

**THIS STAFF REPORT COVERS CALENDAR ITEM NO: 13  
FOR THE MEETING OF: July 15, 2010**

**TRANSBAY JOINT POWERS AUTHORITY**

**BRIEF DESCRIPTION:**

Approve the design concepts and budgets for the following four artists recommended by the Transbay Public Art Steering Committee: James Carpenter, Julie Chang, Jenny Holzer and Ned Kahn, and authorize the Executive Director to enter into an agreement with each of the artists for design development, construction documents, project administration and oversight of fabrication and installation.

**EXPLANATION:**

The TJPA established a public art program budget of \$4.75 million and entered into an intergovernmental agreement with the San Francisco Arts Commission (SFAC) in May of 2008. The SFAC managed the establishment of a Steering Committee, which conducted the artist selection process. The artists presenting today were approved by the TJPA Board on September 10, 2009 to enter into an MOU with the SFAC to develop conceptual proposals for specific sites in the new Transbay Transit Center. SFAC has coordinated the site selection and development of each artist's project and budget in conjunction with Pelli Clarke Pelli Architects. If the artists' concepts and budgets are approved today, each artist will enter into an agreement with the TJPA substantially similar to the form attached hereto. A fifth concept is under development and will be presented to the Board at a future date.

Since the September approval of concepts, individual meetings have taken place with each artist. The sites selected by the artists in conjunction with the architects and TJPA are architecturally significant, highly visible and prominent within the architectural hierarchy of the building. During the past eleven months, each of the artists has worked very closely with the PCPA team, made periodic presentations at key junctions in their concept and design process to the Steering Committee and has been in regular contact with Arts Commission Director of Programs Jill Manton. The artworks being presented today are:

- James Carpenter – Shaw Alley Light Fields
- Julie Chang – Grand Hall Terrazzo Floor
- Jenny Holzer – Bus Level Enclosure LED Array
- Ned Kahn – Bus Jet Fountain

The proposed budgets for each artwork are below. The budget includes all materials, fabrication, and installation costs. Artist fees vary for each project as some artists will be directly involved in fabrication and responsible for purchasing materials whereas others will be developing construction documents and then overseeing installation by construction contractors subcontracted to the CM/GC.

<b>Artwork</b>	<b>Total Budget</b>	<b>Artist Fee (included in budget)</b>
Shaw Alley Light Fields	\$1,000,000	\$240,000
Grand Hall Terrazzo Floor	\$1,107,500	\$145,000
Bus Level LED Array	\$1,025,000	\$260,000
Bus Jet Fountain	\$378,300	\$353,500

The SFAC has had the opportunity to review each of the artists' proposals and is in full support of the work they have reviewed. Even though the Arts Commission has no formal jurisdiction over the projects,

TJPA staff respects their expertise and believes they add value to the review process. The SFAC President was so impressed with the originality, strength and quality of the artists' proposals that he requested that the proposals be presented to the full Arts Commission.

In addition, the SFAC is in the process of working with an outside conservator to evaluate each proposal for maintenance and operation, replacement costs, resistance to vandalism and longevity. A draft report has been submitted, and the final report will be presented to the Steering Committee and TJPA staff after the completion of design development by the artists.

TJPA would like to thank the Pelli Clarke Pelli team and the SFAC for their high level, intelligent and creative collaboration with the artists.

### Public Art Program Background

The five members of the Public Art Steering Committee are Maria Ayerdi-Kaplan, TJPA Executive Director; Luis R. Cancel, Director of Cultural Affairs of the SFAC; Fred Clarke, Pelli Clarke Pelli Architects; Commissioner JD Beltran, Member Visual Arts Committee of the SFAC/Artist and Professor at the San Francisco Art Institute; and Blake Summers, Director and Chief Curator, San Francisco International Airport Museums and Exhibition Program. The work ascribed to the Steering Committee in the intergovernmental agreement includes general oversight of the development of the Art Program such as recommending policies for and objectives of the Art Program; approving the selection of artists and reviewing and approving the artists' proposals and corresponding budgets prior to requesting TJPA Board approval.

The goals and objectives established by the Steering Committee for the Transbay Transit Center Public Art Program are as follows:

- Artworks commissioned for the Transbay Transit Center must be of an appropriate scale and impact to respond to the monumentality and sculptural quality of the architectural design.
- The artist's designs should be timeless and meaningful over the many future decades of the life of the building and should be complex and dynamic enough to maintain interest over time and repeated viewings.
- The artwork should reflect the prestige and civic importance of the building.
- The artwork should be bold, original and unique to San Francisco.
- The artwork should be visually provocative and sophisticated in a way that reflects the San Francisco Bay Area as a leading urban center and cultural destination.
- The artwork should serve as a focal point or landmark within the architectural context of the location where it will be situated.
- The artwork should affect the visitor's experience of the space by enlivening and animating the space with color and light; creating a sense of calm or repose; or responding to the way people will move through the building and how the public will use the space.
- The artwork should provide a visual connection between ground level and roof top Public Park and highlight the vertical visibility and circulation throughout the building and encourage pedestrians from Mission Street to enter into building (This may be a criteria specific to sites such as Mission Square or the Grand Concourse.)
- Artwork acquired and accepted into the TJPA collection should be appropriate to the context of its intended display location at the Transbay Transit Center, and be relevant within the cultural, historical, social/political, design and environmental context of San Francisco and the Bay Area.
- All artworks commissioned must be permanent and require only routine maintenance in order to be maintained in excellent condition.
- The Transbay Transit Center Public Art Program should be diverse in its representation of artists and artistic styles and be reflective of the ethnic diversity of the San Francisco Bay Area population.

The Art Program will be implemented in two phases. Phase I will focus on significant artworks in the Grand Concourse, the building façade, the primary light column, and the rooftop park, as presented today. Phase II of the public art program, pending the future availability of funding, will include multiple smaller-scale opportunities for local San Francisco Bay Area artists in the passenger lobbies, corridors, passageways, pedestrian entrances, pedestrian bridges, treatment of chain link fencing and a new park planned at Second and Howard Streets. There will also be opportunities for artwork created from salvaged artifacts from the Transbay Terminal, as well as the development of preliminary guidelines for a temporary public art or exhibition program and the determination of its location. The SFAC will work to identify other sources of funding, both public and private, to support the implementation of a second phase.

**RECOMMENDATION:**

Approve the design concepts and budgets for the following four artists recommended by the Transbay Public Art Steering Committee: James Carpenter, Julie Chang, Jenny Holzer and Ned Kahn, and authorize the Executive Director to enter into an agreement with each of the artists for design development, construction documents, project administration and oversight of fabrication and installation.

**ENCLOSURES:**

1. Resolution
2. Sample Artist Contract
3. Proposed Art Descriptions

**TRANSBAY JOINT POWERS AUTHORITY  
BOARD OF DIRECTORS**

**Resolution No. \_\_\_\_\_**

WHEREAS, The Transbay Joint Powers Authority (TJPA) acknowledges the importance of art in making public spaces more enjoyable, improving the quality of life in the community, and adding value to the public transportation experience; and

WHEREAS, The TJPA has approved the development of a Public Art Program of the highest standards that will enhance the national and international prestige of the overall Transbay Transit Center Program; and

WHEREAS, The TJPA has expressed its desire to commission original and exceptional artworks that are complementary to the Transbay Transit Center Program's mission, purpose and architectural design, and appropriate for the Transbay Transit Center's constituency and the general public; and

WHEREAS, The San Francisco Arts Commission (SFAC) has been engaged with the TJPA since 2008, planning the objectives and criteria that will guide the development of the program, coordinating the artist selection process, initiating development of an Arts Master Plan and eventually will manage the installation of public art as part of the Transbay Program; and

WHEREAS, A Public Art Steering Committee has been established by the TJPA and SFAC and has established goals and objectives for the TJPA Public Art Program; and

WHEREAS, The SFAC conducted an invitational competition to expedite the selection of artists for Phase I of the TJPA Public Art Program to allow for the maximum interface and coordination between artist design and the design and engineering of the building, and the Steering Committee reviewed the work of thirty-two artists, interviewing ten; and

WHEREAS, On September 10, 2009, the TJPA Board of Directors (TJPA Board) approved the selection of James Carpenter, Julie Chang, Jenny Holzer, and Ned Kahn and authorized the San Francisco Arts Commission to execute MOUs on behalf of the TJPA for each of the artists to develop conceptual proposals and corresponding budgets in coordination with the Transbay Transit Center Architect; and

WHEREAS, The four artists have successfully completed their scope of work and their respective proposals have been approved by the TJPA Steering Committee; now, therefore, be it

RESOLVED, That the TJPA Board authorizes the Executive Director to enter into an agreement with artist James Carpenter Design Associates, Inc. for an amount not to exceed \$240,000 for artist's services related to the production of design development documents, construction documents, project administration and oversight of fabrication and installation for

an art installation to be implemented at Shaw Alley involving artist design overhead lighting fixtures, illuminated benches, illuminated glass pavers and specialized paving; and be it

FURTHER RESOLVED, That the TJPA Board authorizes the Executive Director to enter into an agreement with artist Jenny Holzer Studios for an amount not to exceed \$260,000 for artist's services related to the production of design development documents, construction documents, project administration and oversight of fabrication and installation of a light based text installation for the mezzanine railing of the Spiral Light column within the Grand Concourse; and be it

FURTHER RESOLVED, That the TJPA Board authorizes the Executive Director to enter into an agreement with artist Ned Kahn for an amount not to exceed \$353,500 for artist's services related to the production of design development documents, construction documents, project administration, consultant's fees, production of prototypes, purchase and calibration of sensors and oversight of fabrication and installation of sensors that will activate a fountain in the rooftop park based upon the movement and frequency of buses moving through the bus deck; and be it

FURTHER RESOLVED, That the TJPA Board authorizes the Executive Director to enter into an agreement with artist Julie Chang for an amount not to exceed \$145,000 for artist's services related to the production of design development documents, construction documents and project oversight for her unique design of the 24,000 square foot terrazzo floor of the Grand Concourse.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of July 15, 2010.

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Secretary, Transbay Joint Powers Authority

**AGREEMENT BETWEEN THE  
TRANSBAY JOINT POWERS AUTHORITY AND  
<<INSERT NAME OF ARTIST>>**

This AGREEMENT is made this <<INSERT DAY>> day of <<INSERT MONTH, YEAR>> in the City and County of San Francisco, State of California, by and between the Transbay Joint Powers Authority (the "TJPA") and <<INSERT NAME AND ADDRESS OF ARTIST>>, (the "Artist" or "Contractor"), for the purposes and on the terms and conditions set forth below.

**Recitals**

**A.** The TJPA is responsible for implementing the Transbay Transit Center Program (the "Program"). The Program includes the construction of a new multi-modal Transit Center on the site of the existing Transbay Terminal at First and Mission Streets in San Francisco, an extension of Caltrain from its existing terminus at Fourth and Townsend Streets through a tunnel to the new Transit Center, and the construction of new bus ramps and bus storage facilities. The TJPA has allocated budget for the acquisition and installation of artwork for the new Transbay Transit Center building;

**B.** By intergovernmental memorandum of understanding, the TJPA has retained the San Francisco Arts Commission (the "SFAC") to manage the selection of artists and artwork for the Transit Center and to assist in the oversight of artwork fabrication and installation;

**C.** On October 20, 2009, the SFAC and the Artist entered into a memorandum of understanding for development and submission of preliminary design, budget and presentation (the "Conceptual Proposal MOU"). Under the Conceptual Proposal MOU, the Artist has submitted a preliminary design and budget for the proposed artwork.

**D.** On July 15, 2010, by Resolution No. \_\_\_\_\_, the TJPA Board approved the Artist's preliminary design and budget for the proposed artwork and authorized the Executive Director to execute an Agreement for the completion of the artwork, including development of detailed plans and specifications, and the Artist's consultation and oversight for fabrication and installation of the artwork.

**E.** The TJPA and the Artist intend that this Agreement comply with the regulations of the Federal Transit Administration and Federal Railroad Administration of the United States Department of Transportation ("FTA" and "FRA", respectively).

**F.** The Artist acknowledges and agrees that he/she is ready, able, and willing to perform the services to complete the artwork under the terms and conditions set forth in this Agreement.

Now, THEREFORE, the TJPA and the Artist, hereby agree as follows:

**Definitions**

Where any word or phrase defined below, or a pronoun used in place thereof, whether singular or plural, is used in any part of this Agreement or the Contract Documents, it shall be considered neutral in gender and have the meaning set forth below:

a. "ADA" shall mean the Americans with Disabilities Act (including all rules and regulations thereunder), Title 24 (California Building Code) and all other applicable federal, state and local disabled access legislation, as the same may be amended, modified or supplemented from time to time.

b. "Agreement" shall mean this agreement, including all addenda, appendices and modifications, whether created now or in the future.

c. "Alter" or "Alteration" shall mean, with respect to the Artwork, to alter, repair, modify, remove, relocate, sell, dispose of, distort, destroy, mutilate, or deface.

d. "Approved Costs" shall mean such costs as are scheduled on Appendix C, "Artist's Costs," including the maximum expenditure authorized for each item.

e. "Architect" shall mean the firm of Pelli Clarke Pelli Architects, Inc., retained by the TJPA to design the Transbay Transit Center.

f. "Artist" or "Contractor" shall mean: <<**INSERT NAME OF ARTIST**>>. Where there is more than one Artist, all Artists shall be referred to collectively as "Artist." If Artist is comprised of two or more individual persons or entities, each individual person or entity shall be jointly and severally responsible for satisfying Artist's obligations under this Agreement, and each individual person or entity shall be liable for the acts and omissions of every other individual person or entity comprising Artist.

g. "Artwork" shall mean the work of art designed by Artist for the Transbay Transit Center Program under the terms of this Agreement, as described and defined in the Preliminary Design and Budget, attached to this Agreement as Appendix A and incorporated by reference as if set forth here in full.

h. "Authorization" shall mean a Notice to Proceed, or Purchase Order of TJPA properly executed by the TJPA Executive Director, and certified by the TJPA Finance Coordinator for the specific funding of this Agreement or any modification thereof.

i. "Board" or "TJPA Board" shall mean the Transbay Joint Powers Authority Board.

j. "Budget" shall mean a specific and detailed document identifying the cost of completion of all Work under this Agreement, including all modifications. The Budget shall include the costs for all design fees and costs; preliminary and final engineering requirements; estimates of ongoing maintenance needs; materials and labor for fabrication, including Artist and subcontractors' costs; consultants, including engineers and specifications writers; transportation of Artwork; installation of Artwork, including any necessary permits; permits and licenses; required insurance; any sales tax; post-installation maintenance and staff operation or monitoring required for the Artwork by Artist and a 10% contingency allowance. Budget shall also include anticipated costs associated with ongoing maintenance and operation of Artwork and/or replacement/upgrade of any part of the Artwork and associated moving parts or equipment including any staff time involved in displaying, supervising or operating Artwork.

k. "City" shall mean City and County of San Francisco, a municipal corporation.

l. "Conceptual Design" shall mean drawings (in plan and elevation) and/or 3-dimensional models, a written description, proposed materials and samples and cost estimates at 30% design completion. The information provided in Conceptual Design shall be complete enough to fully illustrate the design intent of the Artwork.

m. "Construction Documents" shall mean final and complete architectural, structural, mechanical and engineering drawings, written specifications, structural and engineering calculations at 100% design completion, prepared by Artist or Artist's subcontractors, setting forth in detail the design and specifications of the Artwork and which are suitable for bidding. Construction Documents shall describe and fix the location, size, materials and character of the Artwork with respect to architectural, structural engineering, mechanical and electrical systems, materials, colors, method of attachment and fabrication methods, and other such elements as may be appropriate. Construction Documents must be signed and stamped by design professionals licensed in the State of California as required by the California Building Code and any local amendments thereto.

n. "Contingency Allowance" shall mean a portion of the Budget reserved by the TJPA for design, construction, installation or other related costs that, due to factors beyond the control of the Artist or General Contractor, exceed the initial budget estimates.

o. "Contract Documents" shall mean any work, including but not limited to, Design and Construction Documents, Shop Drawings, Mock-ups, models, engineering calculations, approved installation plans, and all material samples and product data, project budget, and any and all additional documents and submittals produced under this Agreement that the TJPA has approved and to which the completed Artwork is expected to conform.

p. "Contractor" see "Artist".

q. "Design Development Documents" shall mean presentation quality materials, which shall include colored drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the Artwork and how it will be installed at the Site, mock-ups, final color and materials samples, proposed fabrication methods, feasibility studies and final cost estimates at design completion. When used in reference to the proposed Artwork, Design Development Documents shall fix and describe the size and character of the Artwork with respect to its relationship to the Site, including architectural, structural, mechanical and electrical systems, materials and other elements as may be appropriate.

