

**AGREEMENT**

**Between**

**SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT**

**And**

Click or tap here to enter text.

**ART DESIGN CONSULTATION SERVICES**

**FOR THE**

Click or tap here to enter text.

**BART AGREEMENT NO.**

Click or tap here to enter text.

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## ATTACHMENTS

- ATTACHMENT A: ARTIST SCOPE OF SERVICES
- ATTACHMENT B: SCHEDULE OF PERFORMANCE AND PAYMENT SCHEDULE
- ATTACHMENT C: ARTIST'S APPROVED COSTS
- ATTACHMENT D: STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION  
REQUIREMENTS

Boilerplate Design Agreement

**CONSULTING SERVICES AGREEMENT NO.** Click or tap here to enter text.

**Between**

**SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT**

**And**

Click or tap here to enter text.

THIS AGREEMENT ("Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT ("BART" or "District"), a rapid transit district established pursuant to California Public Utilities Code, Section 28500 et seq., and Click or tap here to enter text. ("Artist"), Choose an item., whose business is located at Click or tap here to enter text.

### **RECITALS**

This Agreement is made with reference to the following facts:

1. BART proposes to obtain from Artist consultation to the Project design team, design and fabrication consultation for an Artwork/s to be (installed/fabricated and installed) by others hired by BART for the Click or tap here to enter text. (the "Project"); and
2. The services required for the Project cannot be performed satisfactorily by the officers and employees of BART; and
3. Artist represents and warrants that it is qualified to perform and that it possesses the requisite experience and resources to render the services required by BART as set forth under this Agreement; and
4. BART has applied for or received grants from the State of California, Department of Transportation and other State agencies to assist in financing portions of the Project; and
5. Artist was selected by a panel of arts professionals and stakeholders from a pool of applicants as the most qualified to design the Artwork; and
6. The parties hereto now wish to enter into this Agreement pursuant to which Artist will furnish professional services in connection with the Project as hereinafter provided.

## AGREEMENT

In consideration of the mutual promises set forth herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

### Definitions:

Where any word or phrase defined below, or a pronoun used in place thereof, is used in any part of this Agreement or the Contract Documents, it shall have the meaning set forth below:

- A. "Agreement" shall mean this agreement, including all addenda, appendices and modifications, whether created now or in the future.
- B. "Agreement Manager" shall mean the individual assigned by BART to oversee Artist's Scope of Services under this Agreement.
- C. "Approved Costs" shall mean such costs as are scheduled on Appendix C, "Artist's Approved Costs," including the maximum expenditure authorized for each item.
- D. "Architect" shall mean the design firm engaged by BART to design the portion of Site in which the Artwork will be incorporated or installed.
- E. "Artist" shall mean [Click or tap here to enter text.](#) 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.
- F. "Artwork" shall mean the work or works of art designed by Artist for the Site under the terms of this Agreement (as described and defined in the Artist's Conceptual Design Proposal, attached herein as Exhibit 1). **When RFQ/RFP process implemented**
- G. "BART" shall mean the San Francisco Bay Area Rapid Transit District, a rapid transit district established pursuant to California Public Utilities Code, Section 28500 et seq.
- H. **Budget** shall mean a specific and detailed document identifying the cost of completion of all Services under this Agreement, including all approved modifications. The Budget shall include all design fees and associated costs; preliminary and final engineering if required;  
**And as warranted:**  
materials and labor for fabrication, including Artist and Artist's subcontractors' costs, crating and transportation of Artwork; required insurance; applicable sales taxes; and a contingency allowance.
- I. "Conceptual Proposal" shall mean drawings (in plan and elevation) and/or 3- dimensional models, a written description, proposed materials and samples and cost estimates. The information provided in Conceptual Proposal shall be complete enough to fully illustrate the design intent of the Artwork.
- J. "Contingency Allowance" shall mean a portion of the Budget reserved by the Artist for

design, construction, installation or other related costs that, due to factors beyond the control of the Artist, exceed the initial budget estimates. The contingency allowance may only be used if approved in advance by BART in writing.

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

L. "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.

M. "Fabricator" shall mean the company selected and engaged by BART to fabricate the Artwork as described in this Agreement. If requested by BART, Artist shall assist in the selection of the Fabricator.

N. "Final Documentation" shall mean a written maintenance manual that includes product specification data and procedures for maintenance of the Artwork.

O. "General Contractor" shall mean the general contractor hired by BART to make improvements for the station that is the subject of this Agreement.

P. "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 Artwork, and other information furnished by Artist to illustrate any materials or equipment for all or any portion of the Services. The purpose of Mock-ups and Samples is to provide physical examples that illustrate materials, equipment or workmanship and establish the standards by which the Services will be judged.

Q. "Proposal" shall mean the proposed artistic intent and visual design of the Artwork. The most recent design approved by BART is incorporated herein as Exhibit 1 of the Contract Documents and is binding unless BART approves changes to the design in writing. When RFQ/RFP process implemented

R. "Services" shall mean all of the work by Artist pertaining to providing BART with the Artwork and related services and deliverables as required under the Agreement, including as set forth in Attachment A, ARTIST SCOPE OF SERVICES, including Exhibit 1, ARTIST's CONCEPTUAL DESIGN PROPOSAL, and any modifications thereto.

S. "Shop Drawings" shall mean drawings, diagrams and other data specifically prepared by Fabricator, Artist or Artist's consultants, contractors, fabricators, manufacturers, suppliers, or distributors (collectively, "Subcontractors") 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 BART specifically waives this requirement.

T. "Site" shall mean the [Click or tap here to enter text.](#), specifically [Click or tap here to enter text.](#) that has been identified to receive Artwork.

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 BART. The words "sufficient," "necessary," or "proper," and the like, mean sufficient, necessary or proper in BART's judgment. The words "approval," "acceptable," "satisfactory," or words of like import, shall mean approved by, or acceptable to, or satisfactory to BART, unless otherwise specified. The terms "include," "included" or "including" and similar terms shall be deemed to be followed by the words "without limitation."

## **1.0 SERVICES TO BE PERFORMED**

The parties agree that the work to be performed by Artist under this Agreement shall be as hereinafter set forth in this Article 1.0.

### **1.1 SCOPE OF SERVICES**

Artist's Services are described in Attachment A, ARTIST'S SCOPE OF SERVICES, including Exhibit 1, ARTIST'S CONCEPTUAL DESIGN PROPOSAL, and any modifications thereto (both of which are incorporated herein and by this reference made a part hereof), and shall further include all of the work by Artist pertaining to providing BART with the Artwork and related services and deliverables as required under this Agreement (collectively, the "Services"). Artist shall be responsible to perform or secure the performance of all requested Services in their entirety subject to the prior written approval of each Phase as set forth in Attachment A by Jennifer Easton, the Agreement Manager, or a designated representative.

The Agreement Manager shall monitor Artist's performance with respect to compliance with the requirements of this Agreement.

### **1.2 PROJECT DIRECTION**

#### **A. Directions to Artist**

The Services to be performed by Artist under this Agreement shall be subject to the project direction of the Agreement Manager. As used herein, the term "project direction" shall include, but not be limited to, the following:

1. Directions to Artist which redirect the Agreement effort, shift work emphasis between tasks, require pursuit of certain lines of inquiry, fill in details or otherwise provide project guidance to Artist in order to accomplish the Services.
2. Review and, where required, obtain approvals by appropriate BART staff of drawings, specifications, or other products prepared by Artist or any of Artist's subcontractors in the performance of the Services.

#### **B. Professional Responsibility**

Notwithstanding any other provision in this Agreement or in the Artist's Scope of Services, the review and/or approval by BART, or any of its directors, officers, the Agreement Manager or its

other employees or agents, of any drawings, specifications or other products or communications prepared by Artist or any of her/his subcontractors, or of any acts or failures to act by Artist or any of her/his subcontractors, shall not relieve Artist or any of Artist's subcontractors of any professional responsibility for the Services performed.

### 1.3 PROCEDURE FOR EXECUTION OF WORK

A. It is the general intent of the parties that Artist will complete the design and fabrication consultation of the Artwork at the Site by BART's General Contractor, provided that BART determines, in its sole discretion, to go forward with the completion of the Artwork. The Services shall be completed in separately defined, successive stages ("Phases"). Each Phase, as defined in "Attachment A" to this Agreement, shall be governed by this Agreement, and by any modifications to this Agreement setting forth specific terms and conditions governing each Phase. Each modification will include the Phase for which BART has given authorization, the scope of work covered by that Phase, the schedule of deliverables, insurance requirements, and payment terms.

B. Artist shall not commence any Phase nor incur any expense in anticipation of commencing any Phase unless BART has given prior written authorization. Prior to beginning each Phase, Artist shall obtain the necessary approval of the previous Phase. In no event shall BART be liable for any claims or damages arising from Artist's unauthorized actions.

C. The Services to be completed by Artist are unique and personal to Artist, and may not be capable of completion by anyone other than Artist or his subcontractors. Therefore, if Artist fails or unreasonably refuses to modify this Agreement to include subsequent Phases after having been requested to do so by BART, or fails to complete the Services required by any Phase, BART may require that Artist return all payments made under this Agreement from the initiation of the Agreement. If BART 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, BART may authorize Artist to keep payments made under this Agreement for prior completed Phases. In such case, BART may, at its option, engage another Artist or contractor to complete the Services.

