



City of San Leandro

Meeting Date: July 15, 2019

Staff Report

File Number: 19-411

Agenda Section: ACTION ITEMS

Agenda Number: 10.A.

TO: City Council

FROM: Jeff Kay
City Manager

BY: Jeff Kay
City Manager

FINANCE REVIEW: David Baum
Finance Director

TITLE: Staff Report for a Resolution of the City Council for the City of San Leandro to Authorize the City Manager to Execute a Non-Professional Services Agreement with Mildred Howard for the Purchase and Installation of a Work of Art in Front of the San Leandro Main Library for an Amount Not-to-Exceed \$135,000 Using Existing Prior Fiscal Year Appropriations that are Authorized to be Carried-forward into the Current Fiscal Year (2019-2020)

SUMMARY AND RECOMMENDATIONS

Staff recommends, based on the City of San Leandro Arts Commission's recommendation, that the City Council approve and authorize the City Manager or his designee to negotiate and execute a Non-Professional Services Agreement with Mildred Howard for the purchase and installation of a significant work of public art to be installed in front of the San Leandro Main Library, for an amount not-to-exceed \$135,000.

Staff's recommendation coincides with a competitive artist selection process that was developed and executed by the City of San Leandro Arts Commission, which identified Mildred Howard as the recommended artist. Thus, coincident with staff's recommendation to approve the contract, the Arts Commission recommends that the City Council award the contract to Mildred Howard.

The Arts Commission is also seeking delegated authority from the City Council to review and authorize the final design of the public work of art.

BACKGROUND

On November 16, 2013, the City of San Leandro hosted an *Arts and Culture Town Hall* meeting at the direction of the City Council. The event commenced with a welcome from the Mayor and City Manager followed by a detailed overview of the various cultural amenities that already exist in San Leandro. Another major component of the event enabled members of the public to participate in a facilitated interactive group discussion to prioritize ideas to advance artistic and

cultural life in San Leandro. A variety of public priorities related to art and culture were identified.

Following further discussions by the City Council in subsequent months, at the July 7, 2014 City Council meeting, Councilmembers directed staff to research the formation of a new City of San Leandro Arts Commission.

Staff then presented its analysis along with a draft resolution and ordinance that was adopted by the City Council at the September 2, 2014 regular City Council meeting. The adopted ordinance formally established the City's first Arts Commission by amending Sections 1-3-100, 1-3-110 and 1-3-115, and adding Title I, Chapter 3, Article 16 to the San Leandro Municipal Code. The first members of the Commission were appointed by the Mayor and each member of the City Council later that year. The Commission commenced regular meetings in January, 2015.

Analysis

Although the Arts Commission was initially assigned staffing support from the Recreation & Human Services Department, due to staffing limitations, the Commission's staffing assignment was later transitioned to the City Manager's office beginning in January, 2018. Since the time of its formation, the Arts Commission has worked on a number of important projects and activities designed to enhance arts and culture in San Leandro. To assist the Commission with its efforts, the City Council appropriated \$100,000 in annual funds to the Arts Commission in the 2017-18 and 2018-19 Fiscal Year budgets. In addition, a \$75,000 appropriation was included for the Commission's use in the FY 2019-20 (current fiscal year) budget.

Highlights of the Arts Commission's accomplishments include:

- The development of a Public Art Master Plan, which was formally presented to the City Council at its September 5, 2017 regular meeting;
- Launch of an Arts & Culture grants program in 2018, which distributed over \$33,000 to 12 local San Leandro-based artists and arts-serving organizations for various artistic projects and cultural activities;
- Development of a City website devoted to public art (www.sanleandro.org/about/public_art/ <http://www.sanleandro.org/about/public_art/>);
- Guidance and recommendations to the City's public utility box mural program, and various other mural projects across the City;
- Development and execution of new designs for street banners for Wicks Boulevard and Bancroft Avenue, per the direction of the City Council; and
- Production of a successful live comedy event at the Main Library, held on June 22, 2019.

In addition to these efforts, during this past year, the Arts Commission held numerous discussions about other ways in which it could allocate its funding to enhance the City's artistic and cultural life. Following these discussions, the Commission ultimately decided to allocate up to \$135,000 of its

City Council-appropriated funds from across two fiscal years toward commissioning a significant sculpture or other work of public art that could be installed in a prominent public location.

Before selecting the location for the art, members of the Commission conducted site visits at various locations throughout the City, including all of the potential sites identified in the Public Art Master Plan. That list of sites for this project was then winnowed and presented to the whole Arts Commission for its consideration in 2018. A number of variables were considered in the site selection process. First and foremost, because the art work would be paid for using City funds, the underlying property would need to be owned and maintained by the City. In addition, the Commission felt that the location should be one that is centrally located and frequently visited by a broad cross-section of the public, enabling residents from across the whole City to benefit.

Ultimately, the Arts Commission selected the grassy courtyard area in front of the Main Library as its preferred location for installation, following consultation with Library staff. This location was recommended by the Commission because it most closely met the criteria above. The Arts Commission has also discussed commissioning additional public art in other locations throughout San Leandro neighborhoods in the future, consistent with recommendations outlined in the Public Art Master Plan.

