure to provide and to maintain the required insurance shall constitute a material breach of this contract.

10.4. 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.

10.5. 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.

10.6. 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.

10.7. 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.

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

SECTION 11. COPYRIGHTS.

11.0. CITY shall have ownership and possession of the ARTWORK. ARTIST warrants that the ARTWORK is a unique edition. 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 without the express written consent of CITY.

11.1. Artist hereby retains all copyrights in the ARTWORK. However, for the term of this Agreement and any time thereafter, ARTIST hereby authorizes and grants a non-exclusive license to CITY to make any and all reproductions or derivatives in whatever form of the ARTWORK for educational, public relations, arts promotional, commercial or any other purpose, provided ARTIST receives notice of such reproductions. If CITY uses the Work for commercial purpose, all revenues received by CITY from such commercial ventures shall be directed to mechanism for long-term maintenance of the Work. Any use of the ARTWORK by ARTIST or any third party must be approved, in advance, by CITY.

11.2. If required, all completed drawings submitted by ARTIST for final approval or issuance of a permit shall bear the seal with signature and date adjacent thereto of a Texas registered architect/engineer licensed to practice in Texas.

11.3 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, INSOFAR AS THE SAME ARE BASED ON ANY CLAIM THAT THE ARTWORK PROVIDED UNDER THIS AGREEMENT CONSTITUTE AN INFRINGEMENT OF ANY PATENT, TRADE SECRET, TRADEMARK, COPYRIGHT OR OTHER INTELLECTUAL PROPERTY RIGHTS.

11.4. ARTIST hereby grants to CITY the exclusive right to display the ARTWORK, 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.

11.5. CITY and ARTIST agree that unless ARTIST requests to the contrary in writing, all references to the ARTWORK and all reproductions of the ARTWORK shall credit the ARTWORK to ARTIST.

11.6. ARTIST agrees that all formal references to the ARTWORK shall include the following credit line: "From the Collection of the City of San Antonio, Texas, Commissioned through Public Art San Antonio."

11.7. ARTIST shall provide information on the ARTWORK requested by CLIENT for its registration files.

11.8. 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.

11.9. ARTIST acknowledges 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. 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 guidelines and review requirements listed in the City's Unified Development Code, Article VI, Division 5, Section 35-656. ARTIST agrees that a CITY decision made under this paragraph regarding if, when and how to remove the ARTWORK is final. CITY agrees to notify ARTIST at least ninety (90) days prior to any removal, demolition, renovation or redevelopment and in the event ARTIST and CITY can negotiate a reasonable agreement, CITY agrees to engage ARTIST to conduct and supervise the restoration of the ARTWORK. ARTIST may be compensated in accordance with an agreement between ARTIST and CITY for the expenses and fees associated with the restoration.

11.10. ARTIST hereby expressly consents to both the installation into and removal from the Project of the ARTWORK and thereby expressly waives his/her Moral Rights to the ARTWORK. It is agreed that if the ARTWORK, or any portion thereof is removed causing it or any part thereof to be destroyed, distorted, mutilated or modified in any way, the ARTWORK may not thereafter be referred to as "an ARTWORK by the Artist".

SECTION 12. REPUTATION AND CREDIT.

12.0. 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.

12.1. ARTWORK PLAQUE. CITY will fabricate and install an identification plaque for the completed ARTWORK, which will include the following information: ARTIST's name, year in which ARTWORK is completed, ARTWORK title, funding agency and commissioning agency. No other information will be included on the ARTWORK Plaque.

12.2. 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.

12.3. FUTURE MODIFICATION OR RELOCATION.

12.3.1. 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.

12.3.2. Except to the extent permitted by Section 12.3.1. above, CITY agrees to not intentionally modify the ARTWORK without first giving ARTIST written notice in accordance with Section 11.9.

