

**City and County of San Francisco
Arts Commission
401 Van Ness Avenue, Suite 325
San Francisco, California 94102**

**First Amendment to Agreement
between the
City and County of San Francisco and White Light Inc. and Werner Klotz Public Art Inc.**

This First Amendment to the Agreement (“Amendment”), dated for convenience as March 3, 2017, is made in San Francisco, California, by and between **White Light Inc. and Werner Klotz Public Art Inc.** (“Contractor” or “Artist”), and the City and County of San Francisco, a municipal corporation (“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

WHEREAS, City and Contractor have entered into the Agreement (as defined below); and

WHEREAS, City and Contractor desire to modify the Agreement on the terms and conditions set forth herein to compensate Contractor for additional engineering services associated with structural engineering of art work (sculpture), engineering peer review process and engineering consultation during fabrication and installation, and additional costs for artwork renderings, as authorized by the Arts Commission in Resolution 0507-12-143;

WHEREAS, approval for this Amendment was obtained when the Civil Service Commission approved Contract number 4062-10/11 on January 3, 2011;

NOW, THEREFORE, Contractor and the City agree as follows:

SUMMARY OF FIRST AMENDMENT

As more particularly described below, this Amendment modifies the Agreement to add to the scope of Work additional engineering services associated with structural engineering of the Artwork (sculpture), engineering peer review process, and engineering consultation during fabrication and installation of the Artwork, and artwork renderings. This Amendment adds \$60,723 to the Contract Amount to compensate the Artist for the performance of said Additional Work. In addition, the Agreement is amended to add contract requirements required by federal procurement laws.

FIRST AMENDMENT OF AGREEMENT

1. Definitions. The following definitions shall apply to this Amendment:

1a. Agreement. The term "Agreement" shall mean the Agreement dated **June 1, 2011** between Contractor and City as modified by this Amendment.

1b. Contract Monitoring Division. Contract Monitoring Division. Effective July 28, 2012, with the exception of Sections 14B.9(D) and 14B.17(F), all of the duties and functions of the Human Rights Commission under Chapter 14B of the Administrative Code (LBE Ordinance) were transferred to the City Administrator, Contract Monitoring Division ("CMD"). Wherever "Human Rights Commission" or "HRC" appears in the Agreement in reference to Chapter 14B of the Administrative Code or its implementing Rules and Regulations, it shall be construed to mean "Contract Monitoring Division" or "CMD" respectively.

1c. Effective Date of this Amendment shall be retroactive to August 30, 2016.

1d. Other Terms. Terms used and not defined in this Amendment shall have the meanings assigned to such terms in the Agreement.

2. Modifications to the Agreement. The Agreement is hereby modified as follows:

2a. Section 5. Compensation of the Agreement

The Contract Amount is increased from \$374,900 to an amount not to exceed \$435,623 to compensate Contractor for Additional Work, as set out below.

Sections 5.a and 5.b are hereby deleted and replaced in their entirety to read as follows:

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 **FOUR HUNDRED THIRTY FIVE THOUSAND SIX HUNDRED TWENTY THREE DOLLARS (\$435,623.00)**, 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 **TWO HUNDRED FIFTY THOUSAND SIX HUNDRED TWENTY THREE DOLLARS (\$250,623.00)** 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.

2b. Section 32 "Earned Income Credit (EIC) Forms" is hereby replaced in its entirety to read as follows:

32. Consideration of Criminal History in Hiring and Employment Decisions.

a. Contractor agrees to comply fully with and be bound by all of the

provisions of Chapter 12T “City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions,” of the San Francisco Administrative Code (Chapter 12T), including the remedies provided, and implementing regulations, as may be amended from time to time. The provisions of Chapter 12T are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the Chapter 12T is available on the web at www.sfgov.org/olse/fco. A partial listing of some of Contractor’s obligations under Chapter 12T is set forth in this Section. Contractor is required to comply with all of the applicable provisions of 12T, irrespective of the listing of obligations in this Section. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12T.

