

AGREEMENT FOR A CONCEPTUAL PROPOSAL FOR A WORK OF ART
At the Emeryville Marina
By and between the
City of Emeryville and Ned Kahn

This Agreement for a Conceptual Design for a work of Art (the "Artwork") for the Emeryville Marina, on the City's shoreline, is effective and entered into this [REDACTED] by and between the City of Emeryville ("City") and Ned Kahn ("Artist").

1. PROJECT BACKGROUND

The Emeryville Marina is located at the center of the city's shoreline. The site is directly across from the Golden Gate and prone to heavy, reoccurring winds such that materials appropriate for the setting must be considered to reduce wind resistance and damage.

As an often overlooked gateway into the City, the Marina could host an iconic piece of public art that both welcomes visitors entering by boat, and deepens the pride of the locals. Two harbors host 840 slips. This location could invite a large-scale and playful piece of art. The project will have to be approved by the Bay Conservation and Development Commission (BCDC), as the Marina in its entirety falls within BCDC's jurisdiction. Preservation of existing views will be a significant consideration and low-lying works may be a priority.

2. PROJECT CONTEXT

The Emeryville Marina is bordered to the north and south by the Eastshore State Park, which extends 8.5 miles along the East Bay shoreline from the Bay Bridge to Richmond. The park includes 1,854 acres of uplands and tidelands along the waterfronts of Oakland, Emeryville, Berkeley, Albany, and Richmond. Eastshore State Park parallels the most heavily traveled corridor in the East Bay (on I-80), making it a highly visible, highly accessible area of parkland. The Emeryville Marina is a destination along the San Francisco Bay Trail, a recreational corridor that, when completed, will encircle San Francisco and San Pablo Bays with a continuous 500-mile network of trails. The Bay Trail provides easily accessible recreation for outdoor enthusiasts, including hikers, joggers, bicyclists and skaters. It also offers a setting for wildlife viewing and environmental education. Over the past decades, the Bay Trail and other efforts such as Save the Bay have been dedicated to increasing public awareness, respect, and appreciation for the Bay. The San Francisco Bay Trail will eventually connect the shoreline of all nine Bay Area counties, link 47 cities as well as cross the major toll bridges in the region. The Emeryville marina is a "spur" trail from the bay trail offering adjacent recreation facilities.

3. PROJECT GOALS

Elements of the Emeryville Marina public art project shall include as many as possible of the following:

- A. Create an iconic image for Emeryville unique to the setting and of a scale and quality to be a memorable image, evocative of Emeryville.
- B. Enhance public awareness of and respect for the shoreline, including its diverse uses and users, natural habitat and biodiversity.
- C. Craft a landmark that welcomes visitors by boat and trail and deepens the pride in place of local residents.
- D. Create kinetic or engage-able/climb-able pieces for residents and visitors while highlighting the site, the environment and the unique vista points.
- E. Utilize innovative and visionary methods to create installation(s) with durable materials evocative of the spirit of prior temporary art works to honor historic temporary art installations at the nearby mudflats of the Emeryville Crescent. For more examples of such prior temporary installations please see:
https://www.instagram.com/emeryville_mudflats/ or
<http://www.spacesarchives.org/explore/collection/environment/emeryville-mud-flats-aka-driftwood-sculptures--tidal-flats/>
- F. Integrate art functionally with the public spaces, creating delightful spaces among the public open spaces of the Marina Park.
- G. Create a memorable artwork to increase the public enjoyment of this beautiful site, and its relationship to both the natural environment and its urban setting.

4. **COMMUNITY PARTICIPATION OPPORTUNITY**

Emery Unified has a robust "Artist in the Schools" program and the Emeryville Art in Public Places Program is interested in incorporating school children and other members of the community in the design and development of artist's works or creating teaching opportunities for students and/or community members with working artists. For artists proposing the inclusion of community participants, including Emery Unified School children a stipend of \$1,500 is available, independent of the call's budget to support the effort. Participation can be in the design, fabrication or installation of the proposed art work(s) or an educational opportunity for an apprentice or multiple students in your lab space or at the project site. An additional optional narrative of the proposal for community participation, should it be of interest to the Artist, should be described in submittal of the Final Design Proposal.

5. **DEFINITIONS**

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

5.1 "Artist" shall mean Ned Kahn. 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.

5.2 "Artwork" shall mean the Artwork proposed by the Artist for the City.

5.3 "Art Selection Panel" shall mean the City Manager appointed board of seven volunteers and their alternates, selected for the expertise related to the Project sites, which make recommendation to the Public Art Committee regarding the selection of artists for the Project Site.

5.4 "City" shall mean the City of Emeryville, a municipal corporation.

5.5 "City Council" shall mean the City Council of the City of Emeryville, California.

5.6 "City Manager" shall mean the City Manager of the City of Emeryville, California.

5.7 "Committee" shall mean the Public Art Committee of the City of Emeryville, California.

5.8 "Project Site" shall mean any one of the locations at the Emeryville Marina Park, as illustrated in Attachment A.

5.9 Whenever the words "as directed", "as required", "as permitted", or words of like effect are used, it shall be understood as the direction, requirement, or permission of the City.

5.10 The words "sufficient", "necessary", or "proper", and the like, mean sufficient, necessary or proper in the judgment of the City.

5.11 The words "approval", "acceptable", "satisfactory", or words of like import, shall mean approved by, or acceptable to, or satisfactory to the City, unless otherwise indicated by the context.

6. TERM OF THE AGREEMENT

The term ("Term") of this Agreement shall commence upon execution of this Agreement by the City and be completed not later than **September 1, 2018**.

7. PAYMENTS AND PAYMENT SCHEDULE

- A. Artist Payment: Artist shall be paid \$3,000 (Three Thousand Dollars) upon the successful submission of the Final Conceptual Design Proposal ("Proposal") as described below in Section 10(B), as well as Reimbursable Expenses as described in 7,B below.
- B. Reimbursable Expenses: In addition to the payment described in Section 7(a), if Artist lives in a geographic area outside of the nine San Francisco Bay Area Counties (Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma), the City shall reimburse Artist for pre-approved costs associated with attending meetings as required by the City. Artist will be reimbursed for pre-approved travel and per diem expenses as set by the Federal Government and identified at: <http://www.gsa.gov/portal/category/100120>. Payment will be made within 60 days of the City's receipt of original itemized receipts, invoices, or other acceptable proof of payment. A budget of up to \$4,000 for your team is available for these costs. The City will not reimburse for alcohol or cannabis, and tips for service are reimbursed at a rate of 15% on the cost of the service.

8. PROJECT SITE

The Emeryville Marina Park has three priority locations as described in Attachment A, which is incorporated by reference as if fully set forth herein. The Project Site shall be one of those locations as described in Attachment A, and the Proposal shall indicate which location is proposed for the Project.

9. PUBLIC ART BUDGET

The budget is a not-to-exceed figure of \$150,000. This amount includes all costs related to the team's design and project management fees; all subcontracted and consultant costs, including engineers, electricians, materials, fabricators, studio and overhead costs; fabrication, transportation, delivery, storage and installation of all art components; General and Automobile Liability, Professional Liability and Fine Arts insurance as required; and all other costs associated with the art project including a minimum budget contingency of 15%. The City will also reserve \$15,000 in contingency for costs potentially incurred by the City or to be allocated to the artist for unforeseen reasons. Please note that the budget also includes all costs required for all permits and licenses, including lane closure.

10. PROJECT ORIENTATION

- A. Artist shall attend a project orientation to be facilitated by the City. The orientation will include a site visit to the Emeryville Marina Park as well as a meeting and discussion with City planners, engineers, and other staff

involved in the project. The City shall provide Artist with any site plans or other available documents that are relevant to the project site.

- B. Artist shall be given information regarding the appropriate use of artwork/construction materials, maintenance concerns and requirements, public safety issues, local regulatory agency requirements and restrictions as may be applicable and other information that the City deems relevant to Artist's development of the Proposal.
- C. Artist understands and agrees that the proposed Artwork must be durable, taking into consideration that the Project Site is an unsecured public space that is exposed to elements such as extreme weather conditions, pedestrian traffic, and public access. Artist shall ensure that all maintenance requirements will be reasonable in terms of the City's time and expense.

11. CONCEPTUAL DESIGN PROPOSAL SUBMITTAL PHASES

The Conceptual Design Proposal shall be reviewed and approved in two phases, as follows:

A) Phase One Submittal: Preliminary Proposal for Technical Review

Not later than **(May 11, 2018)** Artist will submit a Preliminary Proposal for Technical Review ("Preliminary Proposal") to the City in enough detail to show the proposed location, content, materials, dimensions and methods of attachment and installation of the proposed artwork. The Preliminary Proposal shall be submitted to: Amber Evans, City of Emeryville, 1333 Park Avenue, Emeryville CA 94608-3517 or aevans@emeryville.org to the extent practicable.