12.3.3. CITY shall have the right to donate or sell the ARTWORK at any time. Before exercising this right, CITY, by written notice to ARTIST at ARTIST's last known address, agrees to give ARTIST the opportunity to purchase the ARTWORK for the greater of the Total Price or the amount of any offer which CITY has received for the purchase of the ARTWORK, plus all costs associated with the removal of the ARTWORK from the SITE, clean-up of the SITE and delivery to ARTIST. ARTIST shall have thirty (30) days from the date of receipt of CITY's notice to exercise the option to purchase the ARTWORK.

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

SECTION 13. COMPLIANCE WITH LAWS.

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

13.1. 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.

SECTION 14. DEFAULT/TERMINATION AND/OR SUSPENSION OF WORK

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

14.0.1. 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.

14.0.2. The party not in default must issue a signed, written notice of termination (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 ten (10) days to cure any failure to perform under this Agreement. Upon the completion of such ten-day period commencing upon receipt of notice of termination, if such party has not cured any failure to perform, such termination shall become effective without further written notice.

14.1. 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 on the twentieth day following receipt of said notice and upon the scheduled completion date of the performance phase in which ARTIST is then currently working, whichever effective termination date occurs first.

14.2. RIGHT OF CITY TO SUSPEND GIVING RISE TO RIGHT OF ARTIST TO TERMINATE. The 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) which shall outline the reasons for the suspension and the expected duration of the suspension, but such expected duration shall in no way will guarantee what the total number of days of suspension will occur. Such suspension shall take effect immediately upon receipt of said notice of suspension by the ARTIST.

14.3. The ARTIST is hereby given the right to terminate this Agreement in the event such suspension extends for a period in excess of one hundred twenty (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 one hundred twenty (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.

14.4. PROCEDURES ARTIST TO FOLLOW UPON RECEIPT OF NOTICE OF TERMINATION. Upon receipt of a notice of termination 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 out hereinabove, ARTIST shall immediately begin the phase-out and the discontinuance of all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement. Within thirty (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.

14.4.1. 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 in Section 9 above.

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

14.4.3. The CITY, as a public entity, has a duty to document the expenditure of public funds. The ARTIST acknowledges this duty on the part of the CITY. To this end, the ARTIST understands that failure of the ARTIST to comply with the submittal of the statement and documents as required above 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.

14.4.4. Failure of the ARTIST to comply with the submittal of the statement and documents as required above shall constitute a waiver by the ARTIST of any and all rights or claims to collect monies that ARTIST may otherwise be entitled to for services performed under this Agreement.

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

14.5.1 Upon receipt of written notice of suspension, which date shall also be the effective date of the suspension, the ARTIST shall, unless the notice otherwise directs, immediately begin to phase-out and discontinue all services in connection with the performance of this Agreement and shall proceed to promptly suspend all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement.

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

14.5.3 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.

14.5.4 In the event that ARTIST exercises the right to terminate one hundred twenty (120) days after the effective suspension date, within thirty (30) days after receipt by the CITY of ARTIST's notice of termination, ARTIST shall promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement and shall submit the above referenced statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

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

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

14.5.7 The CITY, as a public entity, has a duty to document the expenditure of public funds. ARTIST acknowledges this duty on the part of the CITY. To this end, ARTIST understands that failure of ARTIST to substantially comply with the submittal of the statements and documents as required herein shall constitute a waiver by the ARTIST of any portion of the fee for which ARTIST did not supply such necessary statements and/or documents.

14.6 COMPENSATION. In the event that CITY terminates this Agreement, CITY shall pay ARTIST for services performed up to date of termination, consistent with the schedule of payment set forth in **EXHIBIT C**.

14.7. REMEDIES.

14.7.1. The remedies under this Agreement are cumulative and are in addition to the rights available to the parties at law or in equity.

14.7.2. Without limiting the generality of 14.7.1., above, if ARTIST breaches this Agreement, CITY has the right to exercise its termination rights as described in Section 14 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.

14.8. WAIVER. The parties agree that waiver by any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term or condition.

SECTION 15. CLAIMS AND DISPUTES

15.0. 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 terms, payment 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/or 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, additional 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 by his signature) of the ARTIST, verifying the truth and accuracy of the Claim. The responsibility to substantiate Claims shall rest with the party making the Claim.