b. The requirements of Chapter 12T shall only apply to a Contractor’s or Subcontractor’s operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, shall apply only when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City of San Francisco, and shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

c. Contractor shall incorporate by reference in all subcontracts the provisions of Chapter 12T, and shall require all subcontractors to comply with such provisions. Contractor’s failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

d. Contractor or Subcontractor shall not inquire about, require disclosure of, or if such information is received, base an Adverse Action on an applicant’s or potential applicant for employment’s, or employee’s: (1) Arrest not leading to a Conviction, unless the Arrest is undergoing an active pending criminal investigation or trial that has not yet been resolved; (2) participation in or completion of a diversion or a deferral of judgment program; (3) a Conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; (4) a Conviction or any other adjudication in the juvenile justice system; (5) a Conviction that is more than seven years old, from the date of sentencing; or (6) information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

e. Contractor or Subcontractor shall not inquire about or require applicants, potential applicants for employment, or employees to disclose on any employment application the facts or details of any conviction history, unresolved arrest, or any matter identified in subsection 32(d), above. Contractor or Subcontractor shall not require such disclosure or make such inquiry until either after the first live interview with the person, or after a conditional offer of employment.

f. Contractor or Subcontractor shall state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment to be performed under this Agreement, that the Contractor or Subcontractor

will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of Chapter 12T.

g. Contractor and Subcontractors shall post the notice prepared by the Office of Labor Standards Enforcement (OLSE), available on OLSE's website, in a conspicuous place at every workplace, job site, or other location under the Contractor or Subcontractor's control at which work is being done or will be done in furtherance of the performance of this Agreement. The notice shall be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace, job site, or other location at which it is posted.

h. Contractor understands and agrees that if it fails to comply with the requirements of Chapter 12T, the City shall have the right to pursue any rights or remedies available under Chapter 12T, including but not limited to, a penalty of \$50 for a second violation and \$100 for a subsequent violation for each employee, applicant or other person as to whom a violation occurred or continued, termination or suspension in whole or in part of this Agreement.

2c. Section 62. Such section is hereby amended in its entirety to read as follows:

62. Federal Requirements.

a. **Federal Contract Requirements and Applicable Law.** The provisions set out in this Section 62 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), 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 Artist, 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 officer 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 G 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 an 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 Artist 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. Energy 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. Texting While Driving; Distracted Driving.** Consistent with Executive Order 13513 “Federal Leadership on Reducing Text Messaging While Driving”, Oct. 1, 2009 (available at <http://edocket.access.gpo.gov/2009/E9-24203.htm>) and DOT Order 3902.10 “Text Messaging While Driving”, Dec. 30, 2009, SFMTA encourages Artist to promote policies and initiatives for employees and other personnel that adopt and promote safety policies to decrease crashes by distracted drivers, including policies to ban text messaging while driving, and to include this provision in each third party subcontract involving the project.
- o. Seat Belt Use.** In compliance with Executive Order 13043 “Increasing Seat Belt Use in the United States”, April 16, 1997 23 U.S.C. Section 402 note, the SFMTA encourages Artist to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated vehicles, and to include this provision in each third party subcontract involving the project.

- 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. Civil Rights and 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; and/or
 - (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. **Subcontractor Non-Discrimination Assurances.** Pursuant to 49 C.F.R. Section 26.13, the Artist is required to make the following assurance in its agreement with SFMTA and to include this assurance in any agreements it makes with subcontractors in the performance of this contract: "The Artist or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Artist shall carry out applicable requirements of 49 C.F.R. Part 26 in the award and administration of DOT-assisted contracts. Failure by the Artist or subcontractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as SFMTA deems appropriate."
- u. **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.
- 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.

x. Buy America. If steel, iron, other manufactured products (“materials”) (as defined in 49 CFR Sections 661.3 and 661.5) are used in the fabrication of the Artwork, said materials must be manufactured in the United States in accordance with 49 CFR Sections 661.3 and 661.5 and other applicable federal regulations. Artist shall not use materials that do not comply with said requirements. Artist shall refund the City all funds received for the Work and shall be liable for all costs and damages arising from or related to the replacement or refabrication of the Artwork due to noncompliance with Buy America requirements.

y. Incorporation of FTA Terms.

