



# City of San Leandro

Meeting Date: June 6, 2016

## Staff Report

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**File Number:** 16-248

**Agenda Section:** CONSENT CALENDAR

**Agenda Number:** 8.L.

**TO:** City Council

**FROM:** Chris Zapata  
City Manager

**BY:** Cynthia Battenberg  
Community Development Director

**FINANCE REVIEW:** David Baum  
Finance Director

**TITLE:** Staff Report for a Resolution to Increase the Project Budget from \$235,000 to \$250,000, Increasing the Original Agreement by \$15,000, and Authorizing the City Manager to Execute Amendment No. 1 to the Consulting Services Agreement between the City of San Leandro and the Exploratorium for the Fabrication and Installation of an Interactive Musical Exhibit in Joaquin Plaza

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### SUMMARY AND RECOMMENDATIONS

Staff recommends that the City Council adopt a Resolution to approve an Amendment to the Consulting Services Agreement and authorize an increase to the contract in the amount of \$15,000 from the General Fund for the Exploratorium to fabricate and install an interactive musical exhibit in Joaquin Plaza.

### BACKGROUND

On November 20, 2014, the City of San Leandro was awarded a Housing-Related Parks Program Grant in the amount of \$1,376,600 from the State of California Department of Housing and Community Development. This grant was awarded based on the creation of 746 low-income and 84 very low-income units, and is being used to fund three "Qualifying Park Projects," which are City parks and recreation facilities that meet the eligible use criteria for funding.

One of the qualifying projects submitted for grant funding was a project with the Exploratorium, a museum of science, art, and human perception located in San Francisco, California, for the installation of an interactive exhibit at Joaquin Plaza in Downtown San Leandro.

In October of 2015 the City of San Leandro entered into a Consulting Services Agreement with the Exploratorium for the fabrication and installation phase of the project. This agreement was preceded by another Consulting Services Agreement with the Exploratorium in October of 2014, for the conceptual and structural design of the exhibit.

Joaquin Plaza was selected for the Exploratorium installation because it provides an opportunity to activate a centrally-located public space in Downtown San Leandro. This project will build on the ongoing efforts of the City and the San Leandro Improvement Association (SLIA) to activate and beautify Downtown San Leandro.

During the conceptual design phase, City staff worked with a team from the Exploratorium that included architects, landscape architects, and engineers to design a concept that works well for this particular public space. The team agreed on a musical concept that allows participants to trigger musical tones by interacting with tubular chimes that will be tuned to specific pitches. Particular attention was paid to creating an installation that is audible enough to be heard in the plaza, but not so loud that it negatively impacts local businesses or visitors. The concept also includes fixed seating, ensuring that the plaza will remain an inviting public space, even for those who do not opt to interact with the exhibit.

Per the grant agreement, the City is authorized to use its grant award to create a science-based innovative and interactive Exploratorium art exhibit in Joaquin Plaza and rehabilitate two of its community parks, Siempre Verde and Thrasher Parks.

Exploratorium staff brought a prototype to the 2015 Cherry Festival to witness and learn from people's interaction with the prototype and plans to bring a more current iteration to this year's festival. Staff presented and discussed the preliminary project designs with the City Council Facilities and Transportation Committee, SLIA, and the San Leandro Downtown Association.

On March 1, 2016, the City and the Exploratorium hosted a public meeting in Joaquin Plaza to showcase prototypes and conceptual drawings, and to answer questions, field concerns, and receive feedback from the public and adjacent businesses.

### **Analysis**

The cost of fabrication is slated to exceed the originally contracted amount by \$15,000 (6.38% of the original \$235,000 budget). There were increases in the costs of parts and labor for manufacturing the chime activation mechanisms, as well as the materials for the main support arm weldments. Staff requests a change order in order to ensure completion of the installation without having to reduce the number of interaction points within the exhibit. Available funds in the General Fund Account 210-62-116, which is the contingency fund for the Siempre Verde park improvements, are available for the additional cost and will not require a change to the FY15-16 budget.

### **Previous Actions**

- On January 6, 2014, the City Council adopted Resolution No. 2013-581 authorizing the City Manager to submit an application for State of California Department of Housing and Community Development's Housing-Related Parks Program Grant Funds.
- On October 14, 2014, the City and the Exploratorium entered into a Consulting Services Agreement for the development of an initial concept design document to include elements necessary to move forward with the design development phase.
- On December 1, 2014, the City Council adopted Resolution No. 2014-132 authorizing the

City Manager to execute a standard agreement with the State of California Department of Housing and Community Development for a Housing-Related Parks Program Grant in the amount of \$1,376,600.

- On October 5, 2015 City Council approved Resolution No. 2015-555 authorizing the City Manager to Execute a Consulting Services Agreement with the Exploratorium for the fabrication and installation of the exhibit.

### **Committee Review and Actions**

- On September 1, 2015, the City Council Facilities and Transportation Committee was presented with the project and the preliminary design concepts.

