



City of Austin

Founded by Congress, Republic of Texas, 1839

P.O. Box 1088, Austin, Texas 78767-1088

Financial and Administrative Services Department

September 22, 2011

Mr. Nader Tehrani
NADAAA, Inc.
1920 Washington, St., Ste 2
Boston, MA 02118

Re: Seaholm Electrical Substation Wall Project

Dear Mr. Tehrani:

The Purchasing Office has approved the execution of a contract with your company for the above-referenced item as follows:

Responsible Department:	EGRSO
Department Contact Person:	Susan Lambe
Department Contact Email Address:	susan.lambe@austintexas.gov
Department Contact Telephone:	(512) 974-7852
Project Name:	Seaholm Electrical Substation Wall Project
Contractor Name:	NADAAA, Inc.
Contract Number:	CT 5500 11092201575
Contract Period:	N/A
Dollar Amount	\$194,465.00
Extension Options:	N/A
Requisition Number:	RQS 5500 11091401438
Solicitation Number:	N/A
Agenda Item Number:	17
Council Approval Date:	08/26/10

Attached is a copy of all contract terms and conditions. Thank you for your interest in doing business with the City of Austin. If you have any questions regarding this contract, please contact me at (512) 974-9141.

Sincerely,

Brenda Helgren, Sr. Buyer
Purchasing Office
Finance and Administrative Services Department
Enclosure



PURCHASE ORDER

PO CITY SINGLE

PAGE NO: 1

REFERENCE NUMBER: CT 5500 11092201575

P.O DATE: 09/22/11

PRICE AGREEMENT #:

V Nader Tehrani
E VS0000037094 AR008
N NADAAA, Inc.
D 1920 Washington St.
O Suite 2
R Boston MA 02118

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Requestor: Davetta Martinez, 974-9317
Buyer: See Solicitation, 512-974-2500

THE CITY'S STANDARD PURCHASE TERMS AND CONDITIONS (T & Cs) ARE HEREBY INCORPORATED INTO THIS PURCHASE ORDER (PO) BY REFERENCE. WITH THE SAME FORCE AND EFFECT AS IF THEY WERE INCORPORATED IN FULL TEXT. THE FULL TEXT VERSIONS OF THE T&Cs ARE AVAILABLE AT <http://www.ci.austin.tx.us/purchase/standard.htm> OR CALL THE PURCHASING OFFICE AT (512) 974-2500. PLEASE INCLUDE ABOVE REFERENCE NUMBER ON ALL PACKAGES, DELIVERIES AND INVOICES.

Line	Quantity	Unit	Commodity Information / Description (s)										Unit Price	Extended Amount
1			Commodity: 96207 Arts Services (Cultural, Design, Visual, etc.)										0.000000	\$ 177,447.00
	Line	Fund	Dept	Unit	Objt	Actv	Func	Rept	Task	Ord	Prog	Prog Period	Line Amount	
	1	3240	1107	4853	5280	3610		2800					\$ 177,447.00	
2			Commodity: 96207 Arts Services (Cultural, Design, Visual, etc.)										0.000000	\$ 17,018.00
	Line	Fund	Dept	Unit	Objt	Actv	Func	Rept	Task	Ord	Prog	Prog Period	Line Amount	
	1	5010	5500	2345	5860	9111							\$ 17,018.00	

VENDOR INSTRUCTIONS:

1. SEND ORIGINAL INVOICE WITH DUPLICATE COPY TO THE CITY DEPARTMENT TO WHICH THE GOOD(S) WERE DELIVERED.
2. SHIPPING INSTRUCTIONS: F.O.B. DESTINATION UNLESS OTHERWISE SPECIFIED.
3. NO FEDERAL OR STATE SALES TAX SHALL BE INCLUDED IN PRICES BILLED. LIMITED SALES TAX #74-6000085.

Order Total: \$ 194,465.00

Authorized Agent for City Manager

By acceptance of this purchase order, you agree to comply with the terms and conditions incorporated herein by reference and made a part of this order.

Date

**PROFESSIONAL SERVICES AGREEMENT
SEAHOLM ELECTRICAL SUBSTATION WALL PROJECT**

This Agreement is made and entered into by and between the City of Austin, Texas, a Texas home rule city (the "City") and NADAAA, Inc., a Boston based design firm with lead artist Nader Tehrani, (hereinafter alternatively referred to as the "Consultant" and the "Artist"), with the City and the Consultant/Artist sometimes collectively referred to as the "Parties". All references herein to the Consultant shall include by reference the Professional Subconsultants engaged by the Consultant, as further described below.

