

ATTACHMENT A3

**AGREEMENT FOR COMMISSION OF CIVIC ART WORK AGREEMENT
BETWEEN THE HOUSTON ARTS ALLIANCE
AND [ARTIST, DBA NAME]**

This Agreement is entered into this ____ day of _____, 20__, by and between the **HOUSTON ARTS ALLIANCE**, a Texas nonprofit corporation ("HAA"), and [FULL LEGAL NAME OF ARTIST], a [IF ENTITY, INSERT STATE] [ENTITY OR INDIVIDUAL], located at [ADDRESS], and acting by and through [IF ENTITY, INSERT NAME OF AUTHORIZED SIGNATORY], its duly authorized [TITLE]. The City of Houston has designated the HAA to manage this Agreement on its behalf as authorized by Ordinance _____ approved on _____.

WHEREAS, -----;
ENTER DESCRIPTION OF PROJECT AS NECESSARY

WHEREAS, HAA and Artist wish to set out the terms and conditions under which said Work shall be designed to promote the integrity of Artist's ideas and statements as represented by the Work.

NOW, THEREFORE, HAA and Artist for and in consideration of the covenants and agreements hereinafter set forth, the sufficiency of which is hereby acknowledged, agree as follows:

ARTICLE 1. SCOPE OF SERVICES

1.1. General.

- 1.1.1 The Artist shall perform all services and will furnish all supplies, materials, and equipment as necessary to fabricate, deliver and install the Work, as set forth in Section 1.4. Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.
- 1.1.2 The Artist shall determine the artistic expression, scope, design, color, size, material, and texture of the Work, subject to review and acceptance by HAA as set forth in this Agreement. The location at the Site in which the Work shall be installed shall be mutually agreed upon by the HAA and the Artist.
- 1.1.3 The Artist shall obtain written permission, as needed, including Copyright permission, for use of the selected photographic images that the Artist has incorporated into his design.
- 1.1.4 The Artist shall install the Work on dates and at times mutually agreed upon by the Artist and the HAA.
- 1.1.5 The Artist shall plan and participate in one public education event in Houston at a mutually agreed upon date and time.

1.2. Design Approval. HAA and Artist acknowledge that the Artist's Final Design, attached hereto as Exhibit "B," has been reviewed and approved by the Mayor's Office of Cultural Affairs as the basis for executing this Agreement with the Artist.

1.3. Execution of the Work.

1.3.1 Upon execution of this Agreement, Artist shall promptly furnish to the Contract Manager a schedule ("Schedule") for the completion of the fabrication and installation of the Work, including a schedule for the submission of progress reports, as required. After written approval of the Schedule by the HAA, the Artist shall fabricate, deliver and install the Work in accordance with such Schedule. Schedule changes may be accomplished by written agreement between the Artist and the HAA.

1.3.2 The City and HAA shall have the right to review the Work at reasonable times during its fabrication and/or request visual documentation of the fabrication. Artist shall, upon written request by Contract Manager, provide a written progress report detailing the progress made toward completion of the Work and the remainder of work to be done to complete the Work.

1.3.3 The Artist shall complete the fabrication of the Work in substantial conformity with the Final Design. However, Artist may present to the Contract Manager, in writing for further review and approval, any significant changes in the scope, composition, sound, design, color, size, material, or texture of the Work not in substantial conformity with the Final Design. The Contract Manager shall, in light of the Final Design, determine whether a significant change requires HAA approval.

1.4. Delivery and Installation.

1.4.1 The Artist shall notify the HAA, through its Contract Manager, in writing when fabrication of the Work is completed and ready for its delivery and installation at the Site.

1.4.2 The Artist shall deliver and install the completed Work at the Site in compliance with the Schedule; provided, however, that delivery and installation activities may not commence until written permission is delivered to the Artist by the Contract Manager.

1.4.3 Should Artist complete the Work in advance of the completion of the Site, Artist shall store the Work at no expense to the City until such a time as the Site is completed and the Contract Manager notifies the Artist that installation may commence. -[specify by project]

1.4.4 [specify by project] contract for the Site via a change order, and shall be paid for by public art project funds.

1.4.5 [specify by project] The Artist, individually and through its subcontractors, including its fabricator, shall take all necessary precautions to protect and preserve the integrity and finish of the Site while delivering and installing the Work. The Artist shall repair any damage to the Site due to delivery, installation, or Artist's negligence or the negligence of Artist's subcontractors.

1.4.6 Prior to installation of the Work, Artist shall consult -[specify by project], and with a qualified art conservator, and provide to the Contract Manager written instructions for appropriate maintenance and preservation of the Work on the form attached hereto as Exhibit "C" (Technical and Maintenance Record). The appropriate maintenance and preservation instructions shall not be substantially different from the maintenance and preservation anticipated and conveyed to City for the Work in the final design phase for the Work.

1.5. Post-installation.

1.5.1 The Artist shall be available at such time or times as may be agreed between the HAA and the Artist to attend any inauguration or presentation ceremonies relating to the of the Work to the City. The HAA shall use its best efforts to arrange for publicity for the completed Work in such art publications and otherwise as may be determined between the HAA and the Artist as soon as practicable following installation.

1.6. Final Acceptance.

1.6.1 The Artist shall notify the HAA Manager in writing when all services required have been completed in substantial conformity with the Final Design. Included in such notice from the Artist shall be an affidavit, attached hereto as Exhibit "D" (Affidavit), certifying that all bills relating to services or supplies used in the performance of this Agreement have been paid.

1.6.2 The HAA shall notify the Artist and Contract Manager in writing of its final acceptance of the Work ("Final Acceptance").

1.6.3 Final Acceptance shall be effective as of the earlier to occur of (1) the date of the HAA's notification of Final Acceptance; or, (2) the 35th day after the Artist has sent the written notice to the City required under Section 1.6.a unless the City, upon receipt of such notice and prior to the expiration of the 35-day period, gives the Artist written notice specifying and describing the services which have not been completed.

1.7. Risk of Loss. The risk of loss or damage to the Work shall be borne by the Artist prior to Final Acceptance, and the Artist shall take such measures as are necessary to protect the Work from loss or damage until Final Acceptance, including but not limited to the purchase of property loss insurance; except that the risk of loss or damage shall be borne by the City or its agents prior to Final Acceptance during such periods of time as the partially or wholly completed Work is in the custody, control or supervision of the City or its agents for the purposes of moving, storing, or performing any other ancillary services to the Work.

ARTICLE 2. COMPENSATION AND PAYMENT SCHEDULE

2.1. Fee. The Contract Manager shall pay the Artist in the amount of [specify by project] (collectively, the "Fee"), which shall constitute full compensation for all services to be performed and materials to be furnished by the Artist under this Agreement, inclusive of fabrication, transportation, installation, Artist's fees, insurance, documentation and incidental costs, and all travel expenses.

2.1.1 upon full execution of this Agreement.

2.1.2 upon the Contract Manager's verification that fabrication is 50% complete.

2.1.3. upon the Contract Manager's verification that fabrication is 100% complete and ready to install.

2.1.4 within thirty-five (60) days after Final Acceptance and receipt by City of such documentation it may require concerning payment of supplies and services rendered to the Artist [see Section 1.6 (a)].

2.2. Sales Taxes. The HAA is a tax-exempt organization and no state or local sales taxes or federal excise taxes shall be due upon the Project. The HAA shall supply the Artist with the "Texas Sales Tax and Local Sales Tax Exemption Certificate," in substantially the same form as that attached hereto and incorporated herein as Exhibit "E" for use by Artist in the fulfillment of this Agreement.

2.3. Artist's Expenses. Artist shall be responsible for the payments of all expenses incurred during the performance of this Agreement, including but not limited to services, materials, mailing/shipping charges and insurance on submissions to the HAA, cost of all travel, insurance and costs for Artist's agents, consultants, and/or employees necessary for the proper performance of the services required under this Agreement.

