

GRANT ACCEPTANCE AGREEMENT AND PERMIT TO ENTER

Between

Asian Art Commission of the City and County of San Francisco

and

Asian Art Museum Foundation of San Francisco

(dated **October 5, 2017** for reference purposes)

This Grant Acceptance Agreement and Permit to Enter (the “Agreement”), is dated for reference purposes only as of October 5, 2017, by and between the ASIAN ART COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, a commission of the City and County of San Francisco organized and existing under Article V of the San Francisco Charter (the “Commission”) and the ASIAN ART MUSEUM FOUNDATION OF SAN FRANCISCO, a non-profit corporation organized and existing under the laws of the State of California (the “Foundation,” and together with the Commission, the “Parties”).

RECITALS

WHEREAS, The Asian Art Museum of San Francisco (the “Museum”) is the largest museum in the United States devoted exclusively to the art and cultures of Asia. The Museum showcases, cares for, and grows the City’s collection of more than 18,000 artworks from across Asia. Each year, the Museum organizes and presents thought-provoking special exhibitions that celebrate Asian art from millennia past to cutting-edge contemporary. The Museum’s educational and outreach programs connect a broad, diverse public — including tens of thousands of school students a year — with the historic and living traditions of Asian cultures, sparking conversation, creativity, and cultural empathy in the Bay Area and around the world; and

WHEREAS, The Museum is a charitable trust department of the City and County of San Francisco (the “City”). The City, through the Commission, serves as trustee of Museum charitable trust assets and is in charge of developing and administering the Museum and controlling and managing the City’s Asian art collection. (S.F. Charter Sections 5.100 - 5.101, 5.104). The City owns real property located at 200 Larkin Street, more particularly described on Exhibit A attached hereto (the “Project Location”), and commonly known as the Asian Art Museum of San Francisco, and the Museum’s collection; and

WHEREAS, The Foundation is a private 501(c)(3) charitable organization that exists for the sole purpose of supporting the Museum; and

WHEREAS, The Foundation has proposed to provide the Commission an in-kind grant of construction services to be completed by a third party and permanent gallery improvements, such as new casework and interpretive materials, to be completed by Museum staff with an approximate combined value of \$38,000,000 to complete capital improvements to the Museum (the “Grant”), including renovating approximately 40,000 square feet of existing space (1st, 2nd and 3rd floor existing gallery interiors, modified 1st floor interior public entry and courts, renovated education center, alterations to the existing lower level back of house floor including reconfiguring general storage rooms and office space, expanding an existing mechanical room and removing one skylight to accommodate the added floor of the Pavilion building) and adding approximately 13,000 square feet for a new 1st floor Pavilion building (special exhibition gallery,

lobby, lounge, restrooms) above the existing lower level building with a new 2nd floor Roof Gallery and mechanical/storage room above the Pavilion building with three new entries for access, plus an attached new three level freight elevator, elevator machine room partially above the corner generator building, loading dock improvements, and such other improvements as the Commission and the Foundation may agree in writing (the “Improvements”); and

WHEREAS, The Foundation proposes to hire and pay for the services of a contractor (“Contractor”) to perform the Improvements (other than the permanent gallery improvements to be completed by Museum staff), which Contractor shall be approved in advance by the Commission; and

WHEREAS, On September 6, 2017 the Asian Art Commission approved the acceptance of the Grant from the Foundation as Resolution No: C17-037.

Now, therefore, it is agreed as follows:

The Foundation hereby makes the Grant to the Commission, and, subject to and contingent upon approval by the Commission, the Commission accepts the Grant from the Foundation and authorizes the Foundation to perform the Improvements subject to the following terms and conditions:

1. Grant in Kind

- 1.1. **Permission to Enter; Term.** In addition to all such rights that the Foundation currently has by law or by contract, the Commission additionally confers to the Foundation, its agents and Contractor a revocable, personal, unassignable, non-exclusive and non-possessory privilege to enter upon and use the identified area at the Museum, more particularly described in Exhibit B attached hereto (the “Permit Area”), for the limited purpose and subject to the terms, conditions and restrictions set forth below.

The privilege given to the Foundation, its agents and Contractor pursuant to this Agreement is temporary only and shall commence when the dates are confirmed and agreed to by the Parties in accordance with Section 1.2.4 below.

- 1.2. **Scope of Work.** In addition to all such rights that the Foundation currently has by law or by contract, the Foundation may also enter and use the Permit Area for the purpose of causing Contractor to perform the Improvements. The Foundation may cause Contractor to perform the Improvements in the Permit Area only upon satisfaction of the following conditions, which are for the sole benefit of the City:

- 1.2.1. **Construction Contract.** The Foundation’s contract with the Contractor (“the Construction Contract”) shall require the Contractor to perform the Improvements in all material respects in accordance with specifications as outlined in the construction drawings titled 50% Construction Document Specifications dated June 23, 2017 as modified, if applicable, pursuant to the Transformation Project Approval Protocols described in Exhibit C attached hereto. The Commission acknowledges the formation of the Foundation Transformation Project Committee of the Board of Directors of the Foundation to provide oversight for the design

and construction of the Improvements. The Commission further acknowledges that the Transformation Project Approval Protocols apply to changes in scope or budget and contracts during design phases and to contracts or changes in contracts for, and during, construction. The Foundation will notify the Commission of changes that, according to the Transformation Project Approval Protocols, require approval of the Foundation Executive Committee.

