

**CITY AND COUNTY OF SAN FRANCISCO PROFESSIONAL SERVICES**

**Arts Commission  
25 Van Ness Avenue, Suite 240  
San Francisco, California 94102**

**AGREEMENT BETWEEN THE CITY AND COUNTY OF SAN FRANCISCO  
AND  
TOMIE ARAI TO PROVIDE ARTWORK FOR THE CENTRAL SUBWAY PROJECT**

This Agreement, dated for convenience as **June 1, 2011** is made in the City and County of San Francisco, State of California, by and between Tomie Arai, 245 West 107<sup>th</sup> Street, New York, NY 10025, hereinafter referred to as "Artist" or "Contractor" and the City and County of San Francisco, a municipal corporation, hereinafter referred to as "City," acting by and through its Municipal Transportation Agency ("SFMTA") and its Arts Commission ("Commission"), for the purposes and on the terms and conditions set forth below.

**Recitals**

**A.** The City desires that the Contractor design, fabricate, transport to the City and consult during installation of an Artwork to be installed by the City in the Chinatown Station of the Central Subway Project, Phase 2 of the SFMTA Third Street Light Rail Project ("the Project").

**B.** Funding for Artwork for the Project will be derived from Federal Transit Administration grants and other funds granted the SFMTA, which the SFMTA provides to the Commission to administer the art program for the Project.

**C.** A Request for Qualifications (RFQ) was issued on October 1, 2004 and April 30, 2008, and City selected Artist as one of six highest qualified scorers pursuant to the RFQ.

**D.** 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 the City as set forth under this Contract.

**E.** The City and Contractor intend that this Agreement comply with the regulations of the Federal Transit Administration of the United States Department of Transportation ("FTA").

**F.** Approval for said Agreement was obtained from a Civil Service Commission Notice of Action for Contract No. 4062-10/11 on January 3, 2011.

**G.** The Commission, by Resolution No. 1206-10-338 has authorized the Director of Cultural Affairs to enter into Agreement with Artist for the development and implementation of a work of art for the Central Subway Chinatown Station under the following terms and conditions.

Now, therefore, in consideration of the preceding statements, the accuracy of which the parties hereby stipulate, the Artist, the SFMTA and Commission; on behalf of City, hereby 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:

1. "ADA" means the Americans with Disabilities Act (including all rules and regulations thereunder), Title 24 (California Building Code) and all other applicable federal, state and local disabled access legislation, as the same may be amended, modified or supplemented from time to time.
2. "Additional Work" means Work outside the scope of work of this Agreement, as described in Appendix B to this Agreement.
3. "Agreement" means this agreement, including all addenda, appendices and modifications, whether created now or in the future.
4. "Alter" or "Alteration" means, with respect to the Artwork, to alter, repair, modify, remove, relocate, sell, dispose of, distort, destroy, mutilate, or deface.
5. "Approved Costs" means such costs as are scheduled on Appendix C, including the maximum expenditure authorized for each item.
6. "Architect" means the engineering design firm engaged by the SFMTA to design the portion of the Central Subway Project in which the Art Work will be incorporated or installed.
7. "Artist" (also referred to as "Contractor") means: Tomie Arai. 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.
8. "Artist's Fee" means the fee paid by the City to the Artist to cover all profit, labor and costs related to the design and fabrication of the Artwork, including but not limited to Overhead, that are not otherwise compensable under this Agreement.
9. "Artwork" means the work of art designed by Artist for the Site under the terms of this Agreement, as described and defined in Artist Proposal, to be attached as Appendix A upon completion of Phase I, Conceptual Design, of the Services to be Provided by Artist.
10. "Authorization" means an Agreement, properly executed by the Commission and certified by the Controller for the specific funding of this Agreement or any modification thereof.
11. "Budget" means a specific and detailed document identifying the cost of completion of all Work under this Agreement, including all modifications, as further described in Section 4(c).
12. "Central Subway Project" (CSP) or "Project" means the planning, design and construction of the Central Subway Project, Phase 2 of the SFMTA Third Street Light Rail Project.

13. "City" means the City and County of San Francisco, a municipal corporation.
14. "Commission" means the San Francisco Arts Commission.
15. "Committee" means the Visual Arts Committee of the Commission.
16. "Compensable Expense" means an expenditure by Artist made in the performance of the Work that is eligible under FTA guidelines and other applicable federal regulations for reimbursement as a legitimate Project expense and approved in advance of expenditure by the Arts Commission.
17. "Conceptual Design" means drawings (in plan and elevation) and/or 3-dimensional models, a written description, proposed materials and samples and cost estimates at 30% design completion. The information provided in Conceptual Design shall be complete enough to fully illustrate the design intent of the Artwork.
18. "Construction Contractor" means the licensed contractor and its subcontractors selected by the City to construct the Central Subway Project or any portion thereof, including installation of the Artwork at the Site.
19. "Construction Documents" means the final and complete architectural, structural, mechanical and engineering Design Development Documents (including drawings, written specifications, structural and engineering calculations at 100% design completion) prepared by Artist or Artist's subcontractors and approved by the Commission that sets forth in detail the design and specifications of the Artwork and its installation, which are suitable for bidding to a Construction Contractor. Construction Documents shall describe and fix the location, size, materials and character of the Artwork with respect to architectural, structural engineering, mechanical and electrical systems, materials, colors, method of attachment and fabrication methods, and other such elements as may be appropriate. Construction Documents must be signed and stamped by design professionals licensed in the State of California as required by the California Building Code and any local amendments thereto.
20. "Construction Manager" means the Central Subway Partners, a joint venture between AECOM USA and EPC Consultants, engaged by the SFMTA to manage the design and construction of the Project as the Program Manager/Construction Manager consultant.
21. "Contract Documents" means any work, including but not limited to, Conceptual Designs, Design Development Document and Construction Documents, Shop Drawings, Mock-ups, models, engineering calculations, approved installation plans, and all material samples and product data, project budget, and any and all additional documents and submittals produced under this Agreement that the Commission has approved and to which the completed Artwork is expected to conform.
22. "Contract Sum" (or "Total Amount") means all amounts payable by the City to Artist under this Agreement, and more specifically described in Section 5.
23. "Controller" means the Controller of City.
24. "Cost-plus-Fixed-Fee" means an alternate method compensating the Artist for Work performed under the Agreement that is not paid by Lump Sum and by which the City

reimburses the Artist its costs for performing the Work and also pays a Fixed Fee as compensation for having performed the Work.

25. "Days" means working days of the City and County of San Francisco (unless otherwise indicated). The use of the term "days," "working days" or "business days" shall be synonymous.
26. "Department of Transportation" (DOT) means the federal agency Department of Transportation.
27. "Director of Cultural Affairs" means the Director of Cultural Affairs for the Commission.
28. "Design Development Documents" means the design documents generated by the Artist and submitted to the Commission for review, comment and approval during the course of the design of the Artwork. The content of Design Development Documents shall be determined by the Commission, and may include colored drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the Artwork, that 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, describe how the Artwork 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.
29. "FTA" means the Federal Transit Administration, a department of the federal Department of Transportation.
30. "Force Majeure" with respect to a delay in or prevention of performance means (a) any strike, lockout or other labor or industrial disturbance (whether or not on the part of the employees of either party), civil disturbance, future order claiming jurisdiction, act of the public enemy, war, riot, sabotage, blockade, embargo, inability to secure customary materials, supplies or labor through ordinary sources by reason of regulation or order of any government or regulatory body; (b) any changes in any applicable laws or the interpretation thereof; or (c) any flood, washout, explosion, or any other cause beyond the reasonable control of the party from whom performance is required.
31. "Lump Sum" means a method of compensating the Artist for Work under the Agreement that is a payment of an all-inclusive prefixed amount of compensation agreed by the Parties for completion of Milestones or other Work specified in the Agreement or an amendment to the Agreement. A Lump Sum payment amount is inclusive of and compensates the Artist for all Reimbursable Expenses, Overhead, and the Artist's Fee.
32. "Milestone" means a description of Work to be accomplished by date(s) certain, set out in Appendix D of this Agreement.
33. "Mock-ups" or "Samples" means illustrations such as standard schedules, performance charts, instructions, brochures, diagrams, and physical samples of all or any portion of the Work, and other information furnished by Artist to illustrate materials or equipment for all or any portion of the Work. The purpose of the Mock-ups and Samples is to provide physical examples that illustrate materials, equipment or workmanship and establish the standards by which the Work will be judged.

34. "Overhead" means the costs incurred by Contractor in supporting its Work on the Project that are not specifically listed as Reimbursable Expenses.
35. "Party" means an entity bound by this Agreement.
36. "Parties" mean all entities bound by this Agreement.
37. "Project" means the Third Street Light Rail Project, Phase 2, Central Subway.
38. "Proposal" means the proposed visual, aesthetic, and artistic intent and design of the Artwork incorporated in the Contract Documents approved by the Commission. The most recent design approved by the Commission is incorporated herein by reference, and is binding unless or until changes are approved by resolution of the Commission. Attached is Artist's Proposal at the time of the Agreement date. Artist's Proposal shall be automatically superseded by any Contract Documents that are later approved by the Commission.
39. "Public Work" means a construction project, erection, installation or other element of a construction project defined as a public work or S.F. Administrative Code Section 6.1(l), as currently written or as may be amended from time to time.
40. "Reimbursable Expense" means an expenditure by the Artist, including Salary Burden, that the Arts Commission shall reimburse to the extent that such expenditure is necessary for the Project and meets all applicable requirements of this Agreement, including approval in advance of expenditure by the Arts Commission.
41. "Request for Information" (RFI) means a request from a Construction Contractor for clarification or interpretation of a Contract Document or design document prepared by or under the direction of the Artist under this Agreement.
42. "Request for Qualifications" (RFQ) means the Request for Qualifications issued by the Arts Commission on September 10, 2004 and on April 30, 2008.
43. "Salary Burden" means the full cost of payroll taxes and employee benefits, such as health and dental care insurance, vacation, leave, retirement and pension that are provided to employees in addition to wages.
44. "Scope of Services" or "Work" means the services, tasks, and deliverables that the Artist will provide to the Arts Commission under this Agreement, as outlined in Appendix B of this Agreement.
45. "SFMTA" means the San Francisco Municipal Transportation Agency, created under Article 8A of the City's Charter.
46. "Shop Drawings" means drawings, diagrams and other data specifically prepared by Artist or Artist's subcontractors, fabricators, manufacturers, suppliers, Construction Contractor, or distributors illustrating in detail exactly how the work, or any element thereof, is to be fabricated and installed. Shop Drawings shall be signed and stamped by a licensed design professional unless this requirement is specifically waived by the Commission.
47. "Small Business Enterprise"(SBE) means a for-profit, small business concern with a three (3) year average gross revenue not exceeding Twelve Million Dollars (\$12,000,000) and is certified under any of the following programs: the State of

California's Small Business Program ("State Program"), the City and County of San Francisco's LBE Program ("City Program"), or the California Unified Certification Program ("Federal DBE Program").

48. "Site" means the Project location where the Artwork is to be installed, which for this Agreement is the Central Subway Chinatown Station located at the corner of Stockton and Washington streets.
49. "Work" means the work of Artist necessary, incidental or otherwise pertaining to the performance of the services and deliverables required under this Agreement. In addition to all other services and deliverables required, Work shall include the design, fabrication, consultation concerning the delivery and installation of the Artwork. (See Scope of Work.)

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 Commission or the SFMTA, as provided herein. The words "sufficient," "necessary," or "proper," and the like, mean sufficient, necessary or proper in the judgment of the Commission. The words "approval," "acceptable," "satisfactory," or words of like import, means approved by, or acceptable to, or satisfactory to the Commission or of the SFMTA, as provided herein, unless otherwise indicated by the context. The terms "include," "included" or "including" and similar terms shall be deemed to be followed by the words "without limitation."

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

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

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

City has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. City budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. The Controller is not authorized to make payments on any contract for which funds have not been certified as available in the budget or by supplemental appropriation. Artist's assumption of risk of possible non-appropriation is part of the consideration for this Agreement.

**THIS SECTION 1 CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS AGREEMENT.**

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

The term of this Agreement shall be from March 1, 2011 to December 31, 2018, unless extended by subsequent contract modification pursuant to the contract modification requirements in this Agreement. Notwithstanding the above, this Agreement may be

extended by mutual written agreement of the parties for a period not to exceed two years beyond the initial term, provided that such extension does not create a contract with a total aggregate term of more than 9 years.

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

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

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

**a. Services.** As more specifically provided in Appendix B "Services to be Provided by Artist," Artist agrees to design, fabricate or consult with an assigned fabricator, and consult in the transport and installation by the Construction Contractor of the Artwork for the Central Subway Project, as well as any services provided in any subsequent modification to this Agreement. This Contract is a personal services contract, it is not a public works or construction contract subject to Chapter 6 of San Francisco Administrative Code or to the California Public Contract Code.

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

(1) As more specifically described in Appendix B to this Agreement, the Artist shall perform the Work under this Agreement in three phases. In Phase 1, the Artist shall complete and submit the Design Development Documents and other required submittals for the Artwork. In Phase 2, provided that City determines, in its sole discretion, to go forward with the fabrication of the Artwork, the Artist shall fabricate (or supervise the fabrication of) the Artwork in conformance with the Design Development and Final Design documents and other required submittals approved by the Commission. Provided that the City determines in its sole discretion to install the Artwork, in Phase 3, as directed by the Commission, the Contractor shall assist and consult with the Commission, the SFMTA and the Construction Contractor as to the transportation and installation of the Artwork at the Site, as determined by the Arts Commission.