### **Applicable General Plan Policies**

- 6.01 DOWNTOWN PLAN. In accordance with the adopted Downtown Plan and Urban Design Guidelines and the Downtown San Leandro Transit Oriented Development Strategy, ensure that the new Downtown Development is attractive and creates an image conducive to revitalization.
- 44.06 PUBLIC ART. Encourage the siting of public art in civic open spaces, around public buildings, and within new development areas. Public art should reflect and express the diversity of the City.

### **Permits and/or Variances Granted**

- Building & Safety Inspection Permit B16-0572, issued on April 20, 2016.

### **Summary of Public Outreach Efforts**

- Staff presented a project update to the City Council Facilities and Transportation Committee
- Staff presented a project update to the Downtown San Leandro Improvement Association
- Staff presented a project update to the San Leandro Downtown Association
- Staff hosted a public meeting in Joaquin Plaza where residents and adjacent businesses were invited to learn about the project, view plans and prototypes and provide feedback

### **Legal Analysis**

The amendment was reviewed by the City Attorney's Office and approved as to form.

### **Fiscal Impacts**

The increase to the Exploratorium project cost is \$15,000, which represents a 6% increase in the original project budget of \$235,000 approved by the City Council. The \$15,000 will be funded by a transfer from the contingency fund for Siempre Verde Park, General Fund Account 210-62-116, as additional grant funding was obtained for Siempre Verde Park improvements. With this change order, the total project budget will be \$250,000.

### **Budget Authority**

The project will require an appropriation of \$15,000 in account 122-38-362. This appropriation will draw from the contingency fund for the Siempre Verde park improvements (210-62-116).

## **ATTACHMENTS**

### **Attachments to Resolution**

- Amendment No. 1 to Consulting Services Agreement
- Consulting Services Agreement

**PREPARED BY:** Lars Halle, Business Development Coordinator, Community Development



# City of San Leandro

Meeting Date: June 6, 2016

## Resolution - Council

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**File Number:** 16-247 **Agenda Section:** CONSENT CALENDAR

**Agenda Number:**

**TO:** City Council

**FROM:** Chris Zapata  
City Manager

**BY:** Cynthia Battenberg  
Community Development Director

**FINANCE REVIEW:** David Baum  
Finance Director

**TITLE:** RESOLUTION Approving Amendment No. 1 to Consulting Services Agreement with The Exploratorium for the Fabrication and Installation of an Interactive Musical Exhibit in Joaquin Plaza

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WHEREAS, an agreement dated October 1, 2015 exists between the City of San Leandro and The Exploratorium; and

WHEREAS, the project is funded by a grant from the State of California Department of Housing and Community Development; and

WHEREAS, the fabrication costs associated with this project exceed the contracted budget amount; and

WHEREAS, the \$15,000 amendment will increase the total contract amount to \$250,000.

WHEREAS, Amendment No. 1 to the agreement, a copy of which is attached, has been presented to this City Council; and

WHEREAS, the City Council is familiar with the contents thereof; and

WHEREAS, the City Manager recommends approval of said amendment to the agreement.

NOW, THEREFORE, the City Council of the City of San Leandro does RESOLVE as follows:

That said amendment is hereby approved and execution by the City Manager is hereby authorized.

**AMENDMENT NO. 1 TO CONSULTING SERVICES AGREEMENT BETWEEN  
THE CITY OF SAN LEANDRO AND  
THE EXPLORATORIUM  
FOR  
FABRICATION AND INSTALLATION OF AN INTERACTIVE ART EXHIBIT IN JOAQUIN PLAZA**

This **Amendment No. 1** ("Amendment") is made by and between the City of San Leandro ("City") and The Exploratorium ("Consultant") (together sometimes referred to as the "Parties") as of June 6, 2016, and amends that certain Consulting Services Agreement ("Agreement") dated October 1, 2015, between the Parties.

**WHEREAS**, City and Consultant have executed the Agreement, pursuant to which Consultant has provided certain consulting services to City with regard to the design, fabrication, and installation of an interactive art exhibit in Joaquin Plaza; and

**WHEREAS**, the Parties desire to amend the Agreement to increase the budget.

**NOW THEREFORE**, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties hereby agree to amend the Agreement as follows:

1. Section 2 of the Agreement entitled "Compensation" is hereby amended to pay Consultant a sum not to exceed \$250,000; and
2. Exhibit A of the Agreement entitled "Scope of Services" is hereby amended to read: "Total fees for this scope of work are \$250,000."
3. Exhibit B of the Agreement entitled "Compensation Schedule & Reimbursable Expenses" is hereby amended to read: "An amount of One Hundred and Seventeen Thousand Five Hundred US dollars (\$117,500), within (30) days of execution of this Agreement.

An amount of One Hundred and Seventeen Thousand Five Hundred US dollars (\$117,500), at least one (1) week prior to shipment of the Installation to the City's specified address upon notification by Consultant that the Installation is ready to ship.

