

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

**Second Amendment to Agreement between the
City and County of San Francisco and Tomie Arai**

This Second Amendment to the Agreement (this “Amendment”), dated for convenience as March 21, 2019, in San Francisco, California, by and between Tomie Arai (“Contractor”), 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;

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

SUMMARY OF SECOND AMENDMENT

As more particularly described below, this Amendment modifies the Agreement to extend the term two additional years. The term extension is necessary because the construction of the Central Subway Project is delayed, and the Project will require Contractor’s services through the completion of construction.

In addition, this Amendment also adds contract requirements mandated by federal procurement laws.

SECOND AMENDMENT OF AGREEMENT

The Agreement is modified as follows:

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, and the First Amendment and this Second Amendment to the Agreement.

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

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

2a. Section 2. Term of the Agreement

The Term of the Agreement is extended to **December 31, 2020**.

Section 2 is hereby deleted and replaced in its entirety to read as follows:

2. Term of Agreement

The term of this Agreement shall be from March 1, 2011 to December 31, 2020, 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.

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

i. **Section j. was originally called “Conservation” and is now called “Energy Conservation”**

ii. **Original Section n. is deleted in its entirety and replaced with the following:**

Section 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.

iii. **Original Section o. is deleted in its entirety and replaced with the following:**

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.

- iv. Section q. was originally titled “Nondiscrimination” and is now titled “Civil Rights and Nondiscrimination”
- v. Section t. Subcontractor Non-Discrimination Assurances is added:

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."

- vi. **Original Section u. is deleted and replaced in its entirety with the following:**

The following Sections are Added:

- 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.

3. Effective Date. This Amendment shall be effective when fully executed (that is, signed by all parties); each of the modifications set forth in Section 2 shall be effective as of March 1, 2019.

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.

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


CITY

CONTRACTOR

Recommended by:

Tomie Arai


Tom DeCaigny
Director of Cultural Affairs
San Francisco Arts Commission


Tomie Arai
245 West 107th Street, 12H
New York, NY 10025

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APPROVED:

SAN FRANCISCO MUNICIPAL
TRANSPORTATION AGENCY


Edward Reiskin
Director of Transportation
Date: 5.6.19

Approved as to Form:

Dennis J. Herrera
City Attorney

By: 
Robert K. Stone
Deputy City Attorney
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