- 1.2.2. **Costs.** The Foundation shall bear all costs or expenses of any kind or nature in connection with its use of the Permit Area to perform the Improvements, including payment to the Contractor to perform the Improvements, and shall keep the Permit Area free and clear of any liens or claims of lien arising out of or in any way connected with its use of the Permit Area.
- 1.2.3. **City Not Liable for Costs.** The Foundation shall provide evidence satisfactory to the Commission of the acknowledgment of Contractor and any of its subcontractors that the City is not financially liable, and shall not be invoiced, for any costs incurred in performing any work related to the Improvements, except as expressly approved by the City in writing.
- 1.2.4. **Start and Finish Dates.** The Foundation shall coordinate with the Construction Project Manager identified in paragraph 10 below to determine appropriate start and finish dates and times for Contractor to perform the Improvements that do not interfere with the regular operation of the Museum. The Commission shall approve the start and finish dates. The Foundation shall not authorize Contractor to commence work until the Commission has approved the start date(s) and time(s) in writing executed by the Construction Project Manager.
- 1.2.5. **Exercise of Reasonable Care.** The Foundation shall use, and shall cause Contractor to use, reasonable care at all times to avoid any damage or harm to City's property. The Foundation shall cause Contractor to do everything reasonably within its power, both independently and upon request by City, to prevent and suppress fires on and adjacent to the Permit Area attributable to the Foundation's use hereunder. Nothing in this Section shall in any way limit Foundation's indemnity obligations described elsewhere in this Agreement or its obligations otherwise required by law.
- 1.2.6. **Covenant to Maintain Permit Area.** In connection with its use hereunder, the Foundation shall at all times, at its sole cost, maintain the Permit Area in a good, clean, safe, secure, and sightly condition, so far as the Permit Area may be affected by the Foundation's or Contractor's activities hereunder.
- 1.2.7. **Restoration of Permit Area.** Within a reasonable time, but in no case longer than fifteen (15) days, following completion of the Improvements, Foundation shall cause Contractor to surrender the Permit Area in the same condition as received (subject to the Improvements), free from hazards and clear of all debris. At such time, Foundation shall cause Contractor to remove all of its property from the Permit Area (except for any Improvements), and shall repair, at its cost, any damage caused to the Permit Area caused by such removal. Foundation's obligations under this paragraph shall survive any termination of this Agreement.

Foundation accepts the Permit Area in its “AS-IS” condition, without representation or warranty of any kind by City, its officers, agents, or employees.

1.2.8. **Repair of Damage.** Neither Foundation nor Contractor shall do anything about the Permit Area that will cause damage to any of the City’s property. If any portion of the Permit Area or any property of City located on or about the Permit Area is damaged by any of the activities conducted by Foundation or Contractor hereunder, Foundation shall promptly, at its sole cost, repair or cause Contractor to repair any and all such damage and restore or cause Contractor to restore the Permit Area or property to its previous condition (subject to the Improvements). Foundation shall or cause Contractor to complete any such required repairs prior to the expiration or termination of this Agreement.

1.3. **Limitation on Obligation; Evidence of Available Funds.** The Commission shall not be obligated to fund any funding shortfall pursuant to this Agreement unless the Commission expressly so agrees in writing. Foundation shall not commence work in the Permit Area unless and until it has certified to Commission in writing that it has adequate funds to procure all of the Improvements.

1.4. **Restrictions on Use.** Foundation agrees that, by way of example only and without limitation, the following uses of the Permit Area by Foundation, Contractor, or any other person claiming by or through Foundation are inconsistent with the limited purpose of this Agreement and are strictly prohibited as provided below:

1.4.1. **Dumping.** Neither Foundation nor Contractor shall dump or dispose of refuse or other unsightly materials on, in, under or about the Permit Area.

1.4.2. **Hazardous Material.** When use or storage of hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Foundation shall require Contractor to give the City reasonable advance notice, exercise utmost care and carry on such activities under supervision of properly qualified personnel. Except as provided in the preceding sentence, Foundation shall not cause, nor shall Foundation allow Contractor or any of its other Agents or Invitees (as defined below) to cause, any Hazardous Material (as defined below) to be brought upon, kept, used, stored, generated or disposed of in, on or about the Permit Area, or transported to or from the Permit Area. Foundation shall immediately notify City when Foundation learns of, or has reason to believe that, a release of Hazardous Material has occurred in, on or about the Permit Area. Foundation shall further comply with all laws requiring notice of such releases or threatened releases to governmental agencies, and shall take all action necessary to mitigate the release or minimize the spread of contamination. In the event that Foundation, Contractor, or Foundation’s other Agents or Invitees cause a release of Hazardous Material, Foundation shall, without cost to City and in accordance with all laws and regulations, return the Permit Area to the condition immediately prior to the release. In connection therewith, Foundation shall afford City a full opportunity to participate in any discussion with governmental agencies regarding any settlement agreement, cleanup or abatement agreement, consent decree or other compromise proceeding involving Hazardous Material. For purposes hereof, “Hazardous Material” means material that, because of its quantity,

concentration or physical or chemical characteristics, is at any time now or hereafter deemed by any federal, state or local governmental authority to pose a present or potential hazard to public health, welfare or the environment. Hazardous Material includes, without limitation, any material or substance defined as a “hazardous substance, pollutant or contaminant” pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 et seq., or pursuant to Section 25316 of the California Health & Safety Code; a “hazardous waste” listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the Permit Area or are naturally occurring substances in the Permit Area, and any petroleum, including, without limitation, crude oil or any fraction thereof, natural gas or natural gas liquids. The term “release” or “threatened release” when used with respect to Hazardous Material shall include any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in, on, under or about the Permit Area. For purposes hereof, the term “Agents” shall include the agents, employees, officers, contractors and representatives of Foundation, and the term “Invitees” shall include the clients, customers, invitees, guests, licensees, or assignees of Foundation.