- (1) The preceding provisions include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1F, 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 SFMTA requests which would cause the SFMTA to be in violation of the FTA terms and conditions.
- (2) For purposes of applying federal law to this Agreement, the following terms have the meanings provided below:

- (a) Approved Project Budget means the most recent statement, approved by the FTA, of the costs of the Project, the maximum amount of Federal assistance

for which the City is currently eligible, the specific tasks (including specified contingencies) covered, and the estimated cost of each task.

- (b) Contractor means the Artist that is the individual or entity awarded a third party contract financed in whole or in part with Federal assistance originally derived from FTA.
- (c) Cooperative Agreement means the instrument by which FTA awards Federal assistance to a specific Recipient to support a particular Project or Program, and in which FTA takes an active role or retains substantial control.
- (d) Federal Transit Administration (FTA) is an operating administration of the U.S. DOT.
- (e) FTA Directive includes any FTA circular, notice, order or guidance providing information about FTA's programs, application processing procedures, and Project management guidelines. In addition to FTA directives, certain U.S. DOT directives also apply to the Project.
- (f) Grant Agreement means the instrument by which FTA awards Federal assistance to a specific Recipient to support a particular Project, and in which FTA does not take an active role or retain substantial control, in accordance with 31 U.S.C. § 6304.
- (g) Government means the United States of America and any executive department or agency thereof.
- (h) Project means the task or set of tasks listed in the Approved Project Budget, and any modifications stated in the Conditions to the Grant Agreement or Cooperative Agreement applicable to the Project. In the case of the formula assistance program for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. §§ 5307, 5310, and 5311, respectively, the term "Project" encompasses both "Program" and "each Project within the Program," as the context may require, to effectuate the requirements of the Grant Agreement or Cooperative Agreement.
- (i) Recipient means any entity that receives Federal assistance directly from FTA to accomplish the Project. The term "Recipient" includes each FTA "Grantee" as well as each FTA Recipient of a Cooperative Agreement. For the purposes of this Agreement, Recipient is the City.
- (j) Secretary means the U.S. DOT Secretary, including his or her duly authorized designee.
- (k) Third Party Contract means a contract or purchase order, including this Fabrication Agreement, awarded by the Recipient to a vendor or contractor, financed in whole or in part with Federal assistance awarded by FTA.
- (l) Third Party Subcontract means a subcontract at any tier entered into by Contractor or third party subcontractor, financed in whole or in part with Federal assistance originally derived from FTA.
- (m) U.S. DOT is the acronym for the U.S. Department of Transportation, including its operating administrations.

z. Federal Changes. Artist shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement between the City and FTA, as they may be

amended or promulgated from time to time during the term of this contract. Artist's failure to so comply shall constitute a material breach of this contract.

aa. Access to Records.

- (1) The Artist agrees to provide the City and County of San Francisco, the FTA Administrator, the Comptroller General of the United States or any of their authorized representatives access to any books, documents, papers and records of the Artist which are directly pertinent to this Agreement for the purposes of making audits, examinations, excerpts and transcriptions.
- (2) The Artist agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- (3) The Artist agrees to maintain all books, records, accounts and reports required under this Agreement for a period of not less than three years after the date of termination or expiration of this Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case Artist agrees to maintain same until the City, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. 49 CFR 18.36(i)(11).

bb. No Federal Government Obligations to Artist.

- (1) The City and Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this contract and shall not be subject to any obligations or liabilities to the City, Contractor, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.
- (2) The Artist agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

Section 2d. Appendix B

Appendix B is modified to add the following Additional Work, which Contractor shall perform in addition to the Work currently set forth in Appendix B:

The Artist shall subcontract with a Structural Engineering firm to conduct additional engineering services associated with structural engineering of the sculpture Artist shall produce. Contractor shall resolve any problems or issues in the Work identified through the structural engineering peer review process, consult with the engineer during fabrication and installation of artwork, and provide additional artwork renderings as requested by the Arts Commission. If the engineering peer review process identifies problems or issues in the Work that require modification of the fabricated sculpture that alters the appearance of the sculpture, Artist shall seek approval of the Arts Commission prior to making such changes.