1) The Preliminary Proposal must include the following deliverables:

- (i) Drawings of the proposed artwork, including any footings, anchoring system, lighting elements, etc. showing it in its proposed location.
- (ii) A clearly written description of the proposal, including the design concept, the materials to be used, proposed dimensions of all components of the artwork, including anchoring and attachment systems, and a description of how the artwork will be viewed by the public.
- (iii) Samples of any materials to be used in the Artwork.
- (iv) Draft budget as specified in Attachment B ("Public Art Budgets Requirements and Worksheet"), which is incorporated by reference

as if fully set forth herein. Said draft budget is subject to the requirements set forth in Section 9.

- (v) All images and materials shall be presented in a manner that enables the Preliminary Proposal to be visualized and fully comprehensible for review and evaluation by City staff, an art conservator and others. All written information shall be submitted as a Word document and sent via email or on a flash drive.

2) The City, in its discretion, may ask Artist to revise, supplement and resubmit some or all aspects of the Preliminary Proposal, resubmit a new Preliminary Proposal, or reject the Preliminary Proposal if it is deemed to present a potential risk to public safety, if Artist's proposed use of materials is deemed to be inappropriate for long-term exposure in the environment, or fails to meet the specifications set forth in section 10(A)(1).

3) If the City rejects the Preliminary Proposal for failure to adequately consider the requirements listed in sections 9(B) and 9(C) above, including but not limited to potential public safety risks or concerns regarding materials or maintenance, City shall provide Artist with a written explanation of the cause for rejection not later than 15 working days after its receipt.

4) If requested to submit a revised or new Preliminary Proposal as provided, Artist shall address and correct any design concerns expressed by the City, or supplement any omitted information, and shall submit the revised or new Preliminary Proposal to the City not later than 15 days after the City's request to do so, or with the Final Conceptual Design Proposal, whichever is earlier.

B. Phase Two Submittal: Final Conceptual Design Proposal

1. Artist shall submit the Final Conceptual Design Proposal ("Final Proposal") to City not later than **June 22, 2018**. The Final Proposal shall incorporate any modifications to the Proposal as requested by the City during the Phase One Preliminary Proposal review process set forth in Section 10(A).
2. The Final Proposal must include the following deliverables:
 - i) A maximum of three presentation boards, mounted on foam core no larger than 3' by 4' and no smaller than 2.5' by 3.5', to include to-scale renderings, photographs, and other visual material, as needed, designed to adequately illustrate the appearance and location of the proposed Artwork in the context of the site for which it is designed. Each drawing, photograph, or other element on the presentation board must be labeled.

ii) The presentation board(s) must also include a one-page, concise written description of the proposed Artwork, describing the Artwork's concept, its relationship to the site and environment, and its proposed materials.

3. In a separate document, Artist shall submit the following:

- i) A written description of the materials to be used in the Artwork; the estimated dimensions and weights of the primary elements, a description of and technical specifications for, of the lighting elements to be used in the artwork and a description of their points of and methods of attachment; and a description of any other elements to be used to support or enhance the artwork.
- (ii) A general description of the procedures, vehicles, and equipment to be used in the installation, and a general installation timeline.
- (iii) At least two professional estimates for the cost of the materials, fabrication, transportation, and installation of the Artwork as submitted in Artist's proposed project budget, along with estimated costs for any required site preparation and/or cleanup.
- (iv) An itemized project budget for the Artist's design and management fees, and for engineering, fabrication, transportation, insurance, installation, and all other expenses related to the Artwork's final development and completion, in the amount specified for each Project Component (A, B/C). Artist shall include a mandatory contingency fee of 10% of the project budget.
- v) A General Maintenance Plan for the Artwork to include the following:
 - a) A description of future anticipated maintenance requirements, including a recommended maintenance schedule and estimated maintenance costs.
 - b) Anticipated and required care and/or replacement/upgrade of any part of the Artwork and associated moving parts or equipment, including any City time involved in displaying or operating artwork and the frequency of such involvement.
 - c) Manufacturer's specifications for reasonably foreseeable maintenance and preservation activities relating to the Artwork.

- d) Samples of all materials to be used in the proposed Artwork, including those that illustrate any sections, welds, or other surface treatments as will appear in the final product.
- e) High-quality digital images of the presentation board(s) that can be attached to any subsequent agreement between Artist and the City.
- f) A proposed budget and timeline for the completion of Project Component B, as described in Attachment B.

12. **CONCEPTUAL DESIGN FINAL PROPOSAL SELECTION PROCESS**

Visual Components of the Final Proposals (boards, sample materials, and a binder consisting of materials as described in Section 10(B)) timely received will be placed on public display in City Hall for a period of up to 2 weeks. Following the display period, the Art Selection Panel will evaluate the Final Proposals and will assign a weighted score from 1 to 5 (low to high) for each of the criteria described below. The scores will be tallied, and the Proposal with the highest score will be recommended to the Public Art Advisory Committee for consideration by the City Council for implementation.

A. Artwork Selection Criteria:

1. Aesthetics (40%): The quality of the overall design of the Artwork, including creativity, originality and use of materials; the degree to which the Artwork will remain interesting to the general public over a long period of time; appropriateness of content and subject matter to its audience, and the proposal's relevance to the Project Goals as set forth above in Section 3.
2. Siting (20%): The degree to which all components of the Artwork are appropriately sited to the surrounding environment and its visual impact on and enhancement of the site.
3. Durability, Longevity and Maintenance (20%): The degree to which the Artwork will not require excessive or costly maintenance; the degree to which it will withstand inherent environmental conditions including but not limited to natural light, weather, and public access.
4. Budget (20%): An evaluation of Artist's proposed budget based on viable cost estimates from subcontractors and suppliers. A sample budget worksheet is included herein as Attachment B.

B. The Art Selection Panel will have the following options in the selection process:

1. Recommend implementation of one or more of the Final Proposals as submitted.

2. Recommend implementation of one or more Final Proposal with the stipulation that Artist(s) make modifications based on reasonable comments provided by the Art Selection Panel and approved by the City.
3. Recommend that none of the Final Proposals be implemented.

13. OWNERSHIP, DOCUMENTATION AND REPRODUCTION

- A. All documents prepared under this Agreement shall become the property of the City. Artist may retain a copy of all materials produced under this Agreement for Artist's use in Artist's general business activities, including Artist's portfolio, catalogues, promotional materials and other similar publications. Any uses of such materials for commercial purposes shall only be with prior written permission from the City.
- B. Artist grants to the City a non-exclusive, unlimited and irrevocable right to make, and to authorize the making of, photographs and other two-dimensional reproductions of the Preliminary and Final Proposals and Artwork for all promotional, non-commercial uses, including advertising, educational materials, brochures, books, flyers, postcards, print, broadcast, film, electronic and multi-media publicity, catalogues, and/or similar publications.
- C. City may, at its own discretion, return models, materials or panels to the Artist upon request. Should the Artist request such a return of submittal materials, Artist must provide means of shipping and paying for the delivery of the requested materials and such delivery timing shall be at the discretion of the City.

14. CITY'S RIGHT TO IMPLEMENT

- A. Artist agrees that if Artist's Final Proposal is selected for implementation, the City shall have the irrevocable and exclusive right to enter into an agreement with Artist for the final design, fabrication, transportation and installation of an Artwork (the "Artwork Agreement") as specified in the Final Proposal, including any design modifications to the Final Proposal as may be approved in writing by both parties. The Agreement shall be in a form substantially similar to that shown in Attachment C.
- B. By submitting any Preliminary or Final Proposal in accordance with this Agreement, Artist agrees to abide by the terms set forth herein.
- C. Artist warrants that Artist understands and agrees that if Artist's Preliminary or Final Proposal is not recommended, approved, or selected during any phase of the review and selection process, the City is under no obligation to enter into a subsequent agreement with said Artist.

- D. The City agrees that if Artist's Final Proposal is not selected for implementation, the City will not implement, or authorize the implementation of, the same Final Proposal by itself or by others.

15. UNIQUENESS OF CONCEPTUAL DESIGN PROPOSAL

Artist warrants that the design of the Artwork as specified in the Preliminary and Final Proposals are unique, of his/her own artistic efforts, do not infringe on any copyrights, and have not been previously executed by Artist or any other party or parties.

16. WAIVER OF ARTIST'S RIGHTS

Artist recognizes and agrees that if Artist enters into a subsequent Artwork Agreement for the final design, fabrication, transportation, and installation of an Artwork, Artist will be required to waive any rights Artist may have under the provisions of federal or state law, including the California Art Preservation Act (*California Civil Code Section 987*) and the 1990 Visual Artist's Rights Act (*Title 17 United States Code, Section 106A*). Artist shall, however, retain copyright of the Artwork as well any right to disclaim authorship of the Artwork pursuant to and under the conditions set forth in the California Art Preservation Act and the 1990 Visual Artist's Rights Act.