Concurrent with its process to identify a location for the art work, the Commission also launched a competitive process to identify an artist with whom a contract could be established for the development and installation of the artwork. With the assistance of an arts consultant, artworks from 16 artists from across the United States with experience developing public art for government entities were presented to a committee of the Arts Commission. From that list, a sub-set of finalists was identified and presented to the entire Arts Commission at a publicly-noticed meeting for its review and consideration using a numerical evaluation and points-allocation based on various objective scoring criteria. Mildred Howard scored the highest number of points. A summary of Ms. Howard's qualifications and experience is provided below.

Although the specific details of the art are yet to be finalized, it is currently envisioned to be a bronze sculpture, which is a type of art that Ms. Howard specializes in and has significant experience developing. If the City Council approves the contract, Ms. Howard would be tasked by contract to present draft designs to the Arts Commission for its review and feedback at future publicly-noticed Arts Commission meetings.

The Arts Commission is also seeking delegated authority from the City Council to select and authorize the final design that is developed by the artist.

About Mildred Howard

Mildred Howard is a local Bay Area artist who grew up in Berkeley. She has a strong track record of developing significant works of art in prominent locations across the country. Known for her sculptural installations and mixed-media assemblage work, Howard received her MFA from John F. Kennedy University in Orinda, CA. In 2015 she received the Lee Krasner Award, in recognition of a lifetime of artistic achievement. She has also been the recipient of the Nancy Graves Grant for Visual Artists (2017), the Joan Mitchell Foundation Award (2004/05), a fellowship from the California Arts Council (2003), the Adeline Kent Award from San Francisco Art Institute (1991), and, most recently, the Honorary Doctorate of Fine Arts and the Douglas G.

MacAgy Distinguished Achievement Award from the San Francisco Art Institute. Large-scale installations she designed have been mounted at Creative Time in New York, InSITE in San Diego, the National Museum of Women in the Arts, and the New Museum in New York. Public commissions and installations were also executed for the Museum of Glass in Tacoma, the City of Oakland, and for the San Francisco Arts Commission and San Francisco International Airport. Mildred Howard's works are represented in the collections of SFMOMA, the de Young Museum, the Berkeley Art Museum, the Museum of Contemporary Art San Diego, the Museum of Glass and Contemporary Art, Tacoma, the Oakland Museum, and the San Jose Museum of Art. The Anglim Gilbert Gallery in San Francisco has also shown Ms. Howard's work since 1990.

Summary

The Arts Commission recommends that the City Council approve and authorize the City Manager to execute, subject to approval as to form by the City Attorney, the proposed agreement with Mildred Howard to design, fabricate and install a public work of art for installation in front of the San Leandro Main Library. The proposed agreement would not exceed \$135,000 in total cost, which would be paid using existing appropriations from the 2018-19 Fiscal Year.

The Arts Commission is also seeking delegated authority from the City Council to review and authorize the final design of the public work of art. A copy of the proposed agreement is included as an attachment to the associated City Council Resolution.

Fiscal Impacts

Sufficient funding for this project was already appropriated in the FY 2017-18 and 2018-19 Arts Commission budgets. No additional appropriations are requested.

Budget Authority

Funding for the proposed agreement is currently programmed in the Fiscal Year 2018-19 budget, in the following account: 010-14-010-8516. Adoption of the attached resolution would also authorize the funds to be carried-forward in to the current fiscal year 2019-20 budget, if necessary to finalize the proposed agreement.

ATTACHMENT(S)

Attachment(s) to Related Legislative File

- Non-Professional Services Agreement between the City of San Leandro and Mildred Howard

PREPARED BY: Eric Engelbart, Deputy City Manager, City Manager's Office

Samples of Mildred Howard's Work



“Locks and Keys for Harry Bridges”
(200 Block of Stevenson Street, San Francisco)





“Frame” & “Refrain”
(Hunters Point, San Francisco)



City of San Leandro

Meeting Date: July 15, 2019

Resolution - Council

File Number: 19-412

Agenda Section: ACTION ITEMS

Agenda Number:

TO: City Council

FROM: Jeff Kay
City Manager

BY: Jeff Kay
City Manager

FINANCE REVIEW: David Baum
Finance Director

TITLE: RESOLUTION of the City of San Leandro City Council to Approve and Authorize the City Manager to Negotiate and Execute a Non-Professional Services Agreement with Mildred Howard for the Development, Fabrication, and Installation of a Work of Art to be Installed in Front of the San Leandro Main Library for an Amount Not-to-Exceed \$135,000

WHEREAS, an agreement between the City of San Leandro and Mildred Howard, a copy of which is attached, is presented to this City Council; and

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

WHEREAS, the City Council desires to delegate to the City of San Leandro Arts Commission the authority to execute any procedural steps associated with finalizing the design of the work of art that is authorized by said agreement; and

WHEREAS, the City Manager recommends approval of said agreement.

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

That the contract with Mildred Howard for a not-to-exceed amount of \$135,000 to develop, fabricate and install a work of public art at the San Leandro Main Library is approved, and the City Manager or his designee is hereby authorized to negotiate any final terms or minor modifications, subject to approval as to form by the City Attorney, and execute said agreement for the services outlined therein.