r. "Executive Director" shall mean the Executive Director of the TJPA.

s. "General Contractor" or "CM/GC" shall mean the construction manager/general contractor hired by TJPA to construct the Transbay Transit Center.

t. "Force Majeure" with respect to a delay in or prevention of performance shall mean (a) any strike, lockout or other labor or industrial disturbance (whether or not on the part of the employees of either party), civil disturbance, future order claiming jurisdiction, act of the public enemy, war, riot, sabotage, blockade, embargo, inability to secure customary materials, supplies or labor through ordinary sources by reason of regulation or order of any government or regulatory body; (b) any changes in any applicable laws or the interpretation thereof; or (c) any flood, washout, explosion, or any other cause beyond the reasonable control of the party from whom performance is required.

u. "Mock-ups" or "Samples" shall mean illustrations such as standard schedules, performance charts, instructions, brochures, diagrams, and physical samples of all or any portion of the Work, and other information furnished by Artist to illustrate materials or equipment for all or any portion of the Work. The purpose of the Mock-ups and Samples is to provide physical examples that illustrate materials, equipment or workmanship and establish the standards by which the Work will be judged.



v. "Notice To Proceed" or "NTP" shall mean the written notice by the TJPA issued at the TJPA's sole discretion authorizing the Artist to proceed with a particular phase of the Work.

w. "Preliminary Design" shall mean the proposed visual, aesthetic, and artistic intent and design of the Artwork. The most recent Preliminary Design approved by the Board is attached to this Agreement as Appendix A (see "Artwork"), and is binding unless changes are approved by resolution of the Board.

x. "Public Work" shall have the same meaning as under San Francisco Administrative Code Section 6.1, as currently written or as may be amended from time to time.

y. "SFAC" shall mean the San Francisco Arts Commission.

z. "Shop Drawings" shall mean drawings, diagrams and other data specifically prepared by Artist or Artist's subcontractors, fabricators, manufacturers, suppliers, General Contractor, or distributors illustrating in detail exactly how the Work, or any element thereof, is to be fabricated and installed. Shop Drawings shall be signed and stamped by a licensed design professional unless this requirement is specifically waived by the TJPA.

aa. "Site" shall mean the specific location at the Transbay Transit Center where the Artwork will be installed.

bb. "TJPA" or "Transbay Joint Powers Authority" is a public entity charged with the duties associated with implementing the Transbay Transit Center Program.

cc. "Work" shall mean the work of Artist pertaining to providing the TJPA with the services and deliverables as required under this Agreement. The Work shall not include the actual fabrication, delivery or installation of the Artwork but shall include the development of Design Development and Construction Document plans and specifications and any consultation and/or oversight necessary for or during the fabrication and installation of the Artwork to achieve the intent of the Preliminary Design (Appendix A), as modified only by approval of the TJPA or the Board as appropriate.

dd. Whenever the words "as directed," "as required," "as permitted," or words of like effect are used, it shall be understood as the direction, requirement, or permission of the TJPA. The words "sufficient," "necessary," or "proper," and the like, mean sufficient, necessary or proper in the judgment of the TJPA. The words "approval," "acceptable," "satisfactory," or words of like import, shall mean approved by, or acceptable to, or satisfactory to the TJPA, unless otherwise indicated by the context. The terms "include," "included" or "including" and similar terms shall be deemed to be followed by the words "without limitation."

## **Terms and Conditions**

### **1. Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non-Appropriation**

This Agreement is subject to the budget and fiscal provisions of 'the TJPA. Charges will accrue only after prior written authorization certified by the TJPA Chief Financial Officer. The TJPA's obligation under this Agreement shall not at any time exceed the amount certified for the purpose and period stated in such certification.

This Agreement will terminate without penalty, liability or expense of any kind to TJPA at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are

appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated.

TJPA has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. TJPA budget decisions are subject to the discretion of the Board. Artist's assumption of risk of possible non-appropriation is part of the consideration for this Agreement.

THIS SECTION CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS AGREEMENT.

## **2. Term of the Agreement**

The term of this Agreement shall be from <<INSERT BEGINNING DATE>> to <<INSERT TERMINATION DATE>>, unless extended by subsequent contract modification pursuant to the contract modification requirements in this Agreement. Notwithstanding the above, this Agreement may be extended by mutual written agreement of the parties for a period not to exceed two years beyond the initial term, provided that such extension does not create a contract with a total aggregate term of more than 9 years.

## **3. Effective Date of Agreement**

This Agreement shall become effective when the Chief Financial Officer has certified to the availability of funds and Artist has been notified in writing.

## **4. Services Artist Agrees to Perform; Procedure for Execution of Work; Budget; Consultation**

**a. Services.** Artist agrees to perform the services necessary to complete the plans and specifications for the Artwork and to consult as to and/or oversee the fabrication and installation of the Artwork, as depicted by the Preliminary Design (Appendix A) and as more specifically provided for in Appendix B, "Services to be Provided by Artist," attached to this Agreement and incorporated by reference as though set forth here in full, as well as any scope of services included in any subsequent modification to this Agreement.

### **b. Procedure for Execution of Work**

(1) The TJPA and the Artist generally intend that Artist will complete the design and will provide all necessary consultation or oversight for the fabrication and installation of the Artwork at the Site, provided that TJPA determines, in its sole discretion, to proceed with the completion of the Artwork. The Work shall be completed in four separately defined, successive stages ("Phases"): Phase 1 shall be the Design Development Phase; Phase 2 shall be Construction Documents Phase; Phase 3 shall be the Fabrication Phase; and Phase 4 shall be the Installation Phase. In addition to the Phase(s) set forth in Appendix A at the time this initial Agreement is entered into, the parties may modify this Agreement to include additional or subsequent Phases. Each Phase shall be governed by this Agreement, and by any modifications to this Agreement setting forth specific terms and conditions governing each Phase of Work. Each modification will include the Phase for which the TJPA has given authorization, the scope of work covered by that Phase, the schedule of deliverables, insurance requirements, and payment terms.

(2) By authorizing any particular Phase, the TJPA is not obligated to authorize any subsequent Phase. Subject to the limitations contained in this Agreement, the TJPA may terminate this Agreement at any time and is under no obligation to modify the Agreement to include subsequent Phases.

(3) Artist shall not commence any Phase nor incur any expense in anticipation of commencing any Phase unless the TJPA has given prior written authorization, by Notice To Proceed ("NTP") and the TJPA Chief Financial Officer has certified the availability of funds. Prior to beginning each Phase, Artist shall obtain the necessary approval of the previous Phase. In no event shall TJPA be liable for any claims or damages arising from Artist's unauthorized actions.

(4) If requested to do so in writing by the TJPA, Artist shall enter into modifications of this Agreement to include later Phases of the Work, up to and including final installation at TJPA's option. Artist's fee for such subsequent Phases shall be in accordance with the Budget approved by the Board. TJPA must exercise its option to require a subsequent Phase within 3 years of completion of the prior Phase. If TJPA fails timely to exercise its option, Artist is released from its obligation under this Section. Artist acknowledges that TJPA has provided to Artist a model contract template for Phases 1 through 4 of the Work, from design development through fabrication and installation. Artist agrees that, if TJPA exercises its option to enter into subsequent Phases of Work, Artist shall be bound to modify this Agreement to include such additional Phases of Work under the terms and conditions set forth in such model contract templates.

(5) The Work to be completed by Artist is unique and personal to Artist, and may not be capable of completion by anyone other than Artist. Therefore, if Artist fails or refuses to modify this Agreement to include subsequent Phases after having been requested to do so by the TJPA, or fails to complete the Work required by any Phase, the TJPA may require that Artist return all payments made under this Agreement from the initiation of the Agreement. If the TJPA determines, in its sole and reasonable discretion, that Artist's failure or refusal to complete subsequent Phases is justifiable and in good faith and for reasons beyond the control of Artist, the TJPA may authorize Artist to keep payments made under this Agreement for prior completed Phases. In such case, the TJPA may, at its option, engage another Artist to complete the Work.

**c. Budget.** Artist acknowledges and agrees that the Budget for all materials and labor necessary for the complete fabrication, delivery, and installation of the Artwork is \$XXXXXXXXXXXXXXXXXXXX. The Budget does not include the Artist's compensation under this Agreement (see paragraph 5, below); Artist acknowledges and agrees that the Budget amount will be paid either to the Artist or to the CM/GC or other contractors actually procuring the materials and performing the actual fabrication, delivery, or installation of the Artwork. The Budget shall be binding upon Artist. If Artist is unable to provide the completed and installed Artwork to TJPA within the approved Budget, Artist will be considered to be in breach of this Agreement. The Budget, in addition to allowing for all costs anticipated for the fabrication, transportation and installation of the Work, shall also allow for a 10% contingency allowance. Artist's use of the contingency allowance must be approved in advance in writing by TJPA staff. Any balance remaining in the materials budget or contingency allowance at the conclusion of the Agreement reverts to the TJPA. The Budget shall also include an estimate of the costs of on-going maintenance of the Work. Such maintenance costs shall not be provided out of the Contract Amount unless the TJPA specifically requires in writing that the Artist allocate a portion of the Contract Amount to on-going maintenance costs.

**d. Consultation.** Artist agrees to cooperate in good faith with the TJPA and to be available as reasonably necessary for consultation with the TJPA, Architect, and General Contractor during all stages of the Work. The TJPA agrees to facilitate cooperation and arrange for and coordinate all necessary consultation among the TJPA, Artist, Architect, and General Contractor.

(1) Artist shall incorporate into the Contract Documents any changes made by the Architect to the Site design during the design process.

(2) Artist shall copy the TJPA and the SFAC on all correspondence between Artist, Architect, Construction Management Team, or General Contractor in which the TJPA or SFAC is not a party. Artist shall notify the TJPA and the SFAC in writing of any verbal agreements and/or understandings that are arrived at in conversations or meetings between Artist and Architect, Construction Management Team and/or General Contractor to which Board is not a party. Artist understands that failure to inform TJPA of such agreements, and failure to confirm such agreements in writing with TJPA and/or Client, Architect, Construction Management Team and/or General Contractor may result in such agreements not being honored.

## 5. Compensation

The total compensation due the Artist for his/her Work under this Agreement shall not exceed <<INSERT WHOLE DOLLAR AMOUNT IN NUMBERS AND WORDS -- NO PENNIES AND NO “.00”]>> (the "Compensation Sum"). The Compensation Sum includes the Artist's fee and all expenses associated with performing the Work. Out of the Compensation Sum, Artist shall be responsible for paying all of Artist's costs and expenses associated with the Work, including any overhead or administration costs, fees, taxes, permits, insurance, travel or transportation to and from meetings or presentations, and all other expenses associated with the scope of the Work specified in this Agreement.

The Compensation Sum does *not* include any labor and materials costs associated with the actual fabrication, delivery, or installation of the Artwork, which amounts are included as part of the Budget (see paragraph 4(c), above).

The TJPA shall remit the Compensation Sum commensurate with the Phases of Work (see paragraph 4(b), above), based upon Artist's successful completion of each Phase in the sole reasonable discretion of the TJPA Executive Director, as follows:

Phase 1: Design Development	25%
Phase 2: Construction Documents	25%
Phase 3: Fabrication	25%
Phase 4: Installation	25%

No charges shall be incurred under this Agreement nor shall any payments become due to Artist until deliverables, services, or both, required under this Agreement are received from Artist and approved by the TJPA as being in conformance with the terms and conditions of this Agreement. TJPA may withhold payment to Artist in any instance in which Artist has failed or refused to satisfy any material obligation provided for under this Agreement.

In no event shall TJPA be liable for interest or late charges for any late payments.

## 6. Guaranteed Maximum Costs

The TJPA's obligation hereunder shall not at any time exceed the amount certified by the TJPA Chief Financial Officer for the purpose and period stated in such certification.

Except as may be provided by laws governing emergency procedures, officers and employees of TJPA are not authorized to request, and TJPA is not required to reimburse Artist for, commodities or

services beyond the scope of this Agreement unless the changed scope is authorized by amendment and approved as required by law.

Officers and employees of TJPA are not authorized to offer or promise, nor is TJPA required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which this Agreement is certified without certification of the additional amount by the Controller.

The Chief Financial Officer is not authorized to make payments on any contract for which funds have not been certified as available in the TJPA budget.

## **7. Payments; Invoice Format; Suppliers and Subcontractors**

**a. Artist Invoices.** The Artist shall submit to the TJPA regular invoices in a form acceptable to the TJPA. At a minimum, invoices must identify this Agreement as "<<INSERT NAME OF PROJECT>>," and include the date of transaction, name and address of <<INSERT ARTIST'S NAME>>, interim payment number for which compensation is requested, and amount requested. <<INSERT ARTIST'S NAME>> must submit an original invoice, which must be accompanied by pre-printed and itemized receipts. TJPA shall make payment to <<INSERT ARTIST'S NAME>>'s address for notices in this Agreement. All amounts paid by TJPA to <<INSERT ARTIST'S NAME>> shall be subject to audit by TJPA.

**b. Supplier and Subcontractor Invoices.** Artist shall provide the TJPA with the name, address and telephone number of suppliers and subcontractors whose total invoices are expected to exceed one thousand dollars (\$1,000.00) prior to Artist beginning work under this Agreement, or as such expenses are incurred by Artist after certification of this Agreement.

## **8. Submitting False Claims; Monetary Penalties**

Pursuant to San Francisco Administrative Code §21.35 *et seq.*, any contractor, subcontractor or consultant who submits a false claim shall be liable to TJPA for statutory costs and penalties as provided by law. An Artist, subcontractor or consultant will be deemed to have submitted a false claim to TJPA if Artist, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of TJPA a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by TJPA; (c) conspires to defraud TJPA by getting a false claim allowed or paid by TJPA; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to TJPA; or (e) is a beneficiary of an inadvertent submission of a false claim to TJPA, subsequently discovers the falsity of the claim, and fails to disclose the false claim to TJPA within a reasonable time after discovery of the false claim.

## **9. Disallowance**

If Artist claims or receives payment from TJPA for a service, reimbursement for which is later disallowed by the State of California or United States Government, Artist shall promptly refund the disallowed amount to TJPA upon TJPA's request. At its option, TJPA may offset the amount disallowed from any payment due or to become due to Artist under this Agreement or any other Agreement.

By executing this Agreement, Artist certifies that Artist is not suspended, debarred or otherwise excluded from participation in federal assistance programs. Contractor acknowledges that this certification of eligibility to receive federal funds is a material term of the Agreement.

## **10. Taxes**

a. Any taxes levied upon the Agreement, the transaction, or the equipment or services delivered under this Agreement, including possessory interest taxes and California sales and use taxes, shall be borne by Artist.

b. Artist recognizes and understands that this Agreement may create a "possessory interest" for property tax purposes. Generally, such a possessory interest is not created unless the Agreement entitles the Artist to possession, occupancy, or use of TJPA property for private gain. If such a possessory interest is created, then the following shall apply:

(1) Artist, on behalf of himself and any permitted successors and assigns, recognizes and understands that Artist, and any permitted successors and assigns, may be subject to real property tax assessments on the possessory interest;

(2) Artist, on behalf of himself and any permitted successors and assigns, recognizes and understands that the creation, extension, renewal, or assignment of this Agreement may result in a "change in ownership" for purposes of real property taxes, and therefore may result in a revaluation of any possessory interest created by this Agreement. Artist accordingly agrees on behalf of itself and its permitted successors and assigns to report on behalf of TJPA to the County Assessor the information required by Revenue and Taxation Code section 480.5, as amended from time to time, and any successor provision.

(3) Artist, on behalf of himself and any permitted successors and assigns, recognizes and understands that other events also may cause a change of ownership of the possessory interest and result in the revaluation of the possessory interest (see, e.g., Rev. & Tax. Code section 64, as amended from time to time). Artist accordingly agrees on behalf of himself and its permitted successors and assigns to report any change in ownership to the County Assessor, the State Board of Equalization or other public agency as required by law.

(4) Artist further agrees to provide such other information as may be requested by TJPA to enable TJPA to comply with any reporting requirements for possessory interests that are imposed by applicable law.

## **11. Payment Does Not Imply Acceptance of Work; Approval and Final Acceptance**

a. Payment does not imply acceptance of work. The granting of any payment by TJPA, or the receipt thereof by Artist, shall in no way lessen the liability of Artist to replace unsatisfactory work, equipment, or materials although the unsatisfactory character of such work, equipment or materials may not have been apparent or detected at the time such payment was made. Materials, equipment, components, or workmanship that does not conform to the requirements of this Agreement may be rejected by TJPA and in such case must be replaced by Artist without delay.

b. Approval and Final Acceptance.