### 1.4 PROJECT AND ORGANIZATIONAL PROCEDURES

#### A. Modification of Procedures

At the direction of the Agreement Manager, and provided that the requested modifications are reasonably practicable, and further, that the requested modifications will not alter the aesthetic or physical integrity of the Artwork, Artist shall develop or modify Attachment A in accordance with a schedule and in a form approved by the Agreement Manager. Such procedures as developed or modified shall be specifically related to activities performed for the Services and basic Artist procedural functions including, but not limited to, the process of budgeting, invoicing, and submitting reports to BART hereunder. The intention of the parties is for Artist to develop, implement and maintain clear and concise Project- specific procedures.

#### B. Additional Modifications

In addition to any specific procedures as described immediately above, BART may require Artist to revise the Scope of Services other than those set forth immediately above in Article 1.4.A that are used throughout its organization if they conflict with the requirements of this Agreement



## 1.5 PERSONNEL

- A. Artist has, or will secure at Artist's expense, all personnel required to perform Services. All persons retained by Artist shall possess the requisite licenses, permits, and insurance necessary to perform the work.
- B. Artist shall provide Agreement Manager with a list of all subconsultants and copies of all agreements.
- C. Artist shall not remove any such consultants prior to the completion of their assignment under the Project without the prior written approval of the Agreement Manager, which approval will not be unreasonably withheld. Artist shall nominate a replacement subconsultant to BART and shall not remove any subconsultant from the Project until subconsultant's replacement has been approved by the Agreement Manager.
- D. Removal of Personnel. BART's Agreement Manager reserves the right to direct removal of any Artist or subcontractor's personnel assigned to the Project when in BART's opinion the individual's performance is unsatisfactory or deemed unsafe.
- E. Artist's will submit to Agreement Manager Artist's or subconsultant's DBE participation, if applicable. All DBEs shall be certified by BART or possess DBE certification which BART recognizes prior to proposal submission.

## 1.6 FINANCIAL ADMINISTRATION

Artist and Artist's subcontractors at any tier shall establish and maintain records pertaining to the fiscal activities of the Project. Artist and subcontractors' accounting systems shall conform to generally accepted accounting principles. All such records shall provide, as a minimum, a breakdown of total costs charged to the Project, including properly executed payrolls, time records, invoices and vouchers.

## 2.0 TIME OF PERFORMANCE AND DELAYS

### 2.1 TIME OF PERFORMANCE

#### A. Performance of Services

Artist's performance of the Services shall commence upon execution of this Agreement, and shall be completed by the date specified in Attachment A, ARTIST'S SCOPE OF SERVICES, unless terminated earlier in accordance with Article 5.0, TERMINATION.

#### B. Term of Agreement

The term of this Agreement will be three (3) years from the date of execution of this Agreement subject to termination or the limit on maximum compensation as provided for in the Agreement. To the extent that any Services are not completed during the term of this Agreement, the term of this Agreement shall be extended via change order.

### 2.2 Delays

Neither party hereto shall be considered in default in the performance of its obligations hereunder to the extent that the performance of any such obligation is prevented or delayed by unforeseen causes including acts of God, acts of the public enemy and governmental acts beyond the control and without fault or negligence of the affected party.

Each party hereto shall give notice promptly to the other of the nature and extent of any such circumstances claimed to delay, hinder or prevent performance of any obligations under this Agreement.

### 2.3 Timely Provision of Services; Damages for Delayed Performance

a. Time. Time is of the essence in the Artist's performance of the Work. Artist agrees to provide all deliverables in accordance with the timelines contained herein unless changes to those timelines are approved in writing by the BART. All changes to schedule must be approved by BART in writing.

b. Damages for Delayed Performance.

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 BART for damages resulting from delays caused by Force Majeure or by acts or omissions of BART its directors, officers, agents and employees, except to the extent Artist failed to act reasonably to mitigate such damages.

## **3.0 COMPENSATION AND PAYMENT**

### 3.1 COMPENSATION

#### A. Basis

The compensation for each Phase performed under this Agreement will be on a fixed price basis, an incurred cost reimbursement basis plus a defined fee, or some combination thereof. Such compensation will be allowable only to the extent that costs incurred or cost estimates included in negotiated, or otherwise established prices, are consistent with the Federal Cost Principles (Title 48, Code of Federal Regulations, Chapter 1, Part 31).

#### B. Requirements

Such compensation shall be further subject to the following requirements:

1. Conform with:
  - a. the Services to be performed pursuant to Attachment A: Artist's Scope of Services;
  - b. any compensation limits or sublimits set forth in the Artist's Scope of Services and this Agreement; and
  - c. all other terms of this Agreement.
2. Be necessary in order to accomplish the Services.
3. Be reasonable for the Services to be performed or goods to be purchased in connection with the performance of Services hereunder.

4. As used herein, the term “costs” shall include the following:
  - a. Those costs recorded by Artist that result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the work.
  - b. When Artist is not delinquent in payment of costs of agreement performance in the ordinary course of business, costs incurred, but not necessarily paid, for:
    - (1) Direct labor;
    - (2) Other direct costs that are not subcontracted;
    - (3) Indirect costs.
  - c. The amount of reimbursement that has been paid by Artist for subcontracted services under similar cost standards.
5. Be for direct costs or prices incurred for work performed after the effective date of this Agreement, and presented for payment within 90 days of the incurrence.

### 3.2. RATE AGREEMENT

A. The total amount payable to Artist under this Agreement for all work performed herein by Artist (“Contract Sum”) shall not exceed \$[Click or tap here to enter text.](#) ([Click or tap here to enter text.](#) Thousand Dollars only) unless this Agreement is amended as provided herein. This total amount shall include Artist’s fee and all reimbursable expenses. Out of the total Agreement amount, Artist shall be responsible for paying all of Artist’s costs and expenses associated with the Services, including the costs of suppliers, subcontractors, overhead, fees, taxes, permits, insurance, transportation to and from meetings, and all other expenses associated with the scope of the Services specified in this Agreement (hereinafter “Artist’s Costs”).

In the event Artist incurs costs in excess of the Contract Sum that is not due to actions or directives of BART, the Artist shall pay such excess from the Artist’s fee or Artist’s own funds, and BART shall not be required to pay any part of such excess, and the Artist shall have no claim against BART on account thereof. Artist shall not be responsible for any excess costs incurred due to the acts or conduct of the Architect, the General Contractor, or the Fabricator.

B. Advance Payments: Artist shall be provided with advance payments at the beginning of each project phase, for the purpose of assisting Artist with expenses associated with the deliverables in that phase. Upon completion of any deliverable for which expenses and costs have been paid by Artist, Artist shall submit proof of the payment in the form of original receipts and invoices from the payee.

C. Artist shall be entitled to payment for these costs and expenses only to the extent Artist has actually incurred such costs, and BART shall retain all funds remaining or saved from the costs estimated in Attachment C.

D. Compensation shall be made to Artist based upon Artist’s successful completion, in BART’S sole reasonable discretion, of the milestones set forth in the Appendices to this Agreement.

E. No charges shall be incurred under this Agreement nor shall any payments become due to Artist until Services, including deliverables, required under this Agreement are received from Artist and approved by BART as being in accordance with this Agreement. BART 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.

### 3.3. COMPENSATION LIMITS

Subject only to changes made in conformance with Article 4.0, CHANGES AND MODIFICATIONS, below, it is expressly understood and agreed that:

1. In no event shall Artist be compensated in an amount greater than the amount specified in Section 3.2 A. and Attachment C (ARTIST'S APPROVED COSTS).

2. In no event will the total compensation, including reimbursement for costs and expenses and the applicable fixed fee, to be paid Artist for Services described in Article 1.1, SCOPE OF SERVICES, above, and specified in Section 3.2, exceed \$Click or tap here to enter text.. However, there is no guaranteed minimum level of compensation.

### 3.4 DISALLOWED OR OTHERWISE UNRECOGNIZED COSTS

Artist understands and agrees to the following:

#### A. No Waiver

Any compensation or reimbursement received under this Agreement does not constitute a final decision by the District as to the allowability of such compensation or reimbursement and does not constitute a waiver of any violation by Artist of the terms of this Agreement (including, but not limited to, requirements of the Agreement to be included in Artist's subcontracts).

#### B. Final Determination

Unless approved otherwise by the Agreement Manager, the District will not make final determination about the allowability of compensation or reimbursement of cost received under this Agreement until an audit of the Services performed under this Agreement has been completed.

#### C. Notification

If the District determines that Artist and/or Artist's subcontractor(s) is not entitled to either the compensation or reimbursement requested or received, the District will notify Artist stating the reasons therefor.

#### D. Return of Funds

Completion of the work under this Agreement will not alter Artist's or Artist's subcontractors' obligation to return any funds due the District as a result of later refunds, corrections, or other transactions, nor alter the District's right to disallow or otherwise not recognize costs on the basis of a later audit or other review.

### 3.5 METHOD OF PAYMENT

#### A. Invoices/Subcontractors Payment

Unless approved otherwise by the Agreement Manager, Artist's Services shall be invoiced and payment will be made within thirty (30) calendar days of receipt of an acceptable invoice with satisfactory backup documentation, approved by the Agreement Manager, provided a completed form W-9 is on file with BART Assistant Controller. As used herein, the term "invoice" shall include Artist's bill or written request for payment for Services performed under this Agreement.