2. **Contractor/Installation Requirements.** Foundation shall, at its own expense and at no cost to the City, hire Contractor selected by Foundation and approved by the Commission to perform the Improvements. Foundation shall require Contractor or any such other contractors or agents it procures to perform work related to the Improvements to comply with the following requirements in performing work at the Museum:
 - 2.1. Post signs alerting the public to the date and time the Improvements will take place.
 - 2.2. Implement appropriate measures to ensure public safety while working at the Museum, including, but not limited to, erecting safety barriers and caution signage and/or tape.
 - 2.3. Pay its workers any prevailing rate of wage that may be applicable for the craft or classification of work performed.
 - 2.4. Adhere to Occupational Safety & Health Administration standards.
 - 2.5. The contracts that Foundation enters into with any contractors for all or any portion of the Improvements shall contain the following provisions:
 - 2.5.1. Insurance Requirements for Foundation’s Contractor: Foundation’s Contractor shall maintain in force, during the full term of this Agreement, insurance in the following amounts and coverage:
 - 2.5.1.1. Workers’ Compensation with Employer’s Liability Limits not less than \$1,000,000 each accident; the Worker’s Compensation policy shall be endorsed with a waiver of subrogation in favor of the City for all work performed by the Contractor, its employees, agents and subcontractors and

- 2.5.1.2. Comprehensive General Liability Insurance with limits not less than \$5,000,000 each occurrence, \$10,000,000 General Aggregate, Combined Single Limit for Bodily Injury and Property Damage; including coverage for Contractual Liability, independent contractors, Explosion, Collapse, and Underground (XCU), Personal Injury, Broadform Property Damage, and completed operations and
 - 2.5.1.3. Commercial Automobile Liability Insurance with not less than \$2,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned, and Hired auto coverage, as applicable.
 - 2.5.1.4. An excess or umbrella policy may be used to meet the required insurance limits in this section.
 - 2.5.1.5. The Commission reserves the right to increase the insurance limits required in this agreement if conditions reasonably necessitate such increases.
- 2.5.2. Additional Coverages.
- 2.5.2.1. **Builder's Risk Insurance.** Foundation or Foundation's Contractor shall provide "Special Form" (All Risk) Builder's Risk Insurance on a replacement cost basis as follows:
 - 2.5.2.2. **Amount of Coverage.** The amount of coverage shall be equal to the full replacement cost of the Improvements performed by the Contractor on a completed value basis, including periodic increases or decreases in values through change orders. The policy shall provide for no deduction for depreciation. The policy shall provide coverage for "soft costs," such as but not limited to design and engineering fees, code updates, permits, bonds, insurances, and inspection costs caused by an insured peril; the policy may limit the amount for soft costs but such limit shall not be less than 5% of the coverage amount. The Builder's Risk Insurance shall also include the full replacement cost of Foundation or City-furnished equipment, if any.
 - 2.5.2.3. **Parties Covered.** The Builder's Risk policy shall identify the Foundation as the loss payee. The policy shall name as insured the Commission, the Foundation, the City and County of San Francisco, the Contractor and its subcontractors of every tier.
 - 2.5.2.4. **Included Coverage.** The Builder's Risk Insurance shall include, but shall not be limited to, the following coverages:
 - 2.5.2.4.1. All damages of loss to the Work and to appurtenances, to materials and equipment to be incorporated into the Project

while the same are in transit, stored on or off the Project site, to construction plant and temporary structures.

2.5.2.4.2. The perils of fire, lightning, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, smoke damage, damage by aircraft or vehicles, vandalism and malicious mischief, theft, collapse, and water damage.

2.5.2.4.3. The costs of debris removal, including demolition as may be made reasonably necessary by such covered perils, resulting damage, and any applicable law, ordinance, or regulation.

2.5.2.4.4. Start up and testing and machinery breakdown including electrical arcing.

2.5.2.4.5. Consequential loss (lost revenues and costs of funding or financing when a covered risk causes delay in completing the Work). In the event the Foundation or the City receives coverage specifically for a consequential loss associated with delay to the completion of the Project, such specific amount shall be credited against any liquidated damages for delay for which the Contractor would otherwise be responsible.

2.5.2.5. **Deductibles.** The Builder's Risk Insurance may have a deductible clause not to exceed \$25,000. Contractor shall be responsible for paying any and all deductible costs. The deductible for coverage of All Perils shall not exceed \$50,000 except for earthquake and flood perils.

2.5.3. Professional Liability Insurance: In the event that Contractor employs professional engineering or land surveyor services for performing field engineering or preparing design calculations, plans and specifications, Contractor shall require the retained engineers and land surveyors to carry professional liability insurance with limits not less than \$1,000,000 each claim with respect to negligent acts, errors, or omissions in connection with professional services to be provided under this Contract.

2.5.4. Environmental Pollution Liability: In the event that hazardous and/or contaminated material is discovered during the course of the work, and the Contractor or its subcontractor is required to perform abatement or disposal of such material, then the Contractor, or its subcontractors, who perform abatement of hazardous or contaminated materials removal shall maintain in force, throughout the term of this Contract, Contractor's Pollution Liability and/or Asbestos Pollution Liability and/or Errors & Omissions insurance applicable to the work being performed with limits not less than \$5,000,000 combined single limit per occurrence per policy period of one year, including coverages for on-site or off-site third party claims for bodily injury and property damage. This coverage shall also be endorsed to include Non-Owned Disposal Site coverage.