ARTICLE 3. TERM AND TIME OF PERFORMANCE

3.1. Term. This Agreement shall be in effect from the date stated in the first paragraph of this Agreement, and, unless terminated earlier pursuant to such provisions in this Agreement, shall extend until final payment to Artist by HAA, whichever is later.

3.2. Duration. The services to be required of the Artist set forth in Article I shall be completed in accordance with the Schedule; provided, however, such time limits may be extended or otherwise modified by written agreement between the Artist and the Contract Manager.

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

3.4. Time Extensions: Force Majeure. The Contract Manager or the Artist, as appropriate, shall grant a reasonable extension of time to the other party if conditions beyond the parties' control or Acts of God, flood, riot, civil insurrection, labor strikes, or orders of local or federal government render timely performance of the parties' services impossible or unexpectedly burdensome. The party suffering the impossibility or burdensome conditions must inform the other in writing within ten (10) days of the onset of such performance delay, specifying the reasons therefore. Failure to fulfill contractual obligations due to conditions beyond either party's reasonable control shall not be considered a breach of

this Agreement; provided, however, that such obligations shall be suspended only for the duration of such conditions.

ARTICLE 4. WARRANTIES

4.1. Warranties of Title. The Artist represents and warrants that:

- 4.1.1 the Work shall be the original product of the Artist's sole creative efforts.
- 4.1.2 the Work is and will be unique and original, and does not infringe upon any copyright or the rights of any person;
- 4.1.3 the Work (or duplicate thereof) has not been accepted for sale elsewhere;
- 4.1.4 the Artist has not sold, assigned, transferred, licensed, granted, encumbered or utilized the Work or any element thereof or any copyright related thereto which may affect or impair the rights granted pursuant to this Agreement:
- 4.1.5 the Work is free and clear of any liens from any source whatsoever;
- 4.1.6 the Artist has the full power to enter into and perform this Agreement and to make the grant of rights contained in this Agreement;
- 4.1.7 all services performed hereunder shall be performed in accordance with all applicable laws, regulations, ordinances, etc., and with all necessary care, skill and diligence;
- 4.1.8 the Artist shall assume the defense of, and INDEMNIFY AND HOLD HARMLESS, THE CITY and Contract Manager, ITS OFFICERS, EMPLOYEES, AGENTS, AND CONTRACTORS FROM AND AGAINST ALL CLAIMS, LOSSES, DAMAGES, ACTIONS OR EXPENSES OF EVERY TYPE AND DESCRIPTION, INCLUDING ATTORNEY'S FEES, TO WHICH THEY MAY BE SUBJECTED ARISING OUT OF THE CITY'S USE OR POSSESSION OF THE WORK BY REASON OF AN ALLEGED OR ACTUAL COPYRIGHT VIOLATION OR OTHER LACK OF OWNERSHIP, AUTHORSHIP, OR ORIGINALITY.

4.2 Warranties of Quality and Condition

- 4.2.1 Artist represents and warrants that all work will be performed in accordance with professional "workmanlike" standards and free from defective or inferior materials and workmanship (including any defects consisting of "inherent vice," or qualities that cause or accelerate deterioration of the Work) for one year after the date of Final Acceptance.
- 4.2.2 Artist represents and warrants that the Work and the materials used are not currently known to be harmful to public health and safety.
- 4.2.3 If within one year Contract Manager observes any breach of warranty described in this Section 4.2 that is curable by the Artist, the Artist shall, at the request of the Contract Manager, cure the breach promptly, satisfactorily and consistent with professional conservation standards, at no expense to City or Contract Manager.

Contract Manager shall give notice to Artist of such breach with reasonable promptness.

4.2.4 If after one year Contract Manager observes any breach of warranty described in this Section 4.2 that is curable by the Artist, Contract Manager shall contact the Artist to make or supervise repairs or restorations at a reasonable fee during Artist's lifetime. Artist shall have the right of first refusal to make or supervise repairs or restorations. Should Artist be unavailable or unwilling to accept reasonable compensation under the industry standard, Contract Manager may seek the services of a qualified restorative conservator and maintenance expert.

4.2.5 If within one year Contract Manager observes any breach of warranty described in this Section 4.2 that is not curable by the Artist, Artist is responsible for reimbursing Contract Manager for damages, expenses and loss incurred by Contract Manager as a result of the breach. However, if Artist disclosed the risk of this breach in the Proposal and Contract Manager accepted that it may occur, it shall not be deemed a breach for purposes of this Section 4.2.

4.2.6 Acceptable Standard of Display. Artist represents and warrants that:

4.2.6.1 General routine cleaning and repair of the Work and any associated working parts and/or equipment will maintain the Work within an acceptable standard of public display.

4.2.6.2 Foreseeable exposure to the elements and general wear and tear will cause the Work to experience only minor repairable damages and will not cause the Work to fall below an acceptable standard of public display.

4.2.6.3 With general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the Work will not experience irreparable conditions that do not fall within an acceptable standard of public display, including mold, rust, fracturing, staining, chipping, tearing, abrading and peeling.

4.2.6.4 Manufacturer's Warranties. To the extent the Work incorporates products covered by a manufacturer's warranty, Artist shall provide copies of such warranties to City.

4.2.7 The foregoing warranties are conditional, and shall be voided by the failure of City to maintain the Work in accordance with Artist's specifications and the applicable conservation standards. If City fails to maintain the Work in good condition, Artist, in addition to other rights or remedies the Artist may have in equity or at law, shall have the right to disown the Work as the Artist's creation and request that all credits be removed from the Work and reproductions thereof until the Work's condition is satisfactorily repaired.

4.3 Survival of Representations and Warranties These representations and warranties shall survive the termination or other extinction of this Agreement.

ARTICLE 5. INSURANCE AND INDEMNITY

5.1. **General.** The Artist shall carry insurance as set out in Exhibit "F." Except as provided in Section 1.7 hereof, the risk of damage to or loss of the Work shall, during fabrication and installation but prior to Final Acceptance, shall be solely that of the Artist. This risk shall transfer to the City and shall no longer be the responsibility of the Artist upon Final Acceptance.

5.2. **Performance Bonds.** The Artist shall not be required by the Contract Manager to post any performance bonds or similar undertakings.

5.3. Indemnity.

5.3.1 ARTIST COVENANTS AND AGREES TO INDEMNIFY, HOLD HARMLESS AND DEFEND, AT ITS OWN EXPENSE, CITY AND ITS OFFICERS, AGENTS, SERVANTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS OR SUITS FOR PROPERTY LOSS OR DAMAGE AND/OR PERSONAL INJURY, INCLUDING DEATH, TO ANY AND ALL PERSONS, OF WHATSOEVER KIND OR CHARACTER, WHETHER REAL OR ASSERTED, ARISING OUT OF OR IN CONNECTION WITH THE EXECUTION, PERFORMANCE, ATTEMPTED PERFORMANCE OR NONPERFORMANCE OF THIS AGREEMENT AND/OR THE OPERATIONS, ACTIVITIES AND SERVICES DESCRIBED HEREIN, PROVIDED THAT SAID CLAIMS OR SUITS ARE CAUSED BY ARTIST'S NEGLIGENCE OR WILLFUL MISCONDUCT; AND ARTIST HEREBY ASSUMES ALL LIABILITY AND RESPONSIBILITY OF CITY AND ITS OFFICERS, AGENTS, SERVANTS, AND EMPLOYEES FOR ANY AND ALL CLAIMS OR SUITS FOR PROPERTY LOSS OR DAMAGE AND/OR PERSONAL INJURY, INCLUDING DEATH, TO ANY AND ALL PERSONS, OF WHATSOEVER KINDS OR CHARACTER, WHETHER REAL OR ASSERTED, ARISING OUT OF OR IN CONNECTION WITH THE EXECUTION, PERFORMANCE, ATTEMPTED PERFORMANCE OR NON-PERFORMANCE OF THIS AGREEMENT AND/OR THE OPERATIONS, ACTIVITIES AND SERVICES DESCRIBED HEREIN, PROVIDED THAT SAID CLAIMS OR SUITS ARE CAUSED BY ARTIST'S NEGLIGENCE OR WILLFUL MISCONDUCT. ARTIST LIKEWISE COVENANTS AND AGREES TO AND DOES HEREBY INDEMNIFY AND HARMLESS CITY FROM AND AGAINST ANY AND ALL INJURY, DAMAGE OR DESTRUCTION OF PROPERTY OF CITY, ARISING OUT OF OR IN CONNECTION WITH ALL ACTS OR OMISSIONS OF ARTIST, ITS OFFICERS, MEMBERS, AGENTS, EMPLOYEES, SUBCONTRACTORS, INVITEES, LICENSEES, OR PROGRAM PARTICIPANTS. ARTIST AGREES TO AND SHALL RELEASE CITY, ITS AGENTS, EMPLOYEES, OFFICERS AND LEGAL REPRESENTATIVES FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE OR LOSS TO PERSONS OR PROPERTY SUSTAINED BY ARTIST IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT.