WHEREAS, the City desires to obtain professional design and management services for the design and construction of the Seaholm Electrical Substation Wall Art in Public Places Project, (the "Project"); and

WHEREAS, the Project will provide security and enhance the public appearance of the Austin Energy Seaholm Electrical Substation (the "Facility") located between West Avenue and Rio Grande Street and Third Street and Second Street in downtown Austin (the "Site"); and

WHEREAS, the Consultant and its Professional Subconsultants (as described below) have the professional ability and expertise to fulfill the requirements of the Project, to protect the environment to greatest extent feasible, and to counsel the City in the selection and analysis of cost-effective alternatives; and

WHEREAS, the City is utilizing its Art in Public Places ("AIPP") Program, pursuant to Chapter 7-2 of the Austin City Code, for the enhancement of the Project, by appropriating funding for the establishment of art works in public places and authorizing payments for the design, execution, fabrication, transportation, acquisition, installation and maintenance of works of art and the support of an artist(s) selection process; and

WHEREAS, Public Art funding for Austin Energy and its Seaholm Electrical Substation Wall Project has been allocated for the selection, purchase, and integrated placement of a work of art at this City Facility; and

WHEREAS, the City selected the Artist through a process which included the AIPP Program Guidelines duly adopted through the AIPP Ordinance, as amended, the Austin Arts Commission, and City Council to design, execute, fabricate and install a work of art more particularly described as an artistically enhanced wall to be installed at the Site; and

WHEREAS, the art work component of the Project (referred to herein as the "Art Work") will be integral to the design and function of the Project, and will not be designed, constructed, operated, or maintained so as to interfere in any way with

the functional elements of the Project; and

WHEREAS, the development of the Project and Art Work will also require professional engineering and landscape architectural services (the "Professional Services") and the Artist will be responsible for coordinating all services necessary for the integration of the design of the Art Work and the Project; and

WHEREAS, the major structural, civil, mechanical, electrical and geotechnical engineering and landscape architectural components of the Seaholm Electrical Substation Wall will be designed by the consultants performing the Professional Services (the "Professional Subconsultants") and constructed by a general contractor to be selected by the City in compliance with applicable Texas law and City policy, and with coordination with the Artist as a City construction project; and

WHEREAS, the Art Work will be constructed as a component of the City's contract for the construction of the functional elements of the Project, and it will not be separately fabricated and installed by the Artist and its employees and subcontractors;

NOW, THEREFORE, the Parties agree to the performance of the professional services by the Consultant and the payment for these services by the City as set forth herein.

SECTION I GENERAL

A. Performance of Services. The Consultant has the professional ability and expertise to provide the services required herein to the required standards and to perform the services under this Agreement using at least the same degree of skill, care, and diligence which a reasonably prudent, similarly situated professional would use performing the same or similar services. In consideration of the compensation herein provided, the Consultant shall perform the basic "Scope of Services" set forth in Exhibit 1 (also referred to as the "Services" or the "Work") generally consisting of all elements of work, materials and equipment required for the professional development of the Project satisfactory to the Director of the Economic Growth and Redevelopment Services Office ("Director") and in accordance with the requirements, policies, and general practices of the City referenced in this Agreement. The Consultant will consult with and give advice to the City during the performance of all phases of the Consultant's services.

B. Consultant Project Representative. The Consultant designates Nader Tehrani to act as its Project Representative and the single point of contact on behalf of the Consultant with respect to this Agreement and to communicate with the City. The Project Representative will have complete authority to interpret and define the Consultant's policies and decisions with respect to the Project. The

Consultant may also designate other representatives to transmit information and instructions and act on behalf of the Consultant with respect to this Agreement.

C. City Representative. The City's AIPP Administrator or the Director will act on behalf of the City with respect to this Agreement and will have complete authority to interpret and define the City's policies and decisions with respect to the design and construction of the Project. The Administrator or Director will designate a Project Manager and may designate other representatives to transmit instructions and act on behalf of the City with respect to this Agreement.

D. Artist Selection. The Parties acknowledge that the Artist's Statement of Qualifications, which is incorporated herein by reference, has been approved by the AIPP Panel, the Austin Arts Commission, and the City Council as the basis for selecting the Artist. In addition, the City has selected the Artist based in part upon the team of Professional Subconsultants set forth in its proposal and listed on Exhibit 2, and the Artist agrees that the team will remain intact, unless any change to the team is approved by City in writing.