- 2.5.5. Commercial General Liability and Business Automobile Liability Insurance policies must provide the following:
 - 2.5.5.1. Name as Additional Insured the Commission, the Foundation, and the City and County of San Francisco, its Officers and Employees.
 - 2.5.5.2. That such insurance applies separately to each insured against whom claim is made or suit is brought.
- 2.5.6. All policies shall provide thirty (30) days' advance written notice to the Commission of cancellation mailed to the address provided in Section 10 of this Agreement (Contacts/Notices), provided, however, that in the event of cancellation for non-payment of premiums, only ten (10) days' advance written notice to the Commission shall be provided.
- 2.5.7. Should any of the required insurance be provided under a claims-made form, Foundation's Contractor shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three 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.
- 2.5.8. Except for professional liability insurance, should any required insurance be provided under a form of coverage that includes a general aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general aggregate limit shall be double the occurrence or claim limits specified above.
- 2.5.9. Before the Contractor commences any operations under this Agreement, Foundation or the Contractor shall furnish to City certificates of insurance and additional insured policy endorsements, in form and with insurers satisfactory to City; such insurers shall have an AM Best rating of not less than A-, VIII, and shall be authorized to do business in the State of California; such certificates shall evidence all coverages set forth above, and the Foundation shall furnish complete copies of policies promptly upon City request. Approval of insurance coverage by the Commission shall not diminish the liability of Foundation.
- 2.5.10. Approval of the insurance by the Commission shall not relieve or decrease the extent to which Foundation's Contractor or subcontractor of any tier may be held responsible for payment of any and all damages resulting from its operations. Contractor shall be responsible for all losses not covered by the policy, excluding damage caused by earthquake and flood consistent with section 7105 of the California Public Contract Code in excess of 5 percent of the Contract Sum, including the deductibles.
- 2.5.11. If, at any time during the life of this Contract, Foundation's Contractor fails to maintain any item of the required insurance in full force and effect, all activities permitted under this agreement may, at the Commission's sole option, be discontinued immediately, until notice is received by the Commission that such

insurance has been restored to full force and effect and that the premiums therefor have been paid for a period satisfactory to the Commission.

- 2.6. **Warranty.** The Foundation's contract with Contractor shall require that the Foundation's Contractor warrant and guarantee to the Foundation and City that materials and equipment provided under the Construction Contract will be at least of the quality specified and new unless otherwise required or permitted by the construction specifications and if no quality is specified, then the materials and equipment shall be of commercial grade, suitable for heavy public use in facilities of similar size and complexity; that the work will be free from defects, and that the work will conform to the requirements of the Construction Contract documents. Contractor shall additionally warrant manufacturers' product warranties as may be required by the Construction Contract documents.

The Construction Contract shall further require that the Contractor deliver to the City product warranties and guarantees conforming to the requirements of the Construction Contract specifications prior to final acceptance.

- 2.7. **Third Party Beneficiary:** Foundation agrees that in any contract it enters into for the construction of the Improvements, the City shall be named as a third-party beneficiary, including, without limitation, of all warranties of the work, and as an additional obligee of all required performance bonds.
- 2.8. **Prevailing Wages:** The Construction Contract will require Contractor and all other contractors and subcontractors to pay their workers any prevailing rate of wage that may be applicable for the craft or classification of work performed.
- 2.9. **Indemnification Provided by Contractor**

- 2.9.1. To the fullest extent permitted by law, including California Civil Code section 2782, Contractor shall assume the defense of, indemnify and hold harmless the City, the Foundation, their respective boards and commissions, and all of their officers, agents, members, employees, authorized representatives, or any other persons deemed necessary by any of them acting within the scope of the duties entrusted to them, from all claims, suits, actions, losses and liability of every kind, nature and description, including but not limited to attorney's fees, directly or indirectly arising out of, connected with or resulting from the performance of the work. This indemnification shall not be valid in the instance where the loss is caused by the sole negligence or willful misconduct of any person indemnified herein. Contractor's obligations under this Paragraph apply regardless of whether or not such claim, suit, action, loss or liability was caused in part or contributed to by an Indemnatee. However, without affecting the rights of the City or Foundation under any provision of the Construction Contract, Contractor shall not be required to indemnify and hold harmless City or Foundation for liability attributable to the active negligence of City or Foundation, provided such active negligence is determined by agreement between Contractor and City or Foundation, or by the findings of a court of competent jurisdiction. In instances where City or Foundation is shown to have been actively negligent and where City's or Foundation's active negligence accounts for only a percentage of the

liability involved, the obligation of Contractor will be for that entire portion or percentage of liability not attributable to the active negligence of City or Foundation.

2.9.1.1. Contractor's defense, indemnity and hold harmless obligations shall extend to Foundation Consultants (e.g., design professionals and construction managers) providing services under separate written agreement with the Foundation covering any portion of the Project and designated as additional insured in the contract documents.

2.9.1.2. Contractor's defense, indemnity and hold harmless obligations shall not extend to the liability of a Foundation Consultant designated as additional insured in the contract documents, or its agents, employees or subconsultants arising out of, connected with or resulting from such indemnitee's own active negligence, errors or omissions or from (1) such indemnitee's preparation or approval of maps, plans, opinions, reports, surveys, Change Orders, designs or Specifications, or (2) such indemnitee's issuance of or failure to issue directions or instructions provided that such issuance or failure to issue is the primary cause of the damage or injury.