15.1. TIME LIMIT ON CLAIMS. Claims by the ARTIST or by the CITY must be initiated within twenty-one (21) calendar days after occurrence of the event giving rise to such Claim. Claims by the ARTIST must be initiated by written notice to the CITY. Claims by the CITY must be initiated by written notice to the ARTIST.

15.2. 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.

15.3. CLAIMS FOR ADDITIONAL TIME. If the ARTIST wishes to make Claim for an increase in the time for performance, written notice as provided in this Article 14 shall be given. ARTIST's Claim shall include an estimate of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

15.4. CLAIMS FOR DAMAGES. Except as otherwise provided in this Agreement, 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:

15.4.1. No consequential damages will be allowed.

15.4.2. 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.

15.4.3. No profit will be allowed on any damage claim.

15.5. ATTORNEY'S FEES. IN ACCORDANCE WITH SECTION 271.159 OF THE TEXAS LOCAL GOVERNMENT CODE, AS AMENDED, THE ARTIST SHALL NOT BE ENTITLED TO RECOVER ATTORNEY'S FEES OR CERTAIN DIRECT OR CONSEQUENTIAL DAMAGES AS A PART OF ANY CLAIM MADE UNDER THE AGREEMENT OR IN ANY SUBSEQUENT LAWSUIT OR ALTERNATIVE DISPUTE RESOLUTION PROCEEDING, AND ARTIST HEREBY EXPRESSLY WAIVES SUCH CLAIMS.

15.6. NO WAIVER OF GOVERNMENTAL IMMUNITY. NOTHING IN THIS SECTION 14 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.

15.7. ALTERNATIVE DISPUTE RESOLUTION.

15.7.1. CONTINUATION OF WORK PENDING DISPUTE RESOLUTION. Each party is required to continue to perform its obligations under this 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.

15.7.2. 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 thirty (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.

15.7.3. MEDIATION.

15.7.3.1 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.

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

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

15.7.3.4. The parties engaging in the mediation shall share the mediator's fee and any filing fees equally. Venue for any mediation or lawsuit 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 the Mediation Agreement or of this Agreement is a consent to suit.

SECTION 16. AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE ARTWORK.

16.0. The ARTIST shall, prior to entering into an agreement with such persons, notify the Director in writing of the names of all proposed first tier Subcontractors for the Work.

16.1. ARTIST shall not employ any Subcontractor other person or organization (including those who are to furnish the principal items of 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 prior to the Notice of Award 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 Contract

Sum will be equitably adjusted, if permitted by applicable law, 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.

16.2. 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 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.

16.3. 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.

16.4. 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 Documents for the benefit of CITY.

16.7. 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, the 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, Amendment, Change Orders and other administrative activities. When such systems are employed, the CITY shall administer the software, shall provide training to Project Team Members, and shall make the software accessible via the Internet to all Project Team Members.

16.8. SUBCONTRACTUAL RELATIONS. By appropriate agreement, written where legally required for validity, the ARTIST shall require each Subcontractor, to the extent of the ARTWORK to be performed by the Subcontractor, to be bound to the ARTIST by terms of the Agreement Documents and to assume toward the ARTIST all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work. Each subcontract agreement shall preserve and protect the rights of the CITY under the Agreement Documents with respect to the ARTWORK to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights. Where appropriate, the ARTIST shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The ARTIST shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Agreement Documents 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.

16.9. CONTINGENT ASSIGNMENT OF SUBCONTRACTS.

16.9.1. Each subcontract agreement for a portion of the ARTWORK is assigned by the ARTIST to the CITY provided that:

16.9.1.1. 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.

16.9.1.2. Assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Agreement.

16.9.2. 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.

SECTION 17. PROTECTION OF PERSONS AND PROPERTY.

17.0. SAFETY PRECAUTIONS AND PROGRAMS.

17.0.1 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 develop a safety program applicable to each job 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 standards and regulations promulgated by the Secretary of labor under the Occupational Safety and Health Act of 1970 (OSHA) 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.

17.0.2. 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.