Unless otherwise approved in writing by the Agreement Manager, Artist shall, within seven (7) days after receipt of payment made by BART, pay to each of Artist's immediate subcontractors (or their respective assignees), for satisfactory performance of subcontractor's contract, the amounts to which each is entitled, after deducting any prior payments and any amounts due and payable to Artist by those subcontractors. Any delay or postponement of payment among the parties may take place only for good cause and with the District's prior written approval. If Artist determines the work of the subcontractor to be unsatisfactory, Artist must immediately notify in writing the Agreement Manager (and the Office of Civil Rights if the subcontractor is a DBE) and state the reasons therefor. Failure by Artist to comply with this requirement will be construed to be a breach of contract.

**B. Payment Does Not Imply Acceptance of Work**

The issuance of any payment for Milestone(s), other progress payment or final payment by BART or the receipt thereof by the Artist shall in no way lessen the liability of the Artist to correct unsatisfactory Work or materials, although the unsatisfactory nature of such Work may or may not have been apparent or detected at the time such payment was made. Work that does not conform to the requirements of this Agreement may be rejected by BART and in such case must be replaced or performed again by Artist without delay.

**C. Withholding of Payment**

BART reserves the right to withhold payment(s) otherwise due Artist in the event of Artist's material non-compliance with any of the provisions of this Agreement, including, but not limited to, the requirements imposed upon Artist in Article 8.0, INDEMNIFICATION; and Article 9.0, ARTIST'S WARRANTIES, below. BART shall provide notice of withholding, and may continue the withholding until Artist has provided evidence of compliance which is acceptable to BART.

**D. Final Acceptance.**

Artist shall advise BART in writing when Artist has completed all obligations, services and deliverables under this Agreement and all modifications. Within fifteen (15) days, BART 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 30 days from dispatch of the Notice of Response to cure any defects in Artist's performance identified in BART's Notice of Response. The Artwork shall not be finally accepted by BART unless it has issued a Notice of Final Acceptance. BART shall make a good faith effort to make a determination as to Final Acceptance promptly.

BART Art Collection. Upon Final Acceptance, BART shall accession the Artwork into its Art Collection, and full title to Artwork shall pass to BART.

E. Invoice Procedures

Artist shall invoice for each successfully completed project Phase in conformance with procedures approved by the Agreement Manager and as set forth in Attachment D, ARTIST PAYMENT SCHEDULE.

In no case shall Artist submit an invoice for costs that BART has disallowed or otherwise indicated that it will not recognize.

F. Invoice Requirements

Invoices shall be, as a minimum, (i) mechanically accurate, (ii) substantially vouchered and properly supported and (iii) in compliance with the specific requirements of Article 1.6, FINANCIAL ADMINISTRATION above. Invoices must match PO line items. Invoices must also include both the Agreement number and the applicable Phase number that corresponds to the invoice.

G. Invoice Submittal Address

Artist shall submit a completed Form W-9 and all invoices directly to BART's Accounts Payable (AP) Department. Invoices shall be submitted using one (1) of the following three (3) methods:

(1) E-mail a PDF version of the invoice to: [AP\\_SUPPLIER@BART.gov](mailto:AP_SUPPLIER@BART.gov). Please save the file name using Artist's Company name – Invoice No.

(2) Fax the invoice to: (510) 380-7635

(3) Mail the invoice to: San Francisco Bay Area Rapid Transit District  
Accounts Payable Department – LKS-22 Subject: Invoice Submission  
300 Lakeside Drive, 22<sup>nd</sup> Floor Oakland, CA 94612

Invoices must include: the invoice number; Agreement Number, and the Phase number that corresponds to the invoice.

Artist shall direct questions regarding invoice submission to the Agreement Manager or email the request to [PurchaseOrders@bart.gov](mailto:PurchaseOrders@bart.gov). Invoice submission samples can be viewed at [www.bart.gov/bap](http://www.bart.gov/bap).

H. Taxpayer Identification Number

No later than the date of Artist's execution of this Agreement, Artist shall provide BART with Artist's Tax Identification Number and any proof of Artist's Tax Identification Number as requested by BART, which will be placed on file with the Assistant Controller. Artist agrees to file such tax forms as may be reasonably requested by BART to implement Internal Revenue Code Section 3406 and to accept as a part of any compensation due, any payments made by BART to the Internal Revenue Service pursuant to that Section.

I. Electronic Payments

If Artist is interested in receiving electronic payments, Artist shall send an E-mail request to [SUPPLIERINFO@BART.gov](mailto:SUPPLIERINFO@BART.gov).

#### **4.0 CHANGES AND MODIFICATIONS**

BART reserves the right to order changes to this Agreement, to be performed pursuant to this Agreement, as set forth below.

##### **4.1 CHANGE ORDERS**

###### **A. Services**

BART reserves the right to order changes to this Agreement, including but not limited to, the Services to be performed by Artist, provided that such changes do not alter the aesthetic or physical integrity of the Artwork. All such changes shall be incorporated in written change orders duly executed by BART and Artist, which shall specify the changes ordered and the adjustment of compensation and completion time required therefor.

###### **B. Execution**

Any such services added to the scope of this Agreement by a change order shall be executed under all applicable conditions of this Agreement.

###### **C. Additional Compensation**

No claim for additional compensation or extension of time with respect to a Phase or to the Agreement as a whole shall be recognized unless contained in an accepted change order. The parties also understand and agree that Artist will not be reimbursed for costs prior to the effective date of a change order unless otherwise approved by the Agreement Manager.

#### **5.0 TERMINATION**

##### **5.1 TERMINATION FOR CONVENIENCE**

BART may, at any time prior to completion of the Services under any Phase, terminate any such Phase or this Agreement whenever BART determines that such termination is in its best interest, by written notice to Artist. BART's written notice to Artist shall state in detail the extent of such termination with respect to the Phase or this Agreement. Effective on receipt of such notice of termination from BART, no new work or obligation with respect to such Phase or this Agreement will be undertaken by Artist or Artist's subcontractors unless so directed by BART in writing. Upon such termination, Artist shall submit an invoice or invoices to BART in amounts that represent the compensation specified herein for Services actually performed to the date of such termination and for which Artist has not been previously compensated. Upon payment of the amount due, BART shall be under no further obligation to Artist, financial or otherwise, with respect to terminated Services or this Agreement.

##### **5.2 TERMINATION FOR CAUSE**

A. If Artist is in default, with the exception of Section 6.0: Insurance, and fails to remedy this default within fifteen (15) days after receipt from BART of notice of such default setting forth the nature of the default and the requirements to cure, BART may in its discretion terminate this Agreement or such portion thereof as BART determines is most directly affected by the default.

The term “default” for purposes of this provision includes, but is not limited to, the performance of Services in violation of the terms of this Agreement; abandonment, assignment or subletting of the Agreement without approval of BART; bankruptcy or appointment of a receiver for Artist’s property; failure of Artist to perform the Services or other required acts within the time specified for this Agreement or any extension thereof; refusal or failure to provide proper workmanship; failure to take effective steps to end a prolonged labor dispute; the performance of this Agreement in bad faith; and the breach of any warranty as set forth in this Agreement.

Upon BART’s termination of this Agreement or any portion thereof for default by Artist, BART reserves the right to complete the Services, including the Artwork, by whatever means it deems expedient and the expense of completing such Services as well as any and all damages proximately caused by the default shall be charged to Artist.

B. No Obligation to Pay. Except as specifically provided in this Agreement, BART 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.

C. Remedies are Cumulative. 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.

### 5.3 FORCE MAJEURE

The performance of work under this Agreement may be terminated by BART, in its discretion, upon application therefor by Artist for unforeseen causes beyond the control and without the fault or negligence of Artist, acts of God, acts of the public enemy, governmental acts, fires and epidemics if such causes irrevocably disrupt or render impossible Artist’s performance hereunder. An “act of God” shall mean an earthquake, flood, cyclone, or other cataclysmic phenomenon of nature beyond the power of Artist to foresee or make preparation in defense against.

### 5.4 TRANSFER OF TITLE UPON TERMINATION

If the District terminates this Agreement for any reason, the District shall be automatically vested with title to any works comprising the Services produced under this Agreement up to the date of termination. Artist shall deliver any such works to the District in the manner, at the times, and to the extent directed by the District. If termination is due to the default of Artist, the District may, at its option, require Artist to refund to District any interim payments received under the Agreement; in such case, the District shall transfer title to such works to Artist.

### 5.5 SURVIVAL

The rights and obligations of the parties as set forth in the following sections shall survive any termination of this Agreement: 1.6 (FINANCIAL ADMINISTRATION), 3.0 (COMPENSATION AND PAYMENT), 6.0 (INSURANCE), 7.0 (INDEPENDENT CONTRACTOR), 8.0 (INDEMNIFICATION), 9.0 (ARTIST’S WARRANTIES), 11.0 COPYRIGHT, 12.0 (PATENTS), 13.0 (MATTERS CONFIDENTIAL AND PRIVILEGED), 14.0 (SUBCONTRACTS), 15.0 (ASSIGNMENT OF AGREEMENT), 16.0 (RECORDS), 17.0 (AUDIT), 19.0 (NOTICES).



## 6.0 INSURANCE

At all times during the life of this Agreement to final acceptance of the Services covered by the Agreement, or as may be further required by the Agreement, Artist, at Artist's own cost and expense, shall provide the insurance specified in this Article 6.0, unless otherwise approved in advance and in writing by the District's Department Manager, Insurance.