E. Design Criteria. The Consultant shall be responsible for designing a work of art that is guided by the following: (i) project goals set forth in the Request for Qualifications (**Exhibit 8**), **specifically including but not limited to Austin Energy's Project requirements**; (ii) applicable City Standards for the design and construction of public infrastructure improvements; (iii) the consideration to the extent possible of green elements both from a vegetative and environmentally conscious perspective as well as adherence to the Urban Design Guidelines for Austin; and (iv) a design development process that gathers input from stakeholders and review by relevant City boards and commissions (see Exhibit 5).

SECTION II BASIC SERVICES OF THE CONSULTANT

A. Project Scope. The detailed scope of the Project and the Consultant's Scope of Services to be provided under this Contract are set forth in the Project Scope, which is attached hereto as **Exhibit 1**. To the extent that there is a conflict or inconsistency between Exhibit 1 and this Agreement, Exhibit 1 shall govern.

B. Key Employees and Subconsultants. The Consultant's key employees, including its Lead Artist and Project Manager, who will perform the artistic and coordinating elements of the Services hereunder are identified in **Exhibit 2**. The Consultant's associated Professional Subconsultants to be used in the performance of Professional Services hereunder are also identified in **Exhibit 2**. The Consultant's Lead Artist and Project Manager must be employed by the Consultant. The Consultant shall not change its key employees, subconsultants, Artist or Project Manager without the City's prior written approval, which will not be unreasonably withheld. The Consultant will provide the City with copies of its subconsultant agreements upon request.

SECTION III PAYMENT

A. Not to Exceed Amount. The total compensation paid to the Consultant will not exceed the fixed fee amount of One Hundred Forty-Four Thousand and No/100 Dollars (\$194,465.00) without amendment to this Agreement. The Consultant and the City acknowledge that the not-to-be-exceeded fee is the total estimated costs of Services to be rendered under this Agreement which includes full compensation for all services and materials to be performed and furnished by the Artist under this Agreement, including without limitation the Professional Services. This not-to-be-exceeded fee is based upon the labor and non-labor costs estimated to be required in the performance of the various phases of work provided for under this Agreement.

B. Basic Services Compensation. For and in consideration of the performance by the Consultant of the work described in the Scope of Services, the City shall pay and the Consultant shall be compensated in the installments described in **Exhibit 1**.

C. Additional Services. For the performance of work or for Reimbursable Costs not described in the Basic Scope of Services of the Agreement, the City shall pay and the Consultant shall receive, under a negotiated contract modification, compensation based upon the actual cost method and the rates of principals and support staff providing services under this Agreement as set forth in **Exhibit 2**. In the event of any dispute over the classification of the Consultant's services as basic or additional services under this Agreement, the decision of the Director shall be final and binding on the Consultant, subject to the dispute resolution procedures of Section X. Additional work will be authorized by a written Supplemental Amendment and will require a revision to the Project Scope set forth in **Exhibit 1**. No payment will be made for services performed without a written agreement. Any approved additional work will be paid for on the basis of the actual cost method described above or a lump sum, if agreed by the Parties basis. A multiple of one and five hundredth (1.05) will be applied to the amounts billed for subconsultants. If a party identifies the need for additional work, the party shall notify the other party and the Consultant shall present the City with a written cost proposal with a detailed scope of the work, schedule, special terms and conditions, if any, and cost.

D. Reimbursable Costs. Reimbursable costs will be included in the not to be exceeded contract amount and will be based on actual costs of providing Project services and are limited to those items set forth in **Exhibit 1** or otherwise approved by the City in writing.

E. Supplemental Amendment. Before any additional work may be performed or additional costs incurred beyond what is specified in the approved Resource Allocation Plan (see **Exhibit 6**), the Parties must execute a written Supplemental Amendment. The City is not responsible for paying for any additional costs or work prior to the execution of a Supplemental Amendment. Any change that would modify the authorized scope of work must be approved by a Supplemental Amendment. If the approved change in scope affects the schedule or Consultant's fee for the Project, the Consultant shall prepare a revised Project budget and Resource Allocation Plan for the City's approval.