5.3.2 Artist shall require all of its subcontractors to include in their subcontracts a release and indemnity in favor of City in substantially the same form as above.

5.3.3 All indemnification provisions of this Agreement shall survive the termination or expiration of this Agreement.

ARTICLE 6. OWNERSHIP AND INTELLECTUAL PROPERTY RIGHTS

- 6.1. Title.** Title to the Work, including all documents, models and/or drawings which constitute or are components of the Final Design, shall pass to City upon Final Acceptance and payment for the Work. These documents, models and/or drawings will be retained for archival and exhibition purposes. Artist's Final Design and all other work products under this Agreement shall become the property of City, without restriction on future use, except as provided below.
- 6.2 Copyright Ownership.** Artist retains all rights under the Copyright Act of 1976, 17 U.S.C. Section 101 et seq., as the sole author of the Work for the duration of the copyright.
- 6.3 Reproduction Rights.**
- 6.3.1 In view of the intention that the final Work be unique, Artist shall not make any additional exact duplicate reproductions of the final Work, nor shall Artist grant permission to others to do so except with the express written permission of City. However, nothing herein shall prevent the Artist from creating future artworks in the Artist's manner and style of artistic expression.
- 6.3.2 By execution of this Agreement, Artist grants to City a perpetual, irrevocable license to graphically depict or display the Work for any non-commercial purpose whatsoever; for purposes of this limitation, any graphic depiction or display of the Work intended to promote or benefit City, its public services or its public purposes, regardless of whether or not a fee is charged to the public, or whether revenue is otherwise received by City, shall be deemed a non-commercial purpose. Notwithstanding the above limitation, Artist agrees and understands that nothing in this paragraph shall affect or limit City's absolute, unrestricted rights incidental to City's full ownership of the Work to alter, change, modify, destroy, remove, move, replace, operate, maintain, transport, sell or transfer, in whole or in part, the Work when City deems it necessary within its discretion, in order to otherwise exercise City's powers and responsibility in regard to public works and improvements, in furtherance of City's operations or for any other reason.
- 6.3.3 All reproductions by City shall contain a credit to Artist and a copyright notice substantially in the following form: "© date, Artist's name.'"
- 6.3.4 Unless notified otherwise by the City, Artist shall use Artist's best efforts in any public showing or resume use of reproductions to give acknowledgment to City in substantially the following form: "an original artwork commissioned by and in the public art collection of the City of Houston, Texas. "
- 6.3.5 Artist shall, at Artist's expense, cause to be registered with the United States Register of Copyrights, a copyright in the Work in the Artist's name.
- 6.3.6 City is not responsible for any third party infringement of Artist's copyright and not responsible for protecting the intellectual property rights of Artist.

ARTICLE 7. ARTIST'S RIGHTS

7.1. **Identification.** The Contract Manager shall include credit to the Artist on the public art websites and a permanent plaque at the site.

7.2. **Maintenance.** The City recognizes that maintenance of the Work on a regular basis is essential to the integrity of the Work. The City shall reasonably assure that the Work is properly maintained and protected, taking into account the maintenance instructions provided by Artist in accordance with Section I .4 and Exhibit "C", Technical and Maintenance Record.

7.3. Repairs and Restoration.

7.3.1 The City shall have the right to determine when and if repairs and restorations to the Work will be made. During the Artist's lifetime and to the extent practicable, the City shall give the Artist the right to approve all major repairs and restorations; provided, however, the Artist shall not unreasonably withhold approval for any repair or restoration of the Work. Should Artist unreasonably withhold approval of any intended major repair or restoration, the City shall have the right to make such repair or restoration. To the extent practicable, the Artist, during the Artist's lifetime, shall be given the opportunity to make or personally supervise major repairs and restorations and shall be paid a reasonable fee for any such services, provided that the City and the Artist shall agree in writing, prior to commencement of any significant repairs and restorations, upon the Artist's fee for such services. Should the Artist fail to agree to make or supervise the repairs and restorations, the City shall have the right to choose another entity or person to assist with the restoration and/or repairs or make said repairs by the City.

7.3.2 All repairs and restorations shall be made in accordance with recognized principles of conservation.

7.3.3 When emergency repairs are necessary in order to prevent the loss of or further damage to the Work, such repairs shall be undertaken or arranged by City without advance notice to Artist, and such repairs shall not be deemed to constitute artistic alteration.

7.4. Alteration of the Work or of the Site.

7.4.1 In the event that the Work is incorporated into a building, structure or realty, the installation of the Work may subject it to destruction, distortion, mutilation or other modification by reason of its removal. If removal of the Work would damage either the Work or the Site, the City shall have the right to remove the Work by any means, including destruction, in performing maintenance, repair, renovation, or reconstruction of the building, structure or in devoting realty to a new use.

7.4.2 In the event that the Work is freestanding, or incorporated into a building, structure or realty such that it may be removed without damaging or destroying the Work or the building or structure, the Artist may be given written notice and 90 days to remove the Work at his or her sole expense. Upon Artist's failure to remove the Work, the City shall have the right to remove and dispose of the Work by any means, including its destruction.

- 7.4.3 The City agrees that it will not willfully destroy, damage, or modify the work, except as provided in paragraphs a. and b. above.
- 7.4.4 In the event the Work is substantially damaged or altered, the City shall no longer represent the Work as that of the Artist if the Artist gives written notice to the City that it is the position of the Artist to deny authorship on the grounds stated in this paragraph.
- 7.4.5 The City shall at all times have the right to move the Work, or remove it from public display. The City shall also have the right to sell or trade the Work.
- 7.5. **Permanent Record.** The City and Contract Manager shall maintain on permanent file a record of this Agreement and of the location and disposition of the Work.
- 7.6. **Artist's Address.** The Artist shall notify the City and Contract Manager of changes in the address set forth in Article 13. The failure to do so, if such failure prevents the City from locating the Artist, shall be deemed a waiver by the Artist of the right subsequently to enforce these provisions of Article 7 that require the express approval of the Artist. Notwithstanding this provision, the City shall make every reasonable effort to locate the Artist when matters arise relating to the Artist's rights.
- 7.7. **Additional Rights and Remedies.** Nothing contained in this Article 7 shall be construed as a limitation on such other rights and remedies available to the Artist under the law, which may now or in the future be applicable.

ARTICLE 8. ARTIST AS AN INDEPENDENT CONTRACTOR

- 8.1 Artist shall perform all work and services hereunder as an independent contractor, and not as an officer, agent, servant or employee of City or Contract Manager. Artist shall have exclusive control of, and the exclusive right to control the details of the work performed hereunder, and all persons performing same, and shall be solely responsible for the acts and omissions of his/her officers, agents, employees and subcontractors. Nothing herein shall be construed as creating a partnership or joint venture between City, its Contract Manager and Artist, his/her officers, agents, employees and subcontractors, and doctrine of respondeat superior has no application as between City, its Contract Manager and Artist.