An amount of Fifteen Thousand US dollars (\$15,000), no later than thirty days after installation of Installation."

4. All other terms shall remain in full force and effect.

This Amendment may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

**SIGNATURES ON FOLLOWING PAGE**

The Parties have executed this Amendment as of the date first written above. The persons whose signatures appear below certify that they are authorized to sign on behalf of the respective Party.

CITY OF SAN LEANDRO

THE EXPLORATORIUM

\_\_\_\_\_  
Chris Zapata, City Manager

\_\_\_\_\_  
Laura R. Zander, COO

Attest:

\_\_\_\_\_  
Tamika Greenwood, City Clerk

Approved as to Fiscal Authority:

\_\_\_\_\_  
David Baum, Finance Director

122-38-362-5120 \$235,000  
Account Number

210-62-116 \$15,000  
Account Number

Approved as to Form:

\_\_\_\_\_  
Richard D. Pio Roda, City Attorney

(2015)

**CONSULTING SERVICES AGREEMENT BETWEEN  
THE CITY OF SAN LEANDRO AND THE EXPLORATORIUM**

THIS AGREEMENT for consulting services is made by and between the City of San Leandro ("City") and Exploratorium ("Consultant") (together sometimes referred to as the "Parties") as of **October 1, 2015** (the "Effective Date").

**Section 1. SERVICES.** Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 Term of Services.** The term of this Agreement shall begin on the Effective Date and shall end on June 30, 2016, the date of completion specified in Exhibit A, and Consultant shall complete the work described in Exhibit A on or before that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as referenced in Section 8.
- 1.2 Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which Consultant is engaged.
- 1.3 Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Subsection 1.2 above and to satisfy Consultant's obligations hereunder.
- 1.5 Public Works Requirements.** Because the services described in Exhibit A include "work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work," the services constitute a public works within the definition of Section 1720(a)(1) of the California Labor Code. As a result, Consultant is required to comply with the provisions of the California Labor Code applicable to public works, to the extent set forth in Exhibit D.
- 1.6 City of San Leandro Living Wage Rates.** This contract may be covered by the City of San Leandro Living Wage Ordinance (LWO). Bidder's attention is directed to the San Leandro Municipal Code, Title 1, Chapter 6, Article 6. Successful Bidder must submit completed self-certification form and comply with the LWO if covered.



**Section 2. COMPENSATION.** City hereby agrees to pay Consultant a sum of **\$235,000**, notwithstanding any contrary indications that may be contained in Consultant's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Consultant's proposal, attached as Exhibit A, regarding the amount of compensation, the Agreement shall prevail. City shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City in writing, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consequently, the Parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

**2.1 Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, as outlined in Exhibit B. Invoices shall contain the following information:

- Serial identifications of progress bills; i.e., Progress Bill No. 1 for the first invoice, etc.;
- The beginning and ending dates of the billing period;
- A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion;
- The Consultant's signature;

**2.2 Monthly Payment.** City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have 30 days from the receipt of an invoice that complies with all of the requirements above to pay Consultant.

**2.3 Total Payment.** City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment.

- 2.4 **Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on the compensation schedule attached hereto as Exhibit B.
- 2.5 **Reimbursable Expenses.** Reimbursable expenses are specified in Exhibit B, and shall not exceed \$ None . Expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses are included in the total amount of compensation provided under this Agreement that shall not be exceeded.
- 2.6 **Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.
- 2.7 **Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets to verify costs incurred to that date.
- 2.8 **Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of authorization from the Contract Administrator.

**Section 3. FACILITIES AND EQUIPMENT.** Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, long-distance telephone or other communication charges, vehicles, and reproduction facilities.

**Section 4. INSURANCE REQUIREMENTS.** Before fully executing this Agreement, Consultant, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning work to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of such insurance shall be included in the Consultant's bid. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence that such insurance is in effect to City. VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS

AGREEMENT PRIOR TO EXECUTION. Consultant shall maintain all required insurance listed herein for the duration of this Agreement.

**4.1 Workers' Compensation.**

**4.1.1 General Requirements.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than **\$1,000,000** per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the California Labor Code shall be solely in the discretion of the Contract Administrator.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the Consultant, its employees, agendas, and subcontractors.

**4.1.2 Submittal Requirements.** To comply with Subsection 4.1, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section; and
- b. Waiver of Subrogation Endorsement as required by the section.

**4.2 Commercial General and Automobile Liability Insurance.**

**4.2.1 General Requirements.** Consultant, at its own cost and expense, shall maintain commercial general liability insurance for the term of this Agreement in an amount not less than **\$1,000,000** and automobile liability insurance for the term of this Agreement in an amount not less than **\$1,000,000** per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

**4.2.2 Minimum Scope of Coverage.** Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form

CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001, Code 1 (any auto). No endorsement shall be attached limiting the coverage.