F. Advance Payment. No advance payment will be paid prior to rendering Services.

G. Payment Schedule. Payments for Basic Services will be made in accordance with the Milestones in the Approved Schedule. Payments for Additional Services will be made no more often than monthly upon presentation by Consultant of an acceptable request for payment with supporting invoices and any other evidence of expense as required by the City.

H. Tax Exemption. The City is exempt from certain sales and use taxes with respect to the purchase of materials, supplies, equipment and consumables purchased under separate contracts and incorporated into the Consultant's Services and Work Product (as defined in Section VI.B. below). Consultant shall be provided with a Sales Tax-Exemption Certificate and shall not invoice or charge the City for any such taxes. The City will not pay any taxes from which it is exempt.

I. Prompt Payment. The City will pay Consultant within 30 calendar days of receipt of an acceptable payment application. If the City fails to do so, City will pay Consultant interest on the amount owed at the rate specified in Section 2251.025(b) of the Texas Government Code from date due until fully paid, which shall fully liquidate any injury to Consultant related to such delay. The 30 calendar day review period re-starts after the City receives a corrected payment application.

J. Partial Payments. The City cannot make a partial payment on an invoice in dispute. In the event of such a dispute, the Consultant may either resubmit an invoice for the undisputed amount or defer payment until the dispute is resolved.

K. Withholding Payment. The City may withhold a request for payment under the following conditions: (i) failure of the Consultant to meet the Approved Schedule, including any phase and milestone requirements specified in the Approved Schedule; (ii) receipt of notice that, despite payment to Consultant for services rendered by subconsultants, Consultant has not paid such subconsultants within ten (10) calendar days of Consultant's receipt of payment from City; (iii) payments for subconsultants' costs when those subconsultants are not included in the approved MBE/WBE Compliance Plan; (iv) failure of the Consultant to provide updated record drawings and contract documents within 30 calendar days after receipt by the Consultant of as-built red-lines prepared by the Contractor upon substantial or final completion of the Project, or (v) failure to make timely payment to the City of Austin for taxes. In addition, if through any cause within its control, the Consultant defaults in the timely performance of its material obligations under this Agreement, or if the Consultant violates any of the material covenants, agreements, or stipulations of this Agreement, the City may withhold any payments to the Consultant for the purpose of set-off until such time as the Consultant corrects or remedies the failure to perform in accordance with the Agreement or until the exact amount of damages due the City from the Consultant is determined by a court of competent jurisdiction.

L. Program Purchases. All durable equipment, tools, goods, computer programs, and materials purchased by the Consultant for the Project and paid for by the City shall be considered property of the City and shall be transferred to the City upon completion of the Project, or earlier, upon the City's request. The Consultant shall execute and deliver to the City such bills of sale or other documents necessary to transfer title to the City.

M. Final Payment. The receipt of final payment by the Consultant will constitute a waiver of any and all claims by the Consultant, except for any claims previously asserted in writing and not fully resolved, or for claims which have not by their nature yet accrued.

SECTION IV PERIOD OF SERVICE

A. Production Schedule. The Consultant shall perform the Services in accordance with the Approved Schedule as defined and described in **Exhibit 1** and approved Resource Allocation Plan. To the extent that Consultant incurs additional direct costs caused by schedule delays outside of its reasonable control as set forth in the No Damages for Delay clause set forth below, the Approved Schedule shall be adjusted and the compensation shall be equitably adjusted.

B. Term. This Agreement is effective upon full execution and will remain in full force and effect for the period required for the design, construction contract award and construction of the Project, including warranty periods and any extensions of time, unless terminated earlier as provided for herein. All references to time in this Agreement shall be measured in calendar days unless otherwise specified. TIME IS OF THE ESSENCE IN THE PERFORMANCE OF THIS AGREEMENT.

C. Force Majeure. The Parties will not be responsible for delays caused by "Acts of God", non-City governmental processes, national emergency, or any other causes beyond the Consultant's or the City's reasonable control. Upon the discovery of such an event, the Parties shall attend a special meeting to propose a program for a solution to the problem, and, if necessary, to establish an estimated period of time of suspension or extension of the work.

D. Time Request. If it appears that the Consultant cannot complete its Services before the specified completion or milestone date, the Consultant shall submit a Resource Allocation Plan time extension request to the City for approval. The City may, at its sole discretion, extend the authorized Project period by Supplemental Amendment.