ARTICLE 9. SUBCONTRACTING

- 9.1 The Artist may subcontract portions of the services to be provided hereunder at the Artist's expense, provided that said subcontracting shall not adversely affect the design, appearance or visual quality of the Work and shall be carried out under the personal supervision of the Artist. Any subcontract entered into under this Agreement shall be expressly subject to the terms of this Agreement. Artist shall provide information regarding all subcontractors, including its fabricator, along with a copy of the subcontract between Artist and each subcontractor.

ARTICLE 10. TERMINATION

- 10.1. **Gratuities.** The Contract Manager may cancel this Agreement if it is found that gratuities in the form of entertainment, gifts or otherwise were offered or given by the Artist

or any agent or representative to any City official or employee or Contract Manager employee with a view toward securing favorable treatment with respect to the awarding, amending, or making of any determinations with respect to this performance of this Agreement. In the event this Agreement is canceled by the Contract Manager, pursuant to this Section 10.1, the Contract Manager shall be entitled, in addition to any other rights and remedies, to recover from the Artist a sum equal in amount to the cost incurred by the Artist in providing such gratuities.

10.2. Termination for Cause. If either party to this Agreement shall willfully or negligently fail to fulfill in a timely and proper manner, or otherwise violate, any of the covenants, agreements or stipulations material to this Agreement, the other party shall thereupon have the right to terminate this Agreement by giving written notice to the defaulting party of the intent to terminate specifying the grounds for termination. The defaulting party shall have thirty (30) days after receipt of the notice to cure the default. If it is not cured, then this Agreement shall terminate. Termination of this Agreement under this provision shall not relieve the party in default of any liability for damages resulting from a breach or a violation of the terms of this Agreement.

10.3. Termination for Convenience.

10.3.1 The services to be performed under this Agreement may be terminated by either party, subject to written notice submitted thirty (30) days before termination. The notice shall specify whether the termination is for convenience or cause.

10.3.2 If the termination is for the convenience of the Contract Manager, the Artist shall have the right to an equitable adjustment in the fee including all work performed to date plus any remaining artist fee up to a total of 5% or \$13,414, in which event the Contract Manager shall have the right at its discretion to possession and transfer of title to the sketches, designs and models already prepared and submitted or presented for submission to the City by the Artist under this Agreement prior to the date of termination, provided that no right to fabricate or execute the Work shall pass to the City.

10.3.3 If termination is for the convenience of the Artist, the Artist shall remit to the City's Contract Manager a sum equal to all payments (if any) made to the Artist pursuant to this Agreement prior to termination.

10.4. Incapacity of Artist.

10.4.1 In the event of Artist's death or Artist becoming physically or legally incapacitated during the term of this Agreement, the Contract Manager shall have the right to terminate this Agreement on payment to Artist or Artist's successors for all work and services performed prior to death or incapacity. All finished and unfinished drawings, sketches, photographs, models and work shall become property of the City.

10.4.2 Should Artist's design have been approved or if the Artist's work has progressed to the point of fabrication of the Work, in the event of termination under this Section 10.4, the Contract Manager shall have the right to complete the Work. Due regard shall be made for Artist's intended results and proper credit and acknowledgement shall be given to Artist.

Article 11. EQUAL OPPORTUNITY

- 11.1** The Artist shall not discriminate against any employee or applicant for employment because of disability, familial status, race, color, religion, sex, sexual orientation, or national origin. The Artist shall take affirmative action to ensure that employees are treated equally during employment, without regard to their disability, familial status, race, color, religion, sex, sexual orientation and national origin. Such action shall include but not be limited to the following: Employment, upgrading, demotion, transfer, recruitment or pay or other forms of compensations, and selection for training, including apprenticeship.
- 11.2** The Artist shall state in all solicitation or advertisements for employment placed by or on behalf of the Artist that all qualified applicants shall receive consideration for employment without regard to disability, familial status, race, color, religion, sex, sexual orientation, or national origin.
- 11.3** The Artist shall furnish all information and reports requested by the Contract Manager, and shall permit access to its books, records, and accounts for purposes of investigation to ascertain compliance with such rules and regulations.
- 11.4** In the event of the Artist's noncompliance with the nondiscrimination clauses of this Agreement, this Agreement may be canceled, terminated, or suspended in whole or in part, and the Artist may be debarred from further agreements with the Contract Manager on behalf of the City of Houston.

ARTICLE 12. MISCELLANEOUS

- 12.1 INDEPENDENT CONTRACTOR.** Artist is an independent contractor, and shall perform services provided for in this Contract in such capacity. The City has no control or supervisory powers over the manner or method of Artist or HAA's performance under this Contract. All personnel Artist or HAA uses or provides are its employees or subcontractors and not the City's employees, agents or subcontractors for any purpose whatsoever. Artist is solely responsible for the compensation of all such personnel, for the withholding of income, social security and other payroll taxes, and for all workers' compensation benefits coverage.
- 12.2 FORCE MAJEURE.**
- 12.2.1 Timely performance by both parties is essential to this Contract. However, neither party is liable for reasonable delays in performing its obligations under this Contract to the extent the delay is caused by Force Majeure that directly impacts the Artist, City or HAA. The event of Force Majeure may permit a reasonable delay in performance but does not excuse a party's obligations to complete performance under this Contract. Force Majeure means: fires, interruption of utility services, epidemics in the City, floods, hurricanes, tornadoes, ice storms and other natural disasters, explosions, war, terrorist acts against the City or HAA, riots, court orders, and the acts of superior governmental or military authority, and which the affected party is unable to prevent by the exercise of reasonable diligence. The term does not include any changes in general economic conditions such as inflation, interest

rates, economic downturn or other factors of general application; or an event that merely makes performance more difficult, expensive or impractical. Force Majeure does not entitle HAA or Artist to extra Reimbursable Expenses or payment.

12.2.2 This relief is not applicable unless the affected party does the following:

12.2.2.1 uses due diligence to remove the effects of the Force Majeure as quickly as possible and to continue performance notwithstanding the Force Majeure to the extent performance is not affected by the Force Majeure; and

12.2.2.2 provides the other party with prompt written notice of the cause and its anticipated effect.

12.2.3 The Director will review claims that a Force Majeure that directly impacts the Artist or HAA has occurred and render a written decision within 14 days. The decision of the Director is final.

12.2.4 The HAA may perform contract functions itself or contract them out during periods of Force Majeure. Such performance is not a default or breach of this Contract by the HAA.

12.2.5 If the Force Majeure continues for more than 30 days from the date performance is affected, the Director may terminate this Contract by giving seven days' written notice to Artist. This termination is not a default or breach of this Contract. **ARTIST WAIVES ANY CLAIM IT MAY HAVE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM THE TERMINATION EXCEPT FOR AMOUNTS DUE UNDER THE CONTRACT UP TO THE TIME THE WORK IS HALTED DUE TO FORCE MAJEURE.**

12.2.6 Artist is not relieved from performing its obligations under this Contract due to a strike or work slowdown of its employees. Artist shall employ only fully trained and qualified personnel during a strike.

12.3 SEVERABILITY. If any part of this Contract is for any reason held to be invalid, all other parts remain enforceable unless the result materially prejudices either party.

12.4 ENTIRE AGREEMENT. This Contract merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances, conditions, covenants (express or implied), or other terms of any kind, exist between the Parties regarding this Contract.

12.5 WRITTEN AMENDMENT. Unless otherwise specified elsewhere in this Contract, this Contract may be amended only by written instrument.