**4.2.3 Additional Requirements.** Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:

- a. The Insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- b. City, its officers, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the Consultant; or automobiles owned, leased, hired, or borrowed by the Consultant.
- c. Consultant hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Consultant agrees to obtain any endorsements that may be necessary to affect this waiver of subrogation.
- d. For any claims related to this Agreement or the work hereunder, the Consultant's insurance covered shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.

**4.2.4 Submittal Requirements.** To comply with Subsection 4.2, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section;
- b. Additional Insured Endorsement as required by the section;
- c. Waiver of Subrogation Endorsement as required by the section; and
- d. Primary Insurance Endorsement as required by the section.

### **4.3 Professional Liability Insurance.**

**4.3.1 General Requirements.** Consultant, at its own cost and expense, shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than **\$1,000,000** covering the licensed professionals' errors and

omissions. Any deductible or self-insured retention shall not exceed \$150,000 per claim.

**4.3.2 Claims-Made Limitations.** The following provisions shall apply if the professional liability coverage is written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained and evidence of insurance must be provided for at least 5 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant shall purchase an extended period coverage for a minimum of 5 years after completion of work under this Agreement.
- d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

**4.3.3 Additional Requirements.** A certified endorsement to include contractual liability shall be included in the policy.

**4.3.4 Submittal Requirements.** To comply with Subsection 4.3, Consultant shall submit the Certificate of Liability Insurance in the amounts specified in the section.

**4.4 All Policies Requirements.**

**4.4.1 Acceptability of Insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A:VII.

**4.4.2 Verification of Coverage.** Prior to beginning any work under this Agreement, Consultant shall furnish City with complete copies of all Certificates of Liability Insurance delivered to Consultant by the insurer, including complete copies of all endorsements attached to the policies. All copies of Certificates of Liability Insurance and certified endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf. If the City does not receive the required insurance documents prior to the Consultant beginning work, it shall not waive the Consultant's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

**4.4.3 Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the written approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement. At the option of the City, either: the insurer shall reduce or eliminate

such deductibles or self-insured retentions as respects the City, its officers, employees, and volunteers; or the Consultant shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

**4.4.4 Wasting Policies.** No policy required by this Section 4 shall include a "wasting" policy limit (i.e. limit that is eroded by the cost of defense).

**4.4.5 Endorsement Requirements.** Each insurance policy required by Section 4 shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days' prior written notice has been provided to the City.

**4.4.6 Subcontractors.** Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

**4.5 Remedies.** In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement.

**Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES.** Refer to the attached Exhibit C, which is incorporated herein and made a part of this Agreement.

**Section 6. STATUS OF CONSULTANT.**

**6.1 Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subsection 1.3; however, otherwise City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and

all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.

- 6.2 **Consultant Not an Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

## **Section 7. LEGAL REQUIREMENTS.**

- 7.1 **Governing Law.** The laws of the State of California shall govern this Agreement.
- 7.2 **Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws and regulations applicable to the performance of the work hereunder, including but not limited to, the California Building Code, the Americans with Disabilities Act, and any copyright, patent or trademark law. Consultant's failure to comply with any law(s) or regulation(s) applicable to the performance of the work hereunder shall constitute a breach of contract.
- 7.3 **Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.
- 7.4 **Licenses and Permits.** Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.
- 7.5 **Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the Contract Administrator or this Agreement.

**Section 8. TERMINATION AND MODIFICATION.**

- 8.1 Termination.** City may cancel this Agreement at any time and without cause upon written notification to Consultant.

Consultant may cancel this Agreement upon **30 days'** written notice to City and shall include in such notice the reasons for cancellation.

In the event of termination, Consultant shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

- 8.2 Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if City grants such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the Contract Administrator, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.

- 8.3 Amendments.** The Parties may amend this Agreement only by a writing signed by all the Parties.

- 8.4 Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the Contract Administrator. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors noted in the proposal, without prior written approval of the Contract Administrator.

- 8.5 Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.

- 8.6 Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, City's remedies shall included, but not be limited to, the following:



- 8.6.1 Immediately terminate the Agreement;
- 8.6.2 Retain the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement;
- 8.6.3 Retain a different consultant to complete the work described in Exhibit A not finished by Consultant; or
- 8.6.4 Charge Consultant the difference between the cost to complete the work described in Exhibit A that is unfinished at the time of breach and the amount that City would have paid Consultant pursuant to Section 2 if Consultant had completed the work.

**Section 9. KEEPING AND STATUS OF RECORDS.**

- 9.1 **Consultant's Books and Records.** Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of 3 years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.
- 9.2 **Inspection and Audit of Records.** Any records or documents that Subsection 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds \$10,000.00, the Agreement shall be subject to the examination and audit of the State Auditor, at the request of City or as part of any audit of the City, for a period of 3 years after final payment under the Agreement.