(2) By authorizing Phase 1, the Commission is not obligated to authorize any subsequent Phase or other work. Subject to the limitations contained in this Agreement, the Commission may terminate this Agreement at any time.

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

(4) The parties may negotiate any Additional Work to be performed under this Agreement, which shall not be effective unless and until memorialized in a written modification to this Agreement executed as provided herein.

(5) The City may terminate the Work at anytime, during or between Phases, with or without cause. If the City terminates the Work for convenience (without cause), the Artist shall be paid the amount(s) agreed for completed Milestones and for preapproved and documented Reimbursable Expenses reasonably and actually incurred up to the date of termination.

**c. Budget.** Unless otherwise specified in a modification to this Agreement, at the completion of Final Design Documents, Artist shall submit for the Commission's approval a final Budget for the entire cost of completion of the Artwork, including costs for any further design, fabrication, Construction Support services. Once adopted by the Commission as part of the approval of Phase 1, the Budget shall be binding upon Artist. The Artist's failure to provide the completed and installed Artwork to City within the approved Budget will be a material breach of this Agreement.

**d. Consultation.** Artist agrees to cooperate in good faith with the Commission and to be available as reasonably necessary for consultation and attendance at meetings with the Commission, Architect, SFMTA, Construction Manager, and Construction Contractor during all stages of the Work. The Commission shall facilitate cooperation and arrange for and coordinate all necessary consultation among the Commission, Artist, and the SFMTA. Artist agrees to consult with the Commission, the SFMTA, the Architect and the Construction Contractor as may be required by the Commission on all matters concerning the design, configuration, placement, installation, support requirements of the Artwork. As directed by the Commission, the Artist shall assist the SFMTA and its design consultants and Construction Manager with preparation of drawings, specifications and other documents that may be necessary for the preparation of construction contract modifications and responses to Requests For Information (RFIs) from the Construction Contractor. The Artist's attendance at meetings, consultation with the Architect, SFMTA and Commission, and preparation of contract documents and responses to RFIs are within the Contract Sum

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

(2) Artist shall copy Commission on all correspondence between Artist, Architect, SFMTA, Construction Manager, or Construction Contractor in which Commission is not a party. Artist shall notify Commission in writing of any verbal agreements and /or understandings that are arrived at in conversations or meetings between Artist and Architect, SFMTA, Construction Management Team and/or Construction Contractor to which Commission is not a party. Artist understands that failure to inform Commission of such agreements in writing within five Days or in advance of taking any and all actions based on such agreements may result in such agreements not being honored.

(3) The Artist shall request in writing to the Arts Commission any information and data it will require from the SFMTA or the Architect for its Work. The Artist shall identify the timing and priority for which this information and data will be required in its request for that information. The Artist shall plan its work to allow adequate time for the City to provide the requested information. The Artist shall respond promptly, but in no case more than **eight working days**, to any request for information from the Arts Commission.

(4) The Artist shall inform the Commission at the earliest possible time of any changes in the Design Development Documents, the weight of the Artwork, any special support, suspension or other requirements of the superstructure of the Site necessary for the installation of the Artwork, any electrical power or other utility requirements for the Artwork. The Artist shall ensure that the Commission is notified of any changes to said requirements at the earliest possible time. The Artist shall at all times avoid changes in the design of the Artwork that deviate materially from the Artist's Proposal. The Artist shall avoid at all times changes to support or installation requirements of the Artwork that



would require modification to the Site superstructure design or would require change orders (modification of contract) with the Construction Contractor. The Artist shall not alter any aspect of the Artwork as approved by the Arts Commission and SFMTA without prior written permission from the Art Commission. The Artist shall be entirely responsible for any costs incurred by the City associated with any changes in their Artwork that have not be specifically approved by the Arts Commission in writing in advance of making such changes.

**e. Presentations to Community Representatives.** As directed by the Commission, the Artist shall meet with and make presentations to representatives of communities and property owners along the alignment that may be affected by the Project and other interested parties.

**f. Installation Support Services.** As described in Appendix B, the Artist shall be available to consult as directed by the Commission with the Commission, the Construction Contractor and the SFMTA as to installation of the Artwork at the Site. Said Installation Support Services shall include but are not limited to consulting as to the proper means and methods of installation of the Artwork, inspection of the site prior to installation, and inspection of the installed Artwork to confirm it meets the requirements of the Artist's approved design.

## 5. Compensation.

### a. Total Amount.

(1) The Total Amount payable to Artist under this Agreement (the "Contract Sum") for all Work performed by Artist, shall not exceed **Two Hundred Ninety Thousand Five Hundred Dollars (\$290,500.00)**, unless this Agreement is amended as provided herein. Payment of the full Contract Sum is not guaranteed; to receive the full Contract Sum the Artist shall fully perform all Work described in this Agreement in compliance with the standards of performance described herein. All compensation due to Artist for Work performed under this Agreement shall made in accordance with Appendices C and D, attached hereto.

(2) The Contract Sum is inclusive of the Artist's Fee and all Reimbursable Expenses, including but not limited to direct labor costs, other direct costs and indirect costs for all Work performed under this Agreement, subject only to authorized adjustments as specifically provided in this Agreement. In the event the Artist incurs costs in excess of the Contract Sum (as adjusted) that is not due to actions or directives of the City or the City's engineering consultants or contractors, the Artist shall pay such excess from the Artist's Fee or its own funds, and City shall not be required to pay any part of such excess, and the Artist shall have no claim against City on account thereof. Out of the total Contract Sum, Artist shall be responsible for paying all of Artist's costs and expenses associated with the Work, including Overhead, the costs of suppliers, subcontractors, fees, taxes, permits, insurance, transportation to and from meetings, and all other Reimbursable Expenses associated with the scope of the Work specified in this Agreement.

**b. Reimbursable Expenses.** In addition to the Artist's Fee, as set forth below, Artist shall be reimbursed up to **One Hundred Forty Thousand Five Hundred Dollars (\$140,500.00)** for Reimbursable Expenses based on the submittal of original receipts or invoices. The breakdown of Reimbursable Expenses associated with this Agreement appears in Appendix C, attached hereto and incorporated by reference as though fully set forth herein. Artist shall be entitled to reimbursement only to the extent Artist has

actually incurred such costs, and City shall retain all funds remaining or saved from the costs set out in Appendix C and in the Budget as required in Appendix B (Phase I – Design) and as approved by the Commission. Further, notwithstanding any other provision of this Agreement, the City will reimburse Artist for only those expenses that are allowed under the principles set out in the Office of Management and Budget Circular A-87, "Cost Principles for State, Local, and Indian Tribal Governments" and as specifically authorized therein and as allowed under the compensability standards set out in 48 C.F.R. parts 31.105, 31.2, 31.6 and the Cost Accounting Standards set out in 48 C.F.R. part 9904 et seq. Reimbursable Expenses are as follows:

(1) Actual direct salaries paid by Artist and subconsultants as shown in Attachment C; Overhead of Artist and subconsultants as shown in Attachment C (Summary of Fees), and as described herein.

(2) Actual costs or prices of approved Reimbursable Expenses for the Artist and subconsultants at any tier, net of any discounts, rebates, refunds, or other items of value received by Artist or any of its subconsultants that have the effect of reducing the cost or price actually incurred. Compensation for materials and expenses shall be at direct cost, without any mark-ups.

(3) Artist shall not "mark-up" or request additional compensation for Work performed by subconsultants.

(4) Costs for which Artist seeks compensation must be necessary in order to accomplish the Work, reasonable for the services performed, and approved by Commission in the Budget.

**c. Artist's Fee.**

(1) For all Work performed by the Artist's, except for those tasks and work specifically identified as Additional Work, the Commission shall pay the Artist an Artist's Fee in a sum total amount not to exceed **One Hundred Fifty Thousand Dollars (\$150,000.00)**.

(2) It is understood and agreed that the Artist's Fee is a fixed amount that cannot be exceeded because of any differences between the Contract Sum and actual costs of performing the Work required by this Agreement, and in no event shall payments to the Artist exceed said Contract Sum, adjusted as provided herein. The Commission may approve an increase in the Artist's Fee only if such reasonable and fair increase is required due to the City's requiring the Artist to perform Additional Work that increases the scope of the Work. Absent direction from the City to perform Additional Work, the Artist's Fee shall not be increased for Artist's additional level of effort to complete the original scope of the Work. It is further understood and agreed that the Artist's Fee is only due and payable for Work for which Commission has given Notice to Proceed and which the Artist has satisfactorily completed.

(3) The Artist's Fee is prorated and paid as part of the compensation for completion of Milestones in proportion to the Work satisfactorily completed, as provided in Appendix D (Performance and Payment Schedule). The proportion of Work completed shall be documented by invoices and payment shall be made as set out in Appendix D. Any portion of the Artists' Fee not previously paid for completed Milestones shall be included in the subsequent or final payment. The method of proration may be adjusted by Commission to reflect deletions or amendments in the Work that are approved as herein described.

**d. Milestones; Calculation of Compensation.** Compensation shall be made to Artist in the amounts and based upon Artist's successful completion, in the sole reasonable discretion of the Director of Cultural Affairs, of the Milestones described in Appendix D to this Agreement. No charges shall be incurred under this Agreement nor shall any payments become due to Artist until deliverables, services, or both, required under this Agreement are received from Artist and approved by the Commission as being in accordance with this Agreement. City 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.

**e. Change in Scope of Services.** If the Scope of Services of any Phase or other portion of the Project is reduced, that reduction shall be memorialized in an amendment to the Agreement, and the Fixed Fee for that Work shall be reduced, as negotiated by the Parties, but such reduction shall not be less than the proportional value of the reduced Work, as measured by the value of that Work set out in Attachment C (Summary of Fees) to this Agreement or other agreed document setting out the relative value of tasks. If the Scope of Services is increased, then the Parties will negotiate an appropriate Fixed Fee for the Additional Services. Any negotiations for changes in the scope of services shall be subject to the agreement of the Commission and the Artist. The Artist shall do no work in addition to or beyond the scope of the services set forth and contemplated by this Agreement unless and until it is authorized to do so by the issuance to it of a "Modification of Contract," duly executed and approved.

**f. Additional Work.** Where the City designates Additional Work to be performed, the Parties shall negotiate a reasonable Lump Sum amount as full compensation for the Additional Work, which shall include a budget for the Additional Work that **covers all additional Artist's fee and all additional costs and expenses incurred by Artist arising from the Additional Work** to be paid upon the Artist's completion of the Additional Work to the satisfaction of the Commission.

**g. Cost Plus Fixed Fee Payment.** For all Additional Work that the City does not designate as Lump Sum or for which the parties cannot agree on price, the City may direct the Artist to perform said Additional Work and reimburse Artist for Reimbursable Expenses (allowable costs) provided and approved by the Commission in the Budget and pay an additional Artist's Fee proportionate to the value of the Work. Compensation for Cost-plus-Fixed-Fee Work will be computed as the sum of Reimbursable Expenses actually incurred by Artist in performing the Additional Work and a reasonable additional Artist's Fee.

**h. Transfer of Unused Funds.** Artist may request City's approval to transfer unused funds from one subtask to another subtask within the same main task to cover the unexpected shortfall of another subtask provided that the need for additional funds to complete the subtask is not due to Artist's poor management or planning. Artist may request City's approval to transfer unused funds from one task(s) to other tasks to cover the unexpected shortfall of the other Tasks, provided that (1) the task(s) from which the funds are transferred out of (including all subtasks within the task(s)) is at least ninety-five percent (95%) complete; (2) the funds are no longer necessary for the original task(s) for which the funds were allotted; and (3) the main reason for the task(s) requiring additional funds is not due to Artist's poor management or planning. Such request must be made in writing to the Program Manager at least 15 calendar days in advance of the need to transfer funds across subtasks. City's approval of subtask or task amount changes will not be unreasonably withheld. City's approval shall be by the Commission's Program Manager.

**i. Non-Reimbursable Expenses.** Whether an amount is paid as Lump Sum or otherwise, Artist shall be compensated only for those Reimbursable Expenses authorized in Attachment C. If an expense is not a Reimbursable Expense, the City shall have no obligation to compensate Artist for it. Computer usage, facsimile and telecommunication expenses shall not be accounted as Reimbursable Expenses. Artist and subcontractor personnel entertainment or personal expenses of any kind shall not be considered a Reimbursable Expense. Office and field supplies/ expenses are not reimbursable expenses unless said supplies can be demonstrated to be out of the ordinary and used exclusively for this Project.

**j. Prepayment.** Unless the SFMTA and Commission give specific written authorization, Artist shall not submit invoices and the City shall not pay or otherwise reimburse Artist for costs of any kind that the Artist has not actually incurred and paid prior to date of invoice.

**k. Refunds, Rebates and Credits.** Artist shall assign to the City any refunds, rebates or credits accruing the Artist that are allocable to costs for which the City has paid or has otherwise reimbursed the Artist or for which the Artist will submit an invoice.

**l. Payment of Invoices.** Compensation shall be made within 45 days that the Commission, in its sole discretion, concludes the Milestone or other undisputed portion of Work approved for **payment** has been performed. City shall make payment to Artist at the address specified in Section 25 (Notices to the Parties). All amounts paid by City to Artist shall be subject to audit by City.

**m. No Interest on Late Payments.** In no event shall City be liable for interest or late charges for any late payments.

**n. Payment Limitations.**

(1) No charges shall be incurred under this Agreement nor shall any payments become due to Artist until all Work Product and other services required under this Agreement are received from Artist and approved by the SFMTA as being in accordance with this Agreement.