(1) The granting or withholding of any approval by the TJPA shall be determined by the TJPA in its sole and reasonable discretion. However, the TJPA shall approve all deliverables if they conform to plans or Contract Documents previously approved by the TJPA. If the TJPA withholds approval of any deliverables or Phase, in addition to other rights or remedies available to the TJPA under the Agreement or applicable law, the TJPA shall have the right to terminate this Agreement immediately and shall have no further obligations under this Agreement.

(2) Final Acceptance. Artist shall advise the TJPA in writing when Artist has completed all obligations, services and deliverables under this Agreement and all modifications. The TJPA promptly shall send a Notice of Response identifying in writing any obligations, services or deliverables that Artist has not satisfactorily met, any defects in Artist's performance, and the requirements for Artist to cure any such default. Artist shall have 20 days from dispatch of the Notice of Response to cure any defects in Artist's performance identified in the TJPA's Notice of Response. The Artwork shall not be finally accepted by TJPA unless the TJPA has issued a resolution of Final Acceptance. TJPA shall make a good faith effort to make a determination as to Final Acceptance promptly.

(3) Transbay Transit Center Art Collection. Upon Final Acceptance, the Board shall accession the Artwork into the Transbay Transit Center Art Collection.

#### **11A. Bonds**

a. Labor and Materials (Payment) and Performance Bonds: To the extent that the fabrication and/or installation of any artwork is a "Public Work" as defined by San Francisco Administrative Code Section 6.1(I), and any contract amount, including any subcontract amount, for such fabrication or installation exceeds \$25,000, the Artist or Artist's sub-contractors shall provide performance and payment bonds from a TJPA-approved surety under San Francisco Administrative Code Section 6.22(A). The bonds shall each be in an amount of not less than one hundred percent of the agreement for project-specific work. The performance bond shall name the TJPA as sole obligee if provided by the Artist. The bonds shall be on a TJPA-approved form provided by the TJPA to the Artist. The Artist shall submit the bonds to the TJPA for approval.

b. Bonds Provided by Subcontractors: Bonds provided by the Artist's sub-contractor shall identify the project and name as dual obligees the Artist and the TJPA. Upon written request by the TJPA, in the event of any of Artist's subcontractors' failure to perform, Artist shall assign all rights under any Performance and Payment or Labor and Materials bond in favor of TJPA. The bonds shall be on a TJPA-approved form provided by the TJPA to the Artist. The Artists shall submit the bonds to the TJPA for approval.

c. Labor and Materials (Payment) and Performance Bonds required at Board's Discretion: To the extent that the fabrication and/or installation of any artwork and the contract amount, including any subcontract amount for such fabrication or installation exceeds \$25,000, the TJPA may, at the TJPA's sole discretion, require Payment and Performance Bonds, whether or not the fabrication and or installation of the artwork is defined as a "Public Work" by the San Francisco Administrative Code. In such event, all the above requirements shall apply.

#### **11B. Licensed Contractor Requirements.**

If the fabrication and/or installation of the Artwork or any portion of the Artwork under this Agreement is a "Public Work" as defined by San Francisco Administrative Code Section 6.1 (I) and requires a licensed contractor, Artist shall be solely responsible for ensuring that Artist and Artist's subcontractors (if any) have valid appropriate licenses under California law or the applicable jurisdiction. If the Artist and/or any of Artist's subcontractors are unlicensed during any phase of the project under this Agreement, the TJPA shall have the right to bar Artist from receiving any payment for Artist's services.

**If Artist is not a licensed contractor, Artist shall not be able to subcontract with licensed contractors for fabrication and/or installation of the Artwork or any portion of the Artwork under this Agreement.**

## **12. Qualified Personnel**

Work under this Agreement shall be performed only by competent personnel under the supervision of and in the employment of Artist. Artist will comply with TJPA's reasonable requests regarding assignment of personnel, but all personnel, including those assigned at TJPA's request, must be supervised by Artist. Artist shall commit adequate resources to complete the project within the project schedule specified in this Agreement.

## **13. Responsibility for Equipment**

TJPA is not responsible for any damage to persons or property, including Artwork, as a result of the use, misuse or failure of any equipment used by Artist, or by any of its employees, even though such equipment be furnished, rented or loaned to Artist by TJPA. Artist, rather than TJPA, is responsible for site conditions and the health and safety of Artist's employees, subcontractors and agents, and all other persons that work on or visit the Site at the invitation of Artist.

## **14. Independent Contractor; Payment of Taxes and Other Expenses**

**a. Independent Contractor.** Artist shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which Artist performs the services and work requested by TJPA under this Agreement. Artist is liable for the acts and omissions of itself, its employees and its agents. Nothing in this Agreement shall be construed as creating an employment or agency relationship between TJPA and Artist.

Any terms in this Agreement referring to direction from TJPA or the Board shall be construed as providing for direction as to policy and the result of Artist's work only, and not as to the means by which such a result is obtained.

**b. Payment of Taxes and Other Expenses.** Should TJPA, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that Artist is an employee for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by Artist which can be applied against this liability). TJPA shall then forward those amounts to the relevant taxing authority.

Should a relevant taxing authority determine a liability for past services performed by Artist for TJPA, upon notification of such fact by TJPA, Artist shall promptly remit such amount due or arrange with TJPA to have the amount due withheld from future payments to Artist under this Agreement (again, offsetting any credits for amounts already paid by Artist which can be applied against this liability).

A determination of employment status pursuant to the preceding two paragraphs shall be solely for the purposes of the particular tax in question, and for all other purposes of this Agreement, Artist shall not be considered an employee of TJPA. Notwithstanding the foregoing, should any court, arbitrator, or administrative authority determine that Artist is an employee for any other purpose, then Artist agrees to a reduction in TJPA's financial liability so that TJPA's total expenses under this Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that Artist was not an employee.

## **15. Insurance**



**a. Required Insurance.** Without in any way limiting Artist's liability pursuant to Section 16, the "Indemnification and General Liability" section of this Agreement, Artist shall maintain, or cause to be maintained, in force insurance in the following amounts and coverages, or as modified in Appendix B. Artist shall obtain such insurance on or before the time specified below; if no time is specified below, Artist shall obtain such insurance when required to do so by Appendix B or a modification to this Agreement. Artist shall maintain all required insurance continuously from the time originally specified, throughout the term of this Agreement until Final Acceptance of the Work by resolution of the TJPA Board. The Director of Cultural Affairs, with the approval of the TJPA, may authorize in writing the release of an interest in such insurance at an earlier date.

(1) **Workers Compensation**, in statutory amounts with Employers' Liability Limits not less than \$1,000,000 each accident, injury or illness. Artist shall obtain such insurance prior to certification of this Agreement. To the extent Artist warrants, in writing, that Artist is not an employer and has no employees as defined by the California Labor Code Sections 3351-3351.1, Artist need not provide to the TJPA proof of Workers Compensation insurance.

(2) **Professional Liability Insurance** for all design professionals (such as architects, landscape architects or engineers), applicable to contractor's profession, who provide Artist with signed stamped drawing or calculations. Such insurance shall have limits not less than \$1,000,000 each claim with respect to negligent acts, errors and omissions. Artist or Artist's subcontractors shall obtain such insurance when Artist subcontracts for any work from such a design professional, and prior to the submittal of Construction Documents. Any design professional required to obtain professional liability insurance shall maintain such insurance, and proof thereof, for the term of this Agreement.

(3) **Commercial General Liability Insurance**, with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations. Artist shall obtain such insurance prior to commencing the fabrication of the artwork and shall maintain through the transportation and installation of the Work at the Site.

(4) **Automobile Liability Insurance:** If Artist is an *individual*, Personal Automobile Liability Insurance with limits not less than \$100,000/\$300,000 each occurrence. If Artist is a *corporation or other legal entity*, Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable, unless a lesser amount is approved by TJPA. Artist shall obtain such insurance prior to certification of this Agreement.

(5) **Fine Arts Insurance or other insurance against loss** in an amount equal to the value of the contract. Artist shall obtain such insurance prior to commencing fabrication of the Artwork.

(6) Transportation and/or Installation Coverage, as necessary and appropriate.

**b. Required Policy Language.**

(1) Commercial General Liability and Commercial Automobile Liability Insurance shall be endorsed to provide:

i. Endorse the policy to name as Additional Insured the TJPA, its Members, Directors, Officers, Agents, and Employees;

ii. Professional Liability policies shall name the specific project as a covered project; and

iii. State that such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought, but the inclusion of more than one insured shall not operate to increase the insurer's limits.

iv. Regarding Workers' Compensation, Contractor hereby agrees to waive subrogation which any insurer of Contractor may acquire from Contractor by virtue of the payment of any loss. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the TJPA for all work performed by the Contractor, its employees, agents and subcontractors.

(2) All policies shall provide thirty days' advance written notice to the TJPA of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notices shall be sent to the address specified in the Section entitled "Notices to the Parties".

**c. Miscellaneous Insurance Requirements:**

(1) All insurance policies required under this Agreement shall be issued by insurance companies reasonably acceptable to TJPA and authorized to do business in the State of California. Before commencing any operations under this Agreement, Artist shall do the following: (a) furnish to TJPA certificates of insurance, and additional insured policy endorsements with insurers with ratings comparable to A-, VIII or higher, and that are satisfactory to TJPA, in form evidencing all coverages set forth above, and (b) furnish complete copies of policies promptly upon TJPA request.

(2) Should any of the required insurance be provided under a claims-made form, Artist shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of four years beyond the expiration of this Agreement, to the effect that, should occurrences during the contract term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies. This tail coverage requirement may be waived by the TJPA in writing where appropriate.

(3) Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence or claims limits specified above.

(4) Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until TJPA receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, TJPA may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

(5) Approval of the insurance by TJPA shall not relieve or decrease the liability of Artist hereunder.

(6) In the event of loss or damage and where any insurance proceeds are paid to TJPA, the Board shall make a determination, in its sole discretion, as to whether the Work shall be restored, reconstructed or abandoned. If the Board determines that Artist shall restore or reconstruct the Work, all insurance

proceeds received by TJPA shall be paid to Artist to the extent the proceeds are used for such restoration or re-construction.

(7) If a subcontractor will be used to complete any portion of this agreement, the Artist shall ensure that the subcontractor shall provide all necessary insurance and shall name the TJPA, its members, directors, its officers, agents and employees and the Artist listed as additional insureds.

## **16. Indemnification**

The Artist (or Contractor) shall indemnify and save harmless TJPA and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Contractor or loss of or damage to property, arising directly or indirectly from Contractor's performance of this Agreement, including, but not limited to, Contractor's use of facilities or equipment provided by TJPA or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on TJPA, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of TJPA and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Contractor, its subcontractors or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and TJPA's costs of investigating any claims against the TJPA.

In addition to Contractor's obligation to indemnify TJPA, Contractor specifically acknowledges and agrees that it has an immediate and independent obligation to defend TJPA from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Contractor by TJPA and continues at all times thereafter.

Contractor shall indemnify and hold TJPA harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark, and all other intellectual property claims of any person or persons in consequence of the use by TJPA, or any of its officers or agents, of articles or services to be supplied in the performance of this Agreement.

## **17. Incidental and Consequential Damages**

Artist shall be responsible for incidental and consequential damages resulting in whole or in part from Artist's acts or omissions. Nothing in this Agreement shall constitute a waiver or limitation of any rights, which TJPA may have under applicable law.

## **18. Liability of TJPA**

TJPA'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED FOR IN THIS AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL TJPA BE LIABLE TO ARTIST (REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT) FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOST PROFITS) ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE WORK PERFORMED IN CONNECTION WITH THIS AGREEMENT.

## 19. Timely Provision of Services; Damages for Delayed Performance; Liquidated Damages

a. Time is of the essence in this Agreement. Artist agrees to provide all deliverables in accordance with the timelines contained herein unless changes are approved in writing by the TJPA.

### b. Damages for Delayed Performance

(1) Generally. Artist shall be liable for all incidental and consequential damages resulting, directly or indirectly, from delays in performance caused by Artist's acts or omissions. Artist shall not be liable to TJPA for damages resulting from delays caused by force majeure or by acts or omissions of TJPA, Architect or the General Contractor, except to the extent Artist failed reasonably to mitigate such damages.

(2) Illness, Injury, Death or Incapacity. Should Artist die, become ill, injured or otherwise incapacitated (collectively, "incapacitated") such that Artist is unable to work for any period not exceeding 30 days (whether consecutive or non-consecutive), any delay arising out of such incapacity will be allowed by TJPA whenever it is practicable to do so, considering the facts and circumstances of the Work, the Project, the Architect, the General Contractor and the Client. TJPA may require Artist to provide medical certification of any claimed incapacity. In the event Artist is incapacitated such that Artist Team is unable to work for a period exceeding a total of 30 days (whether consecutive or non-consecutive), TJPA may, at its option, undertake to complete and install the Work in Artist's absence, so long as the final Artwork is substantially similar to that designed by Artist. If TJPA undertakes to complete the Work, TJPA shall give due consideration to Artist's suggestions, and Artist may disclaim authorship of the Work. If TJPA exercises its option to implement the Artwork in Artist's absence, any compensation paid or payable to Artist shall be reduced by the costs and expenditures of TJPA in completion and installation of the Work. In case of incapacity exceeding 30 days, the following person shall be Artist's representative vis-à-vis the TJPA for purposes of this Section 19 (Timely Provision of Services; Damages for Delayed Performance; Liquidated Damages): **<<Name of Representative, Relationship of Representative to Artist, Contact Information including Address, Phone and Email>>** unless otherwise directed in writing by the Artist.

**<<[If this section is left in, fill in the liquidated damages amount and make sure Appendix ? includes measurable standards for the imposition of liquidated damages.]>>**

### c. Liquidated Damages

(1) By entering into this Agreement, Artist acknowledges that in the event the Work is delayed beyond the scheduled milestones and timelines provided in this Agreement, TJPA may suffer actual damages that will be extremely difficult to determine. TJPA may determine that specification of liquidated damages is appropriate for some or all phases of Work under this Agreement and, if so, shall specify the standards and amount of liquidated damages in the appropriate phase of Work under Appendix B. Artist agrees that the sum specified under each phase of work in Appendix B for damages per day for each calendar day of delay beyond scheduled milestones and timelines is not a penalty, but is a reasonable estimate of the loss that TJPA will incur based on the delay, established in light of the circumstances existing at the time this Agreement was awarded.

(2) TJPA may deduct a sum representing the liquidated damages from any money due to Artist. Such deductions shall not be considered a penalty, but rather agreed monetary damages sustained by TJPA because of Artist's failure to deliver to TJPA within the time fixed or such extensions of time permitted in writing by the TJPA.

(3) In case of delay in Artist's services through no fault of Artist, including construction delay, Artist shall store the Work at no additional cost to TJPA for up to 6 months. If Artist's work is delayed due to construction delays at the Site or other delays caused by TJPA or its contractors, so that Artist suffers documented direct cost impacts in the form of increased costs of materials and/or labor, Artist may apply to the TJPA for reimbursement of those expenses, which TJPA may award in its sole discretion.

## 20. Artist's Default; Remedies

a. Each of the following shall constitute an event of default ("Event of Default") under this Agreement:

(1) Artist fails or refuses to perform or observe any term, covenant or condition contained in any of the following Sections of this Agreement:

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|---|---------------------------------------|
| 8. Submitting False Claims; Monetary Penalties.     | 37. Drug-free workplace policy        |
| 10. Taxes   | 53. Compliance with laws              |
| 15. Insurance                                       | 55. Supervision of minors             |
| 24. Proprietary or confidential information of TJPA | 57. Protection of private information |
| 30. Assignment                                      | 58. Graffiti removal                  |

(2) Artist's Default: Artist's failure or refusal to perform or do any act required of Artist in this Agreement, including unexcused failure to meet the delivery deadlines or to conform the Work to the Contract Documents approved by the TJPA, shall constitute a default.

(3) Artist (a) is generally not paying its debts as they become due, (b) files, or consents by answer or otherwise to the filing against it of, a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of Artist or of any substantial part of Artist's property or (e) takes action for the purpose of any of the foregoing.