2.9.2. Contractor acknowledges that any claims, demands, losses, damages, costs, expenses, and legal liability that arise out of, result from, or are in any way connected with the release or spill of any legally designated hazardous material or waste or contaminated material as a result of the work performed under this Contract are expressly within the scope of this indemnity, and that the costs, expenses, and legal liability for environmental investigations, monitoring, containment, removal, repair, cleanup, restoration, remedial work, penalties, and fines arising from the violation of any local, state, or federal law or regulation, attorney's fees, disbursements, and other response costs are expressly within the scope of this indemnity.

2.9.3. The City, Foundation, and other indemnified parties specified in Section 2.9.1 above shall provide Contractor with prompt written notice after receipt of any claim, action or demand ("claim") made by a third party against the City, the Foundation, and/or other indemnified party, provided, however, that no delay on the part of the City, the Foundation, or other indemnified party shall relieve Contractor from any obligation hereunder. Contractor shall obtain the City's, the Foundation's, and other indemnified parties' consent for Contractor's choice of counsel and such consent shall not be unreasonably withheld or delayed, such that any responsive pleadings may be timely filed, and in every instance, within thirty (30) days after City, Foundation, or other indemnified party has given notice of the claim, and provided further that City and other indemnified parties may retain separate co-counsel at their expense and participate in the defense of the claim. If the interests of Contractor and the City, Foundation, and/or other indemnified party conflict and counsel chosen by Contractor cannot, in City's, Foundation's or other indemnified parties' reasonable opinion, adequately represent Contractor, City, Foundation, and/or other indemnified party, then the cost and expense associated with the City, Foundation, and/or other indemnified party retaining

separate co-counsel shall be borne by Contractor, otherwise, the cost and expense of separate co-counsel retained by City, Foundation, and/or other indemnified party shall be borne by the City, Foundation, or other indemnified party, as applicable. Subject to Contractor's obligation to reimburse City's, Foundation's, and other indemnified parties' costs of same, City, Foundation, and other indemnified parties will assist Contractor in the defense of the claim by providing cooperation, information and witnesses, as needed to the extent there is no material conflict of interest.

2.9.3.1. So long as Contractor has assumed and is conducting the defense of a claim in accordance with the preceding subparagraph, (i) Contractor will not consent to the entry of any judgment or enter into any settlement with respect to the claim without the prior written consent of City, Foundation, or other indemnified party, as applicable, which consent will not be unreasonably withheld, unless the judgment or proposed settlement involves only the payment of money damages by Contractor and does not impose any obligation upon City, Foundation, and/or other indemnified party in connection with such judgment or settlement and Contractor obtains the full and complete release of City, Foundation, and/or other indemnified parties; and (ii) City, Foundation, and/or other indemnified parties will not consent to the entry of judgment or enter into any settlement without the prior written consent of Contractor.

2.9.3.2. If Contractor does not assume and conduct the defense of claim as required above, (i) City, Foundation, or other indemnified party may defend against, and consent to, the entry of any judgment or enter into any settlement with respect to the claim in any manner it reasonably may deem appropriate, and City or other indemnified party need not consult with, or obtain any consent from, Contractor, and (ii) Contractor will remain responsible for any losses City, Foundation, and/or other indemnified party may suffer resulting from, arising out of, relating to, in the nature of, or caused by the claim to the fullest extent provided in this Paragraph.

2.9.4. Contractor's liability shall not be limited to the amount of insurance coverages required under the contract documents.

2.9.5. In the event that Contractor and its insurance carrier(s) in bad faith refuse to negotiate and compensate a third party or parties for property damage or personal injuries which arise out of Contractor's performance of the work, the City or Foundation shall have the right to estimate the amount of damages and to pay the same, and the amount so paid shall be deducted from the amount due Contractor under this Contract, or an appropriate amount shall be retained by the Foundation until all suits or claims for said damages shall have been settled or otherwise disposed of and satisfactory evidence to that effect shall have been furnished to the Foundation.

2.9.6. The defense and indemnity obligations of this Paragraph shall survive Final Completion and termination of this Contract. Contractor's defense and indemnity

obligations shall extend to claims arising after the work is completed and accepted if the claims are directly related to alleged acts or omissions by Contractor that occurred during the course of the Work.

2.10. Performance and Payment Bond

2.10.1. The Construction Contract shall provide that, prior to commencing work, Contractor shall provide the following bonds using the form provided by the Commission:

2.10.1.1. a corporate surety bond, in a sum not less than 100 percent of the Contract Sum, to guarantee the faithful performance of the Contract (“Performance Bond”); and

2.10.1.2. a corporate surety bond, in a sum not less than 100 percent of the Contract Sum, to guarantee the payment of labor, materials, supplies, and equipment used in the performance of the Contract (“Payment Bond”).

2.10.2. The Construction Contract shall provide that said Performance Bond shall cover all corrective work required during the correction period, all warranty and maintenance work required by the Contract, and any and all work required to correct latent defects.

2.10.3. The Construction Contract shall provide that corporate sureties issuing these bonds and Bid bonds shall be legally authorized to engage in the business of furnishing surety bonds in the State of California. All sureties shall have a current A.M. Best Rating not less than “A-, VIII” and shall be satisfactory to the City.

2.11. Liability of City. The Construction Contract shall provide that Contractor agrees and acknowledges, and shall cause its subcontractors to agree and acknowledge in writing, that the City and County of San Francisco is not financially liable, and shall not be invoiced, for any costs incurred in performing any work related to the Improvements, except as expressly approved by the City in writing.