### A. Evidence Required

At or before execution of this Agreement and at such other times as the District may request, Artist shall provide the District with Certificate(s) of Insurance executed by an authorized representative of the insurer(s) evidencing the Artist's compliance with the insurance requirements in this Article 6.0. The Certificate(s) shall reference **contract title** the District's Agreement Number and Title to which the Certificate relates. In addition, a copy of all required endorsements shall be included with and attached to the Certificate(s) of Insurance.

### B. Notice of Cancellation, Reduction or Material Change in Coverage.

All policies shall be endorsed to provide the District with thirty (30) days prior written notice of any cancellation, reduction, or material change in coverage. Notices shall be sent to the Department Manager, Insurance, San Francisco Bay Area Rapid Transit District, P.O. Box 12688, Oakland, California, 94604-2688. The Artist shall annually submit to the District's Department Manager, Insurance, certifications confirming that the insurance required has been renewed and continues in place.

### C. Qualifying Insurers

All policies shall be issued by companies authorized to do business in the State of which hold a current policyholders alphabetic and financial size category rating of not less than A:VIII according to Best's Insurance Reports.

### D. Insurance Required

1. Commercial General Liability Insurance for bodily injury (including death) and property damage which provides limits of not less than One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) annual general aggregate.

a. Coverage shall include:

- (1) Premises and Operations;
- (2) Broad Form Property Damage;
- (3) Products and Completed Operations;
- (4) Blanket Contractual liability, expressly including liability assumed under the Agreement;
- (5) Personal Injury and Advertising Injury Liability;
- (6) Separation of Insureds
- (7) Independent Contractors Liability;
- (8) Per project aggregate

b. Such insurance shall include the following endorsements, copies of which shall be provided to the District:

- (1) Inclusion of the District, its directors, officers, representatives, agents and employees as additional insured as respects to Artist's ongoing and completed services and operations under

this Agreement; and

(2) Waiver of subrogation in favor of District, its directors, officers, representatives, agents and employees; and

(3) General liability endorsements equivalent to ISO forms CG2010 04/13, CG2037 04/13; and

(4) Stipulation that the insurance is primary insurance and that no insurance or self-insurance of the District will be called upon to contribute to a loss

2. Automobile Liability Insurance for bodily injury (including death) and property damage that provides limits of liability of not less than One Million Dollars (\$1,000,000) combined single limit per occurrence applicable for all owned, non-owned and hired vehicles.

a. Such insurance shall include the following endorsements, copies of which shall be provided to the District:

(1) Waiver of subrogation in favor of District its directors, officers, representatives, agents and employees

3. Workers' Compensation/Employers' Liability Insurance Statutory Workers' Compensation and Employers' Liability Insurance for not less than One Million Dollars (\$1,000,000) per accident or disease applicable to Employers' Liability coverage for all employees engaged in services or operations under this Agreement. The policy shall include Broad Form All States/Other States coverage. Coverage shall be specifically endorsed to include the insurer's waiver of subrogation in favor of the District, its directors, officers, representatives, agents and employees; a copy of which shall be provided to the District. Should any such work be subcontracted, Artist shall require each subcontractor of any tier to similarly comply with this Article 6.0, all in strict compliance with Federal and State law.

4. Professional Liability Insurance for damages and expense caused by errors, omissions or any negligent acts. for all design professionals (certified/licensed professions) who provide Artist with signed stamped drawing or calculations. The policy shall provide a coverage limit of not less than Three Million Dollars (\$3,000,000) per claim/aggregate as respects Artist's services provided under this Agreement. Artist shall obtain, or cause to be obtained such insurance when Artist subcontracts for any work from such a design professional, and prior to the submittal of Construction Documents. Any design professional shall maintain required professional liability insurance for a period of not less than five (5) years following completion of services under this Agreement.

#### E. Special Provisions

1. The foregoing requirements as to the types and limits of insurance coverage to be maintained by Artist, and any approval of said insurance by the District is not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Artist pursuant to this Agreement including but not limited to the provisions concerning indemnification.

2. The District acknowledges that some insurance requirements contained in this article may be fulfilled by a funded self-insurance program of Artist. However, this shall not in any way limit liabilities assumed by Artist under this Agreement. Any self-insurance program must be approved in writing by the District.

3. Should any of the work under this Agreement be subcontracted, Artist may impose these requirements upon each of her/his subcontractor (s) of any tier at her/his own discretion.

4. The District reserves the right to withhold payments to Artist in the event of material noncompliance with the insurance requirements of this Article 6.0.

5. The District reserves the right to terminate this Agreement in the event of material noncompliance with the insurance requirements of this Article 6.0.

## **7.0 INDEPENDENT CONTRACTOR**

Artist is an independent contractor and not an employee or agent of BART and has no authority to contract or enter into any other agreement in the name of BART. Artist has, and hereby retains, full control over the employment, direction, compensation and discharge of all persons employed by Artist who are assisting in the performance of services under this Agreement. Artist shall be fully responsible for all matters relating to the payment of Artist's employees, including compliance with social security, withholding tax and all other laws and regulations governing such matters. Artist shall be responsible for Artist's own acts and those of Artist's agents and employees during the term of this Agreement.

In Artist's capacity as an independent contractor, Artist shall comply with any and all BART operations rules and procedures that relate to the performance of the Services on BART property. Prior to commencing services, the Agreement Manager may loan Artist a copy of the District's Operations Rules and Procedures which shall be returned upon the completion or termination of Artist's:

### **7.1 CONFLICT OF INTEREST**

Artist, Artist's subcontractors and suppliers shall perform all work under this Agreement in conformance with all applicable statutes and regulations pertaining to conflicts of interest, including but not limited to, the financial reporting requirements and the conflict prohibitions of federal law (see, e.g., Federal Transit Administration Circular 4220.1F, Third Party Contracting Guidance) and California law (see, e.g., Government Code Section 1090 et seq., Government Code Section 87100 et seq. and Title 2, Division 6 of the California Code of Regulations).

When, in the judgment of BART, it is necessary in order to avoid any potential conflicts of interest, Artist, Artist's subcontractors and suppliers may be precluded from subsequently participating as a vendor or contractor on projects for which they are providing services under this Agreement.

## **8.0 INDEMNIFICATION**

Artist, to the extent permitted by law, shall defend, indemnify and hold harmless BART, its directors, officers, agents and employees from all claims, demands, suits, loss, damages, injury and liability, direct or indirect (including reasonable attorney's fees, and any and all costs and expenses in connection therewith), incurred by reason of any act, or failure to act, of Artist, Artist's officers, agents, employees and subcontractors or any of them, under or in connection with this Agreement; and Artist agrees at Artist's own cost, expense and risk to defend any and all claims, actions, suits, or other legal proceedings brought or instituted against BART, its directors, officers, agents and employees, or any of them, arising out of the Services performed by the Artist, and to pay and satisfy any resulting judgments. Artist shall not be required to defend or indemnify BART for any claims, demands, suits, losses, damages, injury and liability, related to or in connection with, services performed by others pertaining to the construction,

engineering, fabrication and/or installation of the Artwork, including but not limited to the work and services performed by the Architect, the General Contractor, and/or the Fabricator.

Artist is not an employee and will defend, indemnify and hold BART harmless of any injuries and claims suffered by ARTIST and /or its officers, agents, employees and subcontractors that would otherwise be subject to Workers Compensation act.

Such indemnification includes without limitation any violation of Artist's Warranties as set forth in Section 9.0 below, and any violation of proprietary rights, copyrights and rights of privacy, arising out of the publication, translation, reproduction, delivery, use or disposition of any deliverables furnished under this Agreement.

## **9.0 ARTIST'S WARRANTIES**

### **9.1.A Warranty of Originality and Title.**

1. Artist warrants and represents that (a) the Artwork is original to Artist, that Artist is the sole author of the Artwork within the meaning of the Copyright Act (17 U.S.C. § 101 et seq.), or, if any other persons are co-authors of the Artwork within the meaning of the Copyright Act, Artist has obtained full assignment to Artist of all rights including copyright in such person's contributions; and, (b) to the best of Artist's knowledge the Artwork does not infringe the copyright or other intellectual property rights of others. Artist further warrants and represents that upon completion of Services, Artist shall have disclosed the identities of all persons, including but not limited to subcontractors, who have performed any of the Services to date, and shall have disclosed fully each person's contribution to the Artwork.

2. Artist warrants that, upon acceptance and final payment by BART of all amounts due and payable for the Services, the Artwork shall be free and clear of any liens, claims, or other encumbrances that may affect BART's title to the Artwork.

## **9.2 RESPONSIBILITY FOR SERVICES**

Artist shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other Services furnished by Artist under this Agreement. Neither BART's review, approval or acceptance of, nor payment for, the Services required under this Agreement shall be construed to operate as a waiver of any rights under this Agreement.

## **10.0 DATA TO BE FURNISHED BY BART**

All data, reports, surveys, studies, drawings, and any other documents and materials made available to Artist by BART for use by Artist in the performance of the Services shall be made available for information only and shall be returned to BART at the completion or termination of this Agreement.

## **11.0 COPYRIGHT**

A. Except as provided in this Agreement, Artist retains all copyrights and other intellectual property interests in the Artwork and in the design, drawings, sketches, prototypes and other materials for the Artwork. Artist's copyright shall not extend to predominantly functional aspects

of the building or Site that may be incorporated into Artwork or which are in the area of the Artwork, such as flooring, walls and other fixtures and features of the Site, furnishings, or other similar objects located at the Site.