(2) The City may reasonably withhold payment to the Artist pending resolution, in an amount equal to questioned, disputed, or disapproved amounts, or for work not satisfactorily completed or delivered as required by this Agreement or for amounts incurred by the City in connection with the Artist's negligent errors or omissions. Payments for undisputed amounts due on the same or other invoice shall not be unreasonably withheld or delayed.

(3) The Artist shall avoid when possible submitting more than one invoice per month unless the submittal of any additional invoice for completed and approved Work and services is agreed to by the Arts Commission in writing and in advance of the expenditure.

**o. Project Suspension or Termination.**

(1) If the Project is suspended for more than one hundred eighty (180) days or abandoned in whole or in part, the Artist shall be compensated for services satisfactorily performed prior to receipt of written notice from the City of such suspension or abandonment. If the Project is resumed after being suspended for more than one

hundred eighty (180) days, the Artist's compensation for the remainder of the services to be provided for the Project shall be equitably adjusted based on the Artist's demonstrated increased costs.

(2) In the event that the City terminates the Agreement for fault, the City may reduce any amount earned or otherwise due the Artist by the sum of any additional costs the City has or will incur as a result of the Artist's default.

**p. Final Payment.** Final payment of any balance earned by the Artist for Project work will be made within ninety (90) days after all of the following:

- (1) Satisfactory completion of all work required by this Agreement;
- (2) Receipt by **the Arts Commission and the SFMTA** of the Work Product not previously delivered;
- (3) Delivery of all equipment/materials purchased specifically for the project where **the Arts Commission or SFMTA** has reimbursed the Artist for such costs;
- (4) Receipt **by the Arts Commission or the SFMTA** of a fully executed final statement of amounts paid to and owed to each **subcontractor** under this Agreement;
- (5) Such audit and verification as SFMTA may deem necessary; and,

Execution and delivery by the Artist of a release of all claims against the City arising under or by virtue of this Agreement, other than such claims, if any, as may be specifically exempted by the Artist from the operation of the release in stated amounts to be set forth therein.

**q. Request for Additional Work.** If the Artist considers any work or services that the Commission directs Artist to perform to be outside the Scope of Services as established by this Agreement, the Artist shall notify the Commission, in writing within five (5) Days of discovering such extra work or services to request authorization to perform the Additional Work. Neither Artist nor any subcontractor or subconsultant shall be reimbursed for out-of-scope work performed without first obtaining the written approval of Commission. If the Artist proceeds to do work that it perceives to be Additional Work without first obtaining City's written approval in as provided herein, regardless of the amount or value of the work, the City shall have no obligation to reimburse Artist for the work thus performed. Eagerness to respond to the City's comments or concerns, expediency, schedule constraints will not be acceptable reasons to proceed with Additional Work without City's prior written approval.

**r. Escalation.** Artist may request increases in reimbursement amounts to the extent that Artist can document increases in materials or labor costs outside the control of the Artist. Approval of such requests is entirely at the discretion of the Commission.

**s. Delay.** Artist shall not claim and waives any claim for damages and additional compensation for delay, other than an extension of time for the completion of Work. Such an extension will be for the period of time that the City determines that Artist was delayed in the completion of Work, where such delay was not caused by and could not have been reasonably avoided by Artist.

## **6. Guaranteed Maximum Costs.**

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

Except as may be provided by laws governing emergency procedures, officers and employees of City are not authorized to request, and City is not required to reimburse Artist for, commodities or services beyond the scope of this Agreement unless the changed scope is authorized by amendment and approved as required by law.

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

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

**a. Artist Invoices.** Invoices furnished by the Artist under this Agreement must be in a form acceptable to the Controller. At a minimum, invoices must identify the contractor as Tomie Arai, the contract project as Central Subway Chinatown Station Landmark Artwork and include the date of transaction, name and address of Artist, interim payment number for which compensation is requested, and amount requested. The Artist must submit an original invoice, which must be accompanied by pre-printed and itemized receipts. City shall make payment to the Artist at the address listed for notices in this Agreement. All amounts paid by City to Artist shall be subject to audit by City and other agencies with jurisdiction over the Project and Project funding.

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

**c. Activity Reports.** The Artist shall submit status reports with its invoices for payment, describing all Milestones and other Work completed by the Artist and subcontractors during the period billed and copies of all invoices for Reimbursable Expenses relating thereto.

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

Pursuant to San Francisco Administrative Code sections 6.80 to 6.83 and 21.35, and pursuant to applicable federal law, any contractor (including Artist), subcontractor or consultant who submits a false claim shall be liable to the City for the statutory penalties set forth in those ordinances and statutes, including but not limited to statutory fines, treble damages, costs and attorneys fees. The text of Sections 6.80 to 6.83 and 21.35, along with the entire San Francisco Administrative Code are available on the web at <http://www.municode.com/Library/clientCodePage.aspx?clientID=4201>. Artist or any contractor, subcontractor or consultant will be deemed to have submitted a false claim to the City if the contractor, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of the City a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City; (c) conspires to defraud the City by getting a false claim allowed or paid by the City; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the City; or (e) is a beneficiary of an inadvertent submission of a false claim to the City, subsequently discovers the falsity of

the claim, and fails to disclose the false claim to the City within a reasonable time after discovery of the false claim. Artist agrees that remedies under local law are cumulative and in addition to the remedies and penalties provided for false claims under federal law.

#### **9. Disallowance, Disputed Amounts, and Debarment.**

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

b. Any Compensation or reimbursement received by Artist under this Agreement does not constitute a final decision or waiver of decision by the City as to whether said payment meets the terms and requirements of this Agreement. If following audit or other review, the City determines that the Artist and/or subconsultants are not entitled to certain compensation requested or received, the City shall notify the Artist stating the reasons therefore.

c. Acceptance of the Artwork, or any portion of the Work under this Agreement, will not alter Artist's or a subconsultant's obligations to return any funds due the City as a result of later refunds, corrections, or other transactions, nor alter the SFMTA or its funding agencies' rights to disallow or otherwise not recognize costs on the basis a later audit or other review. The City may reasonably withhold payment to the Artist pending resolution, in an amount equal to questioned, disputed or disapproved amounts, or for work not satisfactorily completed or delivered as required by this Agreement or for amounts incurred by the City in connection with the Artist's negligent errors or omissions. Payments for other amounts due on the same or other invoice shall not be unreasonably withheld or delayed.

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

#### **10. Taxes.**

a. Except as specifically provided herein, any taxes levied upon the Agreement, the transaction, or the equipment or services delivered under this Agreement, including possessory interest taxes and California sales and use taxes, shall be paid by Artist. To the extent allowed by law, the costs to Artist of sales, use, and possessory interest taxes arising out of the Work performed under this Agreement are Reimbursable Expenses.

b. Artist recognizes and understands that this Agreement may create a "possessory interest" for property tax purposes. Generally, such a possessory interest is not created unless the Agreement entitles the Artist to possession, occupancy, or use of City property for private gain. Only agencies with jurisdiction over tax matters have the authority to determine if a possessory interest has been created; the Commission and SFMTA have no authority to make such determination. If a taxing authority determines that a possessory interest is created, then the following shall apply:

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

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

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

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

(5) The Commission and the SFMTA consider Artist's presence on SFMTA property while performing Work under this Contract to be necessary to the Work and a convenience to the Project. Taxes for any possessory interest created by the Artist's presence on SFMTA property will be considered a Reimbursable Expense.

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

**a. Payment Does Not Imply Acceptance of Work.** The issuance of any payment for Milestone(s), other progress payment or final payment by the City 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 City and in such case must be replaced or performed again by Artist without delay.

**b. Correction of Errors.** Upon notice from Commission or the SFMTA, and as determined in the sole discretion of the Commission or the SFMTA, the Artist shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in such plans, designs, drawings, specifications, reports, and other services; and, in the event of any deficiencies in such plans, designs drawings, specifications, reports, or other services resulting from the Artist's professional negligence, whether or not said deficiencies have been brought to the attention of the Commission, the Artist shall indemnify and reimburse the City for the cost of the corrective remedial work (including, without limitation, design, demolition, and construction) necessary to correct any such deficiencies and the consequences of such deficiencies caused by said professional negligence.

#### **c. Approval and Final Acceptance.**

(1) Approval. The granting or withholding of any approval by the Commission shall be determined by the Commission in its sole and reasonable discretion. However, the Commission shall approve all deliverables if they conform to plans or Contract



Documents previously approved by the Commission. If the Commission withholds approval of any deliverables or Phase, in addition to other rights or remedies available to the Commission under the Agreement or applicable law, the Commission shall have the right to terminate this Agreement immediately and shall have no further obligations under this Agreement.

(2) Final Acceptance. Artist shall advise the Commission in writing when Artist has completed all obligations, services and deliverables under this Agreement and all modifications. The Commission promptly shall send a Notice of Response? identifying in writing any obligations, services or deliverables that Artist has not satisfactorily met, any defects in Artist's performance, and the requirements for Artist to cure any such default. Artist shall have **30 days** from dispatch of the Notice of Response to cure any defects in Artist's performance identified in the Commission's Notice of Response. The Artwork shall not be finally accepted by City unless the Commission has issued a resolution of Final Acceptance. City shall make a good faith effort to make a determination as to Final Acceptance promptly.

(3) Civic Art Collection. Upon Final Acceptance, the Commission shall accession the Artwork into the Civic Art Collection.

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

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

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

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

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

The parties do not intend that the design and fabrication of the Artwork is a Public Work, as the Artwork will be erected, installed and incorporated into the Project by the

Construction Contractor, not the Artist. Artist's responsibilities as to installation of the Artwork shall be limited to consultation with the City and the Construction Contractor only. The parties intentions notwithstanding, if any part of the Artist's Work is deemed by an agency having jurisdiction constitute a "Public Work" as defined by San Francisco Administrative Code Section 6.1 (I) and requires a licensed contractor, Artist shall be solely responsible for ensuring that Artist and Artist's subcontractors (if any) have valid appropriate licenses under California law or the applicable jurisdiction. If the Artist and/or any of Artist's subcontractors are unlicensed during any phase of the project under this Agreement, the City shall have the right to bar Artist from receiving any payment for Artist's services. If Artist is not a licensed contractor, Artist shall not subcontract with licensed contractors for fabrication and/or installation of the Artwork or any portion of the Artwork under this Agreement.

## **12. Qualified Personnel.**

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

## **13. Responsibility for Equipment.**

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

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

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

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

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

Should a relevant taxing authority determine a liability for past services performed by Artist for City, upon notification of such fact by City, Artist shall promptly remit such

amount due or arrange with City to have the amount due withheld from future payments to Artist under this Agreement (again, offsetting any credits for amounts already paid by Artist which can be applied against this liability).

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

## 15. Insurance.

**a. Required Insurance.** Without in any way limiting Artist's liability pursuant to Section 16, the "Indemnification and General Liability" section of this Agreement, Artist shall maintain, or cause to be maintained, in force insurance in the following amounts and coverages, or as modified in Appendix B. Artist shall obtain such insurance on or before the time specified below; if no time is specified below, Artist shall obtain such insurance when required to do so by Appendix B or a modification to this Agreement. Except for required insurance under claims-made form (see Section 15 (d) (2), artist shall maintain all required insurance continuously from the time originally specified, throughout the term of this Agreement until Final Acceptance of the Work by resolution of the Arts Commission. The Director of Cultural Affairs, with the approval of the City's Risk Manager, may authorize in writing the release of an interest in such insurance at an earlier date.

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

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

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

(4) **Automobile Liability Insurance:** If Artist is an *individual*, Personal Automobile Liability Insurance with limits not less than \$100,000/\$300,000 each

occurrence. If Artist is a corporation or other legal entity, Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable, unless a lesser amount is approved by City's Risk Manager. Artist shall obtain such insurance prior to certification of this Agreement.

(5) **Risk of Loss Insurance** or other insurance against loss in an amount equal to the total payment specified under Section 5 (Compensation) of the contract. Artist shall obtain such insurance prior to commencing fabrication of the Artwork.

(6) Transportation and/or Installation Coverage, as required by the Commission.

**b. Required Policy Language.**

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

(a) Endorse the policy to name as Additional Insured the City and County of San Francisco, its Officers, Agents, and Employees;

(b) Professional Liability policies shall name the specific project as a covered project; and

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

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

(2) All policies shall provide thirty days' advance written notice to the City of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notices shall be sent to the following address:

Jennifer Lovvorn, Project Manager  
San Francisco Arts Commission  
25 Van Ness Avenue, Suite 345  
San Francisco, CA 94102

and to

Shahnam Farhangi, Contracts Manager  
SFMTA Capital Projects and Construction Division  
1 South Van Ness, 3<sup>rd</sup> floor  
San Francisco, CA 94103

**c. Miscellaneous Insurance Requirements.**

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

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

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

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

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

(6) In the event of loss or damage and where any insurance proceeds are paid to City, the Commission shall make a determination, in its sole discretion, as to whether the Work shall be restored, reconstructed or abandoned. If the Commission determines that Artist shall restore or reconstruct the Work, all insurance proceeds received by City shall be paid to Artist to the extent the proceeds are used for such restoration or reconstruction.

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

## **16. Indemnification.**

a. Artist shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Artist or loss of or damage to property, arising directly or indirectly from Artist's performance of this Agreement, including, but not limited to, Artist's use of facilities or equipment provided by City or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where such

loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of City and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Artist, its subcontractors or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City.