Furthermore, the funding from the Fiscal Year 2018-19 Adopted Budget, Account # 010-14-010-8516, in the amount of \$135,000, will be carried over to the Fiscal Year 2019-20 Adopted Budget in Account #010-14-010-8516 to provide the funding needed to complete the project.

NON-PROFESSIONAL SERVICES AGREEMENT BETWEEN
THE CITY OF SAN LEANDRO AND
MILDRED HOWARD "Artist"
FOR
PURCHASE OF ARTWORK

THIS AGREEMENT for Mildred Howard services is made by and between the City of San Leandro ("City") and Mildred Howard ("Contractor") (together sometimes referred to as the "Parties") as of July 16, 2019 (the "Effective Date").

- Section 1.** **SERVICES.** Subject to the terms and conditions set forth in this Agreement, Contractor 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 July 20, 2020, the date of completion specified in Exhibit A, and Contractor 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 Contractor 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.** Contractor 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 Contractor is engaged.
- 1.3 **Assignment of Personnel.** Contractor 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, Contractor shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 **Time.** Contractor 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 Contractor's obligations hereunder.
- 1.5 **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.
- 1.6 **Prevailing Wages for Installation.** Prevailing Wages for Installation. Artist shall comply with the California Prevailing Wage Law ("PWL") (California Labor Code Sections 1720 et

seq.) when installing the work of art or shall ensure that any subcontractor performing such installation on behalf of Artist complies with the PWL.

Unless notified otherwise by the City, Artist shall submit or direct its subcontractor to submit certified payroll reports with respect to installation of the Work in accordance with the PWL. Payment pursuant to this section shall be conditioned upon the submission of timely and accurate certified payroll records.

The City shall have the right to monitor payments of prevailing wages and compliance with apprenticeship requirements by Artist or its subcontractor with respect to the installation of the Work. Upon becoming aware of any failure by Artist or its subcontractor to pay prevailing wages and/or noncompliance with apprenticeship requirements, the City shall have the right to take corrective action to rectify any prevailing wage and/or apprenticeship deficiencies, with the any costs incurred by the City to be borne by Artist.

The provisions of California Labor Code Sections 1771, 1775, 1776, 1777.5, 1813 and 1815 are applicable to this contract. In addition, prior to receiving final payment for work performed pursuant to the Contract, Artist, or its subcontractor performing installation of the Work of Art may be required, at the City's sole discretion, to deliver to the City a Certificate of Compliance related to these provisions of State law.

Section 2. **COMPENSATION.** City hereby agrees to pay Contractor a sum not to exceed \$135,000, notwithstanding any contrary indications that may be contained in Contractor's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Contractor's proposal, attached as Exhibit B, regarding the amount of compensation, the Agreement shall prevail. City shall pay Contractor 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 Contractor for services rendered pursuant to this Agreement. Contractor shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City in writing, Contractor shall not bill City for duplicate services performed by more than one person.

Contractor and City acknowledge and agree that compensation paid by City to Contractor under this Agreement is based upon Contractor's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Contractor. Consequently, the Parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Contractor 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.** Contractor shall submit invoices during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred prior to the invoice date. 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;

2.2 **Monthly Payment.** Except for the first payment due upon execution of this Agreement, City shall make 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 Contractor.

2.3 **Final Payment.** City shall pay the last sum due pursuant to this Agreement within 60 days after completion of the services and submittal to City of a final invoice, if all services required have been satisfactorily performed.

2.4 **Total Payment.** City shall pay for the services to be rendered by Contractor pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Contractor 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 Contractor 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.

2.5 **Fees.** Fees for work performed by Contractor shall not exceed the amounts shown on the compensation schedule attached hereto as Exhibit B.

2.6 **Reimbursable Expenses.** Reimbursable expenses are specified in Exhibit B, and shall not exceed \$0. 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.

2.7 **Payment of Taxes.** Contractor is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.

2.8 **Payment upon Termination.** In the event that the City or Contractor terminates this Agreement pursuant to Section 8, the City shall compensate the Contractor for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Contractor shall maintain adequate logs and timesheets to verify costs incurred to that date.

- 2.9 **Authorization to Perform Services.** The Contractor 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.
- 2.10 **Liquidated Damages.** Failure of Contractor to respond to problems referred to it by City within the time limits established in Subsection 1.2 of this Agreement shall result in liquidated damages as set forth in Exhibit A.

Section 3. FACILITIES AND EQUIPMENT. Except as set forth herein, Contractor 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 Contractor only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein. Contractor shall make a written request to City to use facilities or equipment not otherwise listed herein.

- 3.1 **Safety Requirements.** In accordance with generally accepted construction practices and state law, Contractor shall be solely and completely responsible for conditions on the jobsite, including safety of all persons and property during performance of the work. This requirement shall apply continuously and not be limited to normal working hours.

Contractor shall take all necessary precautions and provide all necessary safeguards to prevent personal injury and property damage. Contractor shall provide protection for all persons including, but not limited to, its employees and employees of its subcontractors; members of the public; and employees, agents, and representatives of the City and regulatory agencies that may be on or about the work.