B. Artist may, at Artist's option, place a copyright notice on the Artwork in the form and manner required to protect copyrights in the Artwork under United States copyright law. If the copyright is registered with the U.S. Copyright Office, Artist shall provide BART with a copy of the application for registration, the registration number, and the effective date of registration.

#### 11.1 REPRODUCTIONS

Artist hereby grants to BART, and BART's agents, authorized contractors and assigns, an unlimited, non-exclusive and irrevocable license to do the following with respect to 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. BART may use and display the design development elements for the Artwork (to the extent the Artwork includes graphic representations or models) and the Artwork. To the extent the Artwork involves design elements that are incorporated by BART into the design of the Site, BART may implement such elements at the Site.

(2) Reproduction and Distribution. BART may make and distribute, and authorize the making, display and distribution of, photographs and other 2-dimensional reproductions. BART may use such reproductions for any BART-related purpose, including advertising, educational and promotional materials, brochures, books, flyers, postcards, print, broadcast, film, electronic and multimedia publicity, gifts for BART benefactors, documentation of BART Art Collection, and catalogues or similar publications. BART shall ensure that such reproductions are made in a professional and tasteful manner, in its sole and reasonable judgment. The proceeds from the sale of any such reproductions shall be used to maintain and support BART's Art Collection or for any other public purposes that BART 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 BART are public records and BART may authorize third parties to review and reproduce such documents pursuant to public records laws.

All drawings, designs, specifications, manuals, reports, studies, surveys, models, software (including source code), electronic files used in the production of the Artwork, and any other documents, materials, data and products ("Work Products") prepared or assembled by Artist or obtained from others by Artist in connection with the Services shall be the property of BART; and copies shall be delivered to BART promptly upon the completion of the Services or upon an earlier termination of this Agreement. Artist shall be responsible for the preservation of any and all Work Products prior to transmittal to BART; and Artist shall replace any such Work Products as are lost, destroyed or damaged while in Artist's possession without additional cost to BART.

#### 11.2 EDITION OF ONE AND ARTIST'S RIGHT TO CREATE SIMILAR WORKS

Unless otherwise agreed to in writing by BART, Artist warrants that the Artwork is an edition of one, and that neither Artist nor Artist's agents will execute or authorize another to execute another work of the exact same image(s) or design(s) comprising the Artwork. This warranty

shall continue in effect for a period coextensive with the term of copyright protection for the Artwork under U.S. law, and shall be binding on Artist and Artist's heirs and assigns.

Commercial Use. Neither party shall reproduce or distribute copies of the Artwork for sale without the prior written consent of the other party, which shall not be unreasonably withheld.

BART recognizes and acknowledges that the Artwork may be one of several artworks created by Artist embodying unique artistic characteristics and expression comprising Artist's personal and distinctive style and agrees that, notwithstanding anything herein to the contrary and subject to the warranty provided herein, Artist shall have the nontransferable, perpetual right and license to create new artworks which may be considered "substantially similar" to or "derivative works" of the Artwork, as those terms are defined under the Copyright Act (17 U.S.C. § 101 et seq.)

### 11.3 SURVIVAL OF CERTAIN RIGHTS.

Resale Royalty. If BART 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 BART under this Agreement. Thus, BART has no obligation to pay resale royalties pursuant to California Civil Code §986 or any other law requiring the payment of resale royalties. If BART sells the Artwork as an individual piece, separate from or itemized as part of a real property transaction, BART shall pay to Artist a resale royalty to the extent required by law, based upon the sale price of the Artwork.

### 11.4 CREDITS

A. BART agrees that unless Artist requests to the contrary in writing, all references to the Artwork and all reproductions of the Artwork will credit the Artwork to Artist.

B. Artist agrees that all formal references to the Artwork made or authorized to be made by Artist shall include the following credit: "Collection of San Francisco Bay Area Rapid Transit District" or "Collection of SF BART," or other language agreed to by all parties.

### 11.5 FUTURE MODIFICATION AND RELOCATION.

A. It is the intention of BART to display the Artwork at the Site as originally created by Artist and to maintain the Artwork in good condition. BART has the right to remove the Artwork from the Site at any time. In addition, in the event that any element of the Artwork constitutes a public safety hazard, BART has the right to remove the element posing the public safety hazard.

B. Except as provided in subsection A above, BART shall not intentionally physically deface or mutilate the Artwork. Artist acknowledges, however, that the Artwork will be sited at BART station, a public transit facility, and that the installation, maintenance, repair or removal of facility may result in non-intentional or grossly negligent physical defacement, distortion, mutilation, alteration, destruction or other modification of the Artwork (collectively "Mutilations"). BART shall not be liable for any Mutilations or any acts of vandalism to the Artwork whether by BART or third parties. Any Mutilations resulting from such vandalism shall be repaired, if at all, at BART's sole discretion, and such repairs, if any, would be at BART's expense.

C. BART shall have the right to donate, sell or remove the Artwork at any time. Where time permits, before exercising this right, BART, by written notice to Artist at Artist's last known address, agrees to give Artist the opportunity to purchase the Artwork for the greater of the total price of the original artwork or the amount of any offer which BART has received for the purchase of the Artwork, plus all costs associated with the removal of the Artwork from the Site, clean-up of the Site and delivery to Artist. Artist shall have 30 days from the date of BART's notice to exercise the option to purchase the Artwork.

D. If, during the term or after the term of this Agreement, BART finds the Site to be inappropriate, BART has the right to install the Artwork at an alternate location that BART 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 BART authorizes the removal of the Artwork, BART shall take reasonable precautions to minimize alteration of Artwork during removal.

E. If BART moves the Artwork from its originally installed location without Artist's oversight, Artist shall not be held responsible for the structural integrity or safety of the Artwork to the extent BART's action impaired the structural integrity or safety of the Artwork, nor shall Artist be held responsible for code compliance of the Artwork to the extent that BART's actions rendered the Artwork non-compliant with applicable codes.

F. Artist's Waiver of Rights. Except as specifically provided herein, Artist for Artist, and Artist's heirs, beneficiaries, devisees and personal representatives expressly waives, as against BART, any and all rights Artist now has or may hereafter have to attribution, preservation or integrity of the Artwork, including any repairs or Mutilations made to the Artwork after installation, provided by current applicable law, or hereinafter created under any future laws, including without limitation moral rights, the California Art Preservation Act ("CAPA"), and the 1990 Visual Artists Rights Act ("VARA"), and any other local, state, federal or international laws that convey rights of the same nature as those conveyed in VARA, CAPA, 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. Further, Artist releases, acquits and discharges BART from all suits, claims, actions, liability, damages and expenses arising out of the installation, use, maintenance, repair, or Mutilations of the Artwork; provided, however, that Artist shall retain the right to disclaim authorship of the Artwork pursuant to CAPA and VARA. The waivers provided herein shall survive termination of the Agreement.

G. Artwork Repair or Replacement. Where time permits, BART shall make reasonable good faith efforts to notify Artist at least 20 calendar days prior to authorizing any repair or replacement of the Artwork, at the last phone number or address provided by Artist to BART. After receiving such notice, Artist shall consult with BART to determine whether the Artwork can be restored or replaced and to attempt to come to a mutually agreeable plan for restoring or replacing the Artwork. Such consultation shall be without charge by Artist unless otherwise specifically agreed in writing by BART. If BART, in its sole discretion, intends to replace or repair the Artwork, BART shall make reasonable good faith efforts to engage Artist in the repair or 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 BART. If, however, Artist fails or refuses to negotiate with BART in good faith and in a timely manner with respect

to any repair or restoration, BART may contract with any other qualified art conservator or artist for such restoration. Notwithstanding the foregoing, BART has no obligation under this Agreement to repair or to restore the Artwork to its original condition, to compensate Artist for any restoration work, or to maintain the Artwork on display or in any specific location.

#### **11.6 THIRD PARTY INFRINGEMENT**

A. BART is not responsible for any third party infringement of Artist's copyrights and is not responsible for protecting the intellectual property rights of the Artist.

B. In the event of infringement of the Artwork by third parties, BART and Artist shall consult with each other to determine a course of action, whether by BART or by BART and Artist jointly, to address such infringement.

C. Third Party Mutilations. Artist reserves the rights to prosecute third parties for violations by such third parties of Artist's moral rights including without limitation CAPA and VARA, provided that Artist consults with BART prior to pursuing such claims.

#### **12.0 PATENTS**

Artist agrees to communicate promptly to BART full particulars with respect to any and all improvements and inventions (whether or not patentable) conceived and reduced to practice by Artist in performance of the Services (collectively, "Inventions"). Subject to superseding rights due to the State government assisting in the financing of this Agreement and pursuant to Attachments D, such improvements and inventions (if patentable) shall become the property of Artist, to the extent allowed by the terms of the aforementioned State grant(s) and Artist hereby grants to BART the non-exclusive, perpetual, worldwide, royalty-free right and license to exploit the Inventions solely in connection with the Artwork.