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

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

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

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

#### **18. Liability of City.**

City's payment obligations under this agreement shall be limited to the payment of the compensation provided for in this Agreement. Notwithstanding any other provision of this Agreement, in no event shall city be liable to artist (regardless of whether any claim is based on contract or tort) for any special, consequential, indirect or incidental damages (including, but not limited to, lost profits) arising out of or in connection with this Agreement or the Work performed in connection with this Agreement.

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

**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 Commission. All changes to schedule must be approved by the Commission in writing.

#### **b. Damages for Delayed Performance.**

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

(2) Illness, Injury, Death or Incapacity. Should Artist die, become ill, injured or otherwise incapacitated (collectively, "incapacitated") such that Artist is unable to work for any period exceeding 30 days (whether consecutive or non-consecutive), any delay arising out of such incapacity will be allowed by City whenever it is practicable to do so,

considering the facts and circumstances of the Work, the Project, the Architect, the Construction Contractor and the SFMTA. City may require Artist to provide medical certification of any claimed incapacity. In the event Artist is incapacitated such that Artist is unable to work for a period exceeding a total of 30 days (whether consecutive or non-consecutive), City may, at its option, undertake to complete and install the Work in Artist's absence, so long as the final Artwork is substantially similar to that designed by Artist. If City undertakes to complete the Work, City shall give due consideration to Artist's suggestions and the Artist may disclaim authorship of the Work. If City exercises its option to implement the Artwork in Artist's absence, any compensation paid or payable to Artist shall be reduced by the costs and expenditures of City in completion and installation of the Work. In case of incapacity exceeding 30 days, the following person shall be Artist's representative vis-à-vis the City for purposes of this Section 19 unless otherwise directed in writing by the Artist: **Legan Wong, 245 W. 107<sup>th</sup> Street, 2H, New York, NY, 10025, 212-749-2259.**

**c. Delivery of Artwork. Following final approval of the fabricated Artwork by the Arts Commission, the Artist shall deliver the Artwork to a designated City storage site no earlier than September 30, 2014, but no later than September 30, 2015. Following inspection and approval by the Arts Commission of the delivered Artwork at the City's storage site, the Arts Commission will store the Artwork at no cost to the Artist. The Artist shall be responsible for the storage and safekeeping of the Artwork prior to the delivery of the Artwork to the City's storage site.**

**d. Delay.** In case of delay in Artist's services through no fault of Artist, including construction delay, Artist shall store the Work at no additional cost to City for up to 6 months. If Artist's work is delayed due to construction delays at the 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.

**20. Artist's Default; Remedies.**

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

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

- |   |                                       |
|---|---------------------------------------|
| 8. Submitting False Claims; Monetary Penalties      | 29. Subcontracting                    |
| 10. Taxes   | 29A. Prevailing Wages                 |
| 11A. Bonds  | 30. Assignment or Transfer            |
| 11B. Licensed Contractor Requirements               | 37. Drug-Free Workplace Policy        |
| 15. Insurance                                       | 53. Compliance with Laws              |
| 22A. Artist's Warranties                            | 57. Protection of Private Information |
| 24. Proprietary or Confidential Information of City | 58. Graffiti Removal                  |

(2) Artist's failure or refusal to perform or do any act required of Artist in this Agreement, including unexcused failure to meet the delivery deadlines or to conform the Work to the Contract Documents approved by the Commission;

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

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

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

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

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

**e. 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.

## 21. Termination for Convenience.

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



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

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

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

(3) Terminating all existing orders and subcontracts.

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

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

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

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

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

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

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

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

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

d. In no event shall City be liable for costs incurred by Artist or any of its subcontractors after the termination date specified by City, except for those costs specifically

enumerated and described in the immediately preceding subsection (c). Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, post-termination overhead or unabsorbed overhead, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, prejudgment interest, or any other expense which is not reasonable or authorized under such subsection (c).

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

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

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

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

- |      |   |      |   |
|------|---|------|---|
| 8.   | Submitting False Claims; Monetary Penalties   | 24.  | Proprietary or Confidential Information of City                                   |
| 9.   | Disallowance , Disputed Amounts, and Debarment  | 26.  | Ownership of Results and Risk of Loss   |
| 10.  | Taxes   | 27.  | Intellectual Property and Publicity Rights  |
| 11.  | Payment Does Not Imply Acceptance of Work; Approval and Final Acceptance                  | 28.  | Audit and Inspection of Records; Reports  |
| 11A. | Bonds   | 28A. | City Access to Artwork/Work and Inspection; Status Reports; Artist's Availability |
| 11B. | Licensed Contractor Requirements  | 29A. | Prevailing Wages  |
| 13.  | Responsibility for Equipment  | 48.  | Modification of Agreement   |
| 14.  | Independent Contractor; Payment of Taxes and Other Expenses                               | 49.  | Administrative Remedy for Agreement Interpretation                                |
| 15.  | Insurance   | 50.  | Agreement Made in California; Venue   |
| 16.  | Indemnification   | 51.  | Construction  |
| 17.  | Incidental and Consequential Damages  | 52.  | Entire Agreement  |
| 18.  | Liability of City   | 56.  | Severability  |
| 22A. | Artist's Warranties   | 57.  | Protection of private information   |
| 22B. | Instructions for Maintenance; Variable Media Guidelines; Anticipated Life Span of Artwork | 58.  | Graffiti Removal  |

22C. Artist's Moral Rights; City's Ownership Rights

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

**22A. Artist's Warranties.**

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

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

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

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

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

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

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

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

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

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

Unless specifically provided in this Agreement, Artist shall not be responsible for ongoing maintenance of the Artwork. Artist shall provide the Commission with a General Maintenance Plan for the Artwork, with a detailed description of future anticipated maintenance requirements; a recommended maintenance schedule; anticipated and required care and/or replacement/upgrade of any part of the Artwork and associated moving parts or equipment including any staff time involved in displaying or operating artwork and the frequency of such staff involvement; and written instructions and manufacturer's specifications for reasonably foreseeable maintenance and preservation activities relating to the Artwork. Artist shall also provide Commission and with a description of all equipment and or machinery needed to operate the project (if applicable) and any anticipated or required staffing, supervision or operational needs. The Artwork shall be durable, taking into consideration that the Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, dirt, dust, vibration, and considerable movement of people and equipment. Artist shall ensure that all maintenance requirements of the Artwork will be reasonable in terms of time and expense, and no specialized equipment will be required.

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

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

The anticipated life span of the Artwork is twenty five (25) years from the date of final acceptance by the Commission. After that time, the Commission in its sole discretion may re-evaluate the Artwork to determine if it retains its identity as a work of art and, if

not, whether to take appropriate action, including the possibility of destroying the Artwork. If the Commission determines that, through decay, vandalism or other forces, the Artwork has lost its integrity to the point where it should be destroyed, the Commission shall first offer the Artwork to Artist free of charge.

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

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

b. With respect to the Artwork produced under this Agreement, and in consideration of the procedures and remedies specified in this Agreement, Artist waives any and all claims, arising at any time and under any circumstances, against City, its officers, agents, employees, successors and assigns, arising under the federal Visual Artists Rights Act (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 et seq.), and any other local, state, federal or international laws that convey rights of the same nature as those conveyed under 17 U.S.C. §106A, Cal. Civil Code §§987 et seq., or any other type of moral right protecting the integrity of works of art. If the Artwork is incorporated into a building such that the Artwork cannot be removed from the building without Alteration of the Artwork, Artist waives any and all such claims against any future owners of the Site, and its agents, officers and employees, for Alteration of the Artwork.

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

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

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

Alteration to the Artwork caused by such removal and the potential costs of such removal.

(3) Restoration. If the Artwork is Altered, with or without prior notice to Artist, and City intends to maintain the Artwork on display, City shall make a reasonable good faith effort to engage Artist in the restoration of the Artwork and to compensate Artist for Artist's time and efforts at fair market value, which may be the subject of a future Agreement between Artist and City. However, City has no obligation under this Agreement to restore the Artwork to its original condition, to compensate Artist for any restoration work, or to maintain the Artwork on display. If Artist fails or refuses to negotiate with City in good faith with respect to any restoration, City may contract with any other qualified art conservator or artist for such restoration. During Artist's lifetime, City shall make best efforts not to display or deaccession only a portion of the Artwork without Artist's consent.

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

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

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

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

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

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

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

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

#### **25. Notices to the Parties; Department Liaison.**

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

To Commission:

San Francisco Arts Commission  
25 Van Ness Avenue, Suite 345  
San Francisco, CA 94102  
Attn: Jennifer Lovvorn  
Phone: (415) 252-4637  
Fax: (415) 252-2595  
Email: jennifer.lovvorn@sfgov.org

To Artist:

Tomie Arai  
245 West 107th Street, 12H  
New York, NY 10025  
Phone: 646-456-0821  
Email: tomiearai@verizon.net

Any notice of default shall be sent by registered mail.

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

**b. Department Liaison.** In performing the services provided for in this Agreement, Artist's liaison with the Arts Commission will be the designated Public Art Project Manager for the Central Subway Project.

#### **26. Ownership of Results and Risk of Loss.**

**a. Title Transfer.** Except in the case of early termination of this Agreement, title to the Artwork shall transfer from Artist to City upon the Commission's Final Acceptance of the Artwork. Title transfer shall be self-executing upon Commission's Final Acceptance. Artist will cooperate in providing to City any title transfer documents, confirmation of payment of subcontractors, lien releases, and other documents as the City may request or require during or after the Term of this Agreement.

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

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

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

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

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

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

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

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

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

**e. Publicity.** City shall have the right to use Artist's name, likeness, and biographical information, in connection with the display or reproduction and distribution of the Artwork including all advertising and promotional materials regarding City or the Commission. Artist shall be reasonably available to attend any inauguration or presentation ceremonies relating to the public dedication of the Artwork.

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

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

**h. Resale Royalty.** If City 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 City under this Agreement. Thus, City has no obligation to pay resale royalties pursuant to California Civil Code §986 or any other law requiring the payment of resale royalties. If City sells the Artwork as an individual piece, separate

from or itemized as part of a real property transaction, City shall pay to Artist a resale royalty to the extent required by law, based upon the sale price of the Artwork.

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

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

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

## **28A. City Access to Artwork/Work and Inspection; Status Reports; Artist's Availability.**

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

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

**c. Artist Availability.** Artist or Artist's authorized agent shall be available to meet in San Francisco with the Architect, SFMTA and Commission staff, and others as the SFMTA and the Commission may require to ensure the proper installation and operation of the Artwork. The costs of such meetings are within the Contract Sum, as provided in Appendix C ("Calculation of Charges"). During each visit to San Francisco from a location outside the nine counties of the San Francisco Bay Area, unless otherwise agreed upon by the Arts Commission and the SFMTA. Artist's visits shall last for at least a full 8 hour day.

## **29. Subcontracting.**

**a. Approval Required.** Artist is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by the Commission 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. Any approved subcontracts shall be itemized in Appendix B (or amendment thereto), and Artist shall provide a copy of each approved subcontract to the City with copies of the insurance documents required herein.

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

**c. Subcontract Requirements.** If the Artist subcontracts any portion of the Work under this Agreement (including but not limited to engineering, architecture and/or fabrication of the Artwork), the City must grant prior approval of such subcontractors and the Artist shall require such subcontractors to:

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

(2) Name the City and County of San Francisco as an additional insured on the subcontractor's general liability insurance policy.

(3) The Subcontractor shall agree to indemnify and hold harmless the City and County of San Francisco (consistent with the "Indemnification and General Liability" provisions contained herein as Section 16.)

(4) The subcontractor shall also be responsible for providing any performance and payment (labor and materials) bonds required under this Agreement on the City's form and shall name the City and Artist as dual obligees of such bonds. In the event of Artist or any of Artist's subcontractors' failure to perform, Artist shall assign all rights under any such bonds in favor of the City.

(5) Subcontractor shall certify that he or she has all applicable licenses required by the State for subcontractor to perform any required engineering and/or fabrication specified in the subcontract and that subcontractor warrants that such licenses are valid for the full term of this Agreement and during the period in which the subcontractor performed work under this Agreement.

(6) If Artist does not have an appropriate license issued by the State of California, any subcontract between Artist and any firm engaged to perform a Public Work under this Agreement is void and the City shall have no liability whatsoever for any costs incurred under said subcontract.

**d. Responsibility.** The Artist shall be responsible for the professional standards, performance, and actions of all persons and firms performing subcontract work under this Agreement at any and all tiers.

**e. Substitutions of Subcontractors.** Artist may substitute any Approved Subcontractor listed in Appendix B 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 the SFMTA and the Commission.

**f. Prompt Payment of Subcontractors.** In accordance with SFMTA's SBE Program, no later than three (3) working days from the date of Artist's any payments by the City for the Work or any portion thereof, the Artist shall pay any subcontractors for work that has been satisfactorily performed by said subcontractors, unless the Artist notifies the CCO in writing within (10) working days prior to receiving payment from the City that there is a bona fide dispute between the Artist and the subcontractor. Within ten (10) working days following receipt of payment from the City, Artist shall provide City with a declaration under penalty of perjury that it has promptly paid such subcontractors for the work they have performed and stating the amounts paid. Failure to provide such evidence shall be cause for City to suspend future progress payments to Consultants.

**g. Interest on Unpaid Amounts.** If the Artist does not pay its subcontractor as required under the above paragraphs, it shall pay interest to the subcontractor at the legal rate set forth in subdivision (a) of Section 685.010 of the California Code of Civil Procedure. This Section shall not impair or limit any remedies otherwise available to the Artist or a subcontractor in the event of a dispute involving late payment or nonpayment by the Artist or deficient subcontractor performance or nonperformance by the Artist.