Section 2e. Appendix C.

Appendix C is modified to compensate Artist \$60,723 for the Additional Work described in this Amendment, as set out below, by increasing the Contract Amount from \$374,900 to an amended Contract Amount not to exceed \$435,623

Appendix C is hereby deleted and replaced in its entirety with the following:

	Artist Fee	Reimbursable Expenses	Total
Design Phase (Phase Ia Conceptual Design, 1b Design Development & 1c Final Design)			
ARTIST FEE			
Phase 1a Contractor Fee (ArtistTeam)	\$25,000.00		
Phase 1b Contractor Fee (Artist Team)	\$35,000.00		
Fly-through animation	\$5,000.00		
Phase 1 c Contractor Fee (Artist Team)	\$55,000.00		
Campbell studio assistant	\$5,000.00		
REIMBURSABLE EXPENSES			
Drawings, Graphics		\$32,287.00	
Engineering Subrizi		\$35,875.00	
Consultants		\$10,582.00	
Travel (artist team)		\$8,930.00	
Models		\$55,631.00	
Studio space rental (temporary)		\$18,242.00	
Materials research		\$19,257.00	
Insurance		\$60.00	
Revised Structural Engineering Design Phase Arup		\$37,759.00	
Phase II Fabrication Consultation			
Contractor Fee (Artist Team)			
Artist Team	\$45,000.00		
Subconsultants			
Engineering Arup		\$11,500.00	
Architect		\$1,500.00	
Other direct costs			
Travel (Artist Team)		\$5,000.00	
Phase III Installation Consultation			
Contractor Fee (Artist Team)			
Contractor	\$10,000.00		
Studio assistant	\$5,000.00		

Subconsultants			
Engineering Arup		\$7,500.00	
Architect		\$1,500.00	
Other direct costs			
Travel		\$5,000.00	
TOTAL	\$185,000.00	\$250,623.00	\$435,623.00

Section 2g. Appendix D. Such section is hereby amended in its entirety to read as follows:

WHITE LIGHT & WERNER KLOTZ	Artist Fee	Reimbursable Expenses	*Submittal Deadline
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	\$9,650	Paid in multiple split payments
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.	\$40,000	\$14,750	Paid in multiple split payments
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, 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.	\$60,000	\$167,691	Paid in multiple split payments
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.	\$45,000	\$44,532	Artwork shall be delivered to City no later than May 1, 2018.

WHITE LIGHT & WERNER KLOTZ	Artist Fee	Reimbursable Expenses	*Submittal Deadline
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.	\$15,000	\$14,000	TBD
TOTALS	\$185,000	\$250,623	435,623

3. Effective Date. Each of the modifications set forth in Section 2 shall be effective on and after the Effective Date of this Amendment.

4. Legal Effect. Except as expressly modified by this Amendment, all of the terms and conditions of the Agreement shall remain unchanged and in full force and effect.

The remainder of this page has been intentionally left blank.

IN WITNESS WHEREOF, Contractor and City have executed this Amendment as of the date first referenced above.

CITY

CONTRACTOR

Recommended by:



Tom DeCaigny
Director of Cultural Affairs
Arts Commission



Jack Campbell
White Light Inc
1161 De Haro Street
San Francisco, CA 94107
City vendor number: 83573

APPROVED:

San Francisco Municipal Transportation
Agency



Edward D. Reiskin
Executive Director/CEO
San Francisco Municipal
Transportation Agency




Werner Klotz
Werner Klotz Public Art Inc.
35 West 35th Street
New York, NY 10001
City vendor number: 83190

Date: 3.28.17

Approved as to Form:

Dennis J. Herrera
City Attorney

By: 
Robert K. Stone
Deputy City Attorney