E. Suspension. The City may suspend the work at any time for any reason without terminating this Agreement by giving written Notice of Suspension. The work may be reinstated within sixty (60) days of receipt by the Consultant of a written Notice of Reinstatement. If the Project is suspended in whole or in part for more than three months, the Consultant will be compensated for all services performed prior to receipt of written notice of such suspension, together with Reimbursable Expenses then due. If the Project is resumed after being suspended for more than three months, the Consultant's compensation may be equitably adjusted through negotiation. If the Parties cannot agree on an adjustment, City may terminate this Agreement for convenience. Upon receipt of a Notice of Suspension and prior to the effective date of the suspension, the Consultant shall, unless the Notice otherwise directs, immediately begin to phase-out and discontinue all services in connection with the performance of this Agreement and shall prepare a statement detailing the services performed under this Agreement prior to the effective date of suspension. Copies of all completed or partially completed designs, plans, and specifications prepared under this Agreement prior to the effective date of suspension shall be prepared for possible delivery to the City, but shall be retained by the Consultant unless requested by the City. During the period of suspension, the Consultant may submit the above-referenced statement to the City for payment of the approved services actually performed under this Agreement, less previous payments.

F. Termination for Cause. Either party may terminate this Agreement for the substantial failure of the other party to perform in accordance with the terms of this Agreement, through no fault of the terminating party, with thirty days written

notice.

G. Termination for Convenience. Either party may terminate this Agreement for reasons other than substantial failure by the other party to perform by delivering a written Notice of Termination to be effective on the tenth day following receipt.

H. Procedures for Consultant to Follow on Termination. Upon receipt or delivery of a Notice of Termination and prior to the effective date of the termination, the Consultant shall, unless the Notice from the City (in the case of termination by the City) otherwise directs, immediately begin to phase out and discontinue all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement. Within 30 days after receipt of the Notice of Termination by the Consultant or, as applicable, the Consultant shall submit a statement, showing in detail the services performed under this Agreement prior to the effective date of termination. Copies of all completed or partially completed designs, plans, and specifications prepared under this Agreement prior to the effective date of termination shall be delivered to the City as a pre-condition to final payment. Upon the above conditions being met, the City shall pay the Consultant. Failure by the Consultant to submit the required statement and to comply with the above stated conditions shall constitute a waiver by the Consultant of any and all rights or claims to collect the fee that the Consultant may rightfully be entitled to for services performed under this Agreement.

I. Compensation and Damages on Termination. Consultant will be compensated for all Services performed to termination date, together with Reimbursable Expenses then due, without the right to compensation for anticipated profits on services not completed. In the event of termination of this Agreement because of the substantial failure of Consultant to perform, the City may prosecute the work to completion by contract or otherwise and, in such a case, the Consultant shall be liable for any additional costs incurred by the City.

J. Notice to Cure. The City will provide a Notice to Cure to the Consultant to cure an event of default described herein and/or an anticipatory breach of contract. The Consultant must attend a meeting with the City regarding the Notice to Cure, the event of default, and/or the anticipatory breach of contract. The Notice to Cure will set forth the time limit in which the cure is to be completed or commenced and diligently prosecuted. Upon receipt of any Notice to Cure, the Consultant must prepare a report describing its program and measures to affect the cure of the Cure. The Consultant's report must be delivered to the City at least three (3) business days prior to the required Notice to Cure meeting.

K. Computation of Time. Periods of time during which a Notice of Suspension is in effect or during which a submitted and complete Work Product is in technical review or during a force majeure event will not be taken into account in computing

contract time. In the event that a Work Product received by the City is found to be incomplete, the period of time necessary to produce a completed submittal will be counted in computing contract time and liquidated damages.

M. Proportionate Payment. Any fixed-fee payment to the Consultant, if applicable, shall be proportionate to services performed.

N. Delays. Consultant shall not be entitled to any payment, compensation, or damages in any manner whatsoever for any hindrance or delay from any cause in the commencement or progress of Consultant's Services, except to the extent that direct and unavoidable extra cost to Consultant is caused by forces outside of its reasonable control with the exercise of reasonable commercial due diligence, including the failure of the City to provide information or material, if any, which is to be furnished by the City, or access to the Project Site, or the default or material nonperformance of the Contractor, and only to the extent that such acts continue after the Consultant furnishes the City written notice of such failure and, in such an event, the only remedy of Consultant will be an extension of time plus direct costs incurred by Consultant as a result of such unavoidable delay that the Consultant is otherwise unable to mitigate or otherwise avoid with reasonable good faith efforts.