The services of the City in conducting review and inspection of Contractor's performance is not intended to include review of the adequacy of Contractor's work methods, equipment, bracing or scaffolding, or safety measures, in, on, or near any Contractor jobsite.

All work and materials shall be in strict accordance with all applicable state, city, county, and federal rules, regulations and codes, with specific attention to the United States Department of Labor Occupational Health and Safety Administration (OSHA) requirements. Contractor shall be solely responsible for compliance with all city, county, and state explosive transport, storage, and blasting requirements and for any damages caused by such operations.

Contractor is hereby informed that work on City property could be hazardous. Contractor shall carefully instruct all personnel working on City property that all conditions of the property are potentially hazardous work areas as to potential dangers and shall provide such necessary safety equipment and instructions as are necessary to prevent injury to personnel and damage to property. Special care shall be exercised relative to work underground.

In addition to complying with all other safety regulations, Contractor shall abide by any and all other City requirements contained in any specifications, special conditions or manuals, which shall be made available by City upon request.

Contractor shall provide and maintain all necessary safety equipment such as fences, barriers, signs, lights, walkways, guards, and fire prevention and fire-fighting equipment and shall take such other action as is required to fulfill its obligations under this section. It is the intent of the City to provide a safe working environment under normal conditions. CONTRACTOR IS ADVISED THAT CITY'S OPERATIONS AND PROPERTY ARE INHERENTLY HAZARDOUS BECAUSE OF CONDITIONS SUCH AS CONFINED SPACES, POTENTIALLY EXPLOSIVE ATMOSPHERES, AND POSSIBLE EXPOSURE TO PATHOGENS.

Contractor shall maintain all portions of the jobsite in a neat, clean, and sanitary condition at all times. If required by the City, toilets shall be furnished by Contractor where needed for use of its employees and their use shall be strictly enforced. Contractor shall not use the City's existing sanitary facilities, unless previously authorized by the City.

Contractor shall keep adequate first aid facilities and supplies available and instruction in first aid for its employees shall be given.

City reserves the right to require that Contractor bring onto the project or engage the services of a licensed safety engineer at any time during the term of this Agreement. If Contractor does not have a licensed safety engineer on staff, then City may require that Contractor engage a subcontractor or subconsultant as the project's safety engineer. Contractor shall bear all costs in connection with meeting the requirements of this section.

Section 4.

INSURANCE REQUIREMENTS. Before fully executing this Agreement, Contractor, 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 Contractor and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Contractor 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. Contractor 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 Contractor's bid. Contractor shall not allow any subcontractor to commence work on any subcontract until Contractor has obtained all insurance required herein for the subcontractor(s) and provided evidence to City that such insurance is in effect. VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS AGREEMENT PRIOR TO EXECUTION. Contractor shall maintain all required insurance listed herein for the duration of this Agreement.

4.1 Reserved.

4.2 Commercial General and Automobile Liability Insurance.

4.2.1 General Requirements. Contractor, 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 Contractor; or automobiles owned, leased, hired, or borrowed by the Contractor.
- c. Contractor hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Contractor 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 Contractor's insurance coverage 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 Contractor's insurance and shall not contribute with it.

4.2.4 **Submittal Requirements.** To comply with Subsection 4.2, Contractor 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 **All Policies Requirements.**

4.3.1 **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.

4.3.2 **Verification of Coverage.** Prior to beginning any work under this Agreement, Contractor shall furnish City with complete copies of all Certificates of Liability Insurance delivered to Contractor 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 Contractor beginning work, it shall not waive the Contractor's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

4.3.3 **Deductibles and Self-Insured Retentions.** Contractor 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 Contractor shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

4.3.4 **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).

4.3.5 **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.

4.3.6 Subcontractors. Contractor 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.

4.4 Submittal of Proof of Insurance Coverage. All certificates of insurance and original endorsements effecting coverage required in this Section 4 must be electronically submitted through the City's online insurance document management program, PINS Advantage. Contractor shall comply with all requirements provided by City related to the PINS Advantage program.

4.5 Remedies. In addition to any other remedies City may have if Contractor 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 Contractor'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 Contractor to stop work under this Agreement or withhold any payment that becomes due to Contractor hereunder, or both stop work and withhold any payment, until Contractor demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement.

Section 5. INDEMNIFICATION AND CONTRACTOR'S RESPONSIBILITIES. Contractor shall indemnify, defend with counsel acceptable to City, and hold harmless City and its officers, 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 Contractor's performance of the Services 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.

The Contractor's obligation to defend and indemnify shall not be excused because of the Contractor's inability to evaluate Liability or because the Contractor evaluates Liability and determines that the Contractor is not liable to the claimant. The Contractor must respond within 30 days, to the tender of any claim for defense and indemnity by the City, unless this time has been extended by the City. If the Contractor 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 Contractor 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 Contractor accepts or rejects the tender of defense, whichever occurs first.

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 Contractor to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

In the event that Contractor or any employee, agent, or subcontractor of Contractor providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of City, Contractor shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Contractor or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Section 6. STATUS OF CONTRACTOR.