12.6 APPLICABLE LAWS.

- 12.6.1 This Contract is subject to all laws of the State of Texas, the City Charter and Ordinances, the laws of the federal government of the United States, and all rules and regulations of any regulatory body or officer having jurisdiction.
- 12.6.2 Venue for any litigation relating to this Contract is Harris County, Texas.
- 12.7 **NOTICES.** All notices to either party to the Contract must be in writing and must be delivered by hand, facsimile, United States registered or certified mail, return receipt requested, United States Express Mail, Federal Express, Airborne Express, UPS or any other national overnight express delivery service. The notice must be addressed to the party to whom the notice is given at its address set out in Section I of this Contract or other address the receiving party has designated previously by proper notice to the sending party. Postage or delivery charges must be paid by the party giving the notice.
- 12.8 **COMPLIANCE.** The Artist shall be required to comply with Federal, State and City statutes, ordinances and regulations applicable to the performance of the Artist services under this Agreement.
- 12.9 **CAPTIONS.** The Captions contained in this Contract are for reference only, and, therefore, have no effect in construing this Contract. The captions are not restrictive of the subject matter of any section or article in this Contract.
- 12.10. **ACCEPTANCE AND APPROVAL.** An approval by HAA does not waive compliance with this Contract or establish a standard of performance other than required by this Contract or by law. HAA is not authorized to vary the terms of this Contract.
- 12.11 **INSPECTIONS, AUDITS AND ENFORCEMENT.**
- 12.11.1 HAA and City representatives may perform, or have performed, (i) audits of HAA's books and records, and (ii) inspection of all places where work is undertaken in connection with this Contract. The Artist and HAA shall keep its books and records available for this purpose for at least four years after this Contract terminates. This provision does not affect the applicable statute of limitations.
- 12.11.2 The City Attorney or his or her designee may enforce all legal rights and obligations under this Contract without further authorization. The Artist and HAA shall provide to the City Attorney all documents and records that the City Attorney requests to assist in determining HAA's compliance with this Contract, with the exception of those documents made confidential by federal or State law or regulation.
- 12.12 **AMBIGUITIES.** If any term of this Contract is ambiguous, it shall not be construed for or against any party hereto on the basis that the party did or did not write it.
- 12.13 **SURVIVAL.** Artist shall remain obligated to the HAA and City and the HAA shall remain obligated to the Artist under all clauses of this Contract that expressly or by their nature extend beyond the expiration or termination of this Contract; provided, however, the HAA remains obligated to pay for any such services and/or products delivered by Artist hereunder to the extent allowed by law.
- 12.14 **PARTIES IN INTEREST.** This Contract does not bestow any rights upon any third party

other than the City, but binds and benefits the Artist and HAA only.

- 12.15 REMEDIES CUMULATIVE.** Except as otherwise provided herein, the rights and remedies contained in this Contract are not exclusive, but are cumulative of all rights and remedies which exist now or in the future. Neither party may terminate its duties under this Contract except in accordance with the provisions hereof.
- 12.16 NON-WAIVER.** If either party fails to require the other party to perform a term of this Contract, that failure does not prevent the party from later enforcing that terms and all other terms. If either party waives the other party's breach of a term, that waiver does not waive a later breach of this Contract.
- 12.17 BUSINESS STRUCTURE AND ASSIGNMENTS.** Neither Artist nor HAA shall not assign this Contract at law or otherwise or dispose of all or substantially all of its assets without the Director's prior written consent. Nothing in this clause, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, Artist and HAA shall immediately furnish the HAA and City with proof of the assignment and the name, telephone number, and address of the Assignee and a clear identification of the fees to be paid to the Assignee. Neither HAA nor Artist shall not delegate any portion of its performance under this Contract without the HAA's prior written consent after confirmation from the Director. Any merger or reorganization of HAA pursuant to a City-approved plan shall not be deemed to be an assignment. Such surviving entity shall be deemed to be the legal successor of the HAA.
- 12.18 SUCCESSORS AND ASSIGNS.** This Contract binds and benefits the parties and their legal successors and permitted assigns. However, this provision does not alter the restriction on assignment and disposal of assets set out in **Section 6.16**. This Contract does not create any personal liability on the part of any officer or agent of the City.
- 12.19 NO PARTNERSHIP CREATED HEREBY.** The Artist and the HAA agree that no partnership relationship or joint venture between the parties is created by this Contract.
- 12.20 NO CITY EXPENDITURE.** Nothing in this Contract requires the City to make any expenditure of its funds to the HAA or to any other party.
- 12.21 RIGHTS TO USE PROPERTY.** The rights granted to the HAA and the Artist to use City property shall be personal only and shall not be construed to be any kind of lease, sublease, or any other interest in land, either corporeal or incorporeal.
- 12.22 ARTIST DEBT.** IF ARTIST, AT ANY TIME DURING THE TERM OF THIS CONTRACT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER and HAA IN WRITING. IF THE HAA OR CITY CONTROLLER BECOMES AWARE THAT ARTIST HAS INCURRED A DEBT, HE OR SHE SHALL IMMEDIATELY NOTIFY ARTIST IN WRITING. IF ARTIST DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE HAA MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FROM ANY PAYMENTS OWED TO ARTIST UNDER THIS CONTRACT, AND ARTIST WAIVES ANY RECOURSE THEREFOR.

12.23 ANTI-BOYCOTT OF ISRAEL. Artist and HAA certify that Artist and HAA are not currently engaged in, and agrees for the duration of this Agreement not to engage in, the boycott of Israel as defined by Section 808.001 of the Texas Government Code.

12.24 ZERO TOLERANCE POLICY FOR HUMAN TRAFFICKING AND RELATED ACTIVITIES. The requirements and terms of the City of Houston's Zero Tolerance Policy for Human Trafficking and Related Activities, as set forth in Executive Order 1-56, as revised from time to time, are incorporated into this Agreement for all purposes. The Artist and HAA have reviewed Executive Order 1-56, as revised, and shall comply with its terms and conditions as they are set out at the time of this Agreement's effective date. HAA and Artist shall notify the City's Chief Procurement Officer, City Attorney, and the Director of any information regarding possible violation by HAA, Artist or its subcontractors providing services or goods under this Agreement.

ARTICLE 13. NOTICES

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

1. HAA: _____

Copies to: Debbie McNulty
Director,
City of Houston

2. ARTIST
[ARTIST], [TITLE, IF ENTITY]
[NAME OF COMPANY, IF ENTITY]
[ADDRESS]

IN WITNESS HEREOF, the Parties hereto have executed this Agreement as of the Effective Date.

HAA
by: _____

ARTIST [IF ENTITY, INSERT NAME]
[by:] _____
[ARTIST]
[IF ENTITY, INSERT TITLE]
[IF INDIVIDUAL, REMOVE "BY"]

ATTACHMENT "B" TO EXHIBIT "A"
PROFESSIONAL SERVICES CONSERVATION AGREEMENT

SAMPLE

**PROFESSIONAL SERVICES CONSERVATION AGREEMENT
BETWEEN THE [NAME] AND THE HOUSTON ARTS ALLIANCE**

This **PROFESSIONAL SERVICES AGREEMENT** (this "Agreement") is made and entered into by and between the **HOUSTON ARTS ALLIANCE** (the "HAA"), a Texas nonprofit corporation, acting by and through [_____], its duly authorized Civic Art and Design Director (the "Director"), and **NAME** ("Contractor"), [IF ENTITY, INSERT STATE] [ENTITY OR INDIVIDUAL], located at [ADDRESS], and acting by and through [IF ENTITY, INSERT NAME OF AUTHORIZED SIGNATORY], its duly authorized [TITLE] each individually referred to as a "party" and collectively referred to as the "parties." .

Recitals:

A. The HAA has been engaged by the City of Houston (the "City") to provide professional civic art and conservation administration services in connection with the City of Houston Civic Art Program.

B. In connection with the foregoing, the HAA desires to engage Contractor to provide certain professional services as more specifically set forth herein.