**Section 10. MISCELLANEOUS PROVISIONS.**

- 10.1 **Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.
- 10.2 **Venue.** In the event that either party brings any action against the other under this Agreement, the Parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Alameda or in the United States District Court for the Northern District of California.
- 10.3 **Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any

provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

- 10.4 No Implied Waiver of Breach.** The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the Parties.
- 10.6 Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.
- 10.7 Ownership.** Consultant shall retain all rights to approaches, skills, knowledge and experience acquired by Consultant during the Term of this Agreement. All tangible and intangible results created by or on behalf of Consultant in the course of performing the Services, together with any and all intellectual property rights therein and thereto, (collectively, the "**Work Product**") are the property of Consultant.
- 10.8 Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Section 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous 12 months, an employee, agent, appointee, or official of the City. If Consultant was an employee, agent, appointee, or official of the City in the previous 12 months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of California Government Code Section 1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of California Government Code Section 1090 *et seq.*, and, if applicable, will be disqualified from holding public office in the State of California.

- 10.9 Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.

**10.10 Contract Administration.** This Agreement shall be administered by Cynthia Battenberg, Community Development Director ("Contract Administrator"). All correspondence shall be directed to or through the Contract Administrator or his or her designee.

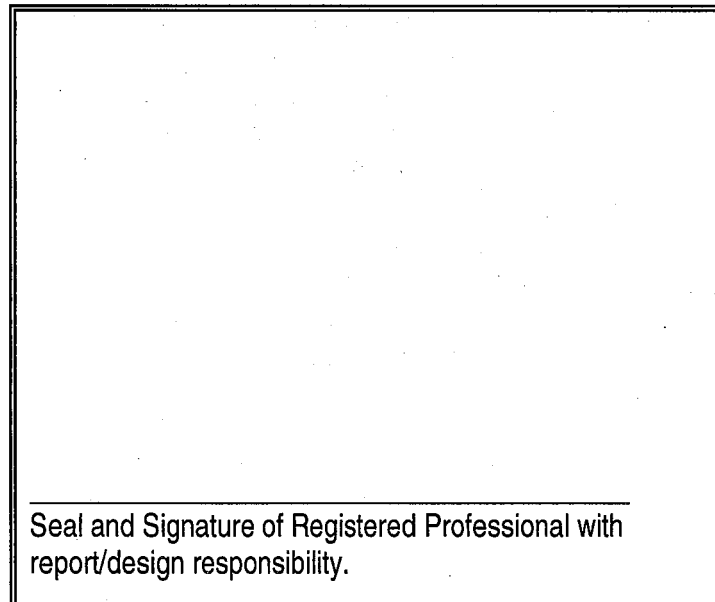
**10.11 Notices.** Any written notice to Consultant shall be sent to:  
Laura R. Zander, COO  
The Exploratorium  
The Piers 15/17  
San Francisco, CA 94111

Any written notice to City shall be sent to:  
Cynthia Battenberg, Community Development Director  
835 East 14<sup>th</sup> Street  
San Leandro, CA 94577

With a copy to:

City of San Leandro  
Department of Finance  
c/o Purchasing Agent  
835 East 14<sup>th</sup> Street  
San Leandro, CA 94577

**10.12 Professional Seal.** Where applicable in the determination of the contract administrator, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation. The stamp/seal shall be in a block entitled "Seal and Signature of Registered Professional with report/design responsibility," as in the following example.



**10.13 Integration.** This Agreement, including the scope of work attached hereto and incorporated herein as Exhibits A, B, C, D and E represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.

<u>Exhibit A</u>	Scope of Services
<u>Exhibit B</u>	Compensation Schedule & Reimbursable Expenses
<u>Exhibit C</u>	Indemnification
<u>Exhibit D</u>	California Labor Code Section 1720 Information
<u>Exhibit E</u>	Trademark and Trademarks Placement Policy
<u>Exhibit F</u>	Maintenance and Warranty of Installation

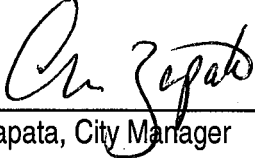
**10.14 Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

**10.15 Certification per Iran Contracting Act of 2010.** In the event that this contract is for one million dollars (\$1,000,000.00) or more, by Consultant's signature below Consultant certifies that Consultant, and any parent entities, subsidiaries, successors or subunits of Consultant are not identified on a list created pursuant to subdivision (b) of Section 2203 of the California Public Contract Code as a person engaging in investment activities in Iran as described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5 of the California Public Contract Code, as applicable.

**SIGNATURES ON FOLLOWING PAGE**

The Parties have executed this Agreement as of the Effective Date. The persons whose signatures appear below certify that they are authorized to sign on behalf of the respective Party.

CITY OF SAN LEANDRO



Chris Zapata, City Manager

CONSULTANT



Laura R. Zander, COO, The Exploratorium

Attest:



Tamika Greenwood, City Clerk

Approved as to Fiscal Authority:



David Baum, Finance Director

010-41-003-5890  
Account Number

Approved as to Form:



Richard D. Pio Roda, City Attorney

1969630.1

**EXHIBIT A**  
**SCOPE OF SERVICES**

**San Leandro – Joaquin Plaza**  
**Scope of Work**

**PHASE II - Fabrication**

**Scope**

The Studio for Public Spaces (SPS) will engage in the design/build process for the Joaquin Plaza installation in San Leandro. This process will include a final round of prototyping to ensure the design strategies are met for the desired lifespan of the installation.