(4) A court or government authority enters an order (a) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Artist or with respect to any substantial part of Artist's property, (b) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction or (c) ordering the dissolution, winding-up or liquidation of Artist.

b. Termination in the Case of Default: On or after any event of Artist default, TJPA shall have the right to exercise its legal and equitable remedies. TJPA's remedies include the right to terminate this Agreement upon written notice to Artist (setting forth with specificity the basis for the Board's termination), or to seek specific performance of all or any part of this Agreement. Upon termination by the TJPA, this Agreement shall be of no further force or effect. The date of termination shall be 5 calendar days from the TJPA's dispatch of notice of termination, unless a later termination date is specified in the notice of termination. The TJPA may rescind the notice of termination or extend the date for termination, but no rescission or extension is valid unless it is in writing and approved by resolution of the Board.

c. Opportunity to Cure: In its sole discretion, the TJPA may give Artist a grace period and opportunity to cure any default. Such grace period may be up to 35 calendar days after dispatch of written notice from the TJPA setting forth the nature of the default and the requirements to cure.

d. No Obligation to Pay: Except as specifically provided in this Agreement, TJPA shall have absolutely no payment or other obligations to Artist for any work or service completed, begun or contemplated by Artist subsequent to termination of this Agreement for any reason.

e. These remedies are in addition to all other remedies available to either party under this Agreement or under applicable federal, state or local laws should the other party fail to comply with the terms of this Agreement.

## **21. Termination for Convenience**

a. TJPA shall have the option, in its sole discretion, to terminate this Agreement, at any time during the term hereof, for convenience and without cause. TJPA shall exercise this option by giving Artist written notice of termination. The notice shall specify the date on which termination shall become effective. As described below in subsection c., TJPA shall pay Artist for services rendered prior to the date of termination.

b. Upon receipt of the notice, Artist shall commence and perform, with diligence, all actions necessary on the part of Artist to effect the termination of this Agreement on the date specified by TJPA and to minimize the liability of Artist and TJPA to third parties as a result of termination. All such actions shall be subject to the prior approval of TJPA. Such actions shall include, without limitation:

(1) Halting the performance of all services and other work under this Agreement on the date(s) and in the manner specified by TJPA.

(2) Not placing any further orders or subcontracts for materials, services, equipment or other items.

(3) Terminating all existing orders and subcontracts.

(4) At TJPA's direction, assigning to TJPA any or all of Artist's right, title, and interest under the orders and subcontracts terminated. Upon such assignment, TJPA shall have the right, in its sole discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.

(5) Subject to TJPA's approval, settling all outstanding liabilities and all claims arising out of the termination of orders and subcontracts.

(6) Completing performance of any services or work that TJPA designates to be completed prior to the date of termination specified by TJPA.

(7) Taking such action as may be necessary, or as the TJPA may direct, for the protection and preservation of any property related to this Agreement which is in the possession of Artist and in which TJPA has or may acquire an interest.

c. Within 30 days after the specified termination date, Artist shall submit to TJPA an invoice, which shall set forth each of the following as a separate line item:

(1) The reasonable cost to Artist, without profit, for all services and other work TJPA directed Artist to perform prior to the specified termination date, for which services or work TJPA has not already tendered payment. Reasonable costs may include a reasonable allowance for actual overhead, not to exceed a total of 10% of Artist's direct costs for services or other work. Any overhead allowance shall be separately itemized. Artist may also recover the reasonable cost of preparing the invoice.

(2) A reasonable allowance for profit on the cost of the services and other work described in the immediately preceding subsection (1), provided that Artist can establish, to the satisfaction of TJPA, that Artist would have made a profit had all services and other work under this Agreement been completed, and provided further, that the profit allowed shall in no event exceed 5% of such cost.

(3) The reasonable cost to Artist of handling material or equipment returned to the vendor, delivered to the TJPA or otherwise disposed of as directed by the TJPA.

(4) A deduction for the cost of materials to be retained by Artist, amounts realized from the sale of materials and not otherwise recovered by or credited to TJPA, and any other appropriate credits to TJPA against the cost of the services or other work.

d. In no event shall TJPA be liable for costs incurred by Artist or any of its subcontractors after the termination date specified by TJPA, except for those costs specifically enumerated and described in the immediately preceding subsection (c). Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, post-termination overhead or unabsorbed overhead, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, prejudgment interest, or any other expense which is not reasonable or authorized under such subsection (c).

e. In arriving at the amount due to Artist under this Section, TJPA may deduct: (1) all payments previously made by TJPA for work or other services covered by Artist's final invoice; (2) any claim which TJPA may have against Artist in connection with this Agreement; (3) any invoiced costs or expenses excluded pursuant to the immediately preceding subsection (d); and (4) in instances in which, in the opinion of the TJPA, the cost of any service or other work performed under this Agreement is excessively high due to costs incurred to remedy or replace defective or rejected services or other work, the difference between the invoiced amount and TJPA's estimate of the reasonable cost of performing the invoiced services or other work in compliance with the requirements of this Agreement.

f. TJPA's payment obligation under this Section shall survive termination of this Agreement.

## **22. Rights and Duties Upon Termination or Expiration**

If the TJPA terminates this Agreement for any reason, TJPA shall be automatically vested with title to any Work produced under this Agreement up to the date of termination. Artist shall deliver any such Work to TJPA in the manner, at the times, and to the extent directed by TJPA. If termination is due to the default of Artist, TJPA may, at its option, require Artist to refund to TJPA any interim payments received under the Agreement; in such case, TJPA may transfer title to the Work to Artist. This Section and the following sections shall survive termination or expiration of this Agreement:

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|---|---|
| 8. Submitting false claims                    | 24. Proprietary or confidential information of TJPA |
| 9. Disallowance                               | 26. Ownership of Results                            |
| 10. Taxes                                     | 27. (Intellectual Property and Publicity Rights)    |
| 11. Payment does not imply acceptance of work | 28. Audit and Inspection of Records                 |

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|---|---|
| 13. Responsibility for equipment                                | 48. Modification of Agreement.                          |
| 14. Independent Contractor; Payment of Taxes and Other Expenses | 49. Administrative Remedy for Agreement Interpretation. |
| 15. Insurance   | 50. Agreement Made in California; Venue                 |
| 16. Indemnification   | 51. Construction  |
| 17. Incidental and Consequential Damages                        | 52. Entire Agreement                                    |
| 18. Liability of TJPA   | 56. Severability  |
|   | 57. Protection of private information                   |

Subject to the immediately preceding sentence, upon termination of this Agreement prior to expiration of the term specified in Section 2, this Agreement shall terminate and be of no further force or effect. Contractor shall transfer title to TJPA, and deliver in the manner, at the times, and to the extent, if any, directed by TJPA, any work in progress, completed work, supplies, equipment, and other materials produced as a part of, or acquired in connection with the performance of this Agreement, and any completed or partially completed work which, if this Agreement had been completed, would have been required to be furnished to TJPA. This subsection shall survive termination of this Agreement.

**22A. Artist's Warranties**

a. Warranty of Title. Artist represents and warrants that Artist is the sole author of the Artwork and that Artist is the sole owner of any and all copyrights pertaining to the Artwork. Artist further represents that the Artwork is free and clear of any liens and that there are no outstanding disputes in connection with property rights, intellectual property rights or any other rights in the Artwork or any parts of the Artwork.

b. Warranty of Workmanship. Artist represents and warrants that, for a period of three years after final acceptance, the Work will be free of defects in workmanship or materials, including Inherent Defects (as defined below), and that the Work will be executed in permanent, non-fugitive materials that will not tend to degrade or fade over long-term installation at the Site. "Inherent Defect" refers to a quality within the material or materials, which comprise the Work which, either alone or in combination, results in the tendency of the Work to destroy itself. "Inherent Defect" does not include any tendency to deteriorate that is specifically identified in the Contract Documents approved by the TJPA. Artist shall, at Artist's sole cost and expense, remedy any defects in workmanship or materials that appear within a period of three years from the date of final acceptance of the Artwork by TJPA.

c. Warranty of Public Safety. Artist represents and warrants that the Work will not pose a danger to public health or safety in view of the possibility of misuse, if such misuse is in a manner that was reasonably foreseeable at any time during the term of this Agreement.

d. Warranty of Acceptable Standard of Display and Operation. Artist represents and warrants that:

(1) The Artwork will conform with design specifications and, where Artwork involves electronic, digital, video, mechanical, living, variable, moving or other dynamic components, the Artwork will also operate, function or perform in accordance with Artist's representations to the TJPA without any costs beyond the final Budget for the Artwork or any additional staff assistance.

(2) Occasional or minimal cleaning and repair of the Artwork and any associated working parts and/or equipment will maintain the Work within an acceptable standard of public display;



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

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

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

## **22B. Instructions for Maintenance; Variable Media Guidelines; Anticipated Life Span of Artwork**

Unless specifically provided in this Agreement, Artist shall not be responsible for ongoing maintenance of the Artwork. Artist shall provide the TJPA with a General Maintenance Plan for the Artwork, with a detailed description of future anticipated maintenance requirements; a recommended maintenance schedule; anticipated and required care and/or replacement/upgrade of any part of the Artwork and associated moving parts or equipment including any staff time involved in displaying or operating artwork and the frequency of such staff involvement; and written instructions and manufacturer's specifications for reasonably foreseeable maintenance and preservation activities relating to the Artwork. Artist shall also provide TJPA with a description of all equipment and or machinery needed to operate the project (if applicable) and any anticipated or required staffing, supervision or operational needs. The Artwork shall be durable, taking into consideration that the Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. Artist shall ensure that all maintenance requirements will be reasonable in terms of time and expense.

With respect to Artwork involving or incorporating electronic, digital, video, mechanical, living, variable, moving or other dynamic components ("Variable Media"), the Artist shall also provide the TJPA with a written recommendations for translating the Artwork into new media or replacing elements of the Artwork in the event that the original medium, components and/or the Artist's installation plan become obsolete ("Variable Media Guidelines."). Although the TJPA is not required to comply with such Variable Media Guidelines, the TJPA may take such Guidelines into account when maintaining the Artwork or trying to preserve the integrity of the Artwork.

Although TJPA will strive to maintain the Transbay Transit Center Art Collection in good repair and condition, TJPA is not required by this Agreement to maintain the Artwork to any particular standard. TJPA may determine to allow the Artwork to deteriorate in accordance with the Artwork's temporary life span, if deemed appropriate by TJPA or if TJPA lacks sufficient funds for required maintenance and/or conservation. If the Artwork suffers deterioration, TJPA shall have sole discretion to determine whether to remove the Artwork from display as a result of deterioration, whether to replace any portion of the Artwork or translate any component into new media, or whether to maintain the Artwork on display despite its deteriorated condition.

The anticipated life span of the Artwork is (<<INSERT # OF YEARS; NOTE DEFAULT IS 25>>) years from the date of final acceptance by the TJPA. After that time, the TJPA in its sole discretion may re-evaluate the Artwork to determine if it retains its identity as a work of art and, if not, whether to take appropriate action, including the possibility of destroying the Artwork. If no life span is specified above or pursuant to a subsequent contract modification, the anticipated life span of the Artwork shall be 25 years. If the TJPA determines that, through decay, vandalism or other forces, the Artwork has

lost its integrity to the point where it should be destroyed, the TJPA shall first offer the Artwork to Artist free of charge.

## **22C. Artist's Moral Rights; TJPA's Ownership Rights**

a. The TJPA, having expended considerable public funds to commission the Artwork, and pursuant to its responsibilities, intends to display the Artwork at the Site as originally created by Artist and to maintain the Artwork in good condition. Public artworks commissioned by the TJPA are sometimes integrated into their site, such that they become an integral, permanent and site-specific part of the building's architecture or landscaped environment and removal of the artwork would result in significant changes to the artwork and the building's architecture. TJPA, however, shall preserve complete flexibility to operate and manage TJPA property in the public's interest. Therefore, TJPA retains the absolute right to Alter the Artwork in TJPA's sole judgment. For example, TJPA may Alter the Artwork to eliminate hazard, to comply with the ADA, to otherwise aid TJPA in the management of its property and affairs, or through neglect or accident. If, during or after the term of this Agreement, TJPA finds the Site to be inappropriate, TJPA has the right to install the Artwork at an alternate location that TJPA chooses in its sole discretion. If the Artwork is free-standing such that it can be removed without significant damage to the Artwork or the Site, and if the Board authorizes the removal of the Artwork, the TJPA shall take reasonable precautions to minimize Alteration of the Artwork during removal.

b. With respect to the Artwork produced under this Agreement, and in consideration of the procedures and remedies specified in this Agreement, Artist waives any and all claims, arising at any time and under any circumstances, against TJPA, its members, directors, officers, agents, employees, successors and assigns, arising under the federal Visual Artists Rights Act (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. If the Artwork is incorporated into a building such that the Artwork cannot be removed from the building without Alteration of the Artwork, Artist waives any and all such claims against any future owners of the Site, and its agents, officers and employees, for Alteration of the Artwork.

c. If TJPA intends to take any action with respect to the Site or the Artwork that would Alter the Artwork, other than routine cleaning and maintenance, the following procedures shall apply:

(1) Notice. Where time permits, TJPA shall make reasonable good faith efforts to notify Artist at least 20 calendar days prior to authorizing any Alteration of the Artwork, at the last phone number or address provided by Artist to the TJPA's Collections Manager. Where time does not permit prior to Alteration of the Artwork – for example, in cases of public hazard, accident or unauthorized Alteration – TJPA shall notify Artist within 30 calendar days after such Alteration.

(2) Consultation. After receiving such notice, Artist shall consult with TJPA to determine whether the Artwork can be restored or relocated, and to attempt to come to a mutually agreeable plan for disposition of the Artwork. Such consultation shall be without charge by Artist unless otherwise specifically agreed in writing. If TJPA intends to remove the Artwork, Artist shall consult regarding methods to minimize or repair any Alteration to the Artwork caused by such removal and the potential costs of such removal.

(3) Restoration. If the Artwork is Altered, with or without prior notice to Artist, and TJPA intends to maintain the Artwork on display, TJPA shall make a reasonable good faith effort to engage Artist in the restoration of the Artwork and to compensate Artist for Artist's time and efforts at fair market

value, which may be the subject of a future Agreement between Artist and TJPA. However, TJPA has no obligation under this Agreement to restore the Artwork to its original condition, to compensate Artist for any restoration work, or to maintain the Artwork on display. If Artist fails or refuses to negotiate with TJPA in good faith with respect to any restoration, TJPA may contract with any other qualified art conservator or artist for such restoration. During Artist's lifetime, TJPA shall make best efforts not to display or deaccession only a portion of the Artwork without Artist's consent.

(4) Removal by Artist. Where time permits, if TJPA intends to take action that will destroy or significantly Alter the Artwork, such as destruction of all or part of the Site, and TJPA determines that it will not remove the Artwork itself, TJPA shall allow Artist to remove the Artwork at Artist's expense within 60 days of notice from the TJPA of the need to remove the Artwork, in which case title shall revert to Artist. If Artist fails to remove the Artwork within that 60 day period, TJPA may Alter the Artwork in any manner, including destroying it, in TJPA's sole discretion.

(5) Remedies. If TJPA breaches any of its obligations under this Section, Artist's remedies shall be limited as follows: If TJPA inadvertently fails to provide a required prior notice of Alteration, TJPA will provide notice as soon as it discovers the omission, and before Alteration of the Artwork if that remains possible. If TJPA Alters the Artwork without providing Artist a required prior notice of Alteration, Artist shall be given the first right of refusal to restore the Artwork at the same location and TJPA shall make reasonable efforts to provide funding for the restoration. If TJPA funds cannot be made available after reasonable efforts are made to secure such funding, Artist may, but is not obligated to, restore the Artwork at Artist's expense. If Artist elects not to restore the Artwork, TJPA may retain another artist or conservator to restore it, or may Alter the Artwork in any manner, at TJPA's sole discretion.

d. If TJPA Alters the Artwork without Artist's consent in a manner that is prejudicial to Artist's reputation, Artist retains the right to disclaim authorship of the Artwork in accordance with California Civil Code §987(d) and 17 U.S.C. §106A(a)(2).

e. Except as provided in this Agreement, with respect to third parties who are not officers, employees, agents, successors or assigns of TJPA, Artist retains Artist's moral rights in the Artwork, as established in the Visual Artists Rights Act (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 and 989), or any other local, state, federal or international moral rights laws that protect the integrity of works of art. Accordingly, nothing herein shall prevent Artist from pursuing a claim for Alteration of the Artwork against a third party who is not an officer, employee, agent, successor or assign of TJPA. TJPA has no obligation to pursue claims against third parties to remedy or prevent Alteration of the Artwork. However, as owner of the Artwork, TJPA may pursue claims against third parties for damages or to restore the Artwork if the Artwork has been altered without TJPA's authorization.