SECTION V COORDINATION WITH THE CITY

A. The Consultant shall not commence work on any phase of the Project until a thorough briefing on the scope of the Project is received and a written Notice to Proceed letter is issued by the Project Manager.

B. The City shall provide the Consultant with all existing plans, maps, studies, reports, field notes, surveys, statistics, computations, land use restrictions, and other data relative to existing facilities and the Project in the City's possession at no cost to the Consultant; provided however, that such information shall remain the property of the City and shall be returned, if the Director so instructs the Consultant. The Consultant must review such information for use on the Project and shall inform the City of any known errors, omissions, or discrepancies, and City makes no guarantee of its accuracy; however, provided that if the Consultant has conducted the foregoing review, subject to its findings of any errors, omissions, or discrepancies, it shall be entitled to rely on the completeness and accuracy of existing site information.

C. The Consultant shall furnish all available data and reasonable assistance necessary for the development of applications or supporting documentation for any permits, grants, or planning advances, as set forth in the Resource Allocation Plan, provided that the Consultant shall not be obligated to develop additional data, appear at hearings, or prepare extensive reports, unless compensated for such work under other provisions of this Agreement.

D. The City will assist Consultant in gaining entry to public and private property, as may be reasonably required by the Consultant in the performance of its Services under this Agreement.

E. The City will give prompt written notice to the Consultant whenever the City observes or otherwise becomes aware of any defect in the Consultant's Work Product or Services.

F. The Consultant shall have the responsibility during the Term of this Agreement to advise the City as to whether in the Consultant's judgment, given the constraints affecting the Project, it is feasible to proceed with the Project.

G. The Consultant shall cooperate and coordinate with City staff, other consultants, contractors, and third parties in interest, as reasonable and necessary and as required by the Director.

H. The Consultant will attend and draft complete meeting minutes of each Project design meeting and submit them to City for approval within seven (7) calendar days of the meeting. Meeting minutes during construction shall be prepared by the Contractor and reviewed and, if necessary, corrected by Consultant.

I. The Consultant shall have primary responsibility and will coordinate and work with the City to prepare and submit all appropriate permit applications, including preparation of supporting drawings, specifications and other documents in the name of the City of Austin to utility companies and providers and governmental authorities having jurisdiction over the Project, and the Consultant shall obtain all approvals and all development and building permits necessary to complete the Project in accordance with the Resource Allocation Plan or as otherwise specified by City. Permit fees may be paid as a Reimbursable Expense or through the City using an internal payment transfer document.

J. The Consultant shall attend and make public presentations, as specified in the Scope of Services and Approved Schedule, as Basic Services. The City will pay additional services compensation to the Consultant for attending additional public meetings not included in the **Exhibit 1** and **Exhibit 5 (Stakeholder Input Process)**, and for mediation and litigation services, where design defects are not at issue.

K. In order to provide the Services under this Agreement, the Consultant may require access to certain confidential City information, including information regarding secure City infrastructure. Consultant agrees to maintain the confidentiality of any such information provided to the Consultant and to release such information only with the prior consent of the City. Consultant will include similar provisions in its subconsultant agreements.

SECTION VI REVIEW OF WORK PRODUCT

A. The Consultant's Work Product will be reviewed by the City under its applicable technical requirements and procedures.

B. Plans, specifications, reports and other supporting documents and work product produced for the Project (the "Work Product") shall be submitted by the Consultant on or before the dates specified in the Approved Schedule. Upon receipt of the Work Product, the submission shall be checked for completion. "Completion" means that all of the required elements and items have been included in the Work Product in compliance with the requirements of this Agreement. If the submission is complete, the City shall notify the Consultant and the City's technical review process will begin. If the submission is incomplete, the City shall notify the Consultant, who shall perform such Professional Services as are required to complete the work and resubmit it to the City. This process shall be repeated until a submission is complete.

C. The City shall review the completed work for compliance with the scope of work. If necessary, the completed work shall be returned to the Consultant, who shall perform any required work and resubmit it to the City. This process shall be repeated until the work is accepted. "Acceptance" shall mean that in the Director's reasonable opinion substantial compliance with the requirements of this Agreement has been achieved. Acceptance will not constitute or be deemed a release of the responsibility, obligations, or liability of the Consultant under this Agreement for any errors, omissions, or defects in the Work Product and Services performed by the Consultant; nor shall such acceptance be deemed an assumption of responsibility or liability by the City for any defect in the Work Product of Consultant, its agents, employees and sub-consultants under this Agreement. No payment made shall constitute or be construed as an acceptance of defective, deficient or improper work.