17.0.3. ARTIST has adopted or will adopt its own policy to assure a drug and alcohol free ARTWORK place 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.

17.0.4. ARTIST will comply with all applicable federal, state, and local drug and alcohol related laws and regulations (e.g., Department of Transportation regulations, Department of Defense Drug-free Work-free Workforce Policy, Drug-Free workplace Act of 1988). The presence of any firearms or other lethal weapons by any person is prohibited on the ARTWORK SITE, regardless of whether the CITY thereof has a permit for a concealed weapon.

17.0.5. Both CITY and ARTIST 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 shall determine that ARTIST has breached or violated the terms of this Section, then CITY shall determine, immediately upon written notice to ARTIST, whether the ARTWORK shall be suspended as a result thereof. 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 thereafter. If CITY shall terminate 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 14.1. "Termination by CITY."

17.0.6. Nothing contained in this Section shall be interpreted as creating or altering the legal duty of CITY to ARTIST or to ARTIST's agents, employees, Subcontractors, or third parties, or altering the status of ARTIST as an independent contractor.

17.0.7 Notwithstanding either of the above 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.

17.1. SAFETY OF PERSONS AND PROPERTY.

17.1.1. The ARTIST shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

17.1.1.1. Employees on the ARTWORK and other persons who may be affected thereby;

17.1.1.2. 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

17.1.1.3. 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.

17.1.2. 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.

17.1.3. 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.

17.1.4. 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.

17.1.5. 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's superintendent unless otherwise designated by the ARTIST in writing to the CITY.

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

17.2. 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.

17.3. PUBLIC CONVENIENCE AND SAFETY.

17.3.1. The ARTIST shall place materials stored at the ARTWORK SITE and shall conduct the ARTWORK at all times in a manner that causes no greater obstruction to the public than is considered necessary by the CITY. 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.

17.3.2. 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 twenty-four (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 Agreement Sum. The ARTIST shall notify the CITY Traffic Control Department 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 forty-eight (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.

17.4. 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 cost and expense.

17.5. 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 right is reserved to the CITY of any public or private utilities to enter upon the ARTWORK SITE for the purpose of making such changes or repairs of their property that may become necessary during the performance of the ARTWORK. The CITY reserves the right of entry upon the ARTWORK 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 for the performance of the ARTWORK, provided that proper notification of schedule requirements has been given to the CITY by the ARTIST.

17.6. ENVIRONMENTAL COMPLIANCE.

17.6.1. 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 to the CITY in the form and at the times requested by the CITY in the furtherance of the policy.

17.6.2. The ARTIST and its Subcontractors are deemed to have made themselves familiar with and shall at all times shall comply with any and all applicable federal, state or local laws, rules, regulations, ordinances, and rules of common law now in effect (including any amendments now in effect), relating to the environment, Hazardous Substances or exposure to Hazardous Substances, including but not limited to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. §§ 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C.A. §§ 1801, et seq.; the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §§ 6901, et seq.; the Federal Water Pollution Control Act, 33 U.S.C.A §§ 1201, et seq.; the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601, et seq.; the Clean Air Act, 42 U.S.C.A. §§ 7401, et seq.; the Safe Drinking Water Act, 42 U.S.C.A. §§ 3808, et seq., and any current judicial or administrative interpretation of these laws, rules, regulations, ordinances, or rules of common law, including but not limited to any judicial or administrative order, consent decree, or judgment affecting the ARTWORK.

17.6.3. In the event the ARTIST encounters on the ARTWORK SITE materials reasonably believed to be a Hazardous Substance that have not been rendered harmless, 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 ARTWORK required under the Agreement Documents, the CITY shall remediate the Hazardous Substance with a separate contractor or through a Change Order with the ARTIST. 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. If applicable, such remediation shall be in accordance with the ARTIST's Spill Remediation Plan.

17.6.4. 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 Supplier. 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; provided, however, that it shall be the ARTIST's sole responsibility to comply with all applicable laws, rules, regulations, or ordinances governing the activities.

SECTION 18. OFFICERS OR EMPLOYEES OF THE CITY NOT TO HAVE FINANCIAL INTEREST IN ANY CONTRACT OF THE CITY.