### **23. Conflict of Interest**

Through its execution of this Agreement, Artist acknowledges that it is familiar with the provision of Section 15.103 of the TJPA's Charter, Article III, Chapter 2 of TJPA's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitutes a violation of said provisions and agrees that it will immediately notify the TJPA if it becomes aware of any such fact during the term of this Agreement.

### **24. Proprietary or Confidential Information of TJPA**

Artist understands and agrees that, in the performance of the work or services under this Agreement or in contemplation thereof, Artist may have access to private or confidential information which may be owned or controlled by TJPA and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to TJPA. Artist agrees that all information disclosed by TJPA to Artist shall be held in confidence and used only in performance of the Agreement. Artist shall exercise the same standard of care to protect such information as a reasonably prudent contractor would use to protect its own proprietary data.

## 25. Notices to the Parties; Department Liaison

a. Notices. Unless otherwise indicated elsewhere in this Agreement, all written communications sent by the parties may be by U.S. mail or by fax, and shall be addressed as follows:

To TJPA:  
Attn: Maria Ayerdi-Kaplan, Executive Director  
201 Mission Street, Suite 2100  
San Francisco, CA 94105  
Phone: (415) 597-4620  
Fax: (415) 597-4615  
Email: Mayerdi-kaplan@transbaycenter.org

To Artist:  
<<INSERT ARTIST'S NAME AND ADDRESS>>  
Phone: <<INSERT PHONE NUMBER>>  
Email: <<INSERT ARTIST'S E-MAIL>>

Any notice of default shall be sent by registered mail.

Any change in the designation of the person or address to which submittals, requests, notices and reports shall be delivered is effective when the other party has received written notice of the change.

b. Department Liaison. In performing the services provided for in this Agreement, Artist's liaison with the TJPA will be SFAC <<INSERT PROJECT MANAGER'S NAME>>.

## 26. Ownership of Results and Risk of Loss

a. **Title Transfer.** Except in the case of early termination of this Agreement, title to the Artwork shall transfer from Artist to TJPA upon the Board's Final Acceptance of the Artwork. Title transfer shall be self-executing upon Board's Final Acceptance. Artist will cooperate in providing to TJPA any title transfer documents TJPA may request or require during or after the Term of this Agreement.

b. **Risk of Loss.** The risk of loss or damage to the Artwork shall be borne solely by Artist until Final Acceptance of the Artwork by the Board. Artist shall take steps to protect the Artwork from loss or damage. The TJPA staff shall make a good faith effort to inspect the Artwork within 15 days after completion so that the Board can approve the Artwork by resolution in a timely fashion.

c. **Ownership of Documents.** Conceptual Design, Design Development Documents, Construction Documents, Samples, Mock-ups and all other documents prepared and submitted by Artist to the TJPA pursuant to this Agreement shall belong to the TJPA. Artist may retain originals of such documents and items and provide copies to TJPA.

## **27. Works for Hire – Left Blank By Agreement of the Parties.**

### **27A. Intellectual Property and Publicity Rights**

a. **Copyright.** Subject to usage rights and licenses granted to TJPA hereunder, Artist shall retain all 17 U.S.C. §106 copyrights in all original works of authorship produced under this Agreement. Artist's copyright shall not extend to predominantly utilitarian aspects of the Work, such as landscaping elements, furnishings, or other similar objects. If Artist is comprised of two or more individual persons, the individual persons shall be deemed joint authors of the Work.

b. **TJPA's Intellectual Property License.** Artist grants to TJPA, and to TJPA's agents, authorized contractors and assigns, an unlimited, non-exclusive and irrevocable license to do the following with respect to the Work, the Artwork, and any original works of authorship created under this Agreement, whether in whole or in part, in all media (including electronic and digital) throughout the universe:

(1) **Implementation, Use and Display.** TJPA may use and display the Work (to the extent the Work includes graphic representations or models) and the Artwork. To the extent the Work involves design elements that are incorporated by TJPA into the design of the Site, TJPA may implement such elements at the Site.

(2) **Reproduction and Distribution.** TJPA may make and distribute, and authorize the making, display and distribution of, photographs and other 2-dimensional reproductions. TJPA may use such reproductions for any TJPA-related purpose, including advertising, educational and promotional materials, brochures, books, flyers, postcards, print, broadcast, film, electronic and multimedia publicity, gifts for the TJPA benefactors, documentation of TJPA's Transbay Transit Center Art Collection, and catalogues or similar publications. TJPA shall ensure that such reproductions are made in a professional and tasteful manner, in the sole and reasonable judgment of the TJPA. The proceeds from the sale of any such reproductions shall be used to maintain and support TJPA's Transbay Transit Center Art Collection or for any other public purposes that TJPA deems appropriate. The license granted hereunder does not include the right to create 3-dimensional reproductions on items such as tote-bags, T-shirts, coffee mugs and similar merchandise. Such reproductions may only be created pursuant to separate license agreements with Artist.

(3) **Public Records Requests.** Any documents provided by Artist to TJPA are public records and TJPA may authorize third parties to review and reproduce such documents pursuant to public records laws, including the San Francisco Sunshine Ordinance and California Public Records Act.

c. **Third Party Infringement.** The TJPA is not responsible for any third party infringement of Artist's copyright and not responsible for protecting the intellectual property rights of Artist.

d. **Credit.** Artist hereby agrees that all formal references to the Artwork and any reproductions of the Artwork in any form shall include the following credit: "Collection of the TJPA." TJPA shall credit Artist for the Artwork upon publication of any two dimensional reproductions of the Artwork. Wherever the TJPA finds practicable, the TJPA shall make an effort to ensure that all reproductions by TJPA shall contain a copyright notice substantially in the following form: "Copyright (c), Artist's name, date," in such a manner and location as shall comply with the U.S. Copyright laws.

e. **Publicity.** TJPA shall have the right to use Artist's name, likeness, and biographical information, in connection with the display or reproduction and distribution of the Artwork including all

advertising and promotional materials regarding TJPA. Artist shall be reasonably available to attend any inauguration or presentation ceremonies relating to the public dedication of the Artwork.

f. **Trademark.** In the event that TJPA's use of the Artwork creates trademark, service mark or trade dress rights in connection with the Artwork, TJPA shall have an exclusive and irrevocable right in such trademark, service mark, or trade dress.

g. **Unique.** Artist warrants that the design of the Artwork as expressed in the Proposal is an edition of one, and that neither Artist nor Artist's agents will execute or authorize another to execute another work of the same or substantially similar image, design, dimensions and materials as the Artwork. Artist may create works that utilize or incorporate various individual art elements that comprise the Artwork, so long as the work utilizing or incorporating such individual elements (1) does not consist predominantly of such elements (2) is not the same or substantially similar in image, design, dimensions and materials as the Artwork, and (3) is not displayed in an environment that is the same or substantially similar to the environment in which the Artwork is to be displayed at the Site. This warranty shall continue in effect for a period consisting of the life of Artist plus 70 years or for the duration of the Artwork's copyright protected status, whichever is longer, and shall be binding on Artist and Artist's heirs and assigns. In the case where Artist Team is comprised of two or more individual persons or a group of people, the measuring life shall be the life of the last surviving individual person comprising Artist Team. Recognizing that TJPA has no adequate remedy at law for Artist's violation of this warranty, Artist agrees that, in the event Artist breaches this warranty, TJPA shall be entitled to enjoin Artist's breach. Nothing hereunder shall be construed to constrain Artist from creating posters, note cards, or other reproductions of the Artwork with appropriate credit to the Board.

h. **Resale Royalty.** If TJPA sells the Artwork as a fixture to real property, and if the resale value of the Artwork is not itemized separately from the value of the real property, the parties agree that the resale price of the Artwork shall be presumed to be less than the purchase price paid by TJPA under this Agreement. Thus, TJPA has no obligation to pay resale royalties pursuant to California Civil Code §986 or any other law requiring the payment of resale royalties. If TJPA sells the Artwork as an individual piece, separate from or itemized as part of a real property transaction, TJPA shall pay to Artist a resale royalty to the extent required by law, based upon the sale price of the Artwork.

## **28. Audit and Inspection of Records; Reports**

a. **Audit and Inspection of Records.** Artist agrees to maintain and make available to TJPA, during regular business hours, accurate books and accounting records relating to its work under this Agreement. Artist will permit TJPA to audit, examine and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. Artist shall maintain such data and records in an accessible location and condition for a period of not less than five years after final payment under this Agreement or until after final audit has been resolved, whichever is later. The State of California or any federal agency having an interest in the subject matter of this Agreement shall have the same rights conferred upon TJPA by this Section.

b. **Records.** Artist shall submit written reports as requested by the TJPA. The TJPA shall determine the format for the content of such reports. The timely submission of all reports is a necessary and material term and condition of this Agreement. The reports, including any copies, shall be submitted on recycled paper and printed on double-sided pages to the maximum extent possible.

## **28A. TJPA Access to Artwork and Inspection; Status Reports; Artist Availability**

**a. TJPA Access to Artwork; Inspection of Work and Artwork.** TJPA shall have the right to inspect the Work, including the Artwork, at the Site during any phase of the project at any time. In the event that all or part of the Work is created in a location other than the Site, the TJPA shall have the right to inspect the Work, including the Artwork, at any phase of the project following 48 hours written notice from the TJPA to the Artist. The Artist shall be responsible for facilitating TJPA's prompt access to Artist's property or the property of the Artist's subcontractors where the Work or portions of the Work are being fabricated or installed.

**b. Status Reports.** Artist shall submit written reports regarding the status of the Work, including the Artwork, as requested by the TJPA. The TJPA shall determine the format for the content of such reports. The timely submission of all reports is a necessary and material term and condition of this Agreement. The reports, including any copies, shall be submitted on recycled paper and printed on double-sided pages to the maximum extent possible.

**c. Artist Availability.** Artist or Artist's authorized agent shall be available at Artist's sole expense for up to <<INSERT NUMBER OF REQUIRED VISITS - IF NO NUMBER IS SPECIFIED THE DEFAULT NUMBER SHALL BE 4>> VISITS to San Francisco to ensure the proper installation and operation of the Artwork. During each visit to San Francisco, unless otherwise agreed upon by the TJPA, the Artist's visits shall last for at least a full 8 hour day. Travel is not a reimbursable expense.

## **29. Subcontracting**

a. Artist is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by TJPA in writing. Neither party shall, on the basis of this Agreement, contract on behalf of or in the name of the other party. An agreement made in violation of this provision shall confer no rights on any party and shall be null and void.

b. Any approved subcontracts shall be itemized in Appendix B by each phase of work and Artist shall provide a copy of each approved subcontract to the TJPA.

c. Documentation of Subcontracts. Artist shall provide a description of the Work to be performed under any subcontract and the amount of the subcontract, and shall provide the Board with written copies of Artist's agreements with each subcontractor. Artist shall include by reference, and include in each and every contract, the requirements of this Agreement relating to the following: submitting false claims; inspection and audit of records; Administrative Code Chapters 12B (non-discrimination), 12P (minimum compensation of employees), 12Q (Health Care Accountability Ordinance); indemnity provisions; bond and insurance requirements; earned income credit form provisions; provisions regarding TJPA Access to Artwork/Inspection of Work and Artwork; flowdown provisions from USDOT Requirements for Agreements with the TJPA; required deliverables and TJPA's right to use and implement the Work. Artist shall include a statement in the subcontract requiring that the subcontractor shall comply with all Agreement requirements applicable to the Artist, including compliance with applicable Federal, State and local laws, including any TJPA contracting requirements applicable to the Artist.

d. Fabrication and Installation Subcontracts. In addition, if the Artist is a licensed contractor and plans to subcontract the fabrication or installation of any portion of the work under this Agreement, the TJPA must grant prior approval of such contractors and the Artist shall require such subcontractors to:

1. Name the TJPA as a third-party beneficiary to the subcontract by expressly stating that "the parties agree that the TJPA shall be a third-party beneficiary to this agreement" and Artist shall provide the TJPA with a copy of each such subcontract.

2. Name the TJPA as an additional insured on the subcontractor's general liability insurance policy.
3. The Subcontractor shall agree to indemnify and hold harmless the TJPA (consistent with the "Indemnification and General Liability" provisions contained herein as Section 16.)
4. If any fabrication and/or installation subcontract qualifies as a "Public Work" under this Agreement and the San Francisco Administrative Code and is **in excess of \$25,000**, the subcontractor shall also be responsible for providing any performance bond required under this Agreement on the TJPA's form and shall name the TJPA and Artist as dual obligees of such performance bond. In the event of Artist or any of Artist's subcontractors' failure to perform, Artist shall assign all rights under any Performance and Payment or Labor and Materials bond in favor of TJPA.
5. Subcontractor shall certify that he or she has all applicable licenses required by the State for subcontractor to perform the fabrication or installation work specified in the subcontract and that subcontractor warrants that such licenses are valid for the full term of this Agreement and during the period in which the subcontractor performed fabrication and installation work under this Agreement.

**Important note: If Artist is not a licensed contractor, Artist shall not be able to subcontract with licensed contractors for fabrication and/or installation of the Artwork or any portion of the Artwork under this Agreement.**

#### **29A. Prevailing Wages.**

If the fabrication and/or installation of any Work under this Agreement is a "Public Work" as defined by San Francisco Administrative Code Section 6.1(I), and Artist plans to subcontract all or any part of the fabrication and/or installation of any Work under this Agreement, Artist agrees to pay to all persons performing labor in the fabrication and/or installation of the of the Work not less than the highest general prevailing rate of wages, as such prevailing wages are established according to Section 6.22(E) of the San Francisco Administrative Code, as may be amended from time to time. Artist further agrees to include, in any subcontract for installation of such Work, a requirement that the subcontractor shall pay to all persons performing labor under such contract not less than the highest general prevailing rate of wages for the labor so performed. Artist shall provide, and shall require any subcontractor to provide, upon request, certified payroll reports with respect to all persons performing labor in the fabrication and/or installation of the Work.

#### **30. Assignment or Transfer**

Artist guarantees that Artist will consistently give personal attention to the faithful execution of this Agreement, including any work performed by employees, agents or subcontractors. Artist shall keep the Work under Artist's control and shall not assign or subcontract the Work, in whole or in part, except as provided in this Agreement. All transactions with subcontractors shall be made through Artist, and no subcontract, assignment or other transfer by Artist Team shall relieve Artist of any of Artist's liability or obligations under this Agreement.

TJPA may assign this Agreement to the General Contractor on such terms and conditions as are acceptable to TJPA.

#### **31. Non-waiver of Rights**



The omission by either party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants, or provisions thereof by the other party at the time designated, shall not be a waiver of any such default or right to which the party is entitled, nor shall it in any way affect the right of the party to enforce such provisions thereafter.

### **32. Earned Income Credit (EIC) Forms**

San Francisco Administrative Code section 12O requires that employers provide their employees with IRS Form W-5 (The Earned Income Credit Advance Payment Certificate) and the IRS EIC Schedule, as set forth below. Employers can locate these forms at the IRS Office, on the Internet, or anywhere that Federal Tax Forms can be found.

Artist shall provide EIC Forms to each Eligible Employee at each of the following times: (i) within thirty days following the date on which this Agreement becomes effective (unless Artist has already provided such EIC Forms at least once during the calendar year in which such effective date falls); (ii) promptly after any Eligible Employee is hired by Artist; and (iii) annually between January 1 and January 31 of each calendar year during the term of this Agreement.

Failure to comply with any requirement contained in subparagraph (a) of this Section shall constitute a material breach by Artist of the terms of this Agreement. If, within thirty days after Artist receives written notice of such a breach, Artist fails to cure such breach or, if such breach cannot reasonably be cured within such period of thirty days, Artist fails to commence efforts to cure within such period or thereafter fails to diligently pursue such cure to completion, TJPA may pursue any rights or remedies available under this Agreement or under applicable law.

Any Subcontract entered into by Artist shall require the subcontractor to comply, as to the subcontractor's Eligible Employees, with each of the terms of this section.

Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Section 12O of the San Francisco Administrative Code.

### **33. Disadvantaged Business Enterprise Program**

The Artist or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this agreement. The Artist shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Artist to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the TJPA deems appropriate.

Pursuant to the monitoring requirements outlined in Section XIII of the TJPA's DBE Program (49 CFR 26.37), the Artist will be required to submit the TJPA's "Bidders/Proposers Information Request Form," regardless of DBE participation. Upon award of the contract, the Artist shall submit the TJPA's "Progress Payment Report" with every invoice, the "Subcontractor Payment Declaration" within five days of each Artist payment to a subcontractor, and a "Final Expenditure Report" with the completion of the contract.