**h. Retention.** Artist may withhold retention from subcontractors if City withholds retention from the Artist. Should retention be withheld from Artist, within thirty (30) days of City's payment of retention to Artist for satisfactory completion of all work required of a subcontractor, Artist shall release any retention withheld to the subcontractor. Satisfactory completion means when all the tasks called for in the subcontract with subcontractor have been accomplished and documented as required by City. Within forty (40) days of satisfactory completion of all Work required of the subcontractor, Artist should release any retention withheld to the subcontractor.

**i. Substitutions of SBE Firms.** If Artist wishes to substitute a subcontractor that is a SBE, the Artist must make good faith efforts to use another SBE as a substitute. The Artist shall notify Commission in writing of any request to substitute a SBE subcontractor or supplier and provide the Commission with any documentation requested to support the substitution. The and the Commission and the SFMTA's CCO must approve the request in writing for the substitution to be valid.

**j. Addition of Subcontractors.** The City reserves the right to require the Artist to retain a subcontractor that possess specific expertise to provide services under this Agreement, if the City determines that the Artist does not have specific expertise necessary for the timely and successful completion of the Artwork.

**k. Flowdown Requirements.** Artist shall fully inform all subcontractors, and shall require each of its subcontractors to warrant that it has fully informed each of its respective lower tier subcontractors (if any), of the terms and conditions of this

Agreement. Artist shall ensure that all services performed and material furnished and the manner by which those services and materials are provided shall conform to the requirements of this Agreement. The terms and conditions of the Artist's subcontracts shall conform to the requirements of this Agreement. Each subcontract and a cost summary of each of those agreements shall be subject to review by the and the SFMTA prior to the subcontractor proceeding with the Work. Artist shall provide the City copies of any written agreements between a first tier subcontractor and any lower tier subcontractor prior to proceeding with the Work.

**l. Privity.** Contractor shall include in every subcontract for architecture and/or engineering services a requirement that to the maximum extent provided by California law, the City may rely upon and bring action for errors and omissions in the designs, calculations and other work performed for the Artist under this Contract as if the City had directly contracted with the architect or engineer. Notwithstanding the preceding provision, the Artist shall be fully responsible for the errors and omissions of its engineers and architects and other subcontractors under this Agreement.

**m. Availability.** Artist's subcontracted engineer(s) and architect(s) must be available to provide Construction Support through the completion of the installation of the Artwork.

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

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

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

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

b. City may assign this Agreement to the Construction Contractor on such terms and conditions as are acceptable to City.

c. As an alternative to the Artist's selection and contracting with a fabricator to produce the Artwork, the city may, in its sole discretion, select and contract with the fabricator for

the Artwork, with the advice and assistance of the Artist, and assign the fabrication contract to the Artist.

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

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

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

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

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

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

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

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

### **33. Small Business Enterprise Program.**

The City is committed to a Small Business Enterprise Program ("SBE Program") for the participation of SBEs in contracting opportunities. In addition, the Artist must comply with all applicable federal regulations regarding Disadvantaged Business Enterprise (DBE) participation, as set out in Title 49, Part 26 of the Code of Federal Regulations (49 C.F.R. Part 26), with respect to DBEs performing work under this Agreement. More information on federal DBE requirements can be found on the internet at: <http://www.fta.dot.gov/library/admin/BPPM/ch7.html>.

### **34. Nondiscrimination; Penalties.**

**a. Artist Shall Not Discriminate.** In the performance of this Agreement, Artist agrees not to discriminate on the basis of the fact or perception of a person's race, color, creed,

religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status) against any employee of, any City employee working with, or applicant for employment with Artist, in any of Artist's operations within the United States, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by Artist.

**b. Subcontracts.** Artist shall incorporate by reference in all subcontracts the provisions of §12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all subcontractors to comply with such provisions. Artist's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

**c. Nondiscrimination in Benefits.** Artist does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for City elsewhere in the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in §12B.2(b) of the San Francisco Administrative Code.

**d. Condition to Contract.** As a condition to this Agreement, Artist shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the HRC.

**e. Incorporation of Administrative Code Provisions by Reference.** The provisions of Chapters 12B and 12C of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Artist shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, Artist understands that pursuant to §§12B.2(h) and 12C.3(g) of the Administrative Code, a penalty of \$50 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against Artist and/or deducted from any payments due Artist.

### **35. MacBride Principles—Northern Ireland.**

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

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

Artist shall not import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product in the performance of this Agreement.

### **37. Drug-Free Workplace Policy.**

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

### **38. Resource Conservation.**

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

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

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

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

### **40. Sunshine Ordinance.**

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

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

If the Artist receives a cumulative total per year of at least \$250,000 in City funds or City-administered funds and is a non-profit organization as defined in Chapter 12L of the San Francisco Administrative Code, Artist shall comply with and be bound by all the applicable provisions of that Chapter. By executing this Agreement, the Artist agrees to open its meetings and records to the public in the manner set forth in §§12L.4 and 12L.5



of the Administrative Code. Artist further agrees to make-good faith efforts to promote community membership on its Board of Directors in the manner set forth in §12L.6 of the Administrative Code. The Artist acknowledges that its material failure to comply with any of the provisions of this paragraph shall constitute a material breach of this Agreement. The Artist further acknowledges that such material breach of the Agreement shall be grounds for the City to terminate and/or not renew the Agreement, partially or in its entirety.

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

Through execution of this Agreement, Artist acknowledges that it is familiar with section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, or for a grant, loan or loan guarantee, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or the board of a state agency on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Artist acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Artist further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Artist's board of directors; Artist's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Artist; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Artist. Additionally, Artist acknowledges that Artist must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. Artist further agrees to provide to City the names of each person, entity or committee described above.

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

a. Artist agrees to comply fully with and be bound by all of the provisions of the Minimum Compensation Ordinance (MCO), as set forth in San Francisco Administrative Code Chapter 12P (Chapter 12P), including the remedies provided, and implementing guidelines and rules. The provisions of Sections 12P.5 and 12P.5.1 of Chapter 12P are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the MCO is available on the web at [www.sfgov.org/olse/mco](http://www.sfgov.org/olse/mco). A partial listing of some of Artist's obligations under the MCO is set forth in this Section. Artist is required to comply with all the provisions of the MCO, irrespective of the listing of obligations in this Section.

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

Agreement comply with the requirements of the MCO. If any subcontractor under this Agreement fails to comply, City may pursue any of the remedies set forth in this Section against Artist.

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

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

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

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

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

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

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

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

Unless exempt, Artist agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q, including the remedies provided, and implementing regulations, as the same may be amended from time to time. The provisions of section 12Q.5.1 of Chapter 12Q are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the HCAO is available on the web at [www.sfgov.org/olse](http://www.sfgov.org/olse). Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12Q.

- a. For each Covered Employee, Artist shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If Artist chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Commission.
- b. Notwithstanding the above, if the Artist is a small business as defined in Section 12Q.3(e) of the HCAO, it shall have no obligation to comply with part (a) above.
- c. Artist's failure to comply with the HCAO shall constitute a material breach of this agreement. City shall notify Artist if such a breach has occurred. If, within 30 days after receiving City's written notice of a breach of this Agreement for violating the HCAO, Artist fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Artist fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, City shall have the right to pursue the remedies set forth in 12Q.5.1 and 12Q.5(f)(1-6). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to City.
- d. Any Subcontract entered into by Artist shall require the Subcontractor to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. Artist shall notify City's Office of Contract Administration when it enters into such a Subcontract and shall certify to the Office of Contract Administration that it has notified the Subcontractor of the obligations under the HCAO and has imposed the requirements of the HCAO on Subcontractor through the Subcontract. Each Artist shall be responsible for its Subcontractors' compliance with this Chapter. If a Subcontractor fails to comply, the City may pursue the remedies set forth in this Section against Artist based on the Subcontractor's failure to comply, provided that City has first provided Artist with notice and an opportunity to obtain a cure of the violation.
- e. Artist shall not discharge, reduce in compensation, or otherwise discriminate against any employee for notifying City with regard to Artist's noncompliance or anticipated noncompliance with the requirements of the HCAO, for opposing any practice proscribed by the HCAO, for participating in proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.
- f. Artist represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the HCAO.
- g. Artist shall maintain employee and payroll records in compliance with the California Labor Code and Industrial Welfare Commission orders, including the number of hours each employee has worked on the City Contract.
- h. Artist shall keep itself informed of the current requirements of the HCAO.

- i. Artist shall provide reports to the City in accordance with any reporting standards promulgated by the City under the HCAO, including reports on Subcontractors and Subtenants, as applicable.
- j. Artist shall provide City with access to records pertaining to compliance with HCAO after receiving a written request from City to do so and being provided at least ten business days to respond.
- k. Artist shall allow City to inspect Artist's job sites and have access to Artist's employees in order to monitor and determine compliance with HCAO.
- l. City may conduct random audits of Artist to ascertain its compliance with HCAO. Artist agrees to cooperate with City when it conducts such audits.
- m. If Artist is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but Artist later enters into an agreement or agreements that cause Artist's aggregate amount of all agreements with City to reach \$75,000, all the agreements shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between Artist and the City to be equal to or greater than \$75,000 in the fiscal year.

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

Intentionally left blank by Agreement of Parties.

#### **46. Prohibition on Political Activity with City Funds.**

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

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

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

that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

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

- a. Except as provided herein, this Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved in the same manner as this Agreement.
- b. Artist shall cooperate with the Arts Commission and the SFMTA's Office of Contract Compliance to submit to the OCC any amendment, modification, supplement or change order that would result in a cumulative increase of the original amount of this Agreement by more than 20%.
- c. The Commission and Artist, by written agreement signed by both parties, may clarify provisions of Appendix A ("Artists Proposal") and/or Appendix B ("Services to be Provided by Artist), by further outlining, correcting, clarifying and refining the substance of each of the Phases of the Work as to the date(s) of deliverables (including modifying or changing the order of the due date(s) for deliverables), the costs associated with each Phase and the Performance and Payment Schedule. Such changes shall be kept on file at the Commission. Such clarifications shall not alter the total maximum term or maximum compensation allowed in Section 2 (Term of the Agreement) and section 5 (Compensation), respectively.

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

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

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

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

#### **51. Construction.**

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

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

This Contract and the documents incorporated by reference herein sets forth and memorializes the entire agreement between the Parties, and supersedes all other oral or written understandings or provisions. This contract may be modified only as provided in Section 48 (Modification of Agreement).

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

Artist shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and shall at all times comply with such local codes,

ordinances, and regulations and all applicable laws as they may be amended from time to time.

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

Any services to the Project to be provided by a law firm or attorney (engaged by the Artist) must be reviewed and approved in writing by the City Attorney in advance of the Artist's engagement of the attorney. No invoices for services to the Artist provided by law firms or attorneys to the Artist, including, without limitation, as subcontractors of Artist, will be reimbursed by the City unless the provider received advance written approval from the City Attorney and such amount is within the Artist's approved Budget. The City Attorney will not review or approve an attorney who only provides confidential advice to the Artist, but the City will not reimburse the Artist for those expenses.

#### **55. Priority of Documents.**

The services and Work that Artist shall provide and perform for the Project are described in this Agreement, the RFP, and the Proposal. All requirements of the RFP and the representations made in the Artist's Proposal that are not in conflict with provisions of this Contract are hereby incorporated by reference and made an integral part of the contract as though fully set forth herein. With respect to any conflict or ambiguity between this Agreement and the RFP or the Proposal, this Agreement shall control except where the RFP or the Proposal refers to services not otherwise mentioned in this Agreement, in which case and to such extent the RFP shall control. The Proposal shall control only where an issue or subject is not addressed in either the RFP or this Agreement. A modification to the Agreement shall control over all other documents. In case of conflict among modifications to the Agreement, the latest modification shall have precedence over any earlier modification.

#### **56. Severability.**

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

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

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

#### **58. Graffiti Removal.**

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

Artist shall remove all graffiti from any real property owned or leased by Artist in the City and County of San Francisco within forty eight (48) hours of the earlier of Artist's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works. This section is not intended to require a Artist to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.). Any failure of Artist to comply with this section of this Agreement shall constitute an Event of Default of this Agreement.

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

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

#### **60. Cooperative Drafting.**

This Agreement is the product of negotiations between the City and the Artist, each of which has opportunity to consult with legal counsel of its choosing as to the terms and conditions set out herein. No statute or rule of construction or interpretation that would require that an ambiguity in this Agreement be construed against the drafter shall apply to this Agreement, but the Agreement shall be construed to implement the intent of the parties.

#### **61. Dispute Resolution Procedure.**

If agreed to by both Parties, disputes may be resolved by a mutually agreed to alternative dispute resolution process.

#### **62. Federal Requirements.**

**a. Federal Contract Requirements and Applicable Law.** The provisions set out in this Section 63 are required by federal law. If there is any conflict between said provisions or any federal law, regulation or requirement, including such limitations and requirements as the FTA may impose, such federal requirements, terms and conditions shall take precedence over any terms and conditions set out in this Agreement. The City and County of San Francisco is a chartered City and County with home rule powers under the Constitution of the State of California. The terms of this Agreement are governed by California Law and the ordinances and Charter of the City and County of San Francisco. Except as expressly provided for in this Agreement, the Federal Acquisition Regulations (FAR) shall not apply to this Agreement, except as to provide guidance as to accounting and auditing standards, including but not limited to calculation of compensable costs and overhead.