- 6.1 **Independent Contractor.** At all times during the term of this Agreement, Contractor shall be an independent contractor and shall not be an employee of City. City shall have the right to control Contractor only insofar as the results of Contractor'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 Contractor accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Contractor 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 **Contractor Not an Agent.** Except as City may specify in writing, Contractor shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Contractor 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.** Contractor and any subcontractors shall comply with all laws applicable to the performance of the work hereunder.
- 7.3 **Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Contractor 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.** Contractor represents and warrants to City that Contractor 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. Contractor represents and warrants to City that Contractor 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, Contractor and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.
- 7.5 **Nondiscrimination and Equal Opportunity.** Contractor 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 Contractor under this Agreement. Contractor 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 Contractor thereby.

Contractor 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.** This Agreement shall become effective on the date that it is signed by both parties, set forth on the first page of the Agreement, and shall continue in effect until both parties have fully performed their respective obligations under this Agreement, unless sooner terminated as provided herein.

City may cancel this Agreement at any time and without cause upon written notification to Contractor.

Contractor 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, Contractor shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Contractor delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Contractor or prepared by or for Contractor 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. Contractor understands and agrees that, if City grants such an extension, City shall have no obligation to provide Contractor 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 Contractor 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 Contractor recognize and agree that this Agreement contemplates personal performance by Contractor and is based upon a determination of Contractor'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 Contractor. Contractor may not assign this Agreement or any interest therein without the prior written approval of the Contract Administrator. Contractor 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 Contractor shall survive the termination of this Agreement.
- 8.6 **Options upon Breach by Contractor.** If Contractor 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 Contractor pursuant to this Agreement;
 - 8.6.3 Retain a different contractor to complete the work described in Exhibit A not finished by Contractor; or
 - 8.6.4 Charge Contractor 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 Contractor pursuant to Section 2 if Contractor had completed the work.

Section 9. KEEPING AND STATUS OF RECORDS.

- 9.1 **Records Created as Part of Contractor's Performance.** Copies of all reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Contractor prepares or obtains pursuant to this Agreement and that relate

to the matters covered hereunder shall be the property of the City. Contractor hereby agrees to deliver those documents to the City upon termination of the Agreement. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. City and Contractor agree that, until final approval by City, all data, plans, specifications, reports and other documents are confidential and will not be released to third parties without prior written consent of both Parties.

- 9.2 **Contractor's Books and Records.** Contractor 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 Contractor to this Agreement.
- 9.3 **Inspection and Audit of Records.** Any records or documents that Subsection 9.2 of this Agreement requires Contractor 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 **Conflict of Interest.** Contractor may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Contractor in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Contractor 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.*

Contractor 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 Contractor was an employee, agent, appointee, or official of the City in the previous 12 months, Contractor warrants that it did not participate in any manner in the forming of this Agreement. Contractor understands that, if this Agreement is made in violation of California Government Code Section 1090 *et seq.*, the entire Agreement is void and Contractor will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Contractor will be required to reimburse the City for any sums paid to the Contractor. Contractor 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.

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

10.8 **Contract Administration.** This Agreement shall be administered by Eric Engelbart, Deputy City Manager ("Contract Administrator"). All correspondence shall be directed to or through the Contract Administrator or his or her designee.

10.9 **Notices.** Any written notice to Contractor shall be sent to:

Mildred Howard
PO Box 99626.
Emeryville, CA 94662
mhoward@exploritorium.edu

Any written notice to City shall be sent to:

City of San Leandro
City Manager's Office
Attention: Eric Engelbart
835 East 14th Street

San Leandro, CA 94577
510-577-3391
eenelbart@sanleandro.org

With a copy to:

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

- 10.10 **Integration.** This Agreement, including the scope of work attached hereto and incorporated herein as Exhibits A, B, and C represents the entire and integrated agreement between City and Contractor 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>	California Labor Code Section 1720 Information

- 10.11 **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.

- 10.12 **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 Contractor's signature below Contractor certifies that Contractor, and any parent entities, subsidiaries, successors or subunits of Contractor 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

CONTRACTOR

Jeff Kay, City Manager

Mildred Howard, Artist

Attest:

Leticia I. Miguel, City Clerk

Approved as to Fiscal Authority:

David Baum, Finance Director

010-14-010-8516
Account Number

Approved as to Form:

Richard D. Pio Roda, City Attorney

EXHIBIT A

SCOPE OF SERVICES

The following outlines the scope of work to manage the acquisition of an artwork for the City of San Leandro public art collection through a direct purchase of an existing artwork OR through the commissioning of a new work specific to the site through an open competition.

Subject to the terms and conditions set forth in this Agreement, Contractor ("Artist") shall:

- A. In accordance with the schedule set forth in Exhibit B, purchase on Artist's account all labor, supplies, materials and equipment required to design and furnish to the City an artwork ("Work") to be located at the San Leandro Public Library and fabricate, deliver and install the Work to the satisfaction of the City and in substantial conformance with Artist's Final Design Proposal ("Final Proposal").
- B. Artist shall not commence performance of any of the services identified in section 1.A until receiving a written "Notice to Proceed" from the City for each Phase and Milestone of this project.

The following schedule shall be adhered to in the design, fabrication and installation of the work:

Start Date: Upon receipt of a Notice to Proceed from the City.