18.0. ARTIST acknowledges that it is informed that the Charter of the CITY of San Antonio and its Ethics Code prohibit a CITY officer or employee, as those terms are 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 CITY officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a Subcontractor, a CITY contract, a partner or a parent or subsidiary business entity. Pursuant to the subsection above, the ARTIST warrants and certifies, and this Contract 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 render the Agreement involved voidable by the City Manager or City Council.

SECTION 19. GIFTS TO PUBLIC SERVANTS.

19.0. The CITY may terminate this Contract immediately if the ARTIST has offered, conferred, or agreed to confer any benefit on a City of San Antonio employee or official that the City of San Antonio employee or official is prohibited by law from accepting.

19.1. 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.

19.2. 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 of San Antonio employee or official.

SECTION 20. VENUE.

20.0. This Contract is performed in Bexar County, Texas, and if legal action is necessary to enforce this Contract, exclusive venue shall lie in Bexar County, Texas.

SECTION 21. RIGHT TO REVIEW AUDIT CONTRACTOR'S RECORDS.

21.0. By execution of the this Agreement, the ARTIST agrees and grants the CITY the right to review and audit, at the CITY's election, all of the ARTIST's records and billings relating to the performance of the ARTWORK under the Agreement Documents. The ARTIST agrees to retain its ARTWORK records for a minimum of four (4) years following completion of the ARTWORK. The CITY agrees that it will exercise

the right to review and audit only at reasonable hours. Any payment, settlement, satisfaction, or release provided under this Agreement shall be subject to the CITY's rights as may be disclosed by any audit.

SECTION 22, MISCELLANEOUS.

22.0. NOTICES.

22.0.1. 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: **Ann Gardner
4136 Meridian Avenue N.
Seattle, Washington 98103**

For CITY: City of San Antonio
Capital Improvements Management Services
Attention: Public Art San Antonio
114 West Commerce Street
San Antonio, TX 78205

22.0.2. 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.

22.0.3. ARTIST agrees for the duration of ARTIST's life, to provide CITY with ARTIST's current mailing address and facsimile number in the event ARTIST's address or facsimile number, as specified above, should change.

22.1. GOVERNING LAW/COMPLIANCE WITH LAWS AND REGULATIONS.

Except to the extent that federal law is applicable, this Agreement must be construed - and its performance enforced - under Texas law.

22.1.1. This Agreement shall be governed by the laws and case decisions of the State of Texas, without regard to conflict of law or choice of law principles of Texas or of any other state.

22.1.2. This Agreement is entered into subject to and controlled by the Charter and ordinances of the CITY of San Antonio and all applicable laws, rules, and regulations of the State of Texas and the Government of the United States of America. The ARTIST shall, during the performance of the Work, comply with all applicable CITY codes and ordinances, as amended, and all applicable State and Federal laws, rules and regulations, as amended.

22.2. **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.

22.3. 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.

22.4. SEVERABILITY. If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

IN WITNESS HEREOF, the parties hereto have executed in duplicate originals this FIRST AMENDMENT on the _____ day of _____ 2009.

CITY OF SAN ANTONIO
a municipal corporation

Consider Karma
a limited liability corporation

Sheryl S. Sculley
City Manager

Ann Gardner
Title: Principal and Artist

ATTEST:

Leticia Vacek
City Clerk

APPROVED AS TO FORM:

Michael D. Bernard
City Attorney

APPENDIX 1

OFF-SITE:

- Create molds from CAD rendering for each section of the spiral coils
- Cast coils in molds using composite materials (carbon fiber and E-glass)
- Attach steel connection joints and steel support points in 4 locations of spiral
- Apply glass tile to coil sections
- Pack, crate and ship ARTWORK to San Antonio International Airport

ON-SITE:

- Construct scaffolding and uncrate ARTWORK
- Assemble coil sections and apply glass tile to connection joints
- Hang and secure ARTWORK
- Remove scaffolding, clean up SITE and photograph installation

EXHIBIT A
LOCATION OF ARTWORK

The ARTWORK is located at the San Antonio International Airport, 9700 Airport Blvd. San Antonio Texas 78216, over the bank of escalators/stairway and under the skylight on the East side of Terminal B.