CONTRACT DOCUMENTS:

The Contract documents shall include the following:

1. This Agreement for Professional Services
2. Exhibit A – Project
3. Exhibit B – Preliminary Performance Schedule
4. Exhibit C – Site Location for Placement of Project
5. Exhibit D – Texas Sales and Use Tax Exemption Certificate
6. Exhibit E – Affidavit

All Exhibits attached hereto are incorporated herein and made a part of this Agreement for all purposes. In the event of any conflict between the documents, the terms and conditions of this Professional Services Agreement shall control.

The term "Contractor" shall include the Contractor, and his or her officers, agents, employees, representatives, contractors or subcontractors.

The term "HAA" shall include its officers, employees, agents, and representatives.

1. SCOPE OF SERVICES.

1.1. Contractor hereby agrees to provide the HAA with professional services as outlined in this section and Exhibit "A", Project, and Exhibit "C", Site Location for Placement of Project, which are attached and incorporated for all purposes incident to this Agreement.

1.2. The HAA is a tax-exempt organization and no state or local sales taxes or federal excise taxes shall be due pursuant to this Agreement. The HAA shall supply Contractor with the certificate for use by Contractor in the fulfillment of this Agreement in substantially the same

form as Exhibit "D", Texas Sales and Use Tax Exemption Certificate, which is attached and incorporated for all purposes incident to this Agreement.

1.3. Additional services, supplies, rentals, or deliverables not outlined in Exhibit "A", Project, must be approved in writing in advance of performance. Contractor will only be compensated for any such additional services or reimbursed as agreed to by the parties.

1.4. Contractor shall be responsible for the payments of all expenses incurred that pertain to services being performed under this Agreement, including but not limited to Contractor's services, cost of equipment for the project including [materials, mailing/shipping charges, engineering costs, insurance costs, costs of all travel for Contractor and any other subcontractors, and any additional costs for Contractor's agents, consultants, subcontractors or employees necessary for the proper performance of the services required under this Agreement.]

1.5. Contractor shall make timely payments to all persons and entities supplying labor, materials, services, or equipment for the performance of this Agreement. CONTRACTOR SHALL DEFEND AND INDEMNIFY THE HAA AND THE CITY FROM ANY CLAIMS OR LIABILITY ARISING OUT OF CONTRACTOR'S FAILURE TO MAKE THESE PAYMENTS. Contractor shall furnish the HAA an affidavit certifying that all bills relating to services or supplies used in the performance of this Agreement have been paid, attached hereto as Exhibit "E," Affidavit, which is attached and incorporated for all purposes incident to this Agreement.

2. TERM.

This Agreement shall commence upon the date that both the HAA and Contractor have executed this Agreement ("Effective Date") and end after the HAA makes payment to Contractor for all services provided under this Agreement, unless terminated earlier in accordance with the provisions of this Agreement.

3. COMPENSATION.

The HAA shall pay Contractor in accordance with the provisions of Exhibit "B", Preliminary Performance Schedule. Contractor shall not perform any additional services for the HAA not specified by this Agreement unless the HAA requests and approves in writing the additional costs for such services. The HAA shall not be liable for any additional expenses of Contractor not specified by this Agreement unless the HAA first approves such expenses in writing.

4. TERMINATION.

4.1. Convenience. The HAA or Contractor may terminate this Agreement at any time and for any reason by providing the other party with 30 days' written notice of termination.

4.2. Non-appropriation of Funds. In the event no funds or insufficient funds are appropriated by the City in any fiscal period for any payments due hereunder, the HAA will notify Contractor of such occurrence and this Agreement shall terminate on the last day of the fiscal period for which appropriations were received without penalty or expense to the HAA of any kind whatsoever, except as to the portions of the payments herein agreed upon for which funds have been appropriated.

4.3. Breach. Subject to Section 26 herein, either party may terminate this Agreement for breach of duty, obligation or warranty upon exhaustion of all remedies set forth in Section 26.

4.4. Duties and Obligations of the Parties. In the event that this Agreement is terminated prior to the Expiration Date, the HAA shall pay Contractor for services actually rendered up to the effective date of termination and Contractor shall continue to provide the HAA with services requested by the HAA and in accordance with this Agreement up to the effective date of termination. Upon termination of this Agreement for any reason, Contractor shall provide the HAA with copies of all completed or partially completed documents prepared under this Agreement. In the event Contractor has received access to HAA or City information or data as a requirement to perform services hereunder, Contractor shall return all HAA and City provided data to the HAA in a format deemed acceptable to the HAA.

5. DISCLOSURE OF CONFLICTS AND CONFIDENTIAL INFORMATION.¹

5.1. Disclosure of Conflicts. Contractor hereby warrants to the HAA that Contractor has made full disclosure in writing of any existing or potential conflicts of interest related to Contractor's services under this Agreement. In the event that any conflicts of interest arise after the Effective Date of this Agreement, Contractor hereby agrees immediately to make full disclosure to the HAA in writing.

5.2. Confidential Information. All reports, information, data or other documents given to, prepared by or assembled by Contractor or its subcontractors arising out of the services performed under this Agreement are the exclusive property of the HAA and will be kept confidential and may not be made available to any individual or organization by Contractor or its subcontractors without the prior written approval of the HAA, provided, however, that these provisions shall not apply to data that is in the public domain; was previously known to Contractor; or was independently acquired by Contractor from third parties who are under no obligation to the HAA to keep the data and information confidential. These provisions shall not apply to information in whatever form that comes into the public domain through no fault of Contractor, nor shall they be interpreted in any way to restrict Contractor from complying with a legally enforceable court order to provide information or data; provided Contractor shall immediately give the HAA notice of the court order to permit the HAA the opportunity to determine whether a protective order will be filed. This restriction includes, but is not limited to, press releases, presentations, promotional materials and other public disclosures.

Except as provided in the preceding paragraph, Contractor shall keep confidential, and shall require its employees, agents, subordinates, and subcontractors to keep confidential all information disclosed by the HAA or its contractors to Contractor or developed by Contractor or Contractor's employees, agents, subordinates, or subcontractors in the performance of services hereunder.

5.3. Unauthorized Access. Contractor shall store and maintain HAA information in a secure manner and shall not allow unauthorized users to access, modify, delete or otherwise corrupt HAA information in any way. Contractor shall notify the HAA immediately if the security or integrity of any HAA information has been compromised or is believed to have been compromised, in which event, Contractor shall, in good faith, use all commercially reasonable efforts to cooperate with the HAA in identifying what information has been accessed by

unauthorized means and shall fully cooperate with the HAA to protect such information from further unauthorized disclosure.

6. RIGHT TO AUDIT.

Contractor agrees that the HAA shall, until the expiration of four (4) years after final payment under this Agreement, or the final conclusion of any audit commenced during the said four years, have access to and the right to examine at reasonable times any directly pertinent books, documents, papers and records of Contractor involving transactions relating to this Agreement at no additional cost to the HAA. Contractor agrees that the HAA shall have access during normal working hours to all necessary Contractor facilities and shall be provided adequate and appropriate work space in order to conduct audits in compliance with the provisions of this section. The HAA shall give Contractor reasonable advance notice of intended audits.

Contractor further agrees to include in all its subcontractor agreements hereunder a provision to the effect that the subcontractor agrees that the HAA shall, until expiration of four (4) years after final payment of the subcontract, or the final conclusion of any audit commenced during the said four years have access to and the right to examine at reasonable times any directly pertinent books, documents, papers and records of such subcontractor involving transactions related to the subcontract, and further that the HAA shall have access during normal working hours to all subcontractor facilities and shall be provided adequate and appropriate work space in order to conduct audits in compliance with the provisions of this paragraph. The HAA shall give subcontractor reasonable notice of intended audits.