3. **Compliance with Laws.** The Foundation shall, at its expense, conduct and cause to be conducted all activities on the Permit Area allowed hereunder in a safe and prudent manner and in compliance with all laws, regulations, codes, ordinances and orders of any governmental or other regulatory entity (including, without limitation, the Americans with Disabilities Act), whether presently in effect or subsequently adopted and whether or not in the contemplation of the parties. Foundation shall, at its sole expense, procure and maintain in force at all times during its use of the Permit Area any and all business and other licenses or approvals necessary to conduct the activities allowed hereunder. Foundation understands and agrees that the Commission is entering into this Permit in its capacity as a property owner with a proprietary interest in the Permit Area and not as a regulatory agency with police powers. Nothing herein shall limit in any way the Foundation’s or Contractor’s obligation to obtain any required regulatory approvals from City departments, boards or commissions or other governmental regulatory authorities or limit in any way City’s exercise of its police powers.

4. **Indemnification.**

- 4.1. **Indemnification by Foundation.** The Foundation shall defend, indemnify and save harmless the City, its officers, commissioners, agents and employees from any and all loss, expense, damage, injury, liability and claims thereof for injury to or death of a person, including employees and agents of the Commission, the Foundation or Contractor, and for loss of or damage to property, resulting directly or indirectly from (i) any Grant-related activity conducted on the premises of the Museum, or (ii) the use of the Museum by the Commission, Foundation or Contractor, or their respective agents, employees, volunteers, and contractors under this Agreement, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except and to the extent where such loss, damage, injury, liability or claim is the result of the gross negligence or willful misconduct of the City, its officers, agents or employees. The Foundation's indemnity obligations shall not extend to claims covered by commercial insurance purchased by the City.
- 4.2. **Indemnification by City.** The City, as authorized by the Board of Supervisors under Resolution Number ____, shall defend, indemnify and save harmless the Foundation's trustees, officers and employees (but not the Foundation itself) from any and all loss, expense, damage, injury, liability and claims thereof for injury to or death of a person, including employees and agents of the Commission, the Foundation or Contractor, and for loss of or damage to property, resulting directly or indirectly from (i) any Grant-related activity conducted on the premises of the Museum or (ii) the use of the Museum by the Commission, Foundation or Contractor, or their respective agents, employees, volunteers, and contractors under this Agreement, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on the City or the Foundation, except and to the extent where such loss, damage, injury, liability or claim is the result of the gross negligence or willful misconduct of the Foundation, as applicable, or their officers, commissioners, directors, agents or employees. The City's indemnity obligations shall not extend to claims covered by insurance maintained by the Foundation.
- 4.2.1. The City Attorney's Office shall represent any Foundation trustee, officer or employee in legal proceedings arising from such claims, or shall secure alternative counsel to provide legal representation to any Foundation trustee, officer or employee in such circumstances.
- 4.2.2. **Limitations.** The obligations of the City under this Agreement to indemnify the Foundation's trustees, officers and employees (each an "Indemnified Person") is subject to the following conditions and limitations.
- 4.2.2.1. The City shall not indemnify any Indemnified Person who does not (i) promptly notify the Office of the City Attorney of any claim or litigation which is threatened or brought against the Indemnified Person and which is covered by the City's indemnification obligation under this Agreement where such delay in notification materially prejudices the City, or (ii) cooperate with reasonable requests by the City or its agents to prepare for and assist in the defense of claims against the City or the that Indemnified Person arising under this Agreement.

4.2.2.2. The City shall have any right to take action that it deems appropriate at its own cost and expense and without obligating the Indemnified Person to take or refrain from taking any action, to defend any claim or lawsuit, including, without limitation, the right to pay or otherwise settle with other persons for or in the name of any Indemnified Person, or to pursue any litigation to final determination, including the right of appeal.

4.3. Both the City, including the Commission, and the Foundation as an entity agree that they will not initiate any action of any type against the Foundation's officers, directors, agents, and employees in an attempt to recover the cost of any losses of any type associated with this agreement except and to the extent where such loss, damage, injury, liability or claim is the result of the gross negligence or willful misconduct of Foundation's officers, commissioners, directors, agents or employees.

5. **Insurance Requirements for Foundation.** Without in any way limiting Foundation's liability pursuant to the "Indemnification" section of this Agreement (Section 4), Foundation shall maintain in force at all times during the term of this Agreement insurance in the amounts and coverage specified in Exhibit D, and shall add as an additional insured the City and County of San Francisco, its Officers, Agents, and Employees. Before commencing any operations under this Agreement, the Foundation shall furnish to the Commission certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A-, VIII or higher, that are authorized to do business in the State of California, and that are satisfactory to the Commission, in form evidencing all coverages set forth above. Failure to maintain insurance shall constitute a material breach of this Agreement. Compliance with the provisions of this section shall in no way relieve or decrease the Foundation's indemnification obligations under this Agreement or any of the Foundation's other obligations hereunder.

6. **Public Relations.** The Commission and the Foundation shall use good faith efforts to cooperate on matters of public relations and media responses related to the Improvements. The Parties shall also use good faith efforts to cooperate with any inquiry by the other Party or by the public in regard to this Agreement. This Agreement, and any report or memorandum between the Parties, shall be subject to the applicable disclosure requirements of the City's Sunshine Ordinance and the California Public Records Act. Any response to an inquiry by a news or community organization to the Commission or Foundation in reference to the Improvements shall include a recommendation to contact the other Party. Neither the Foundation nor the Commission shall issue a press release in regard to this Agreement without providing prior notice to the other party. To facilitate the execution of this Section, the Commission and the Foundation have designated one person as a spokesperson with respect to this Agreement. All media contacts to the Commission or to the Foundation will be directed to the Director of Communications at the address provided for by the Commission and the Foundation in Section 10 below. Nothing in this Agreement shall prohibit Foundation or the Commission from discussing this Agreement in response to inquiries from the public or the press.