17. CREDIT LINES

Artist hereby agrees that all formal references to the Conceptual Design Proposal in any form shall include the following credit: "Conceptual Design Proposal for the Emeryville Center of Community Life, Emeryville, CA." The City hereby agrees to credit Artist by name upon publication of any two-dimensional reproductions of the work.

18. NOTIFICATIONS

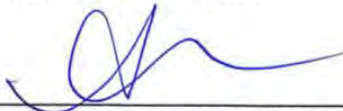
Submittals, questions, requests, notices and reports required under this Agreement shall be in writing and shall be directed to:

For the City: City of Emeryville
1333 Park Avenue
Emeryville, CA 94608-3517:
Attn: Amber Evans

For the Artist: Ned Kahn
nedkahn@earthlink.net
1899 Mariner Drive
Sebastopol, CA 95472
707-481-6770

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

Approved as to form:



Michael Guina, City Attorney

CITY OF EMERYVILLE

Dated: _____, 2018

Carolyn Lehr, City Manager

ARTIST

Dated: 2/26/2018, 2018



Ned Kahn

ATTACHMENTS:

- A: Project Component Sites
- B: Budget Submittal Requirements and Public Art Budget Worksheet
- C: Draft Agreement for the Final Design, Transportation and Installation of the Artwork

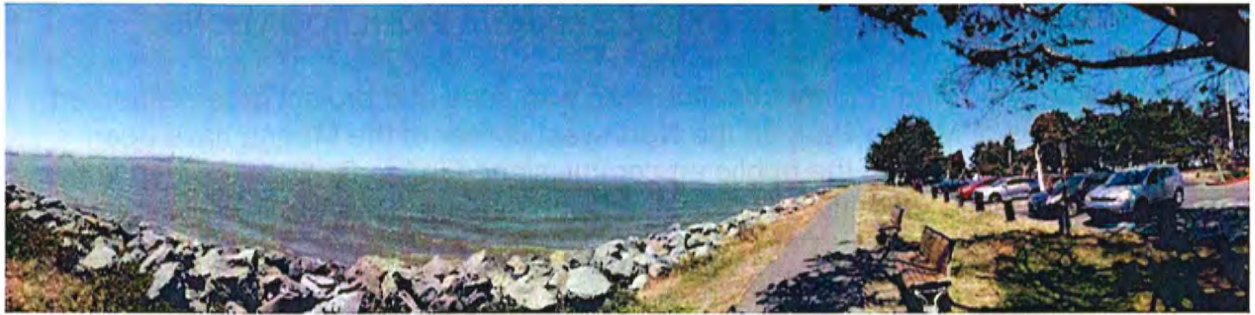
ATTACHMENT A: EMERYVILLE MARINA PARK LOCATIONS

Please see the following Priority Location Map with sites and project area delineated. The public areas of Marina Park on the Northwest corner of the Marina have been prioritized for installation of the public art commissioned in the RFQ as outlined in this Location Map. Artists submitting qualifications should consider their ability to work in the conditions here.

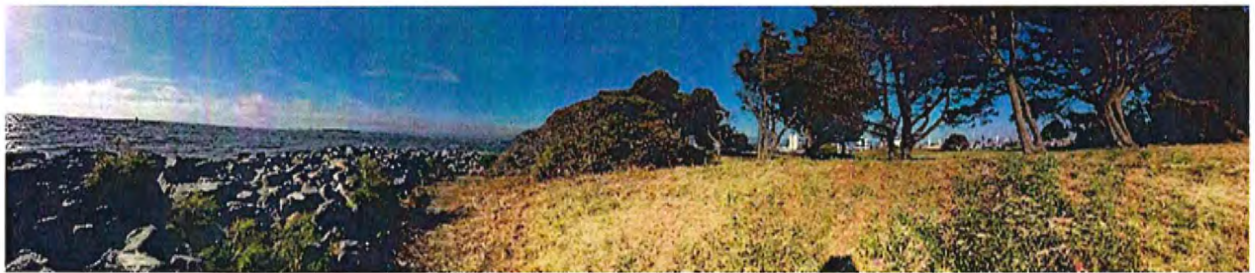
Constraints include:

- Significant wind,
- Limited power access,
- Impacted dirt as the surface treatment,
- Anticipated sea level rise,
- Bay Conservation and Development Commission regulatory review with consideration of both view impacts and prohibitions against installation in the water
- Competing site uses,
- Presence of children and others who may expect unrestricted access to open spaces, and
- Expectations of undisrupted views of the region's iconic bridges, both the Golden Gate and Bay Bridges. Within Marina Park three sites have been identified as minimizing conflict with users and views while maximizing visibility. Other sites within Marina Park (as outlined in Location map) may be considered, as long as the main open spaces and view corridors within, through and from the Park are preserved.

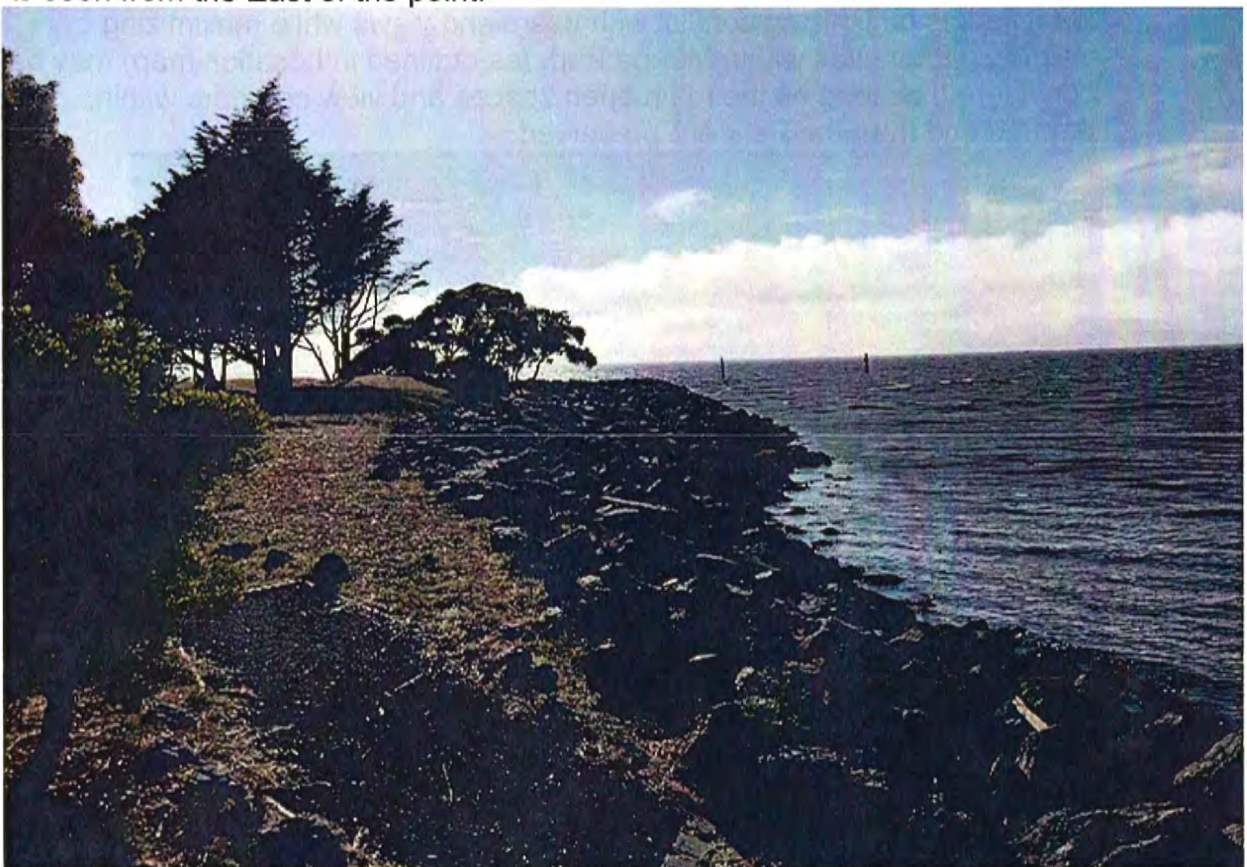




Site 1: North-Western Point



As seen from the East of the point.



Site 2: Mound to the East of the Family Meadow



Site 3: Berm between the Bay and the parking lot along outer trail



REGULATORY AGENCY REVIEWS AND SITE STAKEHOLDERS

Due to its location along the waterfront, there are numerous public agencies with jurisdiction over, or interest in, various aspects of the Marina site. These agencies, and their respective missions, include:

San Francisco Bay Conservation and Development Commission (BCDC)

Along the San Francisco shoreline, BCDC's authority relates primarily to public access, defined as "physical public access to and along the shoreline of the Bay and visual public access (views) to the Bay from other public spaces." When developing proposals for artwork at the Marina, artists must not obstruct physical access to the Bay, submerge any work in the Bay, nor impede the view of the Bay from the adjacent roadways or paths. Artists will be required to submit an image of the proposed artwork that illustrates the relationship of the artwork from the nearest roadway to the Bay as part of the finalist review process. Information about BCDC and its design guidelines may be found at:

http://www.bcdc.ca.gov/planning/reports/ShorelineSpacesPublicAccessDesignGuidelinesForSFBay_Apr2005.pdf

The Audubon Society

The Audubon Society's Mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. Impacts from installations on birds' flights, nesting and other behavior may be of concern to the Society's regional membership.