7. INDEPENDENT CONTRACTOR.

It is expressly understood and agreed that Contractor shall operate as an independent contractor as to all rights and privileges and work performed under this agreement, and not as agent, representative or employee of the HAA. Subject to and in accordance with the conditions and provisions of this Agreement, Contractor shall have the exclusive right to control the details of its operations and activities and be solely responsible for the acts and omissions of its officers, agents, servants, employees, contractors and subcontractors. Contractor acknowledges that the doctrine of *respondeat superior* shall not apply as between the HAA, its officers, agents, servants and employees, and Contractor, its officers, agents, employees, servants, contractors and subcontractors. Contractor further agrees that nothing herein shall be construed as the creation of a partnership or joint enterprise between the HAA and Contractor. It is further understood that the HAA shall in no way be considered a Co-employer or a Joint employer of Contractor or any officers, agents, servants, employees or subcontractors of Contractor. Neither Contractor, nor any officers, agents, servants, employees or subcontractors of Contractor shall be entitled to any employment benefits from the HAA. Contractor shall be responsible and liable

for any and all payment and reporting of taxes on behalf of itself, and any of its officers, agents, servants, employees or subcontractors.

8. LIABILITY AND INDEMNIFICATION.

8.1. LIABILITY. CONTRACTOR SHALL BE LIABLE AND RESPONSIBLE FOR ANY AND ALL PROPERTY LOSS, PROPERTY DAMAGE AND/OR PERSONAL INJURY, INCLUDING DEATH, TO ANY AND ALL PERSONS, OF ANY KIND OR CHARACTER, WHETHER REAL OR ASSERTED, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, EXCEPT TO THE EXTENT CAUSED BY THE GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT OF THE HAA.

8.2. INDEMNIFICATION. CONTRACTOR HEREBY COVENANTS AND AGREES TO INDEMNIFY, HOLD HARMLESS AND DEFEND THE HAA, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES, FROM AND AGAINST ANY AND ALL CLAIMS, LAWSUITS OR CAUSES OF ACTION OF ANY KIND OR CHARACTER, WHETHER REAL OR ASSERTED, FOR EITHER PROPERTY DAMAGE OR LOSS (INCLUDING ALLEGED DAMAGE OR LOSS TO CONTRACTOR'S BUSINESS AND ANY RESULTING LOST PROFITS) AND/OR PERSONAL INJURY, INCLUDING DEATH, TO ANY AND ALL PERSONS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, EXCEPT TO THE EXTENT CAUSED BY THE GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT OF THE HAA.

8.3. [COPYRIGHT INFRINGEMENT.] Contractor agrees to defend, settle, or pay, at its own cost and expense, any claim or action against the HAA for infringement of any patent, copyright, trade secret, or similar property right arising from the HAA's or the City's use of the Project in accordance with this Agreement. Contractor shall have the sole right to conduct the defense of any such claim or action and all negotiations for its settlement or compromise and to settle or compromise any such claim, and the HAA agrees to cooperate with it in doing so. The HAA agrees to give Contractor timely written notice of any such claim or action, with copies of all papers the HAA may receive relating thereto. If the Project or any part thereof is held to infringe and the use thereof is enjoined or restrained or, if as a result of a settlement or compromise, such use is materially adversely restricted, Contractor shall, at its own expense and as the HAA's sole remedy, either: (a) procure for the City the right to continue to use the Project; or (b) modify the Project to make it non-infringing, provided that such modification does not materially adversely affect the City; or (c) replace the Project with equally suitable, compatible, and functionally equivalent non-infringing Project at no additional charge to the HAA; or (d) if none of the foregoing alternatives is reasonably available to Contractor, terminate this Agreement and refund to the HAA the payments actually made to Contractor under this Agreement.]

9. ASSIGNMENT AND SUBCONTRACTING.

Contractor shall not assign or subcontract any of its duties, obligations or rights under this Agreement without the prior written consent of the HAA. If the HAA grants consent to an assignment, the assignee shall execute a written agreement with the HAA and Contractor under which the assignee agrees to be bound by the duties and obligations of Contractor under this Agreement. Contractor and Assignee shall be jointly liable for all obligations of Contractor under this Agreement prior to the effective date of the assignment. If the HAA grants consent to a subcontract, the subcontractor shall execute a written agreement with Contractor referencing

this Agreement under which the subcontractor shall agree to be bound by the duties and obligations of Contractor under this Agreement as such duties and obligations may apply. Contractor shall provide the HAA with a fully executed copy of any such subcontract.

10. INSURANCE.

Contractor will maintain the following insurance coverages in the following amounts:

COVERAGE	LIMIT OF LIABILITY
Workers' Compensation	Statutory for Workers' Compensation
Employer's Liability	<ul style="list-style-type: none"> • Bodily Injury by Accident \$500,000 (each accident) • Bodily Injury by Disease \$500,000 (policy limit) • Bodily Injury by Disease \$500,000 (each employee)
Commercial General Liability: Bodily and Personal Injury; Products and Completed Operations Coverage	Bodily Injury and Property Damage, Combined Limits of \$1,000,000 each Occurrence, and \$2,000,000 aggregate
Automobile Liability	\$1,000,000 combined single limit for (1) Any Auto or (2) All Owned, Hired, and Non-Owned Autos
Professional Liability	\$1,000,000 per occurrence; \$2,000,000 aggregate
Excess Liability applicable to CGL, and Auto	\$1,000,000
Aggregate Limits are per 12-month policy period unless otherwise indicated.	

10.1. At all times during the term of this Agreement and any extensions or renewals, Contractor shall provide and maintain insurance coverage that meets the Agreement requirements. The insurers for all policies must be licensed and/or approved to do business in the State of Texas. All insurers must have a minimum rating of A- VII in the current A.M. Best Key Rating Guide, or have reasonably equivalent financial strength and solvency to the satisfaction of the HAA. Prior to beginning performance under this Agreement, at any time upon the Director's request, or each time coverage is renewed or updated, Contractor shall furnish to the Director current certificates of insurance, endorsements, all policies, or other policy documents evidencing adequate coverage, as necessary. Any failure on the part of the HAA to request required insurance documentation shall not constitute a waiver of the insurance requirement. The Contractor shall be responsible for and pay (a) all premiums and (b) any claims or losses to the extent of any deductible amounts.

10.2. Each of the HAA and the City shall be an Additional Insured under this Agreement, and all policies, except Professional Liability and Worker's Compensation, shall explicitly name the HAA and the City as an Additional Insured. Contractor waives any claim or right of subrogation to recover against the HAA or its officers, agents, or employees, and each of Contractor's insurance policies except professional liability must contain coverage waiving such claim. Each policy, except Workers' Compensation and Professional Liability, must also contain an endorsement that the policy is primary to any other insurance available to the Additional Insured with respect to claims arising under this Agreement.

10.3. **CONTRACTOR SHALL GIVE 30 DAYS' ADVANCE WRITTEN NOTICE TO THE DIRECTOR IF ANY OF ITS INSURANCE POLICIES ARE CANCELED OR NON-RENEWED.** Within the 30-day period, Contractor shall provide other suitable policies in order to maintain the

required coverage. If Contractor does not comply with this requirement, the HAA may immediately suspend Contractor from any further performance under this Agreement and begin procedures to terminate for default.

11. COMPLIANCE WITH LAWS, ORDINANCES, RULES AND REGULATIONS.

Contractor agrees that in the performance of its obligations hereunder, it will comply with all applicable federal, state and local laws, ordinances, rules and regulations and that any work it produces in connection with this Agreement will also comply with all applicable federal, state and local laws, ordinances, rules and regulations. If the HAA notifies Contractor of any violation of such laws, ordinances, rules or regulations, Contractor shall immediately desist from and correct the violation.

12. NON-DISCRIMINATION COVENANT.

Contractor, for itself, its personal representatives, assigns, subcontractors and successors in interest, as part of the consideration herein, agrees that in the performance of Contractor's duties and obligations hereunder, it shall not discriminate in the treatment or employment of any individual or group of individuals on any basis prohibited by law. If any claim arises from an alleged violation of this non-discrimination covenant by Contractor, its personal representatives, assigns, subcontractors or successors in interest, Contractor agrees to assume such liability and to indemnify and defend the HAA and hold the HAA harmless from such claim.