**EXHIBIT B
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.

EXHIBIT C
SCHEDULE OF PERFORMANCE

ARTIST shall perform work according to the following schedule. ARTIST shall not commence ARTIST's Services until this Agreement is fully executed and CITY issues a Notice to Commence Work.

Fabrication of OFF-SITE ELEMENTS:

Completion of Item 1 of Fee schedule: (4) weeks
Completion of Item 2 of Fee schedule: (28-32) weeks

Installation of ARTWORK ON-SITE:

Completion of Item 3 of Fee schedule: (4) weeks
Completion of Item 4 of Fee schedule: (1) weeks

The parties agree that the Schedule Of Performance set forth above may, by mutual agreement, be modified in writing upon agreement of the parties.

The Schedule For Payment set forth in Exhibit D shall occur in accordance with the milestones set forth in Exhibit D. In the event that CITY accepts the ARTWORK, one or more payments set forth in Exhibit D may occur following the completion date for the ARTWORK as set forth above or as may be modified in writing by the parties.

The parties agree that the Schedule set forth above may be modified only upon prior written authorization by the CITY.

**EXHIBIT D
COMPENSATION**

A. ARTIST's Compensation. ARTIST's compensation for the ARTWORK is **\$163,000.00** including a contingency as specified in the budget attached to this Exhibit (the "Budget").

B. Interim Payments. CITY is not obligated to pay any part of ARTIST's compensation unless and until the ARTWORK is finally accepted by CITY. CITY shall, however, make interim payments to ARTIST as compensation to assist ARTIST with financing the fabrication, delivery and installation of the ARTWORK. The amount of the payments shall be made as described below.

C. Payment Schedule for ARTIST's Services. The following amounts will be paid to ARTIST within thirty (30) days of CITY's receipt of an invoice from ARTIST indicating that the appropriate milestone as described below has been reached:

- | | |
|--|---------------------------|
| 1. Upon execution of the agreement, start-up and mobilization, and acquiring materials | <u>\$75,000.00</u> |
| 2. Upon completion of Off-SITE ARTWORK | <u>\$35,000.00</u> |
| 3. Upon transportation of ARTWORK to SITE, installation and clean up of SITE | <u>\$35,000.00</u> |
| 4. Upon CITY's issuance of the Notice of Acceptance | <u>\$18,000.00</u> |

D. Payment Schedule for ARTWORK. CITY shall pay ARTIST for the costs and expenses identified in the Budget. 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 the Documentation Provision is subject to the provisions of Exhibit E. The CITY may make incremental payments of budget line items to facilitate fabrication and installation, at the discretion of the CITY. The form of the invoice shall be subject to the approval of the CITY's PASA Program Director. ARTIST may adjust the line items with the prior written approval of CITY's PASA Program Director, which approval will not be unreasonably withheld.

E. In no event shall CITY be required to make payments in excess of the total budgeted amount.

F. In the event that the CITY determines that work for which it has received a request for payment does not meet specifications required under this Agreement, CITY in its sole discretion shall have the right to withhold such payment until such deficiency has been corrected. In such event, CITY shall provide detailed written notice to

ARTIST within ten (10) days of receipt of such request for payment, specifying the failure of performance for which CITY intends to withhold payment. ARTIST shall work to cure such failure of performance in order to meet the Agreement standards to the satisfaction of CITY.

G. Notwithstanding the foregoing, ARTIST expressly acknowledges that approval of work to permit an interim payment is solely for the benefit of ARTIST. Unless and until the CITY issues a Notice of Acceptance for the ARTWORK, no interim approval shall constitute acceptance or approval of the ARTWORK by CITY nor shall it be construed as a waiver of CITY's right to require that the ARTWORK conform strictly to the Final Proposal and to the Plans.

H. The parties agree that the Schedule for Payment set forth above may be modified only upon prior written authorization of the CITY's PASA Program Director.