7. **Final Acceptance.** Upon notice from Foundation that the Improvements are complete, in accordance with the construction specifications, the Commission shall, within 10 working days of such notice, perform a final inspection. Contingent on conducting this inspection,

Commission must receive as-built drawings that are marked-up on hard copy of construction drawings, operating manuals, all warranties and any additional requirements as outlined in the construction specifications. Upon the Commission's inspection and decision to accept the work as being in accordance with the approved plans, the Commission will, no later than 5 days from such decision to accept the work prepare a letter of final acceptance (the "Acceptance Letter") addressed to Foundation. Upon receipt of the Acceptance Letter, Foundation shall remove all of its property from the Permit Area within 30 working days and shall repair, at Foundation's cost, any damage to the Museum caused by such removal or caused by Foundation's construction activities in the Permit Area, and shall restore the Permit Area to its condition prior to construction of the Improvements undertaken by Foundation (subject to the Improvements). Prior to delivery of the Acceptance Letter to Foundation, the Improvements shall not be open to the public.

8. **Delivery of Improvements.** The Foundation shall deliver the Improvements undertaken by Foundation and its agents or contractor free of all liens, easements or potential claims relating to the construction and shall provide Commission fully executed waivers and releases from all contractors and subcontractors hired by Foundation of all claims against the City, its employees and agents. Upon delivery of the Improvements undertaken by the Foundation, the Foundation shall assign to the City any warranties or guaranties required by its contracts with the contractors and subcontractors hired by Foundation. Foundation shall also assign to the City the right to any available remedies for latent defects.

9. **Termination By the Commission for Cause.**

9.1. **Grounds for Termination.** The Commission may terminate this Agreement and the Improvements to be performed hereunder for cause in the event of (i) a material default in performance of the obligations of the Foundation under the Agreement or (ii) the failure by the Contractor to perform any material obligation under the Construction Contract, if the failure has continued for a period of 7 days after the Foundation or the Architect (as defined in the Construction Contract) demands in writing that the Contractor cure such failure; provided, however, if by its nature the failure cannot be cured within 7 days, the Contractor may have such longer period as is reasonably necessary to cure the failure, provided that the Contractor shall have promptly commenced to cure within said 7 day period and shall thereafter diligently prosecute the cure to completion. The Construction Contract shall require the Contractor to indemnify, defend, protect and hold the Commission harmless against any liability, claim, damage, loss or penalty which may be threatened or may in fact arise during the period any such failure is uncured.

9.2. **Process for Termination.**

9.2.1. In order to effectuate its termination right, the Commission shall give notice to the Foundation of its intent to do so at least ten(10) business days before exercising such right, unless the circumstances would render it unreasonable to provide such notice, in which case the Commission shall give notice to the Foundation that is reasonable under the circumstances.

9.2.2. If the Foundation does not agree with the termination elected by the Commission, Foundation and the Commission shall negotiate in good faith regarding whether

grounds exist for termination of the Agreement and, if applicable, the process and terms associated with such termination. If the Commission so requests, the Foundation shall exercise commercially reasonable efforts to include the Commission in the Foundation’s discussions with the Contractor regarding the grounds for termination asserted by the Commission, the Contractor’s obligations and/or efforts to cure, and/or the process and terms associated with such termination.

9.2.3. The Foundation and the Commission shall endeavor to resolve any disputes as to whether the Construction Contract should be terminated on the grounds of default by the Contractor by mediation which, unless the Foundation and the Commission mutually agree otherwise, shall be administered by a private mediator mutually selected by the Foundation and the Commission, or, if the parties are unable to agree upon a mediator, by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of this Agreement.

10. Contacts/Notices Commission and Foundation: Asian Art Museum, 200 Larkin Street, San Francisco, CA 94102

Media and Public Relations	Construction Project Manager
Tim Hallman	Caryl Sherpa
thallman@asianart.org	csherpa@asianart.org
415 581 3711	415 581 3763

11. Miscellaneous.

11.1. This Agreement shall be governed and construed in accordance with the laws of the State of California and the City and County of San Francisco.

11.2. This Agreement may be amended or modified only in writing signed by the Foundation and the Commission.

11.3. This Agreement (including the Exhibits hereto, which are incorporated herein by reference) contains the entire understanding between the Parties as of the date of this Agreement, and all prior written or oral negotiations, discussions, understandings and agreements are merged herein.

11.4. All actions described herein including but not limited to the performance of the Improvements as permitted herein, are subject to and must be conducted and accomplished in accordance with the applicable requirements of the City’s charter, its municipal code and applicable state and federal laws, building codes and regulations.

11.5. Except as expressly provided to the contrary, all approvals, consents and determinations to be made by the City hereunder may be made by the Chair of the Commission or his or her designee in his or her sole and absolute discretion.

IN WITNESS WHEREOF, the Parties have indicated their approval effective as of the respective dates set forth by their names.