- I. **Phase 1:** To be completed three months after execution of Agreement. Delivery of a Conceptual Design Proposal ("Conceptual Proposal") shall include:
 - a. Presentation quality, to-scale renderings (drawings, animations, and/or study model) illustrating the intended physical appearance -- including scale and form of the artwork;
 - b. A plan showing the location of the artwork;
 - c. A description of the intended materials, colors, and surface treatments;
 - d. An anticipated method of fabrication and installation of the artwork;
 - e. A written description of the artwork describing the Artist's conceptual approach to the project;
 - f. A schedule for final design development, fabrication and installation if the design is approved;
 - g. If requested by the City, artist shall be available to present the Conceptual Proposal, at one or more project meetings, to City staff, The Arts Commission or members thereof, or other individuals and organizations, as needed. Artist agrees to collaborate closely with City through meetings or other necessary means of communication to thoroughly integrate feedback into the design.

- h. A preliminary estimate of the costs associated with the artwork (see below for eligible expenses) that totals no more than \$135,000. This budget must cover all costs related to the design, fabrication, insuring, transportation and installation of Artwork including, but not limited to the following:
- The cost of all materials to be used in the fabrication of the Artwork, including applicable sales tax
 - Software development and engineering, materials analysis and research
 - Costs of labor for assistants
 - Itemized general contractor and subcontractor costs
 - Permits or other fees
 - Insurance, including General Liability, Automobile Liability, and Workers Compensation, if applicable
 - Structural Engineering
 - Lighting
 - Travel and per diem
 - Crating, transporting and unloading the Artwork at the site and the costs of required labor and equipment used for these purposes
 - Fine Arts Insurance for the work during fabrication and while in transit
 - Storage costs both before and during installation, if applicable Itemized installation costs, including labor and equipment unless through no fault of Artist's the site is not ready for installation under the mutually agreed schedule, in which case, the City shall be responsible for any storage, or storage costs incurred
 - Costs of a project manager to oversee the installation if not to be done by the Artist
 - Photo documentation in an amount not to exceed \$2,500
 - Miscellaneous project costs

II. **Phase 2:** To be completed three months after receiving a notice to proceed from the City and delivery of the following:

- a. Engineering drawings;
- b. Estimates from suppliers and fabricators documenting project expenses;
- c. Receipt of required permits;
- d. A Final Design Proposal ("Final Proposal") for the Artwork in substantial conformance with the Conceptual.

The Final Design Proposal shall include:

- a. Details and location of the Work including an indication of form, scale and proposed materials;
- b. A detailed written description of the fabrication and installation methods ("Installation Specification");

- c. A detailed fabrication and installation schedule (“Installation Schedule”), describing Artist’s specific timelines for completing the Work;
- d. A project budget;
- e. Artist, at City’s option, shall be available to present the Final Proposal, at one or more project meetings, to City staff, The Committee for the Arts, the Project Architect, or other individuals and organizations, as needed. Artist agrees to collaborate closely with City through in-person meetings and other necessary means of communication to thoroughly integrate the Final Proposal into the architectural design of the proposed work of art.
- f. The City may approve, with minor changes, or disapprove the Final Proposal. In the event that the City disapproves the Final Proposal, or approves it with minor changes, the Artist, upon written notification by the City, shall respond to the changes in writing and submit up to two design modifications to the Final Proposal. Artist recognizes and agrees that the City will review the Final Proposal as revised and may make additional requests for changes regarding the revised Final Proposal.

III. Phase 3: To be completed 10 months after City approval of Phase 2 and receiving a notice to

- a. 50 percent completion of Artwork fabrication and approval by City staff
- b. 100 percent completion of Artwork fabrication and approval by City staff before transportation to site

Artist shall fabricate the Artwork in accordance with all Final Proposal drawings and Construction Drawings approved by the City. To the extent that any specification for the Artwork is not identified in the Final Proposal or in the Construction Drawings, Artist shall seek the City’s prior approval of these specifications before commencing with fabrication of the Artwork.

Artist shall notify the City when the Artwork is at 50 percent and 100 percent completion. City must review and approve Artwork at each phase before Artist proceeds with the succeeding phase.

IV. Phase 4: To be completed one month after City payment for completion of Phase 3b and is received by the Artist. Complete installation includes Artist installing artwork at the location as described in the Final Proposal and in accordance with the installation methods approved by the City. City will provide reasonable assistance to Artist in support of the procurement of permits that may be required for installation of the Work.

V. Phase 5: To be completed one month after Phase 3 is completed. Upon completion and installation of the Work, and acceptance of the Work by City, Artist shall complete the Maintenance Report attached hereto as Exhibit III to the satisfaction of the City, and submit 20 high resolution digital images of the fabrication and installation of the Artwork, and the completed Artwork to City. Artist will submit proof of all Final and Special Inspection documents. If requested by the City, Artist will deliver one Public Lecture within one year of

project completion on a date to be mutually determined by the Artist and City staff.

In no event shall Artist begin work on any Milestone or Phase without first receiving a written Notice to Proceed from City.

Artist Warranties.