#### **b. Incorporation of Federal Transit Administration (FTA) Terms.**

(1) All contractual provisions required by DOT, as set forth in FTA Circular 4220.1F, ([http://www.fta.dot.gov/laws/circulars/leg\\_reg\\_8641.html](http://www.fta.dot.gov/laws/circulars/leg_reg_8641.html)), as amended and the Master Grant Agreement (<http://www.fta.dot.gov/documents/15-Master.pdf>), are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Artist shall not perform any act, fail to perform any act, or refuse to comply with any City request that would cause the City to be in violation of the FTA terms and conditions.

(2) The FTA Master Agreement obligates SFMTA to incorporate certain provisions into this Agreement and any lower tier subcontracts at any level and to take appropriate measures to ensure that Artist and its lower tier subcontractors at any level comply with certain applicable requirements set forth in the Master Agreement. The FTA Master Agreement is hereby incorporated by reference into this Agreement, and Artist shall comply with all such requirements.

(3) Copies of the FTA Master Agreement are available from the Commission.

#### **c. Applicability of Federal Grant Contract.**

(1) This procurement may be subject to one or more financial assistance contracts between SFMTA and the U.S. Department of Transportation, which incorporate the current FTA Master Agreement and Circular 4220.1F as amended. U.S. Department of Transportation's level of financial assistance may be between zero and



eighty percent (0-80%). The Artist is required to comply with all terms and conditions prescribed for third party contracts in these documents.

(2) Federal laws, regulations, policies and administrative practices may be modified or codified after the date this Agreement is established and may apply to this Agreement. To assure compliance with changing federal requirements, Contract Award indicates that the Artist agrees to accept all changed requirements that apply to this Agreement.

**d. Federal Funding Limitation.** Artist understands that funds to pay for Artist's performance under this Agreement are anticipated to be made available from the United States Department of Transportation through the Federal Transit Administration (FTA). All funds must be approved and administered by FTA. The City's obligation hereunder is payable from funds that are appropriated and allocated by FTA for the performance of this Agreement. If funds are not allocated, or ultimately are disapproved by FTA, the City may terminate or suspend Artist's services without penalty. The Commission shall notify Artist promptly in writing of the non-allocation, delay, or disapproval of funding.

**e. No Federal Government Obligation to Third Parties.** Artist agrees that, absent the Federal Government's express written consent, the Federal Government shall not be subject to any obligations or liabilities to any subrecipient, any third party contractor, or any other person not a party to the Grant Agreement in connection with this Project. Notwithstanding any concurrence provided by the Federal Government in or approval of any solicitation, subagreement, or third party contract, the Federal Government continues to have no obligations or liabilities to any party, including a subrecipient or third party contractor.

**f. Federal Lobbying Restrictions.**

(1) This Agreement is subject to Section 319, Public Law 101-121 (31 U.S.C. §1352) and U.S. DOT regulations "New Restrictions on Lobbying," 49 C.F.R. Part 20, which prohibits Federal funds from being expended to influence or to attempt to influence an officer or employee of any agency, members of Congress, an office or employee of Congress or an employee of any Member of Congress in connection with the awarding of any federally funded contract, the making of any Federal grant or loan, or entering into any cooperative agreement and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. Consultants and Subcontractors at any time who apply or bid for an award of \$100,000 or more shall file the certification required by 49 C.F.R. Part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or any employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures are forwarded from tier to tier up to the recipient. The Artist shall submit the "Certification Regarding Lobbying" included in this document. The Artist's signature on this certification shall certify that: a) it has not engaged in the prohibited activity and b) the language of the certification shall be included in all lower tier subcontracts, which exceed \$100,000, and that all such subcontractors shall certify and disclose accordingly. SFMTA is responsible for keeping the certification form of the Artist, who is in turn responsible for keeping the certification forms of subcontractors.

Further, by executing the Agreement, the Artist agrees to comply with these laws and regulations.

(2) If the Artist has engaged in any lobbying activities to influence or attempt to influence the awarding of this Agreement, the Artist must disclose these activities. In such a case, the Artist shall complete Standard Form SF-LLL, "Disclosure of Lobbying Activities". SFMTA must also receive all disclosure forms.

(3) The Artist and any subcontractors shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of a previously filed disclosure form. An event that materially affects the accuracy of the information reported includes:

(a) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence this federally funded Agreement; or

(b) A change in the person(s) influencing or attempting to influence this federally funded Agreement; or

(c) A change in the officer(s), employee(s) or member contracted to influence or attempt to influence this federally funded Agreement.

**g. Lobbying Certification and Disclosure.** Pursuant to 49 C.F.R. Part 20 (which is by this reference incorporated herein), the Artist shall execute and return the Certification Regarding Lobbying by Artist form set forth in Attachment H with the execution of this agreement.

**h. Certification Regarding Debarment, Suspension And Other Responsibility Matters.**

(1) Pursuant to Executive Order 12549 and 12689, "Debarment and Suspension," 31 USC § 6101 and federal regulations in 49 C.F.R. 29, entities and individuals who are debarred or suspended by the federal government are excluded from obtaining federal assistance funds under this Contract. To assure that such entities and individuals are not involved as participants on this FTA-financed contract, if the contract exceeds \$25,000 each Artist shall complete and submit, as part of its Proposal, the certification form, contained in these documents. The inability of a Artist to provide a certification will not necessarily result in denial of consideration for contract award. A Artist that is unable to provide a certification must submit a complete explanation attached to the certification form. Failure to submit a certification or explanation may disqualify the Artist from participation under this Contract. SFMTA, in conjunction with FTA, will consider the certification or explanation in determining contract award. No contract will be awarded to a potential third-party contractor submitting a conditioned debarment or suspension certification, unless approved by the FTA.

(2) The certification is a material representation of fact upon which reliance is placed in determination of award of contract. If at any time the Artist learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances, it shall immediately provide written notice to SFMTA. If it is later determined that the Artist knowingly rendered an erroneous certification, or failed to notify SFMTA immediately of circumstances which made the original certification no longer valid, SFMTA may disqualify the Artist. If it is later determined that the Artist knowingly rendered an erroneous certification, or failed to notify SFMTA immediately of

circumstances which made the original certification no longer valid, SFMTA may terminate the contract, in addition to other remedies available including FTA suspension and/or debarment.

(3) Further, the Artist shall not knowingly enter into any subcontract with an entity or person who is proposed for debarment under 48 C.F.R. Part 9, Subpart 9.4, debarred, suspended, or who has been declared ineligible from obtaining federal assistance funds. As such, the Artist shall require all subcontractors seeking subcontracts to complete and submit the same certification form contained in these documents before entering into any agreement with said subcontractor.

**i. Exclusionary Or Discriminatory Specifications.** Apart from inconsistent requirements imposed by Federal statute or regulations, the Artist agrees that it will comply with the requirement of 49 U.S.C. § 5323(h)(2) by refraining from using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.

**j. Conservation.** The Artist shall recognize mandatory standards and policies relating to energy efficiency that are contained in the State Energy Action plan issued in compliance with the Energy Policy and Conservation Act (42 USC Section 6321 et seq.).

**k. Clean Water.** The Artist agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq. The Artist agrees to report each violation to the City and understands and agrees that the City will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. The Artist also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

**l. Clean Air.** The Artist agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. The Artist agrees to report each violation to the City and understands and agrees that the Purchaser will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. The Artist also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

**m. Fly America.** International air transportation of any persons involved in or property acquired for the Project must be provided by U.S. flag air carriers to the extent service by these carriers is available, as required by the International Air Transportation Fair Competitive Practices Act of 1974, as amended, 49 U.S.C. 40118, in accordance with U.S. GAO regulations, "Uniform Standards and Procedures for Transportation Transactions," 4 C.F.R. Part 52, and U.S. GAO Guidelines for Implementation of the "Fly America Act" B-138942, 1981 U.S. Comp. Gen. LEXIS 2166. March 31, 1981.

**n. Seismic Safety.** The Artist agrees that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in Department of Transportation Seismic Safety Regulations 49 C.F.R. Part 41 and will certify to compliance to the extent required by the regulation. The Artist also agrees to ensure that all work performed under this Contract including work performed by a subcontractor is in compliance with the standards required by the Seismic Safety Regulations and the certification of compliance issued on the project.

**o. National Intelligent Transportation Systems Consultanture and Standards.** The Artist agrees to conform, to the extent applicable, to the National Intelligent Transportation Systems (ITS) Consultanture and Standards as required by Section 5206(e) of TEA-21, 23 U.S.C. § 502-, and with FTA Notice, "Federal Transit Administration National ITS Consultanture Policy on Transit Projects" 66 Fed. Reg. 1455 et seq., January 8, 2001, and other subsequent Federal directives that may be issued.

**p. Electronic and Information Technology.** When providing reports or other information to the SFMTA, or to the Federal Transit Administration (FTA), among others, on behalf of the SFMTA, the Artist agrees to prepare such reports or information using electronic or information technology capable of assuring that the reports or information delivered will meet the applicable accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d, and U.S. ATBCB regulations, "Electronic and Information Technology Accessibility Standards," 36 C.F.R. Part 1194.

**q. Nondiscrimination.** In addition to the provisions prohibiting discrimination set out in Section 34, above, the Artist shall ensure compliance by it and its subcontractors with all requirements imposed by Title VI of the Civil Rights Act of 1964 (42 USC 2000d), federal Executive Order No. 11246, regulations of the U. S. Department of Labor issued thereunder, the regulations of the federal Department of Transportation issued thereunder, and the Americans with Disabilities Act, as they may be amended from time to time. Accordingly, during the performance of this Agreement, the Artist, for itself, its assignees, and successors in interest (hereinafter referred to as the "Artist"), agrees as follows:

(1) The Artist shall comply with the Regulations relative to nondiscrimination in federally-assisted programs of the Department of Transportation (hereinafter "DOT"), Title 49, Code of Federal Regulations, Part 21 ("Nondiscrimination in Federally-Assisted Programs of the Dept. of Transportation"), as they may be amended from time to time (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this Agreement.

(2) In all solicitations either by competitive bidding or negotiation made by the Artist for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Artist of the Artist's obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, religion, creed, sex, sexual orientation, disability, age, or nationality.

(3) The Artist shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by SFMTA or FTA to be pertinent to ascertain compliance with such regulations, orders, and instructions. Where any information is required of a contractor or subcontractor that is in the exclusive possession of another who fails or refuses to furnish this information, the Artist shall so certify to SFMTA, or FTA, as appropriate, and shall set forth what efforts it has made to obtain the information.

(4) In the event of the Artist's noncompliance with the nondiscrimination provisions of this Agreement, SFMTA shall impose such contract sanctions as it or FTA may determine to be appropriate, including, but not limited to:

(a) Requiring the Artist to take remedial action to bring the Artist into compliance;

(b) Withholding of payments to the Artist under the Agreement until the Artist complies; and/or

(c) Cancellation, termination, or suspension of the Agreement, in whole or in part.

(5) The Artist shall include the provisions of these Subsections r(1) to r(4) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto. The Artist shall take such action with respect to any subcontract or procurement as SFMTA or FTA may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that, in the event the Artist becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Artist may request SFMTA to enter into such litigation to protect the interests of SFMTA and, in addition, the Artist may request the United States to enter into such litigation to protect the interest of the United States.

**r. Title VI Compliance.** During the performance of this Agreement, Artist, for itself, its assignees, and its successors in interest agrees as follows:

(1) **Compliance with Regulations:** Artist shall comply with the Regulations relative to nondiscrimination in federally-assisted programs of the Department of Transportation (hereinafter, "DOT") Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time (hereinafter referred to as the Regulations), which are herein incorporated by reference and made part of this Agreement.

(2) **Nondiscrimination:** Artist, with regard to the work performed by it during the Agreement, shall not discriminate on the grounds of race, religion, color, sex, age, or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment. Artist shall not participate either directly or indirectly in the discrimination prohibited by 21.5 of the Regulations, including employment practices when the Agreement covers a program set forth in Appendix B of the Regulations.

(3) **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations either by competitive bidding or negotiation made by Artist for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by Artist of Artist's obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, religion, color, sex, age, or national origin.

(4) **Information and Reports:** Artist shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by SFMTA or the FTA to be pertinent to ascertain compliance with such Regulations, orders, and instructions. Where any information required of Artist is in the exclusive possession of another who fails or refuses to furnish this information, Artist shall so certify to SFMTA, or the FTA as appropriate, and shall set forth what efforts it has made to obtain the information.

(5) **Sanctions for Noncompliance:** In the event of Artist's noncompliance with the nondiscrimination provisions of this Agreement, SFMTA shall impose such contract sanctions as it or the FTA may determine to be appropriate, including, but not limited to:

(a) Withholding of payments to Artist under the Agreement until Artist complies, and/or,

(b) Cancellation, termination or suspension of the Agreement, in whole or in part.

(6) Incorporation of Provisions: Artist shall include the provisions of Subsection 62.18.1 through 62.18.5 of this Section in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto. Artist shall take such action with respect to any subcontract or procurement as SFMTA or the FTA may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that, in the event Artist becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, Artist may request SFMTA to enter into such litigation to protect the interests of SFMTA, and, in addition, Artist may request the United States to enter into such litigation to protect the interests of the United States.

**s. Requirements of Americans with Disabilities Act.** The Artist is required to comply with all applicable requirements of the Americans with Disabilities Act of 1990 (ADA), 42 USC §§ 12101, et seq.; Section 504 of the Rehabilitation Act of 1973, as amended, 29 USC § 794; and 49 USC § 5301(d), and the following regulations and any amendments thereto:

(1) U.S. Department of Transportation regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37;

(2) U.S. Department of Transportation regulations, "Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. Part 27;

(3) U.S. Department of Justice (DOJ) regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 C.F.R. Part 35;

(4) DOJ regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. Part 36;

(5) U.S. General Services Administration regulations, "Accommodations for the Physically Handicapped," 41 C.F.R. Subpart 101-19;

(6) U.S. Equal Employment Opportunity Commission (EEOC) "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630;

(7) U.S. Federal Communications Commission regulations, "Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities," 47 C.F.R. Part 64, Subpart F; and

(8) FTA regulations, "Transportation for Elderly and Handicapped Persons," 49 C.F.R. Part 609.