California Department of Fish and Game

The Department of Fish and Game maintains native fish, wildlife, plant species and natural communities for their intrinsic and ecological value and their benefits to people. This includes habitat protection and maintenance in a sufficient amount and quality to ensure the survival of all species and natural communities. The Department is also responsible for the diversified use of fish and wildlife including recreational, commercial, scientific and educational uses.

East Bay Regional Parks District/California Parks and Recreation Department

The East Bay Regional Parks District (EBRPD) manages lands owned by the California Parks Department to the south and north of the City owned land at the Marina. The EBRPD's mission is to acquire preserve, protect, and operate regional parklands in perpetuity for public use, while conserving these lands for the natural resource values they contain. The goal of the District resource enhancement projects is to conserve and enhance important resource values such as vegetation, wildlife and water to ensure that natural parkland ecosystems are maintained in a healthy and productive condition. The diverse assortment of birds, mammals, reptiles and invertebrates that dwell in the Regional Parks is an integral part of the ecology of the San Francisco Bay Area and an aesthetic natural feature of the parks that visitors greatly enjoy. While the scope of this RFQ is solely within City lands, these park lands adjacent to site prioritized for natural restoration need to be considered in site context. EBRPD's park space south of the

marina and restored marshlands previously used by artists for temporary installations in the mudflats prior to restoration.

ATTACHMENT B: PUBLIC ART BUDGET REQUIREMENTS AND WORKSHEET

The budget Components B cannot exceed \$150,000. The Artist will submit a budget for the preliminary and final Conceptual Design Proposal with the following details.

This budget submittal shall include all costs related to:

- Artist's design, labor and project management fees;
- All subcontracted and consultant costs, including engineers, electricians, fabricators, studio and overhead costs;
- Materials, fabrication, transportation, delivery, storage and installation of all art components;
- General and Automobile Liability, Professional Liability and Fine Arts insurance as required;
- Traffic controls and permit fees, as necessitated by any work obstructing the right of way;
- Fees associated with permits for the project, such as electrical permits;
- A mandated contingency justified by the uncertainties presented in the Conceptual Design Proposal; and
- All other costs associated with the Artwork.

The following is a summary of potential expenses that should be considered when developing a budget for a public art project. Not all of the categories or expenses may apply to your particular project; please consult with the Project Manager if you have questions about any category or item.

INSURANCE

The selected Artist will be required to carry insurance, including a minimum of \$1,000,000 combined single incident general liability insurance, \$1,000,000 combined single limit per accident automobile liability, and Workers' Compensation and Employer's Liability Insurance in the amount of \$1,000,000 per occurrence, if applicable. Artist will be required to procure and obtain Risk of Loss insurance to cover damage or loss to Artwork until such time that the Artwork is installed and ownership of the Artwork is transferred to the City.

1. Auto Insurance.
2. General Liability for Artist and Artist's subcontractors.
3. Workers Compensation, if applicable.
4. Risk of Loss Insurance.
5. Professional Liability Insurance from all design professionals (such as architects, landscape architects or engineers) who provide Artist with signed stamped drawing or calculations,

PROFESSIONAL CONSULTANTS

1. Architectural fees for production of shop and/or construction documents.
2. Engineering fees (all structural Artwork components must be engineered by a structural engineer licensed to practice in the State of California).
3. Specialty consultants as required (electrical or mechanical engineers, glaziers, etc.)

MATERIALS / FABRICATION

1. Mock-ups, molds, formwork, or other materials used to present Artwork mock-ups if required.
2. Materials needed for fabrication of all Artwork components, including mounting and attachment systems.
3. Lighting elements and applicable components.
4. Labor for Artwork fabrication, including any bases, pedestals or attachment systems.

SITE PREPARATION

1. Installation of any required anchoring or mounting systems.
2. Site preparation or remediation.
3. Site cleanup, debris removal.

INSTALLATION

1. Crating and transporting Artwork to site.
2. Labor for uncrating and installing Artwork.
3. Equipment required for installation (truck, crane, dollies, plywood for protection of ground surfaces etc.).
4. Traffic barriers and roadway controls including staffing and permitting, if required.
5. Storage of Artwork, if required.

CONTINGENCY: Mandatory 10% of total project budget

ARTIST'S Fee: 10-20% of total project budget

ATTACHMENT C: DRAFT AGREEMENT FOR THE FINAL DESIGN, FABRICATION,
TRANSPORTATION AND INSTALLATION OF THE ARTWORK



ARTIST AGREEMENT

AGREEMENT FOR DESIGN, FABRICATION, TRANSPORTATION AND INSTALLATION OF ART WORK FOR THE [SITE NAME] ART PROJECT

THIS AGREEMENT FOR DESIGN, FABRICATION, TRANSPORTATION, AND INSTALLATION OF ART WORK FOR THE [SITE NAME] ART PROJECT ("Agreement"), is effective and entered into this _____ day of _____, 2017, ("Effective Date") by and between **THE CITY OF EMERYVILLE** ("City"), and **[ARTIST NAME]** ("Artist"), collectively referred to as the "Parties."

WHEREAS, pursuant to Article 4 of Chapter 2 of Title 3 of the Emeryville Municipal Code ("Public Art Ordinance"), the City has allocated funds for the design, fabrication, transportation, and installation of an original piece of art for the [Site Name] Public Art Project ("Project"); and

WHEREAS, the Artist has developed a proposal to design, fabricate, transport, and install an original piece of art at [Project Location] ("Project Site"), and as more particularly set forth in the Art Work Proposal submitted by Artist pursuant to that certain Art Work Proposal dated [Date of Proposal] ("Art Work Proposal"), Artist pursuant to that certain Agreement for Artwork Proposal dated [Date of Proposal] by and between the City and Artist; and

WHEREAS, the Art Work Proposal submitted by the Artist was reviewed by the Emeryville Public Art Committee, and the Committee has recommended to the City Council that it enter into this Agreement with Artist to design, fabricate, transport, and install the Art Work; and

WHEREAS, on [City Council Meeting Date], the Emeryville City Council approved the Public Art Committee's recommendation to select the Artist and authorized the City Manager to enter into this Agreement with the Artist to design, fabricate, transport, and install the [Site Name] Art Work at the Project Site;

NOW, THEREFORE, the City and the Artist, for the consideration and under the conditions hereinafter set forth, agree as follows:

1. DEFINITIONS

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

"Artist" shall mean [Artist Name].

FOR CITY USE ONLY			
Contract No.		CIP No.	
Resolution No.		EPW No.	

"Art Work" shall mean the Art Work by the Artist for the Project, as described in Section 3 herein and Exhibit A, attached hereto and incorporated herein, and as approved by the City Council.

"City" shall mean the City of Emeryville, a municipal corporation.

"City Council" shall mean the City Council of the City of Emeryville, California.

"City Manager" shall mean the City Manager of the City of Emeryville, California.

"Committee" shall mean the Public Art Committee of the City of Emeryville, California.

"Project Manager" shall mean Amber Evans of the City of Emeryville Economic Development and Housing Department, or other designee approved by the City Manager.

"Project Site" shall mean the approved location for the installation of the Art Work, as described in Exhibit B.

"Services" shall have that meaning described in Section 3.

"Eligible Costs" shall be those costs for supplies and materials that are necessary and required for the execution and provision of Services, as described in Exhibit C.

"Interim Payment" shall have that meaning described in Section 9.3.

Whenever the words **"as directed"**, **"as required"**, **"as permitted"**, or words of like effect are used, it shall be understood as the direction, requirement, or permission of the City.

The words **"sufficient"**, **"necessary"**, or **"proper"**, and the like, mean sufficient, necessary or proper in the judgment of the City.

The words **"approval"**, **"acceptable"**, **"satisfactory"**, or words of like import, shall mean approved by, or acceptable to, or satisfactory to the City, unless otherwise indicated by the context.

2. TERMS OF THE AGREEMENT

The term ("Term") of this Agreement shall commence upon the Effective Date and be completed no later than [Effective Date], or upon the Final Acceptance of the Art Work by the City Council as described in Section 6, whichever is earlier.

3. SERVICES ARTIST AGREES TO PERFORM

The Artist agrees to design, fabricate, transport, and install the Art Work at the Project Site and as more specifically set forth in Exhibit A, which is attached and incorporated into this Agreement except to the extent inconsistent with the terms of this Agreement.

The Artwork is generally described as [add Narrative].