Approvals:

Asian Art Commission, City and County of San Francisco

By: _____
Akiko Yamazaki, Chair
Asian Art Commission

Asian Art Museum Foundation of San Francisco,
a Non-profit corporation

By: _____
Timothy F. Kahn, President
Asian Art Museum Foundation of San Francisco

APPROVED AS TO FORM:

DENNIS J. HERRERA
CITY ATTORNEY

By: _____
Lauren Curry
Deputy City Attorney

Attachments:

- Exhibit A: Project Location
- Exhibit B: Permit Area
- Exhibit C: Transformation Project Approval Protocols
- Exhibit D: Insurance

EXHIBIT A
Project Location

EXHIBIT B
Permit Area

EXHIBIT C:
Transformation Project Approval Protocols
Asian Art Museum Foundation
Transformation Project Committee
Gallery Transformation Project Approval Protocols

DESIGN PHASES

Basis of Project Budget and Scope:

- Overall budget and scope refer to the approved Transformation Project Budget and Scope, including Contingency, as approved by the Transformation Project Committee and the Executive Committee at that point in time. Contingency may be used for new contracts and contract changes at the discretion of the party granted the right to approve within their financial limit.

Day-to-day project management and direction:

- Construction Project Manager (CPM)

Financial Oversight:

- Chief Operating Officer/Chief Financial Officer (COO/CFO)

Major Design Direction & Key Program Decisions:

- Executive Director

Completion of each Design Phase:

- Staff and CPM to review and provide comments to Executive Director on scope and deliverables. CPM to provide review and comments on budget.
- Executive Director with CPM to make report to the Transformation Project Committee (TPC).
- TPC to provide report to Foundation Executive Committee (FEX), including recommendation for approval of phase completion and authorization to proceed with subsequent design phase as outlined below.

Changes in Design Scope and/or Overall Project Budget during Design Phases and Construction Documents:

- Staff and CPM to review and provide comments to Executive Director on any proposed scope changes. CPM to provide review and comments on budget and schedule impact.
- Executive Director to review and make a request to the TPC, with assistance from CPM.
- TPC to review and either reject change request or provide recommendation to FEX for approval of change. FEX to provide report to the Asian Art Museum Foundation (Foundation) with assistance from the TPC or CPM as required.

New Contracts / Changes in Existing Contracts during Design Phases and Construction Documents:

- New contracts less than \$100,000 and consistent with the overall budget and scope are recommended for approval by the CPM to the COO/CFO and/or Executive Director and signed by either the COO/CFO or Executive Director.

- New contracts between \$100,000 and \$350,000 and consistent with the overall budget and scope are approved by the TPC.
- New contracts over \$350,000 are approved by the FEX.
- Changes to existing contracts less than \$100,000 and consistent with the overall budget and scope are recommended for approval by the CPM to the COO/CFO and/or Executive Director and signed by either the COO/CFO or the Executive Director.
- Changes to existing contracts between \$100,000 and \$350,000 and consistent with the overall budget and scope are approved by the TPC.
- Changes to existing contracts over \$350,000 are approved by the FEX.

Contracts / Changes in Contracts for, and during, Construction:

- New contracts less than \$100,000 and consistent with the overall budget and scope are recommended for approval by the CPM to the COO/CFO and/or the Executive Director and signed by the COO/CFO and/or the Executive Director up to a maximum of \$1,000,000 throughout the duration of construction. Recommended changes beyond these limits go to the TPC for approval.
- New contracts between \$100,000 and \$350,000 and consistent with the overall budget and scope are approved by the TPC up to a maximum of \$2,000,000 throughout the duration of construction. Recommended changes beyond these limits go to the FEX for approval.
- New contracts over \$350,000 are approved by the FEX.
- Changes to existing contracts less than \$10,000 and consistent with the overall budget and schedule are approved by CPM up to a maximum of \$10,000 per month or up to a maximum of \$150,000 throughout the duration of the construction. Recommended changes beyond these limits go to either the COO/CFO and/or the Executive Director for approval.
- Changes to existing contracts between \$10,000 and \$100,000 and consistent with the overall budget and schedule are recommended for approval by the CPM to the COO/CFO and/or the Executive Director up to a maximum of \$500,000 throughout the duration of construction. Recommended changes beyond these limits go to the TPC for approval.
- Changes to existing contracts between \$100,000 and \$350,000 and consistent with the overall budget and schedule are approved by the TPC up to a maximum of \$1,000,000 throughout the duration of construction. Recommended changes beyond these limits go to the FEX for approval.
- Changes to existing contracts over \$1,000,000 are approved by the FEX.

General Notes:

- CPM will report project budget and schedule status to the COO/CFO and Executive Director on a monthly basis.
- The COO/CFO will report the project budget and schedule status, with assistance from the CPM as required, to the Foundation Budget & Finance Committee on a quarterly basis.
- The approvals above move from the TPC to FEX in lieu of the Foundation for the purposes of expediency in project-direct decision making. The FEX can, in its discretion or as required by Foundation policy, refer any of its approvals to the Foundation.

EXHIBIT D:

Insurance

Foundation will maintain in force, during the full term of the Agreement, insurance in the following amounts and coverage:

- A. Workers' Compensation, with Employer's Liability limits not less than \$1,000,000 each accident.
- B. Comprehensive General Liability Insurance with limits not less than \$1,000,000 each occurrence, \$2,000,000 General Aggregate, Combined Single Limit for Bodily Injury and Property Damage.
- C. Business Automobile Liability Insurance with not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage.
- D. Directors and Officers Liability Insurance with limits not less than \$15,000,000 per claim/aggregate.

Comprehensive General Liability and Business Automobile Liability Insurance policies shall be endorsed to provide the following:

- A. Name as Additional Insured (except with respect to the professional liability and workers' compensation coverage) the City and County of San Francisco, its Officers, Agents, and Employees.
- B. That such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of the Contract, and that insurance applies separately to each insured against whom claim is made or suit is brought.