#### **13.0 MATTERS CONFIDENTIAL AND PRIVILEGED**

All of the drawings, designs, specifications, manuals, reports, studies, surveys, models, or other data and products prepared or assembled by Artist, obtained from others by Artist or made available to Artist by BART in connection with the Services, shall be treated as confidential by Artist. At no time shall Artist use or disclose or make available, other than in the performance of Artist's services for BART, confidential information gained in the course of or by reason of Artist's retention by BART and/or performance of services for BART, nor shall Artist permit such use or disclosure, without prior written approval by BART. It is the intention of BART to preserve and make use of all applicable legal privileges, and Artist shall make all reasonable efforts to cooperate with BART in this regard.

Performance of Services under this Agreement may require the District to disclose Security Sensitive Information ("SSI") or require access to locations designated as security sensitive. In addition to the requirements set forth above and prior to commencement of any Services involving SSI, Artist agrees to execute a Non-Disclosure Agreement for Release of Security Sensitive Information ("NDA") and require applicable third parties who will need to access SSI to execute a Third Party Non-Disclosure Agreement for Release of Security Sensitive Information (Third Party NDA), which will be provided under separate cover by the District. In accordance with the NDA, and for purposes of services to be performed under this Agreement,



confidential information shall include any documents designated as SSI.

#### **14.0 SUBCONTRACTS**

##### **A. Approved Subcontracts**

Artist is prohibited from subcontracting this Agreement or any portion of the Services, without the prior written approval of the Agreement Manager and any attempt to do so shall be void and unenforceable. Written approval by the Agreement Manager of use of a subcontractor for specified Services shall not constitute approval for any other purpose. In the event that Artist enters into one or more subcontracts pursuant to this Article, it is understood and agreed that the participating subcontractors shall be solely and directly responsible to Artist, and BART shall have no obligation to them.

If Artist subcontracts any portion of the Services under this Agreement (including but not limited to engineering and/or architecture), BART must grant prior approval of such subcontractors.

Artist may substitute any approved subcontractor for: (a) failure to perform to a reasonable level of professional competence; (b) inability to provide sufficient resources to the Project; or (c) unwillingness to negotiate reasonable contract terms or compensation. Artist may only substitute subcontractors with the prior written approval of BART.

##### **B. Subcontract Provisions**

Artist agrees that the requirements in Articles 1.3 (PROCEDURE FOR EXECUTION OF WORK), 1.4 (PROJECT AND ORGANIZATIONAL PROCEDURES), 1.6 (FINANCIAL ADMINISTRATION), 3.1 (COMPENSATION), 3.2 (RATE AGREEMENT) and 4.0 through 31.0, inclusive, of this Agreement, will be included in every subcontract entered into relating to the Services. Upon request, Artist shall provide BART with copies of all such subcontracts, with changes and amendments thereto.

#### **15.0 ASSIGNMENT OF AGREEMENT**

Artist shall not assign this Agreement, or any part thereof, without the prior express written consent of the Agreement Manager, and any attempt to do so shall be void and unenforceable.

#### **16.0 RECORDS**

Artist shall maintain full and adequate records to show the actual time devoted and the cost incurred by Artist with respect to the performance of the Services.

Artist and Artist's subcontractors shall establish and maintain records pertaining to the fiscal activities of the Project. Artist's and subcontractors' accounting systems shall conform to generally accepted accounting principles and all records shall provide a breakdown of total costs charged to the Project, including properly executed payrolls, time records, invoices and vouchers.

#### **17.0 AUDIT**

Artist and Artist's subcontractors shall permit BART and its authorized representatives to

inspect, examine, make excerpts from, transcribe, and copy Artist's and subcontractors' books, work, documents, papers, materials, payrolls, records, accounts, and any and all data relevant to this Agreement at any reasonable time for the purpose of auditing and verifying statements, invoices or bills submitted by Artist pursuant to this Agreement, and shall provide such assistance as may be reasonably required in the course of such inspection, but not limited to, the following:

A. Audit Interviews

Artist shall arrange audit entrance and exit interviews in which Artist and/or Artist's subcontractors and BART and/or its authorized representatives will participate.

B. Accessing Documents

Artist and Artist's subcontractors' accounting divisions shall provide instruction to BART on accessing documents.

C. Letter of Representation

Artist's management, or the management of a subcontractor, as well as the management of their appropriate units, will provide at BART's request a letter of representation concerning such matters as BART determines appropriate.

BART further reserves the right, for itself and its authorized representatives, to examine and re-examine said books, work, documents, papers, materials, payrolls, records, accounts and data during the three-year period following the final payment under this Agreement and until all pending matters are closed; and Artist and Artist's subcontractors shall in no event dispose of, destroy, alter or mutilate said books, work, documents, papers, materials, payrolls, records, accounts and any and all data in any manner whatsoever for three years after the final payment under this Agreement, or until all pending matters are closed, whichever is later.

Pursuant to California Government Code Section 8546.7, the parties to this Agreement shall be subject to the examination and audit of the State Auditor, at the request of BART or as part of any audit of BART by the State Auditor, for a period of three (3) years after final payment under this Agreement. The examination and audit shall be confined to those matters connected with the performance of this Agreement, including, but not limited to, the cost of administering this Agreement.

**18.0 [LEFT BLANK]**

**19.0 NOTICES**

Except for invoices submitted by Artist pursuant to Article 3.0, COMPENSATION AND PAYMENT, above, and insurance notices submitted pursuant to Article 6.0 B., Notice of Cancellation, Reduction or Material Change in Coverage, above, all notices required hereunder or other communications to either party by the other may be given by personal delivery, U.S. Mail, courier service (such as Federal Express), facsimile transmission, or email, with confirmation of receipt of such email. Notices shall be effective upon receipt at the following addresses:

To BART by US Mail:	San Francisco Bay Area Rapid Transit District P.O. Box 12688 Oakland, California 94604-2688 Attention: Jennifer Easton
To BART by Personal Delivery or Courier Service:	San Francisco Bay Area Rapid Transit District 300 Lakeside Drive, 22 <sup>nd</sup> Floor Oakland, CA 94612 Attention: Jennifer Easton
To BART by email To BART by Facsimile:	<a href="mailto:jeaston@bart.gov">jeaston@bart.gov</a> 510.464.7583
To Artist by US Mail	Click or tap here to enter text.
To Artist by email	Click or tap here to enter text.

Either party may change its address for notices by giving written notice of the new address as provided above.

## **20.0 NONDISCRIMINATION**

Artist and subcontractors shall not discriminate on the basis of race, color, national origin or sex in the performance of this Agreement. Failure by 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 District deems appropriate. In connection with the performance of services under this Agreement, Artist shall not, on the grounds of race, religious creed, color, national origin, ancestry, handicap medical condition, marital status, sex, sexual orientation or age, discriminate or permit discrimination against any person or group of persons in any manner prohibited by Federal, State or local laws.

For purposes of this Article “sexual orientation” shall mean a preference for heterosexuality, homosexuality or bisexuality; or having a history of, or being identified with, any such preference.

## **21.0 DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION**

The District is committed to carrying out all of the Disadvantaged Business Enterprise (“DBE”) requirements of Title 49, Code of Federal Regulations Part 26, as amended from time to time. The procedures contained in the District’s DBE Program will ensure that all contracts and procurements are administered without discrimination on the basis of race, color, sex or national origin, and that DBEs have an equal opportunity to compete for and participate in the performance of all agreements, contracts and subcontracts awarded by the District.

### **A. BART Policy**

It is the policy of the District to ensure nondiscrimination on the basis of race, color, sex, ethnicity or national origin in the award and administration of Federally funded contracts. It is the intention of the District to create a level playing field on which DBEs can compete fairly for agreements, contracts and subcontracts, including but not limited to construction, procurement and Invitation for Bids (“IFBs”) contracts, professional and technical services agreements and purchase orders.

B. DBE Participation: No Goal

Although there is no DBE participation goal for this Agreement, Artist is encouraged to take all steps necessary to provide an equal opportunity for DBEs to participate.

**22.0 [LEFT BLANK]**

**23.0 LAWS AND REGULATIONS**

Artist shall comply with any and all laws, statutes, ordinances, rules, regulations, and procedural requirements of any national, state or local government, and of any agency of such government, including BART, which relate to or in any manner affect the performance of this Agreement. This Agreement and any documents supplied hereunder are subject to public inspection of the California Public Records Act, California Government Code Section 6250 et seq., unless exempted by law.

A. State Requirements

This Agreement may also be funded in part from a grant from the State of California through its Business, Transportation and Housing Agency, Department of Transportation (State). State requirements are set forth in Attachment E, STATE OF CALIFORNIA REQUIREMENTS, incorporated herein and by this reference made a part hereof. As used in Attachment E, the term "CONSULTANT" shall be deemed to refer to Artist, and the term "subconsultants" shall be deemed to refer to subcontractors.

**24.0 ADDITIONAL FUNDING AGREEMENT REQUIREMENTS**

This Agreement is subject to any additional restrictions, limitations or conditions that may be required by any local, State or Federal funding agreements applicable to this Agreement.