62.19.9. Any implementing requirements that the FTA may issue.

**t. Recycled Products.** To the extent practicable and economically feasible, the Artist agrees to provide a competitive preference for recycled products to be used in the Project pursuant to the U.S. Environmental Protection Agency Guidelines at 40 C.F.R. Parts 247, implementing Section 6002 of the Resource Conservation and Recovery Act, as amended, 42 USC § 6962. If possible, the Artist shall use both sides of paper sheets for copying and printing and shall use recycled/recyclable products wherever practical at the fulfillment of this Agreement.

**u. Privacy.**

(1) Should the Artist, or any of its subcontractors, or their employees administer any system of records on behalf of the federal government, the Privacy Act of 1974, 5 USC § 552a, imposes restrictions on the party administering the system of records.

(2) For purposes of the Privacy Act, when the Agreement involves the operation of a system of records on individuals to accomplish a government function, SFMTA and any Consultants, third-party contractors, subcontractors, and their employees involved therein are considered to be government employees with respect to the government function. The requirements of the Act, including the civil and criminal penalties for violations of the Act, apply to those individuals involved. Failure to comply with the terms of the Act or this provision of this Agreement will make this Agreement subject to termination.

(3) The Artist agrees to include this clause in all subcontracts awarded under this Agreement that require the design, development, or operation of a system of records on individuals subject to the Act.

**v. False or Fraudulent Statements and Claims.**

(1) The Artist recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 49 U.S.C. §§ 3801 et seq. and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to its actions pertaining to this Project. Accordingly, by signing this Agreement, the Artist certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the covered Grant Agreement, Cooperative agreement, Contract or Project. In addition to other penalties that may be applicable, the Artist acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Artist, to the extent the Federal Government deems appropriate.

(2) The Artist also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government in connection with an urbanized area formula project financed with Federal assistance authorized by 49 U.S.C. § 5307, the Government reserves the right to impose on the Artist the penalties of 18 U.S.C. § 1001, 31 USC §§ 3801, et seq., and 49 U.S.C. § 5307(n)(1), to the extent the Federal Government deems appropriate.

(3) The Artist agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

**w. Drug-Free Workplace Policy.** Artist acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, 41 U.S.C. 702, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City premises. Artist agrees that any violation of this prohibition by Artist, its employees, agents or assigns will be deemed a material breach of this Agreement.

**63. Approval by Counterparts.**

This Agreement may be executed in counterparts, each of which shall be an original, but together shall constitute one and the same instrument.

**64. Included Appendices.**

The Appendices listed below are incorporated to the Agreement by reference.

- A: Artist's Proposal
- B: Services to be Provided by Artist
- C. Artist's Approved Costs
- D. Payment Schedule
- E. Civic Art Collection Forms
- F. Insurance Waiver


**[The remainder of this page has been intentionally left blank.]**



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

**CITY**


APPROVED:

  
8.8.11  
\_\_\_\_\_  
JD Beltran  
Acting Director of Cultural Affairs  
San Francisco Arts Commission

APPROVED:

SAN FRANCISCO MUNICIPAL  
TRANSPORTATION AGENCY  
  
\_\_\_\_\_  
Debra A. Johnson  
Acting Executive Director/CEO  
San Francisco Municipal  
Transportation Agency  
Date: 8-04-11


**Approved as to Form:**

Dennis J. Herrera  
City Attorney  
By   
8-3-11  
\_\_\_\_\_  
Robert K. Stone  
Deputy City Attorney

**ARTIST**

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

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

  
\_\_\_\_\_  
Tomie Arai  
245 West 107th Street, 12H  
New York, NY 10025  
City vendor number: 55155

## APPENDIX A

### CENTRAL SUBWAY CHINATOWN STATION WAYFINDING ARTWORK

ARTIST TOMIE ARAI

#### CONCEPTUAL ARTWORK PROPOSAL

**Proposal approved by Arts Commission Resolution 0802-10-216 on August 10, 2010, to be developed under this Agreement and subject to ongoing revisions, reviews and approvals by the Commission and the SFMTA.**

#### *URBAN ARCHAEOLOGY*

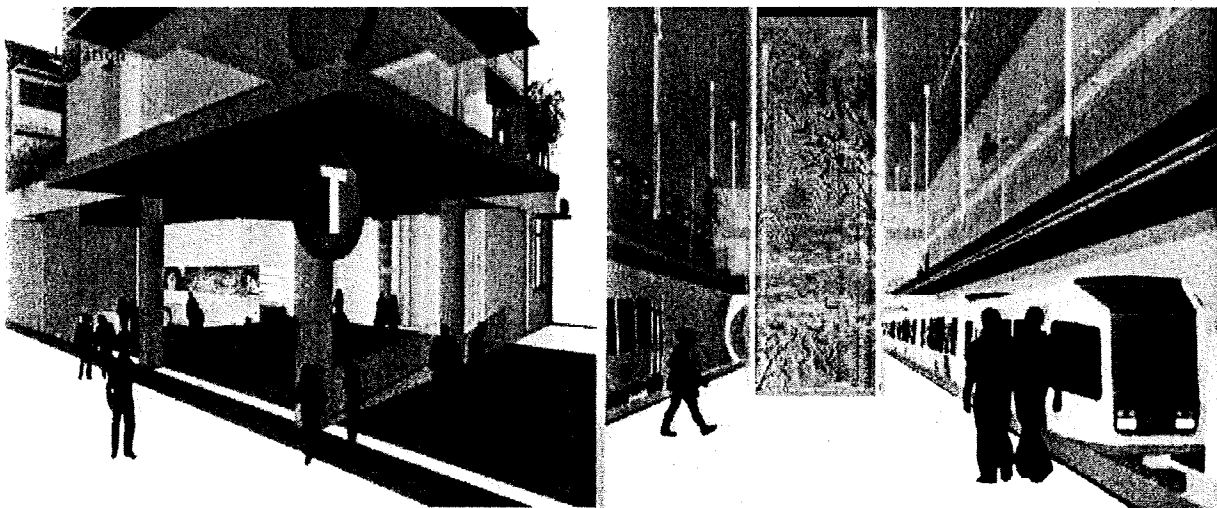
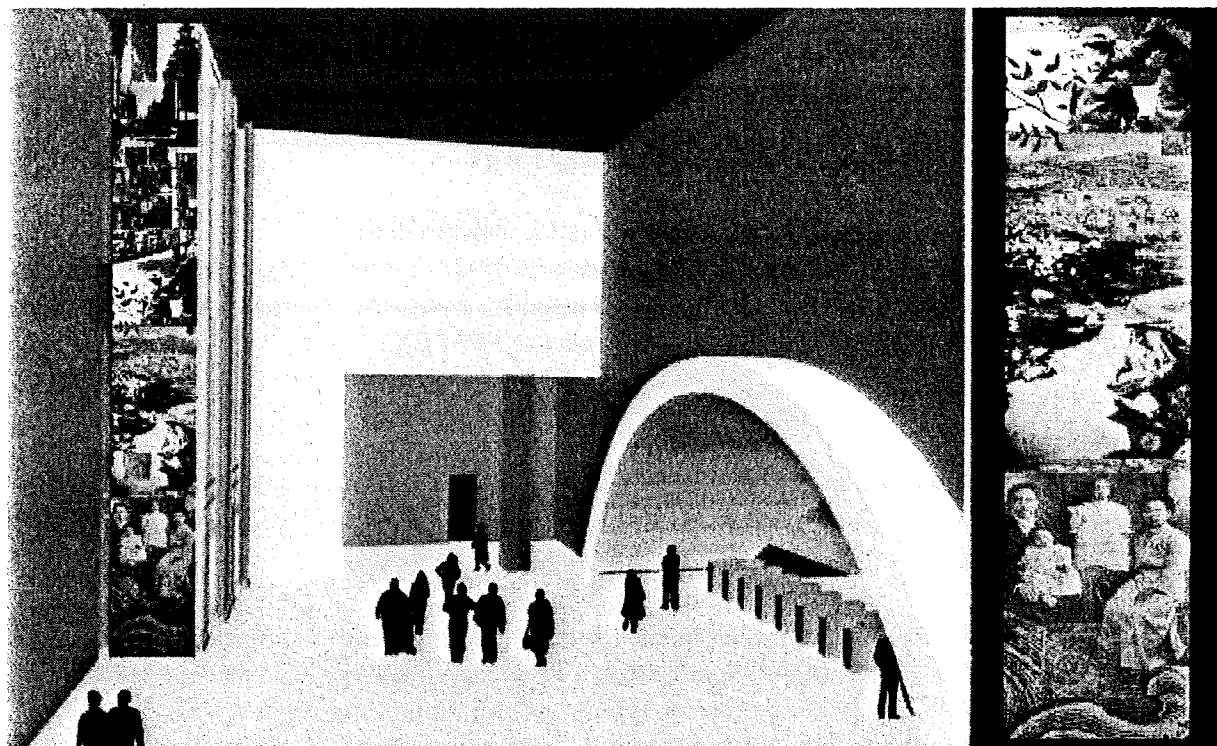
The artist proposes to tell a story about San Francisco's Chinatown through a continuing visual timeline on all three station levels. The artists will collect archival photographs and take new photographs, to be collaged and reproduced in permanent materials such as laminated glass and etched metal panels for permanent installation in the Chinatown Station. Contemporary images of Chinatown will begin the timeline at the entryway, extending down to the platform level with panels depicting life prior to the establishment of San Francisco. Moving from level to level, subway passengers will be invited to experience the artwork in much the same way as archaeologist learn about the past, by sifting through layers of information to uncover shared histories.

Disembarking passengers on the platform level will encounter glass elevator towers with collaged images of life buried deep beneath the city streets that may include fauna and flora, fossils from prehistoric times and cultural artifacts from the indigenous peoples who first inhabited the Bay Area.

Ascending to the concourse level, the artwork will gradually shift from past to present, with images from the early settlement of San Francisco, the great San Francisco earthquake and the arrival of pioneers and immigrants from China and Asia. Actual artifacts collected from the community in the forms of photographs, coaching books, letters, et all, may be embedded in the glass.

Continuing up to the surface level, images of present day Chinatown will represent the vibrant community found at the juncture of Stockton and Washington streets.

**Conceptual Proposal Display Board Image Attached**



**Appendix B**  
**Services to be Provided by Artist Tomie Arai**

**Design, and Consultation during Fabrication, Transportation and Installation of  
Wayfinding Artwork for  
The Central Subway Chinatown Station**

**Authorization:** Phases I, II and III of this Agreement have been authorized by Arts Commission Resolution Number **1206-10-338**. The Commission must approve Artist's submittals at the completion of each Phase of the Work before the Artist proceeds to the next Phase.

**1) PHASE I - DESIGN**

**1. Scope of Work.**

**a. General**

(1) Artist has delivered a Conceptual Proposal for the Artwork ("Proposal") approved by the Arts Commission, **Resolution 0802-10-214**. The scope of work under this Phase includes the development of the Proposal through all Phases of design, including Conceptual Design, Design Development that meets the SFMTA's construction document requirements, Final Design of the Artwork, and Construction Documents for the fabrication and installation of the Artwork.

(2) The Commission must approve changes to the Proposal at each Phase of development before the Artist proceeds to the next Phase. If the Commission does not accept the Proposal at any design Phase, the Artist agrees to submit one alternate proposal or design alternative at no additional cost to the City.

(3) The Proposal shall reflect the requirements of the SFMTA, Architect and Commission, as expressed in the Request for Qualifications and as further directed and discussed in communications with the Commission, SFMTA and Architect.

(4) Artist shall attend Project meetings and make presentations to City staff, the Architect, Commissions, and other individuals and organizations, as directed by the Commission.

(5) Artist agrees to collaborate closely with Architect through in-person meetings and other necessary means of communication to allow the Architect to thoroughly integrate the Proposal into architectural and engineering drawings and plans throughout all Phases of design of the Artwork. **Artist shall coordinate his/her communications with the Architect and the SFMTA through the Arts Commission Project Manager.**

(6) Prior to directing any subcontractor to perform Work, the Artist shall deliver to the City copies of the Artist's subcontracts and required insurance documents. The Artist shall also submit as required by the City documentation establishing that all employees, subcontractors and suppliers have been paid in a timely manner.

**b. Design Development**

(1) Design Development Documents and materials shall incorporate the further development and refinement of the Proposal, Budget and Maintenance Report

developed under Conceptual Design.

(2) Design Development Documents shall include presentation quality materials, which shall include colored drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the Artwork and how it will be installed at the Site, mock-ups, final color and materials samples, proposed fabrication methods, feasibility studies and final cost estimates at design completion. 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, lighting design, materials and other elements as may be appropriate.

(3) Artist and Artist's subcontractor structural engineer or architect shall review all Design Development Documents for consistency and constructability, and report any engineering, structural concerns, or constructability concerns to the City. Modifications to the design necessitated by this review shall be submitted and approved by the City prior to beginning the production of Construction Documents and incorporated therein.