- The Artist will be responsible for the following services (collectively, the “Services”):
- providing the City with the final design submittal for approval;
- fabricating and installing the Art Work and the landscape materials in the timeframe described in Section 5;
- consulting with the City on the Art Work;
- providing reports, documentation and description of maintenance requirements of Art Work; and
- securing all Project Approvals for fabrication and installation from the City and any other governmental agencies.

4. PROJECT APPROVALS

Artist, at his expense, shall secure or cause to be secured any and all project approvals and permits (“Project Approvals”), which may be required by City or other governmental agencies, including compliance with the California Environmental Quality Act (Public Resources Code § 21000, et seq.). Staff will work cooperatively with Artist to assist in coordinating the expeditious processing and consideration of all necessary Project Approvals for the Art Work. However, the execution of this Agreement does not constitute the granting of, or a commitment to obtain, any Project Approvals required by City or any other governmental agency.

5. TIMELY PROVISION OF SERVICES

Artist shall commence and complete design, fabrication, transportation, and installation of the Art Work and satisfy all other obligations and conditions of this Agreement with respect thereto within the times established in this Agreement. The Artist agrees to the following schedule of deliverables. Project Manager and Artist may mutually agree in writing to changes in the following schedule.

5.1 Final Design

Artist shall submit the Final Design of the Art Work to the Project Manager by [Final Design Completion Date]. Final Design Submittal materials shall include:

- to-scale working drawings for all components of the Art work;
- structural/engineering drawings;
- samples of materials to be used indicative of color or surface treatment;
- a scaled site plan showing the revised and accurate site placement of the Art Work;
- budget showing current cost estimates on fabrication and materials;
- written specifications and recommendations for maintenance of the Art Work and its systems.

Within fifteen (15) calendar days of receipt of the Final Design submitted by the Artist, the Project Manager shall either approve or reject the Final Design and provide Artist written notice thereof. If the Final Design is rejected, the Project Manager shall provide the Artist the reasons for such rejection; the Artist shall thereafter correct and resubmit the Final Design to the Project Manager within fifteen (15) calendar days of the rejection. Once the Final Design is accepted, the Project Manager shall provide Artist with written notice of its approval of the Final Design and Notice to Proceed with Fabrication of the Art Work ("Final Design Approval – Fabrication Notice to Proceed").

5.2 Installation Encroachment Permit

Within fifteen (15) calendar days of issuance of the Final Design Approval-Fabrication Notice to Proceed, Artist shall obtain all necessary Project Approvals, including but not limited to an Encroachment Permit from City, for Installation of the Art Work at the Project Site.

5.3 Fabrication

Upon issuance of the Final Design Approval – Fabrication Notice to Proceed by the City, Artist shall commence with fabrication of the Art Work and complete fabrication thereof within ninety (90) calendar days of issuance of the Final Design Approval – Fabrication Notice to Proceed.

Artist will fabricate the Art Work in accordance with the Final Design approved by City for the design of the Art Work.

Artist shall give Project Manager one (1) week notice of the dates of the following milestones for the fabrication of the Art Work: 25% complete, 50% complete, and 75% complete. The City retains the right to review and inspect the Art Work in studio and to approve or reject it as fabricated.

The City will review and approve the Art Work as fabricated at each milestone and will determine, in its sole reasonable discretion, that it meets all of the specifications previously approved by the City and that no default by Artist hereunder has occurred and is continuing. Artist shall contact Project Manager by email two weeks prior to the date of 100% completion of fabrication of the Art Work for review and approval of fabrication of Art Work by Project Manager. Upon approval of the fabrication of the Art Work, the Project Manager shall provide Artist written notice of the approval of the fabrication of the Art Work ("Fabrication Approval Notice").

5.4 Art Work Installation Plan

Within fifteen (15) calendar days from issuance of the Fabrication Approval Notice, Artist shall submit to the Project Manager an Art Work Installation Plan describing the fabrication, delivery, and installation of the Art Work at the Project Site ("Art Work Installation Plan"). The Art Work Installation Plan shall include a list of equipment and materials to be used, surveying requirements, details regarding the limit of the work, staging and storage needs, a list of subcontractors and equipment to be used on the Project Site, a detailed schedule of work at the Project Site. Artist shall submit all

necessary Project Approvals, including but not limited to an Encroachment Permit from City for installation of the Art Work, concurrent with submittal of the Art Work Installation Plan.

Within fifteen (15) calendar days of receipt of the Art Work Installation Plan, City shall notify Artist in writing of approval or rejection of the Art Work Installation Plan. In the case of rejection, Artist shall make revisions to the Art Work Installation Plan specified by City. Upon approval of the Art Work Installation Plan the Project Manager shall issue the Art Work Installation Plan and Notice to Proceed with Fabrication and Installation of the Art Work at the Project Site ("Installation Plan Approval – Installation Notice to Proceed").

Artist will be responsible for the labor, material, and equipment necessary to load and transport the Art Work to the Project Site. Artist will install the Art Work in accordance with the approved Art Work Installation Plan. Artist shall transport and install the Art Work at the Project Site within sixty (60) calendar days of the date of the Installation Plan Approval-Installation Notice to Proceed. Artist shall coordinate the delivery and installation of the Art Work with the Project Manager.

At least three (3) business days prior to the fabrication and installation of the Art Work, the Artist shall contact the Project Manager for approval to begin work at the Project Site. The Project Manager or other City staff shall be present at the Project Site on the first day of fabrication.

Artist shall notify Project Manager upon completion of installation of the Art Work for review and approval of the installed Art Work by the Project Manager.

5.5 Documentation and Final Maintenance Plan

Within fifteen (15) calendar days of the date of the Installation Plan Approval-Installation Notice to Proceed, Artist shall submit to Project Manager a Documentation and Final Maintenance Plan addressing the following elements:

- 1) A written report for the City's files including complete information regarding the intent of the Art Work and the scale, materials, and processes used in the fabrication and installation of the Art Work.
- 2) Final written specifications and recommendations for maintenance of the Art Work, including an estimate of annual maintenance costs associated with the Art Work.
- 3) One (1) set of digital images provided on CD for program and archival purposes, showing fabrication, installation, and completed phases of the Art Work.

Project Manager shall review the Documentation and Final Maintenance Plan within fifteen (15) calendar days of receipt. Artist shall make revisions to the Documentation and Final Maintenance Plan as specified by City prior to its approval. Upon approval of the Documentation and Final Maintenance Plan, the Project Manager shall issue written notice of its approval ("Maintenance Plan Approval Notice").

6. APPROVAL PROCESS

6.1 Generally

If the City in its sole discretion determines to withhold any approval of any element as specified below, the City shall have the right to terminate this Agreement and shall have no further obligations under this Agreement, and the provisions of Section 18 shall apply.

6.2 Final Design Submittal

The Artist shall submit the Final Design Submittal to the Project Manager as described in Section 5.1, and receive approval prior to fabrication and installation.

6.3 Fabrication and Installation of Art Work

The Artist shall consult with the Project Manager prior to and during the fabrication and installation of the Art Work, as described in Sections 5.3 and 5.4. The installed Art Work shall be reviewed by the Project Manager prior to Final Acceptance of the Art Work by the City Council.

6.4 Conditions to Final Acceptance

The completed Art Work shall not be deemed to have been accepted by the City Council until each and every one of the following conditions has been fulfilled, as determined by the City Council:

- All approvals required under Section 5 shall have been obtained by Artist; and
- The installation of the Art Work shall conform to the Final Design specifications for the Art Work approved by Project Manager pursuant to Section 5.1 above; and
- The Art Work shall have been fabricated and installed on a timely basis;
- The completed Art Work shall have been reviewed and approved by the Project Manager.
- The Art Work shall be in substantial compliance with all other terms and conditions contained in this Agreement and shall not be in default of this Agreement.
- Artist has provided City with a Documentation and Final Maintenance Plan ("Maintenance Plan") addressing the following elements:
 - 1) A written report for the City's files including complete information regarding the intent of the Art Work and the scale, materials, and processes used in the fabrication and installation of the Art Work.
 - 2) Final written specifications and recommendations for maintenance of the Art Work, including an estimate of annual maintenance costs associated with the Art Work.
 - 3) One (1) set of digital images provided on CD for program and archival purposes, showing fabrication, installation, and completed phases of Art Work.

4) Maintenance and Materials list as described in Section 15.1. Artist shall advise the Project Manager in writing when these conditions have all been met. The Project Manager shall notify Artist in writing of any deficiencies in meeting the conditions for Final Acceptance.

- The City Council has taken action for Final Acceptance of Art Work ("Final Acceptance").

7. CONSULTATION DURING DESIGN, FABRICATION AND INSTALLATION; DEVIATION FROM APPROVED SPECIFICATIONS

7.1 Consultation

Artist hereby acknowledges that the goal of the parties to this Agreement is the installation of a work of art that best represents the creative talents of Artist and conforms to the requirements of the City. To those ends, Artist agrees to be available as reasonably required for consultation with the Project Manager during design and execution of the Art Work, at no additional cost to the City. Artist shall also make good faith efforts to attend any inauguration or presentation ceremonies and/or public relation events.