**Deliverables**

Final Prototyping:

- Onsite, full scale prototype
- 1 Community meeting

Design Development:

- Plan and Elevations of Joaquin Plaza Installation
- Design Documentation of Joaquin Plaza Installation Graphics
- Detail and Structural Documentation for permitting
- Preliminary maintenance guidelines and documentation

Fabrication:

- Construction Documents of Final Design
- Fabrication and installation of Joaquin Plaza Installation
- Final Maintenance guidelines and documentation

**Timeline**

October 2015 – June 2016

**Fees**

Total fees for this scope of work are \$235,000

## EXHIBIT B

### COMPENSATION SCHEDULE & REIMBURSABLE EXPENSES

City agrees to pay for the Services outlined in Exhibit A in three (3) installments as follows:

An amount equal to fifty percent (50%) of the Total Price, i.e., One-Hundred and Seventeen Thousand US dollars (\$117,500), within ten (30) days of execution of this Agreement.

An amount equal to forty percent (40%) of the Total Price, i.e., Ninety-Four Thousand US dollars [\$94,000], at least one (1) week prior to shipment of the Installation to the City's specified address upon notification by Consultant that the Installation is ready to ship.

An amount equal to ten percent (10%) of the Total Price, i.e., Twenty-Three Thousand Five Hundred US dollars (\$23,500) no later than thirty (30) days after installation of Installation.

## EXHIBIT C

### INDEMNIFICATION

Consultant shall indemnify, defend with counsel acceptable to City, and hold harmless City and its officers, elected officials, employees, agents and volunteers from and against any and all liability, loss, damage, claims, expenses, and costs (including without limitation, attorney's fees and costs and fees of litigation) (collectively, "Liability") of every nature arising out of or in connection with Consultant's performance of the services called for or its failure to comply with any of its obligations contained in this Agreement, except such Liability caused by the sole negligence or willful misconduct of City.

Notwithstanding the forgoing, to the extent this Agreement is a "construction contract" as defined by California Civil Code Section 2782, as may be amended from time to time, such duties of Consultant to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

The Consultant's obligation to defend and indemnify shall not be excused because of the Consultant's inability to evaluate Liability or because the Consultant evaluates Liability and determines that the Consultant is not liable to the claimant. The Consultant must respond within 30 days to the tender of any claim for defense and indemnity by the City. If the Consultant fails to accept or reject a tender of defense and indemnity within 30 days, in addition to any other remedy authorized by law, so much of the money due the Consultant under and by virtue of this Agreement as shall reasonably be considered necessary by the City, may be retained by the City until disposition has been made of the claim or suit for damages, or until the Consultant accepts or rejects the tender of defense, whichever occurs first.



## EXHIBIT D

### PROVISIONS REQUIRED FOR PUBLIC WORKS CONTRACTS PURSUANT TO CALIFORNIA LABOR CODE SECTION 1720 ET SEQ.

#### HOURS OF WORK:

- A. In accordance with California Labor Code Section 1810, 8 hours of labor in performance of the services described in Exhibit A shall constitute a legal day's work under this contract.
- B. In accordance with California Labor Code Section 1811, the time of service of any worker employed in performance of the services described in Exhibit A is limited to 8 hours during any one calendar day, and 40 hours during any one calendar week, except in accordance with California Labor Code Section 1815, which provides that work in excess of 8 hours during any one calendar day and 40 hours during any one calendar week is permitted upon compensation for all hours worked in excess of 8 hours during any one calendar day and 40 hours during any one calendar week at not less than one-and-one-half times the basic rate of pay.
- C. The Consultant and its subcontractors shall forfeit as a penalty to the City \$25 for each worker employed in the performance of the services described in Exhibit A for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day, or more than 40 hours in any one calendar week, in violation of the provisions of California Labor Code Section 1810 and following.

#### WAGES:

- A. In accordance with California Labor Code Section 1773.2, the City has determined the general prevailing wages in the locality in which the services described in Exhibit A are to be performed for each craft or type of work needed to be as published by the State of California Department of Industrial Relations, Division of Labor Statistics and Research, a copy of which is on file in the City Public Works Office and shall be made available on request. The Consultant and subcontractors engaged in the performance of the services described in Exhibit A shall pay no less than these rates to all persons engaged in performance of the services described in Exhibit A.
- B. In accordance with California Labor Code Section 1775, the Consultant and any subcontractors engaged in performance of the services described in Exhibit A shall comply with California Labor Code Section 1775, which establishes a penalty of up to \$50 per day for each worker engaged in the performance of the services described in Exhibit A that the Consultant or any subcontractor pays less than the specified prevailing wage. The amount of such penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the Consultant or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the Consultant or subcontractor in meeting applicable prevailing wage obligations, or the willful failure by the Consultant or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of

prevailing wages is not excusable if the Consultant or subcontractor had knowledge of their obligations under the California Labor Code. The Consultant or subcontractor shall pay the difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate. If a subcontractor worker engaged in performance of the services described in Exhibit A is not paid the general prevailing per diem wages by the subcontractor, the Consultant is not liable for any penalties therefore unless the Consultant had knowledge of that failure or unless the Consultant fails to comply with all of the following requirements:

1. The contract executed between the Consultant and the subcontractor for the performance of part of the services described in Exhibit A shall include a copy of the provisions of California Labor Code Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
  2. The Consultant shall monitor payment of the specified general prevailing rate of per diem wages by the subcontractor by periodic review of the subcontractor's certified payroll records.
  3. Upon becoming aware of a subcontractor's failure to pay the specified prevailing rate of wages, the Consultant shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for performance of the services described in Exhibit A.
  4. Prior to making final payment to the subcontractor, the Consultant shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages for employees engaged in the performance of the services described in Exhibit A and any amounts due pursuant to California Labor Code Section 1813.
- C. In accordance with California Labor Code Section 1776, the Consultant and each subcontractor engaged in performance of the services described in Exhibit A shall keep accurate payroll records showing the name, address, social security number, work, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed in performance of the services described in Exhibit A. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:
1. The information contained in the payroll record is true and correct.
  2. The employer has complied with the requirements of California Labor Code Sections 1771, 1811, and 1815 for any work performed by the employer's employees on the public works project.

The payroll records required pursuant to California Labor Code Section 1776 shall be certified and shall be available for inspection by the Owner and its authorized representatives, the Division of Labor Standards Enforcement, the Division of Apprenticeship Standards of the

Department of Industrial Relations and shall otherwise be available for inspection in accordance with California Labor Code Section 1776.

- D. In accordance with California Labor Code Section 1777.5, the Consultant, on behalf of the Consultant and any subcontractors engaged in performance of the services described in Exhibit A, shall be responsible for ensuring compliance with California Labor Code Section 1777.5 governing employment and payment of apprentices on public works contracts.
  
- E. In case it becomes necessary for the Consultant or any subcontractor engaged in performance of the services described in Exhibit A to employ for the services described in Exhibit A any person in a trade or occupation (except executive, supervisory, administrative, clerical, or other non manual workers as such) for which no minimum wage rate has been determined by the Director of the Department of Industrial Relations, the Consultant or subcontractor shall pay the minimum rate of wages specified therein for the classification which most nearly corresponds to services described in Exhibit A to be performed by that person. The minimum rate thus furnished shall be applicable as a minimum for such trade or occupation from the time of the initial employment of the person affected and during the continuance of such employment.

## EXHIBIT E

### TRADEMARK AND TRADEMARKS PLACEMENT POLICY

#### POLICY

- A. Subject to the limitations set forth herein, Exploratorium grants a non-exclusive, revocable license to City during the term of this Agreement, to use Exploratorium's trade name (the "Name") and trademarks (the "Trademarks") (defined below) solely in connection with the installation.
- B. The Name is The Exploratorium.
- C. The Trademarks are the mark EXPLORATORIUM and the Exploratorium logo ("Logo"). Exploratorium will provide City with the high-resolution artwork via email, or in a form suitable for City reproduction needs. In reproducing the Logo, City may only use the artwork provided by Exploratorium in the colors depicted. City may not alter the Logo in any manner, including proportions, color, elements, type or in any other respect.
- D. The Trademarks will contain the <sup>TM</sup> or ® symbol and that symbol should never be deleted. All uses of the Trademarks must include the following statement in a reasonably visible location: "Exploratorium and the Exploratorium logo are trademarks or registered trademarks of The Exploratorium."
- E. City may not use any name or trademark confusingly similar to the Name or the Trademarks. City may not use the Name or the Trademarks in such proximity to any of City's own trademarks or third party trademarks so as to create a combination or composite mark.
- F. City agrees that nothing herein shall give City any right, title or interest in the Name, the Trademarks or any other trademark of Exploratorium, except the right to use the Name and the Trademarks solely in accordance with the terms of this Agreement. City also agrees that the Name and the Trademarks are the sole property of Exploratorium and that any and all uses by City of the Name and the Trademarks and all goodwill derived therefrom, whether or not done pursuant to the written agreement, shall inure solely to the benefit of Exploratorium.
- G. City may not (1) do anything that might harm the reputation or goodwill of Exploratorium, the Name, or the Trademarks; (2) take any action inconsistent with Exploratorium's ownership of the Name or the Trademarks; or (3) attempt to register the Name or the Trademarks or any other Exploratorium trademark or any trademark or Trademarks substantially similar thereto.
- H. City must promptly notify Exploratorium in writing of any adverse use by a third party of the Name or the Trademarks or of a mark or name confusingly similar to the Name or the Trademarks and will take no action of any kind with respect thereto except with prior written authorization of Exploratorium. City will provide full cooperation with any legal or equitable action by Exploratorium to protect its right, title and interest in and to the Name and the Trademarks.