Restoration of Work Site. Artist agrees and warrants that, within 30 days after the Work is accepted by the City, Artist shall restore the Work site (including the entire area affected by the fabrication and installation of the Work) to a state and condition that is substantially similar to that which existed when the Work was begun. Artist further agrees and warrants that, within the period specified herein, Artist shall repair or replace, as is determined necessary by the City, and to the reasonable satisfaction of the City, all property (real, personal or otherwise), which has been damaged, injured or otherwise adversely affected by the acts or omissions of Artist, Artist's agents, contractors, or employees. Artist shall be solely responsible for all expenses and costs which may be necessary to comply with the requirements of this paragraph, and the City shall have no responsibility or liability therefore.

Originality of Work. Artist warrants that the Work is original and is solely the product of Artist's own creative efforts and does not infringe the rights, including copyrights, of any person or entity. Artist also warrants that, unless otherwise stipulated in writing, the Work is original, that it is an edition of one (1), and that Artist shall not sell, license, perform or reproduce a substantially similar copy of the Work without the prior written consent of City. However, nothing contained herein shall prevent the Artist from creating future works in his style and manner of working.

Copyright. Artist owns the copyright. Artist expressly reserves every right available to Artist at common law or under the Federal Copyright Act to control the making and dissemination of copies or reproductions of the Work. Artist authorizes the City and its assigns to make photographs, drawings, and other two-dimensional reproductions of the Work without prior consent of Artist if used solely for non-commercial purposes, advertising, descriptive brochures, and similar purposes.

Work Free from Defects. Artist shall warrant and maintain the Work free from all faults or defects related to material or workmanship for a period of one year after the Work is accepted by the City.

Transfer of Title to Work. Title to the Work shall remain with the Artist until the City has accepted the Work as completed and it is installed to the satisfaction of the City. When the City has so certified, title shall transfer to the City. Artist shall bear all risk of loss of the Work until title has been transferred to the City, and the City agrees to inspect Work and accept Work within thirty (30) days of Artist's notification of completion, unless the provisions of identified in Acceptance of Work below apply. Artist shall not be liable for any damage not caused by the artist or subcontractors in between time of completed installation and acceptance of the art work by the City.

Performance Made Impossible. In the event it shall become impossible for Artist to complete the Work because of illness or injury, this Agreement may be terminated at the sole discretion of the City, and, in such event, all completed work, materials, and supplies related to the Work shall be delivered to the City and shall, along with the Proposal, become the City's sole property. The Artist will be compensated for all Work completed prior to becoming ill or injured. The City shall thereafter have no obligation to make any

additional or further payments to Artist, and Artist shall have no further or additional claims against the City with respect to the Work or such portion thereof as may be completed, or the Proposal, or with respect to any matter whatsoever pertaining to, affected by or embodied in this Agreement. In the event of such termination, the City may take such action as may appear to it appropriate under the circumstances, including, without limitation of the generality of the foregoing, commissioning another artist to complete the Work. In the event that the City completes the Work or arranges to have it completed, Artist's name shall be publicly displayed at, on or near the Work, unless Artist and City mutually agree otherwise.

Acceptance of Work. The City agrees to accept the completed Work unless the Work was not completed in conformance with the Proposal or the Specifications and to the City's satisfaction, as determined in the City's sole discretion.

Upon the City's refusal to accept the Work for the reasons stated above, the City shall have the right to: 1) request that Artist correct the deficiencies in the Work within a reasonable time, or 2) terminate this Agreement and recover all sums previously paid to Artist. Both remedies shall be independent and cumulative and in addition to any other remedy available to the City at law or equity. Enforcement of one such remedy shall not be exclusive nor shall it be deemed an election of such remedy to the exclusion of any other or further remedy. However, nothing contained herein shall limit City's available remedies at law and equity.

No payments to Artist shall be deemed as a waiver of the City's right to refuse to accept the Work.

City Maintenance of Work. City agrees to reasonably ensure that the Work is properly maintained and protected after City's acceptance of the Work. City agrees that it will not intentionally destroy damage, alter, modify or change the Work in any way. If an alteration should occur, either intentionally or unintentionally, the Work will no longer be represented as the work of the Artist without his or her written permission. This does not preclude the City's right to move or remove the Work from display or deaccession the Work. In the event it becomes necessary to change the placement of the Work, City shall confer with Artist concerning placement, though the ultimate placement of the Work is solely within the City's discretion.

Repair of Work. In the event repair of the Work is required, City may give Artist the opportunity to perform the repairs for a reasonable fee to be determined. In the event Artist refuses to make the repairs whether due to lack of agreement on the fee, or otherwise, City may arrange for repairs by another qualified person. 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 constitute an artistic alteration. City shall thereafter notify Artist as soon as is practicable.

Work Authorship. City shall ensure that Artist's name is publicly displayed on, at, or near the Work. In the event the Work is substantially damaged or altered, City shall no longer represent the Work to be the Work of Artist if Artist gives written notice to City that Artist denies authorship of the Work on the grounds stated in this paragraph.