7.2 Deviations From Approved Specifications

Artist shall fabricate and install the Art Work in strict conformity with the specifications and designs approved by the City pursuant to Sections 5 and 6 above. However, Artist may at any time make a request of the City for its approval of a deviation from the approved specifications. All such requests must be made in reasonable specificity and with reasonable advance notice to provide the City with sufficient information and time to make an informed and considered decision. City reserves the right to bring such requests to the Committee and/or City Council for approval. In no event shall any deviation increase the project scope and/or Contract Amount without prior City Council approval. The City may withhold approval to any such requested deviation in its sole discretion.

8. PREPARATION OF AND ACCESS TO PROJECT SITE/NOTICE OF CONFLICTING CONDITIONS

The preparation of the Project Site shall be the responsibility of the Artist. Artist shall not fabricate or install the Art Work until access to the Project Site has been approved and scheduled in coordination with the Project Manager. Cost of transportation to and from the Project Site and any parking fees incurred by the Artist are the responsibility of the Artist.

Where the Artist's work is associated with that of any other contractor, the Artist shall examine the adjacent work and report in writing to the Project Manager any visible defect or condition preventing the proper execution of Artist's contract. If Artist proceeds without giving notice, the Artist shall be held to have accepted the work or material and the existing conditions, and shall be responsible for any defects in its own work consequent thereon, and shall not be relieved of any obligation or any guarantee because of any such condition or imperfection.

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

9. COMPENSATION

9.1 Contract Amount

The total compensation is **[ONE THOUSAND DOLLARS AND NO CENTS] (\$1,000.00)** ("Contract Amount") for all Services under this Agreement, including payment to all suppliers, subcontractors, fees, taxes, Emeryville business tax certificate, Project Approvals, insurance, transportation to and from meetings, site preparation, restoring site to prior condition, and all other expenses associated with the scope of work specified in this Agreement. The Artist shall be responsible for the payment of all mailing or shipping charges on submissions to the City, the costs of fabricating, transporting, and installing the Art Work, for transporting and unloading materials and equipment to the Project Site, and for the costs of all travel by the Artist and the Artist's agents, subcontractors, fabricators, and employees necessary for the proper performance of the Services required under this Agreement.

No charges shall be incurred under this Agreement nor shall any payments become due to Artist until all deliverables and Services required under this Agreement are received from and performed by Artist and approved by the City as being in accordance with this Agreement and the Artist provides invoices for each Interim Payment. The final payment is due and payable upon Final Acceptance of the Art Work and a final invoice is submitted by the Artist.

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

9.2 Method of Payment

City agrees to pay Artist for the Services performed and Eligible Costs incurred by Artist upon certification by City that the Services were actually performed and Eligible Costs actually incurred in accordance with this Agreement. A schedule of the approved Eligible Costs is included herein as Exhibit C.

9.3 Payment Schedule

City shall make payments to Artist for the amounts specified and Services as described in Exhibit D: Artist's Payment Schedule. Compensation for Services performed and Eligible Costs incurred shall be paid to Artist upon receipt and approval of invoices by City. Artist shall submit invoices for each Payment Milestone described in Exhibit D. City shall pay Artist within forty-five (45) days after approval of the invoice by City (each an

"Interim Payment"). In no event shall total payment exceed the total Contract Amount described in Section 9.1; provided further that no payment shall include expenditure of any Contingency Amount, unless such expenditure has been approved in writing by City as described in Section 9.1 and invoices for Eligible Costs in Exhibit C demonstrate costs in excess of total payments made and to be made to the Artist. City may withhold any payments to Artist in any instance in which Artist has failed or refused to satisfy any material obligation provided for under this Agreement or is otherwise in default. In no event shall City be responsible for payments to supplier or subcontractor of Artist.

9.4 Effect of Interim Payments

Approval of the work to permit an Interim Payment is solely for the benefit of the Artist. Any Interim Payment does not constitute acceptance or approval of the work by the City; nor shall it be construed as a waiver of the City's right to require that the work conform strictly to the Final Design as approved by the Project Manager, as specified under Section 5.1.

10. METHOD OF PAYMENT; AUDIT AND RECORDS

Invoices furnished by the Artist under this Agreement must be in a form acceptable to the City. Payment shall be made within forty-five (45) days after approval of the invoice by Project Manager.

At any time during normal business hours and as often as the City may deem necessary, there shall be made available to the City for examination all records with respect to all matters covered by this Agreement. The Artist will permit the City to audit, examine, and make excerpts or transcripts from such records, and to audit all contracts, invoices, materials, payrolls, records of personnel, conditions of employment and or data relating to all matters covered by this Agreement.

11. TAXES

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

12. LIABILITY FOR DAMAGE TO EQUIPMENT OR ART WORK

The City shall bear no responsibility, nor incur any liability, for loss or damage to the Art Work or any Artist-owned equipment involved in Artist's performance under this Agreement.

13. INDEPENDENT CONTRACTOR

Artist shall be deemed at all times to be an independent contractor and shall be wholly responsible for the manner in which the Artist performs the service required by the terms of this Agreement. Nothing contained herein shall be construed as creating an employment or City relationship between the City and the Artist. Terms in this Agreement referring to direction from the City shall be construed as providing for direction as to policy

and result of the Artist's work only and not as to the means by which such a result is obtained.

Artist is solely responsible for hiring and paying subcontractors and employees, as well as responsible for the acts of these subcontractors and employees.

14. ARTIST WARRANTIES

14.1 Conformance with Plans and Specifications

Artist hereby expressly warrants to the City that the Art Work, and all services and materials incorporated therein, shall conform to all plans and specifications of the Art Work approved by the City. The Art Work shall be subject to inspection and rejection by the City from the beginning of fabrication until the completion and Final Acceptance. An inspection by the City of any work or material shall not be deemed to be a waiver of any future right of inspection or of any right to demand correction of any subsequently discovered defect. Any work or material found to be unsatisfactory or defective before final approval of the work shall be corrected or replaced by the Artist within a reasonable time. Inspection shall not relieve the Artist of the Artist's obligation to furnish materials and workmanship reasonably in accordance with the contract.

14.2 Defects in Material and Workmanship

Artist warrants that the work will be fit for the intended purpose; will be safe and will not have any nuisance or harmful effect; and will be free of defects in workmanship or materials, including inherent defects. Artist warrants that it shall, at Artist's cost and expense, remedy such defects in workmanship or materials that appear within twenty-four (24) months of the Final Acceptance of the Art Work.

In the event the Art Work should deteriorate due to an inherent defect during the Installation Period, the Artist will replace the work at Artist's expense. "Inherent defect" refers to a quality within the material or materials which comprise the Art Work which, either alone or in combination, results in the tendency of the work to destroy itself. "Inherent defect" does not include any tendency to deteriorate which is specifically identified in the proposal submitted by the Artist.

14.3 Title

The Artist represents and warrants that 1) the Art Work is solely the result of the artistic effort of the Artist; and 2) the Art Work is unique and original and does not infringe upon any copyright.

15. MAINTENANCE, REPAIRS, ALTERATIONS AND REMOVAL

15.1 Maintenance and Repair

As a condition to Final Acceptance by the City of the Art Work, the Artist shall provide the City with a materials list, the manufacturer's technical sheets and/or specifications for the materials, and a written description of the regular maintenance needs of the Art Work

("Maintenance and Materials List"). Routine maintenance of the Art Work shall be the responsibility of the City. The City shall maintain the Art Work and/or make minor or emergency repairs without Artist's approval or consultation, provided such work is performed in accordance with the maintenance and materials information provided by the Artist. If necessary maintenance and repairs cannot be made in accordance with the Artist's specifications, or if the Artist has provided insufficient information to the City, the City may use its best judgment to effect necessary repairs in a timely fashion.

15.2 Removal or Destruction

Artist hereby acknowledges that the Art Work, when installed, will be incorporated within and made a part of the Project Site in such a way that removing the Art Work from the Project Site, or the destruction or modification of the Project Site may cause the destruction, distortion, mutilation or other modification of the Art Work. Artist therefore agrees that the City shall have the absolute right incidental to its ownership of the Art Work to alter, change, modify, destroy, remove, relocate, move, replace, transport, or transfer, in whole or in part (such actions being referred to herein as "Alterations"), the Art Work at such time as the City shall deem necessary in order to exercise its powers and responsibilities with respect to public works and improvements in furtherance of City's operations. The City shall make a good faith effort to provide the Artist with prior written notice of the City's intent to undertake any Alterations to the Art Work. To the extent the provisions of this Section are inconsistent with the provisions of federal or state law, including without limitation the California Art Preservation Act (California Civil Code Sections 980 et seq.) and the 1990 Visual Artists' Rights Act, Artist hereby waives any right to preservation of the Art Work provided by those laws; provided, however, that the Artist shall retain any right to disclaim authorship of the Art Work pursuant to and under the conditions set forth in the California Art Preservation Act and the 1990 Visual Artists' Rights Act.