- I. City may use and apply the Name and the Trademarks only to the products and other materials permitted by this Agreement only so long as the quality of those products and other materials meet with Exploratorium's high standard of quality consistent with the level of quality reflected in Exploratorium's own services and products.

#### COPYRIGHTS / USE OF EXHIBITS

- A. It is understood by City that all intellectual property in the Exhibits and Graphics, including without limitation, all undivided copyrights (and all renewals and extensions thereof), moral rights, patents, design rights, trademarks, trade dress, and other proprietary rights throughout the universe in all languages and in all media and forms of expression and communication now known or later developed, are intended to remain property of Exploratorium. Notwithstanding the foregoing, the ownership of the tangible property rights in the Exhibits shall belong to City, subject to the terms and limitations set forth herein.
- B. Exploratorium grants City a non-exclusive license to display the Exhibits and Graphics with the Installation at the museum installation and as otherwise granted in this Agreement. No other use of the Exhibits and the Graphics may be made without prior written consent of Exploratorium, including without limitation making translations of the Exhibits and/or Graphics.
- C. In the event of an infringement, the parties agree to execute all papers, testify on all matters, and otherwise cooperate in every way necessary and desirable for the prosecution of any such dispute.
- D. City shall have the right to create and use photographs or images of the Exhibits, in their setting for publicity, educational materials, posters, postcards, and publications, only to the extent any of the foregoing uses is related to the Installation. City may not make commercial use of such photographs or images of the Exhibits, such as in commercial advertising, without the prior written consent of Exploratorium.
- E. Nothing in this Agreement restricts the right of Exploratorium or Artists to duplicate and sell the Exhibits/Graphics, plans for the Exhibits/Graphics or written materials associated with the Exhibits/Graphics included in the Installation.
- F. City shall acknowledge that the Exhibits/Graphics are the creations of the Exploratorium in publications, publicity materials, broadcasts and other literature associated with the Exhibits/Graphics and on any graphics which are incorporated into the display of the Exhibits. The following notice shall appear on the Exhibits and Graphics in the following form:  
  
© (\*) The Exploratorium  
All Rights Reserved  
Used Under Authorization  
(\* ) indicate year of first publication
- G. Exploratorium agrees to indemnify, defend, protect and hold harmless City and its officers, elected officials, employees, agents and volunteers against damages, liability and costs suffered or incurred by City as a result of any claims by any third party that the Exhibits/Graphics constitute an infringement of any patent, trademark, design patent, copyright or other industrial property rights.

- H. City likewise agrees to indemnify, defend, protect and hold harmless Exploratorium against damages, liability and costs suffered or incurred by Exploratorium as a result of any claims by any third party that the Exhibits constitute an infringement of any patent, trademark, design patent, copyright or other industrial property rights, with respect to contributions of City to the Exhibits, Installation-related materials, Graphics and/or the Installation.

## EXHIBIT F

### Maintenance and Warranty of Installation

- A. Consultant warrants that the installation shall be free from all significant defects in materials and workmanship and all significant defects due to design for a period ("Warranty Period") commencing with City's acceptance of all the Installation and ending Three Hundred and Sixty (360) days later. Within the warranty period, Consultant agrees to repair or replace upon City's written request any such defects at no charge to City for all parts and labor.
- B. Consultant shall provide a technical manual, a listing and description of standard commercially available parts which are incorporated into the Exhibits and written maintenance instructions to be reviewed with City at the time of installation. No additional proprietary drawings or original designs shall be required of the Consultant.
- C. After Warranty Period, Consultant agrees to repair the Installation at City's request and expense, or to sell (subject to availability) to City, parts and specialty items for which Consultant is a producer, so that City may maintain and repair the Installation.
- D. Normal wear and tear, acts of vandalism, or damage caused by mishandling, accidental or otherwise, or lack of proper maintenance of the Installation by the City is not covered by Consultant's warranty, and Consultant shall have no duty to remedy any defects caused by such normal wear and tear, vandalism, mishandling or lack of proper maintenance.
- E. The foregoing constitutes the Consultant's complete warranty, implied or expressed, and no other warranties are made by Consultant.
- F. City agrees to perform routine maintenance and cleaning of the Installation during the Warranty Period consistent with the technical manual provided to City by Consultant. City agrees to notify Consultant in writing prior to performing any repair, modification or adjustments beyond routine maintenance as specified in the technical manual provided by Consultant.
- G. Except as provided below, any work created or performed by City hereunder, whether created by City alone or in collaboration with others, shall be wholly original with City and shall not infringe upon or violate any rights of any third party, including without limitation any rights of privacy, publicity, or copyrights, and shall not constitute a libel or slander of any person or entity;
- H. City possesses all licenses and permits required for the performance of all services under this Agreement, and that such licenses and permits are in full force and effect and shall remain so.