13. NOTICES.

Notices required pursuant to the provisions of this Agreement shall be conclusively determined to have been delivered when (1) hand-delivered to the other party, its agents, employees, servants or representatives, (2) delivered by facsimile with electronic confirmation of the transmission, or (3) received by the other party by United States Mail, registered, return receipt requested, addressed as follows:

Houston Arts Alliance
Attn: Chief Executive Officer
3201 Allen Parkway
Houston, TX 77019-1800
Facsimile: [_____]

NAME
ADDRESS
CITY, STATE ZIP
Facsimile: (____) NUMBER

14. SOLICITATION OF EMPLOYEES.

Neither the HAA nor Contractor shall, during the term of this Agreement and additionally for a period of one (1) year after its termination, solicit for employment or employ, whether as employee or independent contractor, any person who is or has been employed by the other during the term of this Agreement, without the prior written consent of the person's employer.

Notwithstanding the foregoing, this provision shall not apply to an employee of either party who responds to a general solicitation of advertisement of employment by either party.

15. NO WAIVER.

The failure of the HAA or Contractor to insist upon the performance of any term or provision of this Agreement or to exercise any right granted herein shall not constitute a waiver of the HAA's or Contractor's respective right to insist upon appropriate performance or to assert any such right on any future occasion.

16. GOVERNING LAW / VENUE.

This Agreement shall be construed in accordance with the laws of the State of Texas. If any action, whether real or asserted, at law or in equity, is brought pursuant to this Agreement, venue for such action shall lie in state courts located in Harris County, Texas or the United States District Court for the Southern District of Texas, Houston Division.

17. SEVERABILITY.

If any provision of this Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired.

18. FORCE MAJEURE.

The HAA and Contractor shall exercise their best efforts to meet their respective duties and obligations as set forth in this Agreement, but shall not be held liable for any delay or omission in performance due to force majeure or other causes beyond their reasonable control, including, but not limited to, compliance with any governmental law, ordinance or regulation, acts of God, acts of the public enemy, fires, strikes, lockouts, natural disasters, wars, riots, material or labor restrictions by any governmental authority, transportation problems and/or any other similar causes. If the force majeure event continues for more than 30 days from the date performance is affected, the HAA may terminate this Agreement by giving seven days' written notice to Contractor. This termination is not a default or breach of this Agreement.

19. HEADINGS NOT CONTROLLING.

Headings and titles used in this Agreement are for reference purposes only, shall not be deemed a part of this Agreement, and are not intended to define or limit the scope of any provision of this Agreement.

20. REVIEW OF COUNSEL.

The parties acknowledge that each party and its counsel have reviewed and revised this Agreement and that the normal rules of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement

or exhibits hereto.

21. AMENDMENTS.

No amendment of this Agreement shall be binding upon a party hereto unless such amendment is set forth in a written instrument, which is executed by an authorized representative of each party.

22. ENTIRETY OF AGREEMENT.

This Agreement, including the schedule of exhibits attached hereto and any documents incorporated herein by reference, contains the entire understanding and agreement between the HAA and Contractor, their assigns and successors in interest, as to the matters contained herein. Any prior or contemporaneous oral or written agreement is hereby declared null and void to the extent in conflict with any provision of this Agreement.

23. COUNTERPARTS AND ELECTRONIC SIGNATURES.

This Agreement may be executed in one or more counterparts and each counterpart shall, for all purposes, be deemed an original, but all such counterparts shall together constitute one and the same instrument. A signature received via facsimile or electronically via email shall be as legally binding for all purposes as an original signature.

24. WARRANTY OF SERVICES.

Contractor warrants that his or her services will be of a professional quality and conform to generally prevailing industry standards. Contractor provides a one (1) year warranty of his or her services as set forth on Exhibit "A", Project, and Exhibit "C", Site Location for Placement of Project. Contractor further provides a one (1) year warranty on all equipment installed at the Site Location above and beyond any manufacturer's warranty commencing upon completion of the Project. In the event that any portion of the Project must be repaired or replaced due to ineffectiveness, defects in materials, or otherwise, Contractor shall pay all costs of repair or replacement, including all costs of material, equipment or supplies; travel expenses; and transportation or shipping costs for replacement material, equipment, or supplies. The HAA must give written notice of any breach of this warranty section within thirty (30) days from the date that the breach was actually known to the HAA. Upon notice to Contractor, at Contractor's option, Contractor shall either (a) use commercially reasonable efforts to re-perform the services in a manner that conforms with this warranty, or (b) refund all fees paid by the HAA to Contractor under this Agreement. This warranty section shall survive any expiration or termination of this Agreement.

25. IMMIGRATION NATIONALITY ACT.

The HAA actively supports the Immigration & Nationality Act (INA) which includes provisions addressing employment eligibility, employment verification, and nondiscrimination. Contractor shall verify the identity and employment eligibility of all employees who perform work under this Agreement. Contractor shall complete the Employment Eligibility Verification Form (I-9), maintain photocopies of all supporting employment eligibility and identity documentation for all employees, and upon request, provide the HAA with copies of all I-9 forms and supporting eligibility documentation for each employee who performs work under this Agreement. Contractor

shall establish appropriate procedures and controls so that no services will be performed by any employee who is not legally eligible to perform such services. Contractor shall provide the HAA with a certification letter that it has complied with the verification requirements required by this Agreement. Contractor shall indemnify the HAA from any penalties or liabilities due to violations of this provision. The HAA shall have the right to immediately terminate this Agreement for violations of this provision by Contractor.^{2]}

26. INFORMAL DISPUTE RESOLUTION.

Except in the event of termination pursuant to Section 4.2, if either the HAA or Contractor has a claim, dispute, or other matter in question for breach of duty, obligations, services rendered or any warranty that arises under this Agreement, the parties shall first attempt to resolve the matter through this dispute resolution process. The disputing party shall notify the other party in writing as soon as practicable after discovering the claim, dispute, or breach. The notice shall state the nature of the dispute and list the party's specific reasons for such dispute. Within ten (10) business days of receipt of the notice, both parties shall commence the resolution process and make a good faith effort, either through email, mail, phone conference, in person meetings, or other reasonable means to resolve any claim, dispute, breach or other matter in question that may arise out of, or in connection with this Agreement. If the parties fail to resolve the dispute within sixty (60) days of the date of receipt of the notice of the dispute, then the parties may submit the matter to non-binding mediation in Harris County, Texas, upon written consent of authorized representatives of both parties in accordance with the Industry Arbitration Rules of the American Arbitration Association or other applicable rules governing mediation then in effect. The mediator shall be agreed to by the parties. Each party shall be liable for its own expenses, including attorney's fees; however, the parties shall share equally in the costs of the mediation. If the parties cannot resolve the dispute through mediation, then either party shall have the right to exercise any and all remedies available under law regarding the dispute. Notwithstanding the fact that the parties may be attempting to resolve a dispute in accordance with this informal dispute resolution process, the parties agree to continue without delay all of their respective duties and obligations under this Agreement not affected by the dispute. Either party may, before or during the exercise of the informal dispute resolution process set forth herein, apply to a court having jurisdiction for a temporary restraining order or preliminary injunction where such relief is necessary to protect its interests.

27. TIME EXTENSIONS.

The Parties may agree, in writing, to extend or modify any of the time deadlines set forth in this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in multiples this _____ day of _____, 20____.

John Abodeely, CEO

ACCEPTED AND AGREED:

Date: _____

HOUSTON ARTS ALLIANCE:

ATTEST:

By: _____

By: _____

Date: _____

NAME

ATTEST:

By: _____
NAME

By: _____

SAMPLE