Property of the City. It is mutually agreed that the Work, and all materials and components prepared by Artist related thereto under this Agreement, shall become the property of City, and Artist shall have no property right therein whatsoever. Immediately upon termination and/or completion of this Agreement, City shall be entitled to, and Artist shall deliver to City, reports, investigations, appraisals, inventories, studies,

analyses, drawings and data estimates performed to that date, whether completed or not, and other such materials as may have been prepared or accumulated to date by Artist in performing this Agreement which is not Artist's privileged information, as defined by law, or Artist's personnel information, along with all other property belonging exclusively to City which is in Artist's possession. Publication of any information derived from work performed or data obtained in connection with services rendered under this Agreement must be approved in writing by City. Additionally, it is agreed that the Parties intend this to be an agreement for services and each considers the products and results of the services to be rendered by Artist hereunder to be work made for hire.

Waiver of VARA and CAPA Rights. With the exception of Artist's rights as to third parties, Artist waives any and all rights Artist may have with respect to the Work under the federal Visual Artists Rights Act of 1990 (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 et seq.), and any other local, state, federal or international laws that convey rights of the same nature as those conveyed under 17 U.S.C. §106A, Cal. Civil Code §§987 et seq., or any other type of moral right protecting the integrity of works of art.

Location of Work. The final location of the Work shall be determined by the City's architect or engineer following consultation with Artist.

Excuse from Performance. In the event Artist's performance of any of his obligations or undertakings under this Agreement is delayed, interrupted, or prevented by an act of God, unforeseen conditions, unusually severe weather, or occurrences that are beyond the reasonable control of either party to this Agreement, Artist shall be excused from any further performance for whatever period of time after the occurrence necessary to remedy the effects of that occurrence. Artist shall notify City in writing within ten (10) days after any occurrence described in this section that may delay Artist performance. City shall amend the Installation Schedule when, in its determination, Artist's performance has been excused, and the delay or interruption has resulted in a material change in the time for performance.

In the event that the installation site has not been adequately prepared for receipt of the Work as scheduled, or delivery or installation is delayed due to a material failure on the part of the City or its subcontractors, then the City shall promptly act to address the problem(s) identified by Artist. In such events, timelines for performance by Artist shall be extended as needed, provided, that none of the delays are caused in whole or in part by Artist. Site preparation by City shall not include site measurements, which shall be the sole responsibility of Artist.

Public Lecture. If requested by the City, Artist will give one public art lecture regarding the Work after the installation of the Work is completed. Arrangements are to be approved in advance by the City.

Model. As part of this Agreement, Artist will provide the City one (1) model and/or drawing of the proposed artwork.

EXHIBIT B

COMPENSATION SCHEDULE & REIMBURSABLE EXPENSES

Funds have been allocated by the City for the selection, purchase and placement of artwork to be installed at the San Leandro Public Library located at 300 Estudillo Avenue, San Leandro, CA. The artist was selected through a competitive process and the artwork concept was approved by the San Leandro Arts Commission. Upon signing of this contract, the City and Contractor agree on the following allocation of payment schedule.

I. Compensation Schedule and Payment

- A. The payment is to not exceed one hundred and thirty-five thousand dollars (\$135,000) total.
- B. Payments to Artist shall be made within 30 days after receipt of Artist's invoices. Artist shall be responsible for the cost of supplying all documentation necessary to verify the billings to the satisfaction of City. Artist agrees that City has no obligations regarding commissions or any agreements with galleries or agents with whom Artist may have contracted. The City is not responsible for paying sales tax.
- C. Payments to Artist will be made upon completion of the following tasks as described in Exhibit A:
 - (1) Ten thousand dollars (\$10,000) upon submission of certificates of insurance acceptable to the City, execution of this Agreement, and dispatch of purchase order.
 - (2) Fifteen thousand dollars (\$15,000) upon completion of Phase 1.
 - (3) Forty thousand dollars (\$40,000) upon completion of Phase 2.
 - (4) Thirty thousand dollars (\$30,000) upon completion of Phase 3.a.
 - (5) Twenty-five thousand dollars (\$25,000) upon completion of Phase 3.b. milestone.
 - (6) Ten thousand dollars (\$10,000) upon completion of Phase 4.
 - (7) Five thousand dollars (\$5,000) upon completion of Phase 5.
- D. No payment shall be made if Artist is in default of this Agreement or if any milestone or Phase is not completed to the satisfaction of City. City shall have sole discretion to determine whether a milestone or Phase has been completed to its satisfaction.

EXHIBIT C

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 Contractor 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 Contractor 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 or work.
- B. In accordance with California Labor Code Section 1775, the Contractor and any subcontractors engaged in performance of the services described in Exhibit A shall comply with California Labor Code Section 1775, which establishes penalties per day for each worker engaged in the performance of the services described in Exhibit A that the Contractor 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 Contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous record of the Contractor or subcontractor in meeting applicable prevailing wage obligations, or the willful failure by the Contractor 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 Contractor or subcontractor had knowledge of their

obligations under the California Labor Code. The Contractor 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 Contractor is not liable for any penalties therefore unless the Contractor had knowledge of that failure or unless the Contractor fails to comply with all of the following requirements:

1. The contract executed between the Contractor 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 Contractor 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 Contractor 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 Contractor 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 Contractor 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 sent directly to the Labor Commissioner, and 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 Contractor, on behalf of the Contractor 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 Contractor 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 Contractor 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.