15.3 Public Hazard

Artist warrants to the City that the Art Work as installed does not contain features, materials or elements that pose a foreseeable danger to the public. In the event that the City determines that the Art Work presents an imminent hazard to the public, the City may authorize the removal of the Art Work without approval of the Artist. The Artist shall be notified within ten (10) days of any such action, and the City shall then consider options for the final disposition, repair, reinstallation, maintenance or de-accession of the Art Work. In the event that the Art Work cannot be removed without being irreparably damaged or destroyed, the Artist hereby agrees to waive any rights the Artist may have under the California Art Preservation Act and the 1990 Visual Artists' Rights Act, provided, however, that the Artist shall retain any right to disclaim authorship of the Art work pursuant to and under the conditions set forth in the California Art Preservation Act and the 1990 Visual Artists' Rights Act.

16. INSURANCE

16.1 Required Insurance

Artist shall place and maintain for the periods stated below, and pay the cost thereof, the following insurance policies:

- A. **Worker's Compensation.** If Artist has employees, Artist shall procure and maintain statutory Worker's Compensation Insurance in the jurisdiction where the work is being performed and provide a waiver of subrogation against the City. Artist shall also procure and maintain Employer's Liability Insurance with a limit of no less than \$1,000,000 each accident, covering all employees. If Artist warrants that it is not an employer and has no employees as defined by the California Labor Code Sections 3351-3351.5, then the City waives the requirement for Worker's Compensation and Employer's Liability Insurance under this Agreement.

Artist shall ensure that Artists' subcontractors who do qualify as employers as defined by the California Labor Code Sections 3351-3351.5 procure prior Worker's Compensation, with Employer's Liability insurance, with limits of no less than \$1 million each accident, covering all employees employed by Artist's subcontractor to provide statutory benefits as required by the laws of California, said policy shall be endorsed to provide that the insurer waives all rights of subrogation against the City.

I certify that my business has no employees and that I do not employ anyone. I am exempt from the legal requirement to provide Workers' Compensation Insurance.

_____ (Artist's Initials)

- B. **General Liability Insurance.** Artist shall procure and maintain Comprehensive General Liability Insurance with limits not less than \$1,000,000 for each occurrence combined single limit for bodily injury and property damage, including coverage for contractual liability, broad form property damage, completed operations, and if any subcontracted work, independent contractors.
- C. **Comprehensive Automobile Insurance.** Artist shall procure and maintain, and cause any subcontractors to procure, Comprehensive Automobile Liability insurance with single limit for bodily injury and property damage of \$1,000,000, including coverage for owned, non-owned and hired automobiles, as applicable. Any deductible under such policy shall not exceed \$1,000 for each occurrence.

- D. **Risk of Loss Insurance.** Artist shall procure and maintain Risk of Loss Insurance in an amount not less than **ONE HUNDRED THOUSAND DOLLARS AND NO CENTS (\$100,000.00)**. Artist shall take such measures as are reasonably necessary to protect the Art Work from loss or damage until Artist has completed the Art Work as specified herein and ownership is transferred to the City. The risk of loss or damage to the Art Work shall be borne by Artist prior to final acceptance of the Art Work by the City.

16.2 Miscellaneous Insurance Matters

All insurance policies obtained pursuant to Section 16 shall be endorsed to provide:

- 1) That thirty (30) days written notice of cancellation, non-renewal or reduction in coverage or limits shall be given to

City of Emeryville
Attn: Economic Development and Housing Manager
1333 Park Avenue
Emeryville, CA 94608-3517

; and

- 2) That such insurance is primary to any other insurance available to an additional insured with respect to claims arising out of this Agreement and that insurance applies separately to each insured against whom a claim is made or a suit is brought, but the inclusion of more than one insured shall not operate to increase the insurer's limits of liability.

All insurance policies required under this Agreement shall be issued by insurance companies reasonably acceptable to the City and shall be admitted to do business in the State of California.

The liability insurance policies required above shall be endorsed to name as an additional insured the City and its respective members, officers, directors, agents and employees.

Copies of all insurances shall be provided to the City, and complete copies of any insurance policies obtained pursuant to this Agreement shall be provided to the City if requested at any time.

17. INDEMNIFICATION AND GENERAL LIABILITY

Artist shall defend, indemnify and hold harmless the City and its officers, employees, agents, contractors, consultants and members of its boards, committees and commissions (an "Indemnified Person") harmless from and against any and all Losses arising directly or indirectly, in whole or in part, out of any injury to or death to any person or damage to or destruction of any property, from any cause whatsoever, relating to Artist's performance, attempted performance or failure to perform under this Agreement or breach of this Agreement, whether such Loss is caused by the Artist or its agents, employees or contractors, or by any third party, but excluding liability caused by conduct of the City.

In the event any action or proceeding is brought against an Indemnified Person by reason of a claim arising out of any Loss covered by this indemnity, and upon written notice from such Indemnified Person, Artist shall at the Artist's sole expense answer and otherwise defend such action or proceeding using counsel approved in writing by the Indemnified Person. Each Indemnified Person shall have the right to defend, adjust, settle or compromise any claim, obligation, debt, demand, suit or judgment covered by the indemnity set forth in this Section.

For purposes of this Section, the term "Losses" shall mean any and all claims, demands, losses, damages, liens, liabilities, injuries, deaths, penalties, fines, lawsuits and other proceedings, judgments and awards rendered therein, and costs and expenses, including, but not limited to, reasonable attorney's fees.

The Artist shall indemnify and hold the City harmless from all loss and liability, including attorney's fees, court costs, and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark and all other intellectual property claims of any third party persons arising from the Artist's work under this Agreement.

The provisions of this Section 17 shall survive termination of this Agreement.

18. DEFAULT; REMEDIES; TERMINATION

18.1 For Cause

Failure or refusal of either party to perform or do any act herein required shall constitute a default. Either party may terminate this Agreement upon seven (7) days' advance written notice to the other party in the event that the other party 1) materially breaches any duty, obligation, or service required pursuant to this Agreement and 2) fails to cure such breach within ten (10) days after written notice of such breach from the non-breaching party.

In the event this Agreement is terminated by reason of the Artist's default, the Artist shall immediately refund to the City the amount of any interim payment(s) made to the Artist.

18.2 For Public Convenience or Necessity

The City may terminate this Agreement at any time, in whole or in part, for any as a condition of receiving the fair and reasonable payment from the City, the Artist agrees to transfer title to all partially completed work, plans, notes, drawings, etc. to the City. Upon termination by City pursuant to this subsection 18.2, City shall provide for payment to the Artist for services rendered and expenses incurred prior to the termination date. Artist shall receive payment only for expenses directly related to the current phase of the Project at the time of termination. Such payment shall not exceed the amount of the Interim Payment for the current phase of the Project at the time of termination.

18.3 Legal Remedies

Termination by the City pursuant to this Section does not waive any other legal remedies available to the City. The remedies described herein are in addition to all other remedies available to either party under the laws of the State of California should the other party fail to comply with the terms of this Agreement.

19. NOTICES

Submittals, payments, requests, notices and reports required under this Agreement shall be delivered as follows:

CITY

[PROJECT MANAGER]

1333 Park Avenue

Emeryville, California 94608

Phone No.: (510) 000-0000

Fax No.: (510) 000-0000

E-Mail: E-MAIL@emeryville.org

ARTIST

[ARTIST NAME]

[ADDRESS]

Phone No.: (000) 000-0000

Fax No.: (000) 000-0000

E-Mail: [E-MAIL ADDRESS]

Any submittal, payment, request, notice, or report shall be deemed delivered five (5) business days after the party providing notice has mailed said notice to the other party by certified mail.

20. OWNERSHIP OF ART WORK; COPYRIGHT AND PATENTS; DOCUMENTATION

20.1 Generally

Artist shall retain all rights under the Copyright Act of 1976, 17 U.S.C. 101 et seq., and all other rights in and to the Art Work except as otherwise set forth in this Agreement. The City is not responsible for any third party infringement of the Artist's copyrights and Artist agrees to hold the City harmless for any such infringement.

20.2 Title and Risk of Loss

Title to the Art Work shall be held by the City. The Artist bears the risk of damage to or loss of the Art Work prior to Final Acceptance by City.

20.3 Display

The City has the right to display the project drawings and models, and is authorized to make and reproduce photographs and other two-dimensional reproductions of any drawings or models for publicity and program purposes.

20.4 Ownership of Documents and Models

Studies, drawings, designs, maquettes and models prepared and submitted to the City shall be returned to the Artist following Execution of the Art Work.