### **34. Prompt Payment to Subcontractors**

#### **a. Prompt Progress Payment to Subcontractors**

Artist shall pay a subcontractor not later than ten (10) days of receipt of each progress payment in accordance with the provision in Section 7108.5 of the California Business and Professions Code

concerning prompt payment to subcontractors. The ten (10) days is applicable unless a longer period is agreed to in writing. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanction and other remedies of that Section. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over thirty (30) days of receipt of each payment may take place only for good cause and with the TJPA's prior written approval. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the Artist or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

**b. Prompt Payment of Withheld Funds to Subcontractors**

If the TJPA requires retainage from the Artist and prompt and regular incremental acceptances of portions, as determined by the TJPA of the contract work and retainage is paid to the Artist based on these acceptances, then the Artist or subcontractor shall return all monies withheld in retention from all subcontractors within thirty (30) days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the TJPA. Any delay or postponement of payment may take place only for good cause and with the TJPA's prior written approval. Any violation of these provisions shall subject the violating Artist to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the Artist or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

**35. MacBride Principles—Northern Ireland**

Pursuant to San Francisco Administrative Code §12.F.5, TJPA urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. TJPA urges San Francisco companies to do business with corporations that abide by the MacBride Principles. By signing below, Artist acknowledges and agrees that Artist Team has read and understood this section.

**36. Tropical Hardwood and Virgin Redwood Ban**

Pursuant to San Francisco Environment Code section 804(b), TJPA urges Artist not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product in the performance of this Agreement.

**37. Drug-Free Workplace Policy**

Artist acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on TJPA premises. Artist agrees that any violation of this prohibition by Artist, its employees, agents or assigns will be deemed a material breach of this Agreement.

**38. Resource Conservation**

Chapter 5 of the San Francisco Environment Code ("Resource Conservation") is incorporated herein by reference. Failure by Artist to comply with any of the applicable requirements of Chapter 5 will be deemed a material breach of contract.

### **39. Compliance with Americans with Disabilities Act**

Artist acknowledges that, pursuant to the ADA, programs, services and other activities provided by a public entity to the public, whether directly or through Artist, shall be accessible to the disabled public. Artist shall provide the services specified in this Agreement in a manner that complies with the ADA. Artist shall not discriminate against disabled persons in the provision of services, benefits or activities provided under this Agreement and further agrees that any violation of this prohibition on the part of Artist, its employees, agents or assigns will constitute a material breach of this Agreement.

Artist shall cooperate with TJPA and allow TJPA to take reasonable steps to ensure that the Artwork is accessible to the disabled, with respect to the elimination of both architectural and programmatic barriers. Such cooperation shall include assisting with modifications to the Artwork, or preparing or authorizing tactile models, reproductions, or other materials necessary to provide access to the Artwork. If requested by TJPA, Artist shall engage a consultant, as part of the project Budget, to review the Artwork for compliance with the ADA.

### **40. Sunshine Ordinance**

Pursuant to San Francisco Administrative Code §67.24(e), contracts, Artist's bids, responses to solicitations and all other records of communications between TJPA and persons or firms seeking contracts, shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this paragraph will be made available by TJPA to the public upon request.

### **41. Public Access to Meetings and Records**

If the Artist receives a cumulative total per year of at least \$250,000 in TJPA funds or TJPA-administered funds and is a non-profit organization as defined in Chapter 12L of the San Francisco Administrative Code, Artist shall comply with and be bound by all the applicable provisions of that Chapter. By executing this Agreement, the Artist agrees to open its meetings and records to the public in the manner set forth in §§12L.4 and 12L.5 of the Administrative Code. Artist further agrees to make-good faith efforts to promote community membership on its Board of Directors in the manner set forth in §12L.6 of the Administrative Code. The Artist acknowledges that its material failure to comply with any of the provisions of this paragraph shall constitute a material breach of this Agreement. The Artist further acknowledges that such material breach of the Agreement shall be grounds for the TJPA to terminate and/or not renew the Agreement, partially or in its entirety.

### **42. Limitations on Contributions**

Through execution of this Agreement, Artist acknowledges that it is familiar with section 1.126 of the TJPA's Campaign and Governmental Conduct Code, which prohibits any person who contracts with the TJPA for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, or for a grant, loan or loan guarantee, from making any campaign contribution to (1) an individual holding a TJPA elective office if the contract must be approved by the individual, a board on which that individual serves, or the board of a state agency on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Artist acknowledges that the foregoing restriction applies only if the

contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Artist further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Artist's board of directors; Artist's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Artist; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Artist. Additionally, Artist acknowledges that Artist must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. Artist further agrees to provide to TJPA the names of each person, entity or committee described above.

### **43. Requiring Minimum Compensation for Employees**

a. Artist (hereinafter referred to as "Contractor" in this section) agrees to comply fully with and be bound by all of the provisions of the Minimum Compensation Ordinance (MCO), as set forth in San Francisco Administrative Code Chapter 12P (Chapter 12P), including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 12P are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the MCO is available on the web at [www.sfgov.org/olse/mco](http://www.sfgov.org/olse/mco). A partial listing of some of Contractor's obligations under the MCO is set forth in this Section. Contractor is required to comply with all the provisions of the MCO, irrespective of the listing of obligations in this Section.

b. The MCO requires Contractor to pay Contractor's employees a minimum hourly gross compensation wage rate and to provide minimum compensated and uncompensated time off. The minimum wage rate may change from year to year and Contractor is obligated to keep informed of the then-current requirements. Any subcontract entered into by Contractor shall require the subcontractor to comply with the requirements of the MCO and shall contain contractual obligations substantially the same as those set forth in this Section. It is Contractor's obligation to ensure that any subcontractors of any tier under this Agreement comply with the requirements of the MCO. If any subcontractor under this Agreement fails to comply, TJPA may pursue any of the remedies set forth in this Section against Contractor.

c. Contractor shall not take adverse action or otherwise discriminate against an employee or other person for the exercise or attempted exercise of rights under the MCO. Such actions, if taken within 90 days of the exercise or attempted exercise of such rights, will be rebuttably presumed to be retaliation prohibited by the MCO.

d. Contractor shall maintain employee and payroll records as required by the MCO. If Contractor fails to do so, it shall be presumed that the Contractor paid no more than the minimum wage required under State law.

e. The TJPA is authorized to inspect Contractor's job sites and conduct interviews with employees and conduct audits of Contractor

f. Contractor's commitment to provide the Minimum Compensation is a material element of the TJPA's consideration for this Agreement. The TJPA in its sole discretion shall determine whether such a breach has occurred. The TJPA and the public will suffer actual damage that will be impractical or extremely difficult to determine if the Contractor fails to comply with these requirements. Contractor agrees that the sums set forth in Section 12P.6.1 of the MCO as liquidated damages are not a penalty, but are reasonable estimates of the loss that the TJPA and the public will incur for Contractor's noncompliance. The procedures governing the assessment of liquidated damages shall be those set forth in Section 12P.6.2 of Chapter 12P.

g. Contractor understands and agrees that if it fails to comply with the requirements of the MCO, the TJPA shall have the right to pursue any rights or remedies available under Chapter 12P (including liquidated damages), under the terms of the contract, and under applicable law. If, within 30 days after receiving written notice of a breach of this Agreement for violating the MCO, Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Contractor fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the TJPA shall have the right to pursue any rights or remedies available under applicable law, including those set forth in Section 12P.6(c) of Chapter 12P. Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the TJPA.

h. Contractor represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the MCO.

i. If Contractor is exempt from the MCO when this Agreement is executed because the cumulative amount of agreements with this department for the fiscal year is less than \$25,000, but Contractor later enters into an agreement or agreements that cause contractor to exceed that amount in a fiscal year, Contractor shall thereafter be required to comply with the MCO under this Agreement. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Contractor and this department to exceed \$25,000 in the fiscal year.

#### **44. Requiring Health Benefits for Covered Employees**

Unless exempt, Artist agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q, including the remedies provided, and implementing regulations, as the same may be amended from time to time. The provisions of Chapter 12Q are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the HCAO is available on the web at [www.sfgov.org/olse](http://www.sfgov.org/olse). Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12Q.

a. For each Covered Employee, Artist shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If Artist chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Board.

b. Notwithstanding the above, if the Artist is a small business as defined in Section 12Q.3(e) of the HCAO, it shall have no obligation to comply with part (a) above.

c. Artist's failure to comply with the HCAO shall constitute a material breach of this agreement. TJPA shall notify Artist if such a breach has occurred. If, within 30 days after receiving TJPA's written notice of a breach of this Agreement for violating the HCAO, Artist fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Artist fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, TJPA shall have the right to pursue the remedies set forth in 12Q.5.1 and 12Q.5(f)(1-6). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to TJPA.

d. Any Subcontract entered into by Artist shall require the Subcontractor to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. Artist shall notify TJPA's Contracts Compliance Manager when it enters into such a Subcontract and shall certify to the Contracts Compliance Manager that it has notified the Subcontractor

of the obligations under the HCAO and has imposed the requirements of the HCAO on Subcontractor through the Subcontract. Each Artist shall be responsible for its Subcontractors' compliance with this Chapter. If a Subcontractor fails to comply, the TJPA may pursue the remedies set forth in this Section against Artist based on the Subcontractor's failure to comply, provided that TJPA has first provided Artist with notice and an opportunity to obtain a cure of the violation.

e. Artist shall not discharge, reduce in compensation, or otherwise discriminate against any employee for notifying TJPA with regard to Artist's noncompliance or anticipated noncompliance with the requirements of the HCAO, for opposing any practice proscribed by the HCAO, for participating in proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

f. Artist represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the HCAO.

g. Artist shall maintain employee and payroll records in compliance with the California Labor Code and Industrial Welfare Board orders, including the number of hours each employee has worked on the TJPA Contract.

h. Artist shall keep itself informed of the current requirements of the HCAO.

i. Artist shall provide reports to the TJPA in accordance with any reporting standards promulgated by the TJPA under the HCAO, including reports on Subcontractors and Subtenants, as applicable.

j. Artist shall provide TJPA with access to records pertaining to compliance with HCAO after receiving a written request from TJPA to do so and being provided at least ten business days to respond.

k. Artist shall allow TJPA to inspect Artist's job sites and have access to Artist's employees in order to monitor and determine compliance with HCAO.

l. TJPA may conduct random audits of Artist to ascertain its compliance with HCAO. Artist agrees to cooperate with TJPA when it conducts such audits.

m. If Artist is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but Artist later enters into an agreement or agreements that cause Artist's aggregate amount of all agreements with TJPA to reach \$75,000, all the agreements shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between Artist and the TJPA to be equal to or greater than \$75,000 in the fiscal year.

**<<(IF THE CONTRACT AMOUNT IS MORE THAN \$50,000 INSERT THE FOLLOWING SECTION, IF THE CONTRACT AMOUNT IS EQUAL TO OR LESS THAN \$50,000, PARAGRAPH #45 SHOULD READ "LEFT BLANK BY AGREEMENT OF THE PARTIES.")>>**

#### **45. First Source Hiring Program**

##### **a. Incorporation of Administrative Code Provisions by Reference**

The provisions of Chapter 83 of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Artist (hereinafter referred to as "Contractor" in this section) shall comply fully with, and be bound by, all of the provisions that apply to this Agreement under such Chapter, including but not limited to the remedies provided therein. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 83.

**b. First Source Hiring Agreement**

As an essential term of, and consideration for, any contract or property contract with the TJPA, not exempted by the FSHA, the Contractor shall enter into a first source hiring agreement ("agreement") with the TJPA, on or before the effective date of the contract or property contract. Contractors shall also enter into an agreement with the TJPA for any other work that it performs in the TJPA. Such agreement shall:

(1) Set appropriate hiring and retention goals for entry level positions. The employer shall agree to achieve these hiring and retention goals, or, if unable to achieve these goals, to establish good faith efforts as to its attempts to do so, as set forth in the agreement. The agreement shall take into consideration the employer's participation in existing job training, referral and/or brokerage programs. Within the discretion of the FSHA, subject to appropriate modifications, participation in such programs maybe certified as meeting the requirements of this Chapter. Failure either to achieve the specified goal, or to establish good faith efforts will constitute noncompliance and will subject the employer to the provisions of Section 83.10 of this Chapter.

(2) Set first source interviewing, recruitment and hiring requirements, which will provide the San Francisco Workforce Development System with the first opportunity to provide qualified economically disadvantaged individuals for consideration for employment for entry level positions. Employers shall consider all applications of qualified economically disadvantaged individuals referred by the System for employment; provided however, if the employer utilizes nondiscriminatory screening criteria, the employer shall have the sole discretion to interview and/or hire individuals referred or certified by the San Francisco Workforce Development System as being qualified economically disadvantaged individuals. The duration of the first source interviewing requirement shall be determined by the FSHA and shall be set forth in each agreement, but shall not exceed 10 days. During that period, the employer may publicize the entry level positions in accordance with the agreement. A need for urgent or temporary hires must be evaluated, and appropriate provisions for such a situation must be made in the agreement.

(3) Set appropriate requirements for providing notification of available entry level positions to the San Francisco Workforce Development System so that the System may train and refer an adequate pool of qualified economically disadvantaged individuals to participating employers. Notification should include such information as employment needs by occupational title, skills, and/or experience required, the hours required, wage scale and duration of employment, identification of entry level and training positions, identification of English language proficiency requirements, or absence thereof, and the projected schedule and procedures for hiring for each occupation. Employers should provide both long-term job need projections and notice before initiating the interviewing and hiring process. These notification requirements will take into consideration any need to protect the employer's proprietary information.

(4) Set appropriate record keeping and monitoring requirements. The First Source Hiring Administration shall develop easy-to-use forms and record keeping requirements for documenting compliance with the agreement. To the greatest extent possible, these requirements shall utilize the

employer's existing record keeping systems, be nonduplicative, and facilitate a coordinated flow of information and referrals.

(5) Establish guidelines for employer good faith efforts to comply with the first source hiring requirements of this Chapter. The FSHA will work with TJPA to develop employer good faith effort requirements appropriate to the types of contracts and property contracts handled by each department. Employers shall appoint a liaison for dealing with the development and implementation of the employer's agreement. In the event that the FSHA finds that the employer under a TJPA contract or property contract has taken actions primarily for the purpose of circumventing the requirements of this Chapter, that employer shall be subject to the sanctions set forth in Section 83.10 of this Chapter.

(6) Set the term of the requirements.

(7) Set appropriate enforcement and sanctioning standards consistent with this Chapter.

(8) Set forth the TJPA's obligations to develop training programs, job applicant referrals, technical assistance, and information systems that assist the employer in complying with this Chapter.

(9) Require the developer to include notice of the requirements of this Chapter in leases, subleases, and other occupancy contracts.

**c. Hiring Decisions**

Contractor shall make the final determination of whether an Economically Disadvantaged Individual referred by the System is "qualified" for the position.

**d. Exceptions**

Upon application by Employer, the First Source Hiring Administration may grant an exception to any or all of the requirements of Chapter 83 in any situation where it concludes that compliance with this Chapter would cause economic hardship.

**e. Liquidated Damages**

Contractor agrees:

(1) To be liable to the TJPA for liquidated damages as provided in this section;

(2) To be subject to the procedures governing enforcement of breaches of contracts based on violations of contract provisions required by this Chapter as set forth in this section;

(3) That the contractor's commitment to comply with this Chapter is a material element of the TJPA's consideration for this contract; that the failure of the contractor to comply with the contract provisions required by this Chapter will cause harm to the TJPA and the public which is significant and substantial but extremely difficult to quantify; that the harm to the TJPA includes not only the financial cost of funding public assistance programs but also the insidious but impossible to quantify harm that this community and its families suffer as a result of unemployment; and that the assessment of liquidated damages of up to \$5,000 for every notice of a new hire for an entry level position improperly withheld by the contractor from the first source hiring process, as determined by the FSHA during its first



investigation of a contractor, does not exceed a fair estimate of the financial and other damages that the TJPA suffers as a result of the contractor's failure to comply with its first source referral contractual obligations.

(4) That the continued failure by a contractor to comply with its first source referral contractual obligations will cause further significant and substantial harm to the TJPA and the public, and that a second assessment of liquidated damages of up to \$10,000 for each entry level position improperly withheld from the FSHA, from the time of the conclusion of the first investigation forward, does not exceed the financial and other damages that the TJPA suffers as a result of the contractor's continued failure to comply with its first source referral contractual obligations;

(5) That in addition to the cost of investigating alleged violations under this Section, the computation of liquidated damages for purposes of this section is based on the following data:

A. The average length of stay on public assistance in San Francisco's County Adult Assistance Program is approximately 41 months at an average monthly grant of \$348 per month, totaling approximately \$14,379; and

B. In 2004, the retention rate of adults placed in employment programs funded under the Workforce Investment Act for at least the first six months of employment was 84.4%. Since qualified individuals under the First Source program face far fewer barriers to employment than their counterparts in programs funded by the Workforce Investment Act, it is reasonable to conclude that the average length of employment for an individual whom the First Source Program refers to an employer and who is hired in an entry level position is at least one year; therefore, liquidated damages that total \$5,000 for first violations and \$10,000 for subsequent violations as determined by FSHA constitute a fair, reasonable, and conservative attempt to quantify the harm caused to the TJPA by the failure of a contractor to comply with its first source referral contractual obligations.