(4) Maintenance Plan. At the time Artist submits Artist's amended Proposal for review by the Arts Commission as part of the Design Development Documents, Artist shall provide the Commission with a General Maintenance Plan for the Artwork, with a detailed description of future anticipated maintenance requirements; a recommended maintenance schedule; anticipated and required care and/or replacement/upgrade of any part of the Artwork and associated moving parts or equipment including any staff time involved in displaying or operating Artwork and the frequency of such staff involvement; and written instructions and manufacturer's specifications for reasonably foreseeable maintenance and preservation activities relating to the Artwork. Artist shall also provide the Commission with a description of all equipment and or machinery needed to operate the Artwork and any anticipated or required staffing, supervision or operational needs. The Artwork must be durable, taking into consideration that the Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment, and may also be subject to graffiti and vandalism. Artist shall ensure that all maintenance requirements will be reasonable in terms of time and expense. The Artist shall be responsible for making any updates or clarifications to this Maintenance Plan if the maintenance requirements and estimates change over the course of the Project.

**c. Construction Documents:**

1) The plans for the construction and/or installation of the proposed Artwork as set out in the Construction Documents must conform to the California Uniform Building Code and any San Francisco amendments to the Building Code as approved, and must be signed and stamped by design professionals licensed in the State of California.

2) Artist shall deliver Mock-ups and Samples, as required by Commission or its staff.

3) Artist and its subcontractor architect or engineer 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 the Commission and Architect with written comments and/or corrections.

4) If the anticipated maintenance requirements and estimates have changed, Artist shall provide the Commission with a revised Maintenance Plan.

5) Artist shall deliver an updated schedule describing Artist's specific timelines for completing the Work.

**d. Schedule of Deliverables.** See Appendix D.

**e. Compensation and Payment Schedule.** Artist's compensation for Phase I shall be in accordance with Appendix C, Project Budget, and Appendix D, Payment and Performance Schedule which are incorporated herein by reference. Such compensation shall cover all of Artist's costs and fees for Phases Ia, 1b and 1c.

**f. Approved Subcontractors and corresponding insurance requirements**  
The Arts Commission approves the Artist's subcontracts to provide structural engineering documents and other design development deliverables, and other consultants as necessary to provide project assistance. Subcontractors are subject to the same insurance requirements as listed in **Section 15: Insurance in the main body of the Agreement** unless waived by the City Risk Manager. The subcontractors approved to perform work under this Contract are: Winder Gibson Architects.

**g. Total City Costs.** Artist shall design the Artwork so that it can be designed, fabricated and installed for an amount not to exceed Eight Hundred Thousand Dollars (\$800,000). Said amount includes but is not the compensation to the Artist, but is the total cost to the City for the Artwork. This Budget must cover all costs associated with the Artwork, whether or not the Work is performed (that is, designed, fabricated, and installed) by the Artist, Artist's subcontractors, or by another contractor under a separate agreement with City. Said costs include, but are not limited to: Artist fees, employees, consultants, fabrication, including but not limited to design fees charged by the Artist's subcontracted architects and engineers. In the event that cost estimates indicate that the Artist's Proposal cannot be executed within the approved Budget, the Artist hereby agrees to redesign or modify the Proposal so that the Artwork can be fabricated within the approved Budget.

## PHASE II -CONSULTATION DURING FABRICATION OF ARTWORK

### 1. Scope of Work.

a. The City will engage a Fabricator to manufacture the Artwork based on the Artist's approved Final Design Documents. At the City's direction, the City may assign and the Artist shall accept assignment of the Fabricator's contract so that the Fabricator is a subcontractor to the Artist, either prior to or after the Commission's final approval of the Design Development Documents. As directed by the Commission, the Artist shall assist the Commission in the selection of a Fabricator. As directed by the Commission, 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 and Artist's Engineer 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 City's glazing and other structures to which the Artworks shall be attached, all attachment systems, and all other relevant components and interfaces.

c. Inspection of Artwork.

1) Artist shall send photo documentation of Artwork fabrication at 50% and 100% completion. Documentation to be sent to Arts Commission Project Manager at each stage for review and approval prior to advancing with next Phase of fabrication.

2) Artist shall notify the Commission 30 days in advance of 100% completion of all the Artwork elements so that the Arts Commission can do a field inspection of the Artwork at the fabricator.

2. Schedule of Deliverables. See Appendix D for specific schedule. **Note: Following final approval of the fabricated Artwork by the Arts Commission, the Artist shall deliver the Artwork to a designated City storage site no earlier than September 30, 2014, but no later than September 30, 2015. Following inspection and approval by the Arts Commission of the delivered Artwork at the City's storage site, the Arts Commission will store the Artwork at no cost to the Artist. The Artist shall be responsible for the storage and safekeeping of the Artwork prior to the delivery of the Artwork to the City's storage site.**

3. Compensation. Artist's total compensation for Phase II and the payment schedule for said Work shall be in accordance with **Appendix C, Project Budget**, and Appendix D, Performance and Payment Schedule. Such compensation shall cover all of Artist's costs and fees for Phase II.

**PHASE III -  
CONSULTATION DURING TRANSPORTATION AND INSTALLATION OF ARTWORK**

**1. Scope of Work.**

a. Transportation and Installation. The Artwork shall be transported to the site by others under separate contract assigned to the Artist and installed at the Site by the Construction Contractor. The Artist shall review and provide written comments and recommendations concerning the Construction Contractor's plans for installation of the Artwork, and the Artist shall consult with the City and the Construction Contractor as to the means and methods of installing the Artwork. The preparation of the Site for installation of the Artwork shall be the responsibility of the Construction Contractor.

b. Review of Site. Prior to installation of the Artwork is to visit the Site and confer with the Commission, the SFMTA and Construction Contractor to verify that the preparation of the site(s) designated for the Artwork is in conformance with the Artist's design intent as expressed in the SFMTA's contract documents and the Artist's Contract Documents as approved in Phase I. Artist shall be present in San Francisco to provide on-Site consulting services on the installation of the Artwork, with a Commission staff person present at all times, and as directed by the Commission. Artist shall respond to requests for information from the City within 72 hours of the request. Artist shall coordinate Artist's activities on-Site with the General Contractor through Commission staff and the SFMTA Construction Management Team.

c. Inspection of Construction. Artist shall examine the work of the Construction Contractor and report in writing to the Commission any visible defect or condition that may interfere with the installation of the Artwork as depicted in the Artist's approved design documents. If Artist fails to measure, inspect and/or report defects that are reasonably discoverable, all additional costs of installing the Artwork shall be borne by Artist. The forgoing does not apply to latent defects in the work of the Construction Contractor. Artist shall report to City any defects in another Contractor's work at any time such defects become known to the Artist. Any difference or conflict that may arise between Artist and the Construction Contractor, or other Contractors engaged by City to perform work on the Site, shall be adjusted as determined by City, its agents, or its authorized representatives when necessary to facilitate the completion of the Project. No damages or claims by Artist will be allowed other than an extension of time for the completion of Work. Such an extension will be for the period of time City shall consider Artist to have been delayed in the completion of Work by reason of the work of other Contractors or workers.

d. Maintenance Documents. Artist shall deliver all information necessary for the Commission to properly care for and maintain the Artwork, including information regarding the physical make-up of the Artwork, methods and materials, and information about the Artistic intent of Artist in the Design, Fabrication and Installation of the Artwork in the forms attached as Appendix E: Civic Art Collection Forms.

e. Photographic Documentation. Artist shall deliver a CD Rom containing both high resolution and low resolution digital images of the Artwork from various perspectives.

**2. Schedule of Deliverables.** See Appendix D, Performance and Payment Schedule.

**3. Compensation.** Artist's total compensation for Phase III shall be as set forth in Appendix C, Project Budget, and Appendix D, Performance and Payment Schedule, which are both incorporated herein by reference. **Such compensation shall cover all of Artist's costs and fees for Phase III.**



**Appendix C  
ARTIST'S APPROVED COSTS**

Contractor: Tomie Arai		
	Artist Fee	Reimbursable Expenses
<b>Phase Ia Conceptual Design</b>		
Submittal of drawings and data for SFMTA's 65% construction documents		
Contractor Fee (Artist)		
Artist Fee	\$25,000.00	
Subconsultants		
Architect/Engineer		\$10,000.00
Insurance		\$750.00
<b>Phase Ib Design Development</b>		
Submittal of any additional drawings and data for SFMTA's 100% construction documents		
Consultant Fee (Artist)		
Artist Fee	\$20,000.00	
Subconsultants		
Architect/Engineer		\$10,000.00
Other direct costs		
Travel (artist)		\$1,250.00
<b>Phase Ic Final Design</b>		
Submittal of artwork construction docs and shop drawings, final content		
Contractor Fee (Artist)		
Artist Fee	\$45,000.00	
Subconsultant		
Architect/Engineer		\$15,000.00
Other direct costs		
Mock-ups, samples		\$20,000.00
Photographer		\$3,500.00
Archival photo repro fees		\$2,500.00
Chinese Historical Society		\$3,000.00
Graphic and design drawings		\$20,000.00
Travel (artist)		\$10,000.00
<b>Phase II Fabrication consultation</b>		
Contractor fee (Artist)		
Artist Fee	\$40,000.00	

Subconsultant		
Architect/Engineer		\$18,000.00
Other direct costs		
Travel (artist)		\$5,000.00
Insurance		\$3,000.00
Phase III Installation consultation		
Contractor fee (Artist)		
Artist Fee	\$20,000.00	
Subconsultants		
Architect/Engineer		\$12,000.00
Other direct costs		
Travel		\$5,000.00
Insurance		\$1500.00
TOTAL	\$150,000.00	\$140,500.00

**Appendix D  
PAYMENT SCHEDULE**

<b>Appendix D Payment Schedule</b>			
<b>TOMIE ARAI</b>	<b>Artist Fee</b>	<b>Reimbursable Expenses</b>	<b>Submittal Due Date</b>
Payment 1: Invoice may be submitted upon receipt and approval by the SFAC and the SFMTA of all submittals, to include, but not limited to drawings, data, specifications, samples, mock-ups, required to the SFMTA's 65% construction documents. Subcontracts and documentation subcontractors and other pre-approved expenditures have been paid.	25,000.00	10,750.00	<b>No later than August 19, 2011</b>
Payment 2: Invoice may be submitted upon receipt and approval by the SFAC and the SFMTA of all submittals, to include, but not limited to, additional drawings, data, specifications, samples, mock-ups required for the SFMTA's 100% construction documents. Subcontracts and documentation all subcontractors and other pre-approved expenditures have been paid.	20,000.00	11,250.00	<b>No later than October 10, 2011</b>
Payment 3: Invoice may be submitted upon receipt and approval by the SFAC and the SFMTA of all submittals, to include, but not limited to, artwork drawings, any imagery and text, construction documents, specifications, data, shop drawings, material samples, material data sheets, mock-ups, required tests for ease of maintenance and durability required for final approval and fabrication of the artwork.	45,000.00	74,000.00	<b>No later than July 31, 2012</b>
Payment 4: Invoice may be submitted upon approval of completed fabrication of the artwork by the SFAC and SFMTA, and approval of all required documents, and documentation that all subcontractors have been paid.	40,000.00	26,000.00	<b>Artwork shall be delivered to site no later than 9/30/15</b>
Payment 5: Invoice may be submitted upon approval of transported and installed artwork by the SFAC and the SFMTA, and approval of all remaining required submittals, and documentation that all subcontractors have been paid.	20,000.00	18,500.00	<b>TBD</b>
<b>Payment Schedule Notes:</b>			
1. All budget figures are not-to-exceed amounts. Artist shall only invoice the Arts Commission for actual reimbursable expenses incurred, totaling less than the not-to-exceed amount for each Phase.			
2. Receipts and invoices shall be submitted to the Arts Commission for all reimbursable expenses.			
3. All due dates are subject to change by the Arts Commission or SFMTA			

4. Artist shall not proceed to the next Phase, as indicated above, without written permission from the Arts Commission.

**5. Artist may request approval in writing by the Arts Commission in advance to submit invoices for additional interim payments for Work completed and approved within each Phase.**

--	--	--

**APPENDIX E  
ARTIST COLLECTIONS FORM**

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

Return to:  
Civic Art Collection Program  
San Francisco Arts Commission  
25 Van Ness Ave., Suite 240  
San Francisco, CA 94102

**Appendix E  
CIVIC ART COLLECTION FORMS**

**ARTIST BIOGRAPHY**

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

**OBJECT INFORMATION**

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

**NON-COMMISSIONED WORKS**

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

**ARTIST COLLECTIONS FORM**

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

**ARTIST INTENT**

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

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

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

**2D Artwork Technical Maintenance Record**

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

Return to:  
Civic Art Collection Program  
San Francisco Arts Commission  
25 Van Ness Ave., Suite 240  
San Francisco, CA 94102

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

## 2D Artwork Technical Maintenance Record

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

**Foundation/Installation Method:**

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

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

**Handling Instructions:**



Please print or type answers

to be completed before final payment

Return to:  
Civic Art Collection Program  
San Francisco Arts Commission  
25 Van Ness Avenue, Suite 240  
San Francisco, CA 94102

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

## 2D Artwork Technical Maintenance Record

<b>Finish:</b> (all anti-graffiti coatings, fixative coatings, fire retardant sprays, etc., attach Material Safety and Technical Data sheets.)
<b>Foundation/Installation Method:</b>
<b>Maintenance and Care of Artwork:</b> (Suggested cleaning agent and procedure, attach Material Safety and Technical Data sheets.)
<b>Placement of Artwork:</b> (cautions regarding sunlight, heat, etc.)
<b>Handling Instructions:</b>
<b>Attach any diagrams and disassembly instructions.</b>