20.5 Reproduction Rights

City shall have a perpetual, nonexclusive license to make, and to authorize the making of photographs and other two-dimensional reproductions of the work for educational, public relations, arts promotional and other non-commercial purposes. For the purposes of this Agreement, the following are deemed to be reproductions for non-commercial purposes: reproduction in exhibition catalogues, books, slides, photographs, postcards, posters and calendars, and the City's on-line homepage; in art magazines, art books, and art and news sections of newspapers; in general books and magazines not primarily devoted to art but of an educational, historical or critical nature; slides and film strips not intended for a mass audience, and television from stations operated for educational purposes or on programs for educational purposes from all stations.

20.6 Artistic Credit

The City hereby agrees to credit the Artist for the Art Work upon publication of any two-dimensional reproductions of the work as stated in this Section.

21. SUBCONTRACTING

The Artist shall not subcontract this Agreement or any part of it unless such subcontracting is approved by the City in writing. Neither party shall, on the basis of this Agreement, contract on behalf of or in the name of the other party. An agreement made in violation of this provision shall confer no rights on any party and shall be null and void. In the event Artist desires to subcontract for any of the services under this Agreement, the Artist shall notify the City in writing and describe in detail the services to be provided by said subcontractor. Within ten (10) business days after receipt of Artist's notice of intent to subcontract, City shall notify Artist in writing of its consent to subcontract, which consent shall not be unreasonably withheld. All subcontractors shall obtain insurance for the coverages and amounts described in Section 16. All insurance policies of subcontractors shall name the City as an additional insured.

The Artist's agreements with its subcontractors shall require that the subcontractors comply with each of the Artist's legal obligations to the City as set forth in this Agreement.

22. NO ASSIGNMENT OR TRANSFER

Artist shall consistently give its personal attention to the faithful execution of the scope of work of this Agreement. The Artist shall keep the work under its control and shall not assign or subcontract the whole or any part thereof, except as herein provided. All transactions with subcontractors shall be made through the Artist, and no subcontractor shall relieve the Artist of any of the Artist's liability or obligations under this contract.

23. COMPLIANCE WITH LAWS

In the performance of this contract, Artist agrees to comply with applicable laws and regulations. Artist covenants and declares that it has obtained all diplomas, certificates, licenses, permits or the like required of Artist by any and all national, state, regional, county, city or local boards, agencies, commissions, committees or other regulatory

bodies in order to perform the services contracted for under this Agreement. All work performed by Artist under this Agreement shall be in accordance with applicable legal requirements and shall meet the standard of quality ordinarily expected of competent professionals. Artist shall not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, or disability.

24. CONFLICTS OF INTEREST

Artist covenants and declares that, other than this Agreement, it has no business holdings or agreements with any official, employee or other representative of the City. For the duration of this Agreement, in the event the Artist or its principals, agents or employees acquire such a holding, interest or agreement within the City of Emeryville or with any official, employee or representative of the City in the future, the Artist will immediately notify the City of such holding, interest or agreement in writing.

25. BUSINESS TAX CERTIFICATE

Prior to commencement of the services to be provided hereunder, Artist shall apply to the City of Emeryville Finance Department for a business tax certificate, pay the applicable business license tax and maintain said business tax certificate during the term of this Agreement, as provided in Article 1 of Chapter 1 of Title 3 of the Emeryville Municipal Code.

26. LIVING WAGE

Artist shall comply with the requirements of the City's Living Wage Ordinance set forth in Chapter 31 of Title 5 of the Emeryville Municipal Code, unless said Agreement is (i) between the City and another governmental entity, (ii) subject to a higher prevailing wage rate as defined in the California Labor Code, or (iii) subject to federal or state laws or regulations that would preclude the application of the City's laws.

Compliance with the Living Wage Ordinance, if applicable, shall be required during the term of the Agreement for all employees of Artist who perform at least twenty-five percent (25%) of the work arising from this Agreement, unless said employees are otherwise exempt from the application of the Living Wage Ordinance pursuant to Section 5-31.08. Artist shall promptly provide to the City documents and information verifying compliance with the requirements of the Living Wage Ordinance within ten (10) working days following a written request for such documentation and information from the City.

Failure to comply with the Living Wage Ordinance provides that a person claiming a violation thereof may bring an action against Artist for back pay, reinstatement and compensatory damages, as well as a penalty up to three times the amount of damages for a willful violation, plus reasonable attorney's fees and costs. In addition, the City may terminate the Agreement and pursue any other remedies available to the City, including debarment, for violations of the Living Wage Ordinance.

Artist shall notify each of its affected employees with regards to wages that are required to be paid pursuant to this chapter. "Living Wage" means no less than \$13.36 per hour (as of July 1, 2012, subject to increase annually on July 1st to reflect the twelve-month average increase to the Consumer Price Index for all urban consumers in the San Francisco-Oakland-San Jose Metropolitan Statistical Area for the preceding year from May to April, not to exceed three percent (3%) in any one year) including wages and health benefits. If Artist contributions for health benefits are not paid on an hourly basis, Artist must demonstrate to the City the hourly value of such benefits in order to receive credit for such payments to covered employees.

27. MISCELLANEOUS

27.1 Survival of Indemnities and Other Provisions

Termination of this Agreement shall not affect City's right to enforce any and all indemnities, representations or warranties given or made by Artist to City under this Agreement, nor shall it affect any other provision of this Agreement that expressly states it shall survive termination.

27.2 Force Majeure

The term "Force Majeure" with respect to a delay in performance shall mean any delay that is attributable to:

- 1) any strike, lockout or other labor or industrial disturbance (whether or not on the part of the employees of either party thereto), civil disturbance, future order claiming jurisdiction, act of the public enemy, war, riot, sabotage, blockade, embargo, inability to secure customary materials, supplies or labor through ordinary sources by reason of regulation or order of any government or regulatory body;
- 2) any changes in any applicable laws or the interpretation thereof; or
- 3) any flood, washout, explosion, or any other cause beyond the reasonable control of the party from whom performance is required, or any of its contractors or other representatives. Any prevention, delay or stoppage in a party's performance hereunder due to Force Majeure shall excuse the performance of the party affected for a period of time equal to any such prevention, delay or stoppage; provided, however, that during the period of any such delay or stoppage, the party whose performance hereunder is excused shall take all reasonable steps necessary to minimize the length of such delay or stoppage.

27.3 Governing Law

This Agreement, regardless of where executed or performed, shall be governed by and construed in accordance with the laws of the State of California. Any legal action taken to enforce the terms of this Agreement shall be instituted in the Superior Court of the State of California, County of Alameda, or in the United States District Court, Northern District of California. The prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which the party may be entitled.

27.4 Successors and Assigns

The terms, covenants and conditions contained in this Agreement shall bind and inure to the benefit of Artist and City and, except as otherwise provided herein, their personal representatives and successors and assigns. There are no third-party beneficiaries to this Agreement.

27.5 Integrated Agreement; Modification

This Agreement contains all the agreements of the parties hereto relating to the subject matter addressed herein, and cannot be amended or modified except by a written agreement mutually executed between each of the parties hereto.

27.6 Non-waiver of Rights

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

27.7 Entire Agreement; Construction and Interpretation of Agreement

- The parties intend that this Agreement (including all of the attached exhibits, which are made a part of this Agreement) shall be the final expression of their agreement with respect to the subject matter hereof and may not be contradicted by evidence of any prior or contemporaneous written or oral agreements or understandings.
- Should any provisions or portions of this Agreement be held unenforceable or invalid, the remaining provisions and portions shall be unaffected by such holdings.
- The subject headings of the paragraphs of this Agreement are for convenience only and shall not affect the construction or interpretation of any of its provisions.
- The parties hereto agree to execute such further instruments and to take such further actions as may be reasonably required to carry out the intent of this Agreement.
- This Agreement may be executed in two or more counterparts, each of which shall be deemed original, but all of which taken together shall constitute one and the same instrument.
- If more than one person executes this Agreement on behalf of Artist, the obligations and liabilities of each such person shall be joint and several as to all obligations and liabilities of Artist hereunder.
- For purposes of this Agreement, reasonable attorney's fees and legal costs and charges of City's City Attorney Office shall be based on fees regularly charged by private attorneys in the City with an equivalent level of expertise and practicing in law firms with approximately the same number of attorneys as the City Attorney's Office.

28. WAIVER OF AGREEMENT

The City's failure to enforce any provision of this Agreement or the waiver in a particular instance shall not be construed as a general waiver of any future breach or default.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year indicated below, effective as of the day the City Manager executes the Agreement on behalf of the City.

APPROVED AS TO FORM:

Michael A. Guina, City Attorney

CITY OF EMERYVILLE

Dated: _____, 2017

Carolyn Lehr, City Manager

ARTIST

Dated: _____, 2017

[ARTIST NAME]

29. EXHIBITS

- Exhibit A: Artist Proposal
- Exhibit B: Art Work Location Map
- Exhibit C: Eligible Costs
- Exhibit D: Artist Payment Schedule