(6) That the failure of contractors to comply with this Chapter, except property contractors, may be subject to the debarment and monetary penalties set forth in Sections 6.80 et seq. of the San Francisco Administrative Code, as well as any other remedies available under the contract or at law; and

(7) That in the event the TJPA is the prevailing party in a civil action to recover liquidated damages for breach of a contract provision required by this Chapter, the contractor will be liable for the TJPA's costs and reasonable attorneys fees.

Violation of the requirements of Chapter 83 is subject to an assessment of liquidated damages in the amount of \$5,000 for every new hire for an Entry Level Position improperly withheld from the first source hiring process. The assessment of liquidated damages and the evaluation of any defenses or mitigating factors shall be made by the FSHA.

**f. Subcontracts**

Any subcontract entered into by Contractor shall require the subcontractor to comply with the requirements of Chapter 83 and shall contain contractual obligations substantially the same as those set forth in this Section.

**46. Prohibition on Political Activity with TJPA Funds**

In accordance with San Francisco Administrative Code Chapter 12.G, Artist may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure (collectively, "Political Activity") in the performance of the services provided under this Agreement. Artist agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the TJPA's CFO. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event Artist violates the provisions of this section, the TJPA may, in addition to any other rights or remedies available hereunder, (i) terminate this Agreement, and (ii) prohibit Artist from bidding on or receiving any new TJPA contract for a period of two (2) years. The CFO will not consider Artist's use of profit as a violation of this section.

#### **47. Preservative-treated Wood Containing Arsenic**

Artist may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of Environment under Section 1304 of the Code. The term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Artist may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude Artist from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

#### **48. Modification of Agreement**

This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved in the same manner as this Agreement.

#### **49. Administrative Remedy for Agreement Interpretation**

Should any question arise as to the meaning and intent of this Agreement, the question shall, prior to any other action or resort to any other legal remedy, be referred to TJPA who shall decide the true meaning and intent of the Agreement.

#### **50. Agreement Made in California; Venue**

The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

#### **51. Construction**

All paragraph captions are for reference only and shall not be considered in construing this Agreement.

#### **52. Entire Agreement**

This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. This contract may be modified only as provided in Section 48 (Modification of Agreement).

### **53. Compliance with Laws**

Artist shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and shall at all times comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time.

### **54. Services Provided by Attorneys**

Any services to be provided by a law firm or attorney must be reviewed and approved in writing in advance by the TJPA Attorney. No invoices for services provided by law firms or attorneys, including, without limitation, as subcontractors of Artist, will be paid unless the provider received advance written approval from the TJPA.

**<<[If the contract will involve contractor or subcontractors providing services involving direct supervision of minors,. Supervision includes oversight responsibilities at City parks, playgrounds, recreational centers or beaches. Otherwise, §55 should read "Left Blank by Agreement of the Parties."]>>**

### **55. Supervision of Minors**

Artist, and any subcontractors, shall comply with California Penal Code section 11105.3 and request from the Department of Justice records of all convictions or any arrest pending adjudication involving the offenses specified in Welfare and Institution Code section 15660(a) of any person who applies for employment or volunteer position with Artist, or any subcontractor, in which he or she would have supervisory or disciplinary power over a minor under his or her care.

If Artist, or any subcontractor, is providing services at a City park, playground, recreational center or beach (separately and collectively, "Recreational Site"), Artist shall not hire, and shall prevent its subcontractors from hiring, any person for employment or volunteer position to provide those services if that person has been convicted of any offense that was listed in former Penal Code section 11105.3(h)(1) or 11105.3(h)(3).

If Artist, or any of its subcontractors, hires an employee or volunteer to provide services to minors at any location other than a Recreational Site, and that employee or volunteer has been convicted of an offense specified in Penal Code section 11105.3(c), then Artist shall comply, and cause its subcontractors to comply with that section and provide written notice to the parents or guardians of any minor who will be supervised or disciplined by the employee or volunteer not less than ten (10) days prior to the day the employee or volunteer begins his or her duties or tasks. Artist shall provide, or cause its subcontractors to provide TJPA with a copy of any such notice at the same time that it provides notice to any parent or guardian.

Artist shall expressly require any of its subcontractors with supervisory or disciplinary power over a minor to comply with this section of the Agreement as a condition of its contract with the subcontractor.

Artist acknowledges and agrees that failure by Artist or any of its subcontractors to comply with any provision of this section of the Agreement shall constitute an Event of Default. Artist further

acknowledges and agrees that such Event of Default shall be grounds for the TJPA to terminate the Agreement, partially or in its entirety, to recover from Artist any amounts paid under this Agreement, and to withhold any future payments to Artist. The remedies provided in this Section shall not limit any other remedy available to the TJPA hereunder, or in equity or law for an Event of Default, and each remedy may be exercised individually or in combination with any other available remedy. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

## **56. Severability**

Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

## **57. Protection of Private Information**

Artist has read and agrees to the terms set forth in San Francisco Administrative Code Sections 12M.2, "Nondisclosure of Private Information," and 12M.3, "Enforcement" of Administrative Code Chapter 12M, "Protection of Private Information," which are incorporated herein as if fully set forth. Artist agrees that any failure of Artist to comply with the requirements of Section 12M.2 of this Chapter shall be a material breach of the Contract. In such an event, in addition to any other remedies available to it under equity or law, the TJPA may terminate the Contract, bring a false claim action against the Artist pursuant to Chapter 6 or Chapter 21 of the Administrative Code, or debar the Artist.

## **58. Graffiti Removal**

Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti shall be abated as quickly as possible to avoid detrimental impacts on the City and County and its residents, and to prevent the further spread of graffiti.

Artist shall remove all graffiti from any real property owned or leased by Artist in the City and County of San Francisco within forty eight (48) hours of the earlier of Artist's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works. This section is not intended to require a Artist to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act

(California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

Any failure of v to comply with this section of this Agreement shall constitute an Event of Default of this Agreement.

#### **59. Food Service Waste Reduction Requirements**

Artist agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in San Francisco Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this Agreement as though fully set forth. This provision is a material term of this Agreement. By entering into this Agreement, Contractor agrees that if it breaches this provision, TJPA will suffer actual damages that will be impractical or extremely difficult to determine; further, Artist agrees that the sum of one hundred dollars (\$100) liquidated damages for the first breach, two hundred dollars (\$200) liquidated damages for the second breach in the same year, and five hundred dollars (\$500) liquidated damages for subsequent breaches in the same year is reasonable estimate of the damage that TJPA will incur based on the violation, established in light of the circumstances existing at the time this Agreement was made. Such amount shall not be considered a penalty, but rather agreed monetary damages sustained by TJPA because of Artist's failure to comply with this provision.

#### **60. Slavery Era Disclosure**

a. Artist acknowledges that this contract shall not be binding upon the TJPA until the TJPA receives the affidavit required by the San Francisco Administrative Code's Chapter 12Y, "San Francisco Slavery Era Disclosure Ordinance."

b. In the event the TJPA finds that Artist has failed to file an affidavit as required by Section 12Y.4(a) and this Contract, or has willfully filed a false affidavit, the Artist shall be liable for liquidated damages in an amount equal to the Artist's net profit on the Contract, 10 percent of the total amount of the Contract, or \$1,000, whichever is greatest as determined by the TJPA. Artist acknowledges and agrees that the liquidated damages assessed shall be payable to the TJPA upon demand and may be set off against any monies due to the Artist from any Contract with the TJPA.

c. Artist shall maintain records necessary for monitoring their compliance with this provision.

#### **61. Cooperative Drafting.**

This Agreement has been drafted through a cooperative effort of both parties, and both parties have had an opportunity to have the Agreement reviewed and revised by legal counsel. No party shall be considered the drafter of this Agreement, and no presumption or rule that an ambiguity shall be construed against the party drafting the clause shall apply to the interpretation or enforcement of this Agreement.

#### **62. Dispute Resolution Procedure**

A Dispute Resolution Procedure is attached under the Appendix **[enter the appendix letter]** to address issues that have not been resolved administratively by other departmental remedies.

#### **63. USDOT Requirements**

The provisions contained in “USDOT Requirements for Professional Services Contracts,” attached as Appendix \_\_\_\_, are incorporated into this Agreement, and the Artist agrees to abide by such provisions. Such provisions supplement the provisions in this Agreement, and shall be interpreted in the broadest possible manner to avoid any conflicts. If there is an unavoidable conflict between the USDOT terms and conditions and any other terms and conditions of this Agreement, in the TJPA’s sole determination, the USDOT terms and conditions shall take precedence.

**SIGNATURES**

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day first mentioned above.

**TRANSBAY JOINT POWERS AUTHORITY**

\_\_\_\_\_  
Maria Ayerdi-Kaplan  
Executive Director

Transbay Joint Powers Authority  
Board of Directors  
Resolution No. \_\_\_\_\_  
Adopted: \_\_\_\_\_  
Attest:

\_\_\_\_\_  
Secretary, TJPA Board

**Approved as to Form:**

Dennis J. Herrera  
City Attorney

By \_\_\_\_\_  
Deputy City Attorney

**ARTIST**

By signing this Agreement, I certify that I comply with the requirements of the Minimum Compensation Ordinance, which entitle Covered Employees to certain minimum hourly wages and compensated and uncompensated time off.

I have read and understood paragraph 35, San Francisco's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles.

\_\_\_\_\_  
Authorized Signature  
[name of authorized representative]  
[title]  
[address]  
[city, state, ZIP]

**APPENDICES:**

- A: Artist's Proposal
- B: Services to be Provided by Artist
- C. Artist's Approved Costs
- D. Payment Schedule
- E. Transbay Transit Center Art Collection Forms

## **Appendix A**

### **ARTIST'S PROPOSAL**

1. "Proposal" shall mean the proposed visual, aesthetic, and artistic intent and design of the Artwork incorporated in the Contract Documents approved by the TJPA. The most recent design approved by the TJPA is incorporated herein by reference, and is binding unless or until changes are approved by resolution of the Board.

**IF ARTIST ALREADY HAS A PROPOSAL, USE THIS LANGUAGE. IF A PROPOSAL IS TO BE DEVELOPED, OMIT "a" AND USE "b."**

a. Attached is Artist's Proposal at the time of the Agreement date. Artist's Proposal shall be automatically superseded by any Contract Documents that are later approved by the TJPA.

b. Artist's proposal will be developed, fabricated and installed in accordance with Appendix B, Scope of Work. It is incorporated herein by reference upon TJPA approval of each Phase by Resolution. No work shall be authorized under a subsequent Phase until the work required by the previous Phase has been completed and approved by the TJPA.



## Appendix B

### Services to be provided by Artist

#### **Design, Fabrication, Transportation and Installation of Artwork for (<<INSERT NAME OF PROJECT>>)**

**Authorization:** Phases (<<INSERT PHASES APPROVED TO DATE BY COMMISSION>>) of this Agreement have been authorized by the TJPA Resolution Number (<<INSERT AC RESOLUTION #>>). The TJPA Board must approve Artist's work at each phase of development before the Artist proceeds to the next phase.

Phase I

DESIGN

#### **1. Scope of Work.**

##### **a) General**

- i) Artist has delivered a Preliminary Design for the Artwork ("Proposal"). The scope of work under this phase includes the development of the proposal through all phases of design, including Conceptual Design, Design Development and Construction Documents.
- ii) The TJPA must approve the Work at each phase of development before the Artist proceeds to the next phase. If the TJPA does not accept the Work at any design phase, the Artist agrees to submit one alternate proposal or design alternative at no additional cost.
- iii) The Proposal shall reflect the requirements of the TJPA and Architect, as expressed in the Request for Qualifications and as further discussed in communications with the TJPA, SFAC and Architect.
- iv) Artist shall attend project meetings and make presentations to TJPA staff, Architects, Boards, and other individuals and organizations, as needed.
- v) Artist agrees to collaborate closely with Architect through in-person meetings and other necessary means of communication to allow Architect to thoroughly integrate the Proposal into architectural drawings (if applicable) throughout all phases of design. **Artist shall coordinate his/her communications with the Architect through the Arts Board Project Manager.**
- vi) Artist shall deliver subcontracts of all or any Work pursuant to Paragraph 29, as well as documentation establishing that all employees, subcontractors and suppliers have been paid in a timely manner (collectively, "Subcontracts and Documentation").

b) **Conceptual Design:** The Proposal at Conceptual Design shall include:

- i) Drawings (in plan and elevation) and/or 3-dimensional models, proposed materials and samples, colors, finishes, textures and patinas, the specific location and orientation of the work relative to the site and a written description of the Artwork in sufficient detail that Artist's design intent is clearly expressed.
- ii) Budget for the cost of design, fabrication, insurance, transportation and installation of the Artwork with documentation of the sources and/or assumptions upon which the Budget figures are based regardless of whether these services are provided by Artist, Artist's subcontractors or by third parties under a separate agreement. Budget shall also reflect the costs associated with any onsite project manager or staff to ensure that Artwork operates properly as installed at the Site.
- iii) Maintenance Report: describing the estimated maintenance requirements of the artwork, including any manufacturer's warranties or specifications for the durability of any proposed materials.

**c) Design Development**

- i) Design Development Materials and Documents shall incorporate the further development and refinement of the Proposal, Budget and Maintenance Report developed under Conceptual Design.
- ii) Design Development shall include presentation quality materials, which shall include colored drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the Artwork and how it will be installed at the Site, mock-ups, final color and materials samples, proposed fabrication methods, feasibility studies and final cost estimates at design completion. When used in reference to the proposed Artwork, Design Development Documents shall fix and describe the size and character of the Artwork with respect to its relationship to the Site, including architectural, structural, mechanical and electrical systems, materials and other elements as may be appropriate.
- iii) Artist and Artist's structural engineer and fabricator shall review all Design Development drawings, materials and documents for consistency and constructability, and report any engineering, structural concerns, or constructability concerns to the TJPA. Modifications to the design necessitated by this review shall be submitted and approved by the TJPA prior to beginning the production of Construction Documents and incorporated therein.
- iv) Maintenance Plan. At the time Artist submits Artist's proposal for review by the TJPA and as part of the Design Development Documents, Artist shall provide the TJPA with a General Maintenance Plan for the Artwork, with a detailed description of future anticipated maintenance requirements; a recommended maintenance schedule; anticipated and required care and/or replacement/upgrade of any part of the Artwork and associated moving parts or equipment including any staff time involved in displaying or operating artwork and the frequency of such staff involvement; and written instructions and manufacturer's specifications for reasonably foreseeable maintenance and preservation activities relating to the Artwork. Artist shall also provide TJPA with a description of all equipment and or machinery needed to operate the project (if applicable) and any anticipated or required staffing, supervision or operational needs. The Artwork must be durable, taking into consideration that the

Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. Artist shall ensure that all maintenance requirements will be reasonable in terms of time and expense. The Artist shall be responsible for making any updates or clarifications to this Maintenance Plan if the maintenance requirements and estimates change over the course of the project.

**d) Construction Documents:**

- i) Construction Documents for construction and/or installation of the proposed Artwork as approved, which must be signed and stamped by design professionals licensed in the State of California, as required by the California Uniform Building Code and any San Francisco amendments to the Building Code.
- ii) Artist shall deliver Mock-ups and Samples, as required by TJPA.
- iii) Artist shall review Architect's Design Development and/or Construction Documents for accuracy of the integration of Artist's Proposal within the Site and provide the TJPA and Architect with written comments and/or corrections.
- iv) If the anticipated maintenance requirements and estimates have changed, Artist shall provide the TJPA with a revised Maintenance Plan.
- v) Artist shall deliver a schedule describing Artist's specific timelines for completing the Work.