**25.0 STATE OF CALIFORNIA LABOR CODE REQUIREMENTS**

Special attention is directed to Division 2, Part 7, Chapter 1, Article 2 of the California State Labor Code, including Section 1774 and Section 1775, concerning the payment of prevailing wages. Artist and each subcontractor shall pay not less than the appropriate prevailing wages to all workers performing work that is subject to the prevailing rate of wages as determined by the Director of the State Department of Industrial Relations. Pursuant to Section 1773 of the State Labor Code, the District has obtained from the Director of the State Department of Industrial Relations the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality(ies) in which the work is to be performed and has copies available upon request from the Procurement Department, 300 Lakeside Drive, 17<sup>th</sup> Floor, Oakland, CA 94612. The prevailing rates of wages are also available at the following website: [www.dir.ca.gov/dlsr/pwd](http://www.dir.ca.gov/dlsr/pwd). For crafts or classifications not shown on the prevailing wage determinations, Artist may be required to pay the wage rate of the closest craft or classification shown in such determinations for work under the Agreement. The Artist may contact the Division of Labor Statistics and Research, Prevailing Wage Unit, P.O. Box 420603, San Francisco, CA 94142, (415)703-4774, for questions concerning job classifications not found in the general prevailing wage determinations. The Artist shall comply with the provisions of the State Labor Code Section 1776 and Section 1812, and shall be responsible for compliance by its subcontractors. The penalties specified in State Labor Code Section 1776 for noncompliance by the Artist or any of Artist's subcontractors of every tier may be deducted from any monies due or which may become due the Artist. Among other things, the Artist shall comply with the requirements of State Labor Code Section 1777.5 applicable to

Apprentices. A certified copy of payroll records shall be provided by the Artist in accordance with State Labor Code Section 1776 and shall be furnished to the District each week.

**26.0 CHOICE OF LAW**

All questions pertaining to the validity and interpretation of this Agreement shall be determined in accordance with the laws of the State of California applicable to agreements made and to be performed within the State, without reference to conflicts of law principles.

**27.0 SEVERABILITY**

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

**28.0 COVENANT AGAINST CONTINGENT FEES**

Artist warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by Artist for the purpose of securing business. For breach or violation of this warranty, BART will have the right to annul this Agreement without liability, or at its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

**29.0 COVENANT AGAINST GRATUITIES**

Artist warrants that she/he will not and has not offered or given gratuities in the form of entertainment, gifts or otherwise, to any director, officer or employee of BART to secure favorable treatment in the awarding, amending or evaluating performance of the Agreement.

**30.0 CAPTIONS**

The captions of the Articles and paragraphs in this Agreement are for purposes of reference only, and shall not be construed to affect the meaning of any provision hereof.

**31.0 BENEFIT OF AGREEMENT**

This Agreement shall bind and benefit the parties hereto and their assignees, successors and permitted assigns.

**32.0 ENTIRE AGREEMENT**

This Agreement is the entire agreement of the parties, and supersedes and replaces all prior communications, written and oral, regarding the subject matter hereof. Artist represents that in entering into this Agreement, she/he has not relied on any previous representations, inducements, or understandings, written or oral, of any kind or nature.

**[SIGNATURES ON NEXT PAGE]**

**IN WITNESS WHEREOF**, this Agreement has been executed by the parties hereto as of the day and year first written above.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

By: \_\_\_\_\_  
(Signature)

Title: \_\_\_\_\_

“ARTIST”

Click or tap here to enter text.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Boilerplate Design Agreement

**EXHIBIT 1: ARTIST'S CONCEPTUAL DESIGN PROPOSAL**

Artwork consists

Boilerplate Design Agreement

**ATTACHMENT A: ARTIST'S SCOPE OF SERVICES**  
**ART DESIGN and CONSULTATION during FABRICATION of ARTWORK**

**For the San Francisco Rapid Transit District Powell Street Station**

Artist agrees to design and consult as needed to fabrication of Artwork in accordance with Artist's Conceptual Design Proposal, a copy of which is attached hereto as Exhibit 1 and incorporated herein by reference.

**PHASE I: DESIGN**

**SCOPE OF WORK**

**A. GENERAL**

1. Artist's Conceptual Design Proposal (the "Proposal") is incorporated herein by reference. The scope of work under this phase includes the development of the Proposal through all phases of final design.

**ALT: Artist shall deliver a Proposal for the Artwork ("Proposal"). The scope of work under this phase includes the development of the Proposal through all phases of design, including Conceptual, Schematic, Design Development and Construction Documents.**

2. Artist shall not commence any Phase nor incur any expense in anticipation of commencing any Phase unless BART has given prior written authorization.

3. The Services shall reflect the requirements of the project Project as expressed in the Request for Qualifications **and the Proposal** and as further discussed in communications with BART.

4. Artist shall attend project meetings and make presentations to BART and other individuals and organizations, as needed.

5. Artist agrees to collaborate closely with BART through in-person meetings and other necessary means of communication to successfully incorporate the Artwork into the station's Site design and construction schedule. Artist shall coordinate communications with the BART subcontractors through the Agreement Manager.

6. Artist shall deliver documentation establishing that all Artist's employees, and all of Artist's consultants, contractors, fabricators, manufacturers, suppliers, or distributors (collectively, "Subcontractors"), have been paid in a timely manner (collectively, "Subcontracts and Documentation"). With each invoice, Artist shall submit Subcontracts evidencing Artist's payments to subcontractors subsequent to Artist's submittal of last invoice to BART.

7. The Artwork must be durable, taking into consideration that the Site is an unsecured public space within a public transit system that may be exposed to elements such as weather, temperature variation, people and equipment. Artist shall ensure that for all elements under control of Artist, maintenance requirements will be reasonable in terms of time and expense for the anticipated life of the project.

8. Artist shall be available to present Proposals to the Reviewing Body for approval.



9. Artist shall provide quality visual material suitable for presentation of Proposals to the Reviewing Body and for release to the press. The specific types of presentation materials shall be as required by BART.

**INCLUDE if artist not selected with accepted proposal**

**B. CONCEPTUAL DESIGN.**

Artist shall prepare one or more concept designs showing Artist's idea(s) for the Artwork (the "**Conceptual Design Proposal**").

- 1 The Concept Design Proposal will include:
  - i. The general intent of the Artwork, the proposed form and indication of location, scale and proposed materials.
  - ii. A budget for the cost of design, including any anticipated engineering and consultant costs; cost of fabrication and transportation; and any assumptions regarding scope and cost of installation shall also be submitted as part of the Conceptual Design Proposal.
  - iii. Maintenance scope indicating the estimated maintenance requirements including frequency, available warranties, and general durability of materials.

**C. CONCEPTUAL DESIGN REVIEW.**

1. The Concept Design Proposal shall be submitted to BART. Artist acknowledges that one or more reviewing bodies (collectively, the "**Reviewing Body**") may be assembled to review and make recommendations on the Concept Design Proposal.
2. The Reviewing Body may recommend approval, approval with minor changes or disapproval. In the event that the Reviewing Body recommends disapproval, or approval with minor changes to the Concept Design Proposal, Artist, upon written notification by BART, shall respond to the Reviewing Body's comments and submit the revised Concept Design Proposal to BART for review. Artist recognizes and agrees that the Reviewing Body may review the Concept Design Proposal as revised and make additional recommendations regarding the revised Concept Design Proposal.
3. In the event that all approvals are secured, BART will issue a notice of acceptance of the Concept Design Proposal to Artist.

B or D

**D. SCHEMATIC DESIGN.**

1. Following BART approval of Concept Design Proposal, Artist shall prepare one or more designs showing Artist's Schematic design for the Artwork (the "**Schematic Design Proposal**"). The Schematic Design Proposal will respond to comments received by Artist as part of Conceptual Design Review and include :
  - i. The form, indication of the scale, and proposed materials (samples to be provided where appropriate).
  - ii. Information on structural considerations, surface integrity, permanence, and protection against theft and vandalism.
  - iii. Cost estimates related to the fabrication and installation of the Schematic Design

Proposal. The estimates shall indicate the feasibility of producing the proposed Artwork within the budget.

- iv. Proposed installation method, and a schedule for the Artwork fabrication and installation.
- v. As part of Schematic Design, Artist will consult with a qualified art conservator to review the proposed Artwork materials and methods. As part of the review, the conservator should address longevity of materials, frequency and scope of maintenance, and estimated cost of regular maintenance. This report will be submitted noting any proposed changes to the project scope as a result of the review.

**E. SCHEMATIC DESIGN PROPOSAL REVIEWS.**

1. The Schematic Design Proposal shall be submitted to the BART. Artist acknowledges that the Reviewing Body may be assembled to review and make recommendations on the Schematic Design Proposal.
2. The Reviewing Body may recommend approval, approval with minor changes or disapproval. In the event that the Reviewing Body recommends disapproval, or approval with minor changes to the Schematic Design Proposal, Artist, upon written notification by the BART, shall respond to the Reviewing Body's comments and submit the revised Schematic Design Proposal to the City for review. Artist recognizes and agrees that the Reviewing Body may review the Schematic Design Proposal as revised and make additional recommendations regarding the revised Schematic Design Proposal.
3. In the event that all approvals are secured, BART will issue a notice of acceptance of the Schematic Design Proposal to Artist.

**B.F. DESIGN DEVELOPMENT**

1. Following approval of Schematic Design Proposal, Artist shall develop a final proposal for the Artwork ("**Artwork Design Development Proposal**") showing the details of the Artwork.
2. BART shall provide Artist with available construction documents and specifications for the Site as required for the Artist to complete Design Development Documents. BART shall provide all available specifications to coordinate for the design and installation of the Artwork. BART shall provide Artist will current renderings indicating the location of furnishings, signage, mechanical and electrical systems, and other structural or architectural elements that may affect, or be affected by, the placement of the Artwork, if applicable.
3. As required, Artist shall review the drawings, materials and documents provided by BART for consistency with any documents previously reviewed by Artist and for accuracy of the integration of Artist's Proposal with the Site. Artist shall report any structural or constructability concerns in writing to BART.
4. If applicable, Artist shall submit Design Development Documents that illustrate the final design and placement of the Artwork. Artist's Design Development documents shall include presentation-quality materials, including color drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the design and location of the Artwork at the Site, final color and material samples as appropriate or directed by BART, and final cost estimates. 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.