**2. Schedule of Deliverables.**

<b>Deliverable</b>	<b>Due Date</b>
Evidence of Workers Compensation and Personal Automobile Liability Insurance	
Conceptual Proposal and Budget	
Design Development Documents and Budget (Including Maintenance Plan)	
Construction Documents, Budget, Material Samples, Written Cost Estimates, Schedule Maintenance Plan	
Subcontracts and Documentation	

- 3. Compensation.** Artist's compensation for Phase I shall be in accordance with Appendix C, Artist's approved costs, which is incorporated herein by reference. Such compensation shall cover all of Artist's costs and fees for Phase I.
- 4. Payment Schedule.** Artist's payment schedule and milestones shall be in accordance with Appendix D, Artist's Payment Schedule, which is incorporated herein by reference.
- 5. Insurance:** Artist shall obtain the following insurance prior to the commencement of Phase I unless waived by the TJPA. Artist shall comply with all the insurance requirements specified under Section 15 (Insurance) in the body of this Agreement.

(a) **Workers Compensation**, in statutory amounts with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness. Artist shall obtain such insurance prior to certification of this Agreement. To the extent Artist warrants, in writing, that Artist is not an employer and has no employees as defined by the California Labor Code Sections 3351-3351.1, Artist need not provide to the TJPA proof of Workers Compensation insurance.

(b) **Professional Liability Insurance** for all design professionals (such as architects, landscape architects or engineers) who provide Artist with signed stamped drawing or calculations. Such insurance shall have limits not less than \$1 million each claim with respect to negligent acts, errors and omissions, and any deductible may not exceed \$50,000 each claim. Artist shall obtain such insurance when Artist subcontracts for any work from such a design professional, and prior to the submittal of Construction Documents. Any design professional required to obtain professional liability insurance must maintain proof of insurance for the term of this Agreement.

(c) **Automobile Liability Insurance:** If Artist is an *individual*, Personal Automobile Liability Insurance with limits not less than \$100,000/\$300,000 each occurrence. If Artist is a *corporation or other legal entity*, Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable, unless a lesser amount is approved by TJPA. Artist shall obtain such insurance prior to certification of this Agreement.

## **6. Approved Subcontractors and corresponding insurance requirements**

The TJPA approves the Artist's subcontracts to provide structural engineering documents and other design development deliverables, and other consultants as necessary to provide project assistance. Subcontractors are subject to the same insurance requirements as listed above unless waived by the TJPA.

### **Approved Subcontractors:**

**<<INSERT NAME OR TYPE OF SUBCONTRACTORS>>**

## **7. Other Requirements**

Artist shall design an artwork for **<<INSERT PROJECT SITE>>** that can be designed, fabricated and installed for an amount not to exceed **<<INSERT TOTAL PROJECT BUDGET>>**. This budget must cover all costs associated with the project, whether or not the work is performed by the Artist, Artist's subcontractors, or by another contractor under a separate agreement with TJPA. Costs include, but are not limited to: Artist fees, consultants, fabrication,

installation, lighting, and any modifications made to the site to accommodate the Artist's work, including but not limited to design fees charged by the architects and their consultants. Artist is responsible for verifying all costs associated with the fabrication and installation of the project as part of Artist's deliverables under this agreement. In the event that cost estimates indicate that the Artist's Proposal cannot be executed within the above budget, the Artist hereby agrees to redesign or modify the Proposal so that the work can be fabricated and installed within the available budget.

## **Appendix B**

### **Services to be Provided by Artist**

#### **Phase II**

#### **Fabrication of Artwork**

##### **1. Scope of Work.**

- a) Artist shall deliver subcontracts prior to the start of fabrication of all or any Work pursuant to Paragraph 29, as well as documentation establishing that all employees, subcontractors and suppliers have been paid in a timely manner (collectively, "Subcontracts and Documentation").
- b) Artist shall fabricate the Artwork in accordance with all Contract Documents approved by the TJPA through Phase I.
- c) Shop Drawings. Artist shall deliver Shop Drawings as needed for sculpture armature, foundation and attachment hardware, produced by Artist or Artist's fabricator. The Shop Drawings shall be signed and stamped by a structural engineer as required by the California Uniform Building Code and any San Francisco amendments to the Building Code.
- d) Inspection of Artwork:
  - i) Artist shall send photo documentation of artwork fabrication at \_\_\_% completion. Documentation to be sent to Arts Board Project Manager and TJPA at each stage for review and approval prior to advancing with next phase of fabrication.
  - ii) Artist shall notify the TJPA 30 days in advance of 100% completion of all the artwork elements so that the TJPA can do a field inspection of the artwork at the fabricator.
- e) Transportation Plan. Artist shall deliver a written list of the workers, vehicles, and equipment that will be involved in the transportation of the Artwork to the Site. Evidence of insurance of the artwork during transportation must be provided by the company or individual hired to transport the artwork.
- f) Installation Plan. Artist shall deliver an installation plan indicating the staging and sequence of all aspects of installation. The Installation Plan must include a detailed description of the estimated duration of installation, the equipment to be used, and all workers who will be on site to assist. Liability Insurance must be provided for all persons contracted by the Artist or his subcontractor to perform any work on site.
- g) Final documentation, written proof of timely payment to subcontractors, maintenance manual, product specification data.

##### **3. Schedule of Deliverables.**

Deliverable	Due Dates

**4. Compensation.** Artist's total compensation for Phase II shall be in accordance with Appendix C, Artist's Approved Costs, which is incorporated herein by reference. Such compensation shall cover all of Artist's costs and fees for Phase II.

**5. Payment Schedule:** Artist's payment schedule and milestones shall be in accordance with Appendix D, Artist's Payment Schedule, which is incorporated herein by reference.

**6. Insurance and/or Bond Requirements.** Artist shall obtain the following insurance and/or bonds before commencement of Phase II:

**<<INSERT TYPE OF INSURANCE/BONDS TO BE REQUIRED, SEE SECTION 15 (INSURANCE) AND CONSULT WITH TJPA>>**

**7. Approved Subcontractors and corresponding insurance requirements**

The TJPA approves the Artist's subcontracts with fabricators and other consultants as necessary to provide project assistance. Subcontractors are subject to the same insurance requirements as listed above unless waived by the TJPA.

**Approved Subcontractors:**

**<<INSERT NAME OR TYPE OF SUBCONTRACTORS>>**

**8. Other Requirements (i.e., liquidated damages): TBD**

### **Phase III**

#### **Transportation and Installation of Artwork**

##### **1. Scope of Work.**

- a) Artist shall provide for the transportation of the Artwork in accordance with the Transportation Plan approved by the TJPA in Phase II. Artist shall not transport the Artwork until access to the Site has been approved and scheduled by the TJPA. Artist shall prepare the Artwork for transportation in accordance with customary industry standards for the transportation of fine works of art, and in accordance with the following additional specifications:
- b) Artist shall install the Artwork in accordance with Contract Documents approved in Phase I.
- c) Artist shall consult with the TJPA, the Project Construction Management Team and General Contractor prior to and during the installation of the Artwork. Artist shall coordinate Artist's activities on site with the General Contractor through the Construction Management Team and/or the TJPA staff.
- d) Maintenance Documents. Artist shall deliver all information necessary for the TJPA to properly care for and maintain the Artwork, including information regarding the physical make-up of the Artwork, methods and materials, and information about the artistic intent of Artist in the Design, Fabrication and Installation of the Artwork (attached as Appendix E: Transbay Transit Center Art Collection Forms).
- e) Artist shall deliver subcontracts of all or any Work pursuant to Paragraph 29, as well as documentation establishing that all employees, subcontractors and suppliers have been paid in a timely manner (collectively, "Subcontracts and Documentation").
- g) Artist is responsible for rental of crane, and all other equipment needed for installation. Artist shall supply all hardware and personnel necessary for installation. Artist is responsible for repairing or paying for the repair of any damage to the Site, the Artwork, or the work of other Artists to the extent such damage is caused by Artist, Artist's agents, employees, subcontractors or Artists. At the completion of installation, Artist shall clean and restore the Site and the work area to the condition it was in at the beginning of installation.
- f) Approval of Site: The preparation of the Site for installation of the Artwork shall be the responsibility of the General Contractor in accordance with a separate written agreement between TJPA and the General Contractor. Where Artist's Work is associated with that of the General Contractor, or any other Contractor engaged by the TJPA to do work on the Site, Artist shall examine the work of such other Contractor and report in writing to the TJPA any visible defect or condition preventing the proper execution of Artist's Work. If Artist proceeds without giving notice, the Artist shall be held to have approved the work or material and the existing conditions, and shall be responsible for any defects in Artist's own Work consequent thereon, and shall not be relieved of any obligation or any guarantee because of any such condition or imperfection. To the extent that any part



of the Artist's Work is to interface with work performed or installed by the General Contractor or other Contractor engaged by TJPA to perform work on the Site, Artist shall inspect and measure the in-place work and promptly report to the TJPA any defect in such in-place work that will impede or increase the cost of Artist's interface unless corrected. TJPA and/or its authorized representatives will require the party responsible for the defective work to make corrections so as to conform to its contract requirements, or if the defect is the result of a default or omission in the contract documents, may issue a change order. If Artist fails to measure, inspect and/or report defects that are reasonably discoverable, all costs of accomplishing the interface shall be borne by Artist. The forgoing does not apply to latent defects. Artist shall report to TJPA any latent defects in another Contractor's work at any time such defects become known. TJPA or its authorized representatives shall promptly thereafter take such steps as may be appropriate. Any difference or conflict that may arise between Artist and the General Contractor, or other Contractors engaged by TJPA to perform work on the Site, shall be adjusted as determined by TJPA, its agents, or its authorized representatives when necessary to facilitate the work of Artist and/or other Contractors or workers. No damages or claims by Artist will be allowed other than an extension of time for the completion of Work. Such an extension will be for the period of time TJPA shall consider Artist to have been delayed in the completion of Work by reason of the work of other Contractors or workers.

**3. Schedule of Deliverables.**

Deliverable	Due Date
Delivery of Required Proof of Insurance	
Transportation of Artwork	
Installation of Artwork	
Installation Documentation	
Maintenance Documents	
Subcontracts and Documentation	

**4. Compensation.** Artist's total compensation for Phase III shall be as set forth in Appendix C, which is incorporated herein by reference.

**5. Insurance and/or Bond Requirements.** Artist shall obtain the following insurance and/or bonds before commencement of Phase III:

(1) **Workers Compensation**, in statutory amounts with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness. Artist shall obtain such insurance prior to certification of this Agreement. To the extent Artist warrants, in writing, that Artist is not an employer and has no employees as defined by the California Labor Code Sections 3351-3351.1, Artist need not provide to the TJPA proof of Workers Compensation insurance.

(2) **Professional Liability Insurance** for all design professionals (such as architects, landscape architects or engineers) who provide Artist with signed stamped drawing or calculations. Such insurance shall have limits not less than \$1 million each claim with respect to negligent acts, errors and omissions, and any deductible may not exceed \$50,000 each claim. Artist shall obtain such insurance when Artist subcontracts for any work from such a design professional, and prior to the submittal of Construction Documents. Any design professional required to obtain professional liability insurance must maintain proof of insurance for the term of this Agreement.

(3) **Commercial General Liability Insurance**, with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations. Artist shall obtain such insurance prior to commencing the fabrication of the artwork and must maintain through the transportation and installation of the Work at the Site.

(4) **Automobile Liability Insurance**: If Artist is an *individual*, Personal Automobile Liability Insurance with limits not less than \$100,000/\$300,000 each occurrence. If Artist is a *corporation or other legal entity*, Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable, unless a lesser amount is approved by TJPA. Artist shall obtain such insurance prior to certification of this Agreement.

(4) **Fine Arts Insurance or other insurance against loss** in an amount equal to the value of the contract. Artist shall obtain such insurance prior to commencing fabrication of the Artwork.

## 6. Payment Schedule.

Completion milestones and payment schedule for Phase III shall be as set forth in Appendix D, Payment Schedule, and is incorporated herein by reference.

## 7. Approved Subcontractors and corresponding insurance requirements.

The TJPA approves the Artist's subcontracts for the installation and transportation of the artwork and other consultants as necessary to provide project assistance. Subcontractors are subject to the same insurance requirements as listed above unless waived by the TJPA.

### Approved Subcontractors:

<<INSERT NAME OR TYPE OF SUBCONTRACTORS>>

## 8. Other Requirements (i.e., liquidated damages): TBD

**APPENDIX C**

**Artist's Approved Costs**

**[TO BE INSERTED]**

**APPENDIX D**  
**Payment Schedule**  
**[TO BE INSERTED]**

**APPENDIX E  
ARTIST COLLECTIONS FORM**

**Please print or type answers  
to be completed before final payment**

Return to:  
Transbay Transit Center Art Collection Program  
Transbay Joint Powers Authority  
201 Mission Street, Suite 2100  
San Francisco, CA 94105

**ARTIST BIOGRAPHY**

<b>Artist Surname:</b>		<b>Given Name:</b>	
<b>Birth Date:</b>	<b>Birth Place:</b>		<b>Sex:</b>
<b>Ethnicity:</b> (optional)			
<b>Contact Information:</b> (current address, phone number and e-mail)			
<b>Attach Artist Resume:</b> (curriculum vitae or resume)			

**OBJECT INFORMATION**

<b>Title of Artwork:</b>
<b>Object Description:</b> (describe the artwork and the components that comprise the complete installation)
<b>Installation Location:</b>
In the interest of history, as well as for future conservation and restoration, should that become necessary, please complete the attached <b>Technical and Maintenance Record Sheet</b> . Describe all materials used to create this work of art, providing trade names wherever possible.

**NON-COMMISSIONED WORKS**

<b>Provenance:</b> (history of ownership, including dates work was transferred)
---

## ARTIST COLLECTIONS FORM

**Exhibition History:** (list all exhibitions by title, date and museum/gallery name)

### ARTIST INTENT

**Statement of Intent:** (provide any information about the subject of the work, sources of inspiration, ideas expressed in it or historical value relating to the work. You may attach a separate sheet.)

**Artist Signature and Date certifies that the information provided is accurate and complete:**

**Attach photographic documentation of the fabrication and completed artwork for the archive. Digital images on disk are preferred.**

**APPENDIX E**  
**2D Artwork Technical Maintenance Record**

**Please print or type answers**  
to be completed before final payment

Return to:  
Transbay Transit Center Art Collection  
Transbay Joint Powers Authority  
201 Mission Street, Suite 2100  
San Francisco, CA 94105

**Full Name of Artist:**

**Title of Artwork:**

**Date of Execution:**

**Dimensions:**

**Artwork Material/s:** (list type and brand name for all materials; attach Material Safety and Technical Data Sheets. Include contact names for each supplier and attach warranties when possible.)

**Framing Materials and Construction Method:** (list type and brand name for all materials; attach Material Safety and Technical Data Sheets. Include contact names for each supplier and attach warranties when possible.)

## 2D Artwork Technical Maintenance Record

**Technique or Construction Method:** (List all architects and fabricators. Attach any warranties or agreements)

**Finish:** (all anti-graffiti/protective coatings, fixative coatings, fire retardant, sprays, etc., attach Material Safety and Technical Data Sheets)

**Foundation/Installation Method:**

**Maintenance and Care of Artwork:** (suggested cleaning agent and procedures, attach Material Safety Data and Technical Data Sheets)

**Placement of Artwork:** (cautions regarding sunlight, heat, etc.)



## 2D Artwork Technical Maintenance Record

**Handling Instructions:**

**APPENDIX E**  
**3D Artwork Technical Maintenance Record**

**Please print or type answers**  
to be completed before final payment

Return to:  
Transbay Transit Center Art Collection  
Transbay Joint Powers Authority  
201 Mission Street, Suite 2100  
San Francisco, CA 94105

<b>Full Name of Artist:</b>
<b>Title of Artwork:</b>
<b>Date of Execution:</b>
<b>Dimensions:</b>
<b>Artwork Material/s:</b> (List type and brand name for all materials; attach Material Safety and Technical Data Sheets. Include contact names for each supplier and attach warranties when possible.)
<b>Material Thickness:</b>
<b>Welding or Joint Material:</b>
<b>Welding Rod Alloy or Joint Material:</b>
<b>Casting Alloy, Wax Body, Glass or Fiber Type:</b>
<b>Framing Materials and Construction Method:</b> (List type and brand name for all materials; attach Material Safety and Technical Data Sheets. Include contact names for each supplier and attach warranties when possible.)
<b>Technique or Construction Method:</b> (List all architects and fabricators. Attach any warranties or agreements.)

### 3D Artwork Technical Maintenance Record

**Finish:** (all anti-graffiti coatings, fixative coatings, fire retardant sprays, etc., attach Material Safety and Technical Data sheets.)

**Foundation/Installation Method:**

**Maintenance and Care of Artwork:** (Suggested cleaning agent and procedure, attach Material Safety and Technical Data sheets.)

**Placement of Artwork:** (cautions regarding sunlight, heat, etc.)

**Handling Instructions:**

## 3D Artwork Technical Maintenance Record

Attach any diagrams and disassembly instructions.