E. If requested to do so by BART, Artist shall construct a one-to-one-scale Mock-Up of the Artwork. The Mock-Up will incorporate the same materials proposed for use in the final Work, and may be included in the final installed Artwork if appropriate.

F. Maintenance Plan. Artist shall submit a General Maintenance Plan for the Artwork, with a detailed description of anticipated maintenance requirements; a recommended maintenance schedule; required care and/or replacement/upgrade and schedule thereof for any part of the Artwork and associated moving parts or equipment; and written instructions and manufacturer's specifications for reasonably foreseeable maintenance and preservation activities relating to the Artwork. Artist should also indicate any specific intentions regarding aging of the materials over time, as well as intention for any allowable changes or collaborative programming, in particular for programmed media.

#### E.G. SHOP DRAWINGS

A. **For the purposes of this agreement, Shop Drawings shall include the following:**

1. [Click or tap here to enter text.](#)

B. Artist shall review the Architect's plans, designs and specifications to ensure they accurately reflect the agreed installation of the Artwork at the Site, and Artist shall provide BART with written comments and/or corrections.

### **Phase II: Consultation During Fabrication of Artwork**

#### 1. SCOPE OF WORK

A. As directed by the BART, Artist shall assist in the selection of a Fabricator. As directed by BART, prior to and after the aforesaid assignment of contract, the Artist shall consult with the selected Fabricator to ensure that the Artwork conforms to the approved Design Development Documents.

B. Shop Drawings. Artist shall review and comment on Shop Drawings produced by the fabricator as needed to fabricate the Artwork, to include, but not limited to, compatibility with BART's structures to which the Artwork shall be attached, all attachment systems, and all other relevant components and interfaces.

C. Fabricator's Samples and Final Product.

1. Artist shall coordinate with BART's fabricator on the development of the Artwork elements.

2. Artist shall submit color proofs, as needed, to the BART's fabricator for use in the sample production.

3. Artist shall review and comment on samples provided by the BART's fabricator.

4. Artist shall be available, as needed, to review 100% completion of fabrication of the Artwork. However, since Artist's role is limited to consultation during the fabrication process, Artist shall bear no responsibility for any problems arising from or related to the quality or actual fabrication of the Artwork that is produced by the Fabricator.

#### 2. FINAL DOCUMENTATION

a. As directed by BART, Artist will submit final written maintenance manual including all and product specification data sheets and copies of all warranties for the artwork Artwork ("Final Documentation").

b. Artist shall provide biographical materials, an artist statement, information on the design process, and other educational materials to be used by BART for

marketing, educational outreach and publicity purposes.

- c. Artist shall deliver a minimum of five professional-quality digital images (.jpeg), with no use restrictions other than identified in Section 11.1.2 that represent the artwork in whole and in detail. Images files should be of a quality reproducible for color printing.

Boilerplate Design Agreement

**ATTACHMENT B: ARTIST’S PAYMENT SCHEDULE**

A. Artist’s fee for Artwork Design, and Consultation to Fabrication and Installation, including all expenses related thereto, shall not exceed \$Click or tap here to enter text. (Click or tap here to enter text. Dollars only). An amount of \$Click or tap here to enter text. (Click or tap here to enter text. Thousand Dollars only) shall be held as a contingency to cover unforeseen costs that may be incurred during the course of producing the Artwork, which shall be retained by BART and shall not be paid to the Artist except where unforeseeable and unavoidable circumstances cause an increase in the costs incurred by Artist in the Fabrication and Delivery of the Artwork.

B. Modification of Schedule. The parties agree that the schedule set forth below may be modified by mutual agreement and only upon prior written authorization of BART’s Agreement Manager.

C. Commencement of Services. Artist shall commence work upon full execution of this Agreement. The following are milestone dates that must be met in accordance with this Agreement.

<b>Deliverable</b>	<b>Amount</b>	<b>Submittal Due Date</b>
Upon execution of Agreement. Payment in advance is contingent upon satisfactory achievement of Click or tap here to enter text.	\$	Upon execution of agreement
Upon approval by BART Click or tap here to enter text. .	\$	
Upon approval by BART Click or tap here to enter text..	\$	
Upon approval Click or tap here to enter text.	\$	
Upon submittal of all required materials and specifications for the fabrication by BART of Click or tap here to enter text. and final approval of any required production samples for Click or tap here to enter text., and delivery of all required documentation	\$	
Upon Final Acceptance of Click or tap here to enter text. as installed, and delivery of all required documentation	\$	
CONTINGENCY	\$	

D. Contingency Draw. Included in the Budget is a contingency of \$Click or tap here to enter text. (Click or tap here to enter text. Thousand Dollars Only). The contingency shall not be paid to the Artist except where unforeseeable and unavoidable circumstances cause an increase in the costs incurred by Artist during the art project. In the event Artist wishes to draw from the Contingency/Holdback, Artist shall submit a written request ("Contingency Draw Request") specifying the reason for the request and the total amount of the request. No contingency draw shall be paid without the written approval of Agreement Manager, which will not be unreasonably withheld. Without limitation of the foregoing, BART shall have no obligation to approve a Contingency Draw to make corrections for which the Artist or Artist's subcontractors are responsible nor to pay for any costs that Artist or Artist's subcontractors could have reasonably avoided. In the event that any of the amounts budgeted for contingency remain unpaid upon BART's acceptance of the Artwork as satisfactory, the remaining Contingency will be retained by BART. In no event shall BART be required to make payments in excess of the total budget.

Boilerplate Design Agreement

**ATTACHMENT C: ARTIST'S APPROVED COSTS**

Boilerplate Design Agreement

**ATTACHMENT D: STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION  
REQUIREMENTS**

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Allowable Costs (See Article 3.0 of this Agreement)

Termination for Convenience (See Article 5.1 of this Agreement) Termination for Cause (See Article 5.2 of this Agreement)

E.1 Fair Employment Practices

E.2 Audit, Inspection, Access to Records and Retention of Records

**E.1 Fair Employment Practices.** In the performance of work under this Agreement, CONSULTANT and its subconsultants will not unlawfully discriminate, harass or allow harassment, against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (including cancer), age (over 40), marital status and denial of family care leave. 1 CONSULTANT and its subconsultants shall ensure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. CONSULTANT and its subconsultants shall comply with the provisions of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12900 (a-f), set forth in chapters of Division 4 of Title 2 of the California Code of Regulations are incorporated into this agreement by reference and made a part hereof as if set forth in full. CONSULTANT and its subconsultants shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement. CONSULTANT and its subconsultants shall include the nondiscrimination and compliance provisions of this clause in all subconsultant agreements to perform work under this agreement.

CONSULTANT and its subconsultants will permit access to all records of employment, employment advertisements, application forms, and other pertinent data and records by the State Fair Employment Practices and Housing Commission, or any other agency of the State of California designated by BART for the purpose of investigation to ascertain compliance with this Fair Employment Practices Section.

**E. 2 Audit, Inspection, Access to Records and Retention of Records.** CONSULTANT and its subconsultants shall establish and maintain an accounting system and records that properly accumulate and segregate incurred costs by line item for the project. CONSULTANT and its subconsultants' accounting systems shall conform to generally accepted accounting principles (GAAP) and all records shall provide a breakdown of total costs charged to the Project, including properly executed payrolls, time records, invoices and vouchers as well as all accounting generated reports. CONSULTANT and its subconsultants shall permit representatives of the State and State Auditor to inspect, examine, make excerpts or transcribe CONSULTANT and its subconsultants' work, documents, papers, materials, payrolls, books, records, accounts, any and all data relevant to this Agreement at any reasonable time and to audit and verify statements, invoices or bills submitted by CONSULTANT and its subconsultants pursuant to this Agreement,



and shall provide copies thereof upon request and shall provide such assistance as may be reasonably required in the course of such audit or inspection.

The State, its representatives and the State Auditor further reserve the right to examine, inspect, make copies, or excerpts of all work, documents, papers, materials, payrolls, books and accounts, and data pertaining to this Agreement and to inspect and re-examine said work, documents, papers, materials, manner whatsoever for three (3) years after final payment under this Agreement and all pending matters are closed.

Any costs for which CONSULTANT and its subconsultants has received payment that are determined by subsequent audit to be unallowable under the terms of this agreement may be required to be repaid to BART by the CONSULTANT and its subconsultants. Should CONSULTANT and its subconsultants fail to reimburse money due BART within 30 days of demand, or within such other period as may be agreed between the parties hereto, BART is authorized to withhold future payments due CONSULTANT and its subconsultants from any source.

The CONSULTANT agrees that the Contract Cost Principles and Procedures at least as restrictive as 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31 et seq., shall be used to determine the allowability of individual items of costs.

The CONSULTANT agrees to comply with Federal procedures in accordance with 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

Any costs for which payments have been made to the CONSULTANT, which are determined by subsequent audit to be unallowable under 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31 et seq., or 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, are subject to repayment by CONSULTANT to BART.

Any subcontract entered into as a result of this Agreement shall contain all the provisions of this section.

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