D. After acceptance, the Consultant shall perform any required modifications, changes, alterations, corrections, redesigns, and additional work necessary to receive final approval by the Director. "Approval" in this sense shall mean formal recognition that the work has been fully carried out.

E. In the event of any dispute over the classification of the Consultant's work products as complete, accepted, or approved under this Agreement, the decision of the Director shall be final and binding on the Consultant, subject to the dispute resolution procedures of Section X.

F. After approval of final Work Products, the Consultant shall without additional compensation perform any work required as a result of the Consultant's errors or omissions. However, any work required or occasioned for the convenience of the City after approval of a final product shall be paid for as Additional Services. In addition, Consultant will, if necessary, revise the plans in order to make the

Project constructible in accordance with accepted standards of professional practice without additional compensation.

SECTION VII FIXED CONSTRUCTION BUDGET

A. The "Fixed Construction Budget" means the amount allocated by the City for the Project's Construction Cost, which may only be adjusted by the City in accordance with the terms and conditions of this Agreement. The Fixed Construction Budget for the Project, including the Art Work and contingencies, is \$720,000.00. During the preliminary phase and as the design of the Project progresses, the Owner, based on the information and Professional Services provided by the Consultant, may modify the Fixed Construction Budget from time to time based on modifications in the design and the detailed statement of probable construction cost. The Fixed Construction Budget, as established by the Owner, will be the amount of funds which Owner, upon approval of City Council, will have available for the payment of all costs for the construction of the Project.

B. "Construction Cost" is the cost of the Project at current market rates, including a reasonable allocation for overhead and profit, general conditions, labor, materials, and equipment, review fees, permitting fees, and other fees required by the City or other governmental authorities. Construction Cost does not include the compensation of the Consultant and other consultants, the cost of land, or other costs which are specifically stated to be Reimbursable Costs or the exclusive responsibility of the City. As part of its basic scope of Services, acting through its Project Subconsultants, the Consultant will provide interim construction estimates to verify that the Project is within the Fixed Construction Budget as further described in the Resource Allocation Plan. In addition, the Consultant will provide the services of an independent cost estimating subconsultant, as set forth in Exhibit 1.

C. The Consultant will develop cost estimates for the City's approval during the development of its Services, at the City's request as a mutually agreed upon Additional Service. The approved cost estimates will be used to establish the estimated Construction Cost. This process will include levels of contingencies for various cost elements not within the control of the Parties. As part of this process, the Consultant will propose baseline cost contingencies for approval by the City. If the lowest responsible bid or best value proposal exceeds the Construction Cost plus the baseline contingency amounts, the City may approve the increase and accept the bid/proposal or require the Consultant to revise the Project scope as required to reduce the Construction Cost plus the baseline contingencies without additional compensation to the Consultant, provided that re-soliciting occurs within six (6) months of the original bid date. If re-soliciting occurs after six months, the Consultant will be entitled to additional compensation.

D. Bid/Proposal Alternates.

1) If, under the City's direction, the Consultant prepares the bid/proposal documents to include a reasonable number of bid/proposal alternates as a means to keep the Project and Art Work cost within the Fixed Construction Budget, the Consultant's compensation will remain the established fee amount irrespective of the outcome of bids/proposals. In the event the base bid is not within the Fixed Construction Budget, Section VII.D.2 of this Agreement governs. The City's acceptance of the base bid or bid/proposal alternates will not change the Consultant's fee amount.

2) If, under the City's direction, the Consultant prepares bid/proposal documents that include bid alternates, and Consultant has advised the City that such alternates may not be within the Fixed Construction Budget, the Consultant must track the cost of any such alternates. Compensation for the requested bid/proposal alternates will be as follows:

(i) If the bid/proposal for the alternates requested by City is within the Fixed Construction Budget, there is no change in the fee.

(ii) Otherwise, the work to reconfigure the Bid/Proposal Documents to include the requested bid/proposal alternates will be considered Additional Services with compensation to be determined in accordance with Section III of this Agreement.

SECTION VIII QUALITY CONTROL PLAN

A. Consultant, acting through its lead Professional Subconsultant, shall perform inter-disciplinary quality assurance-quality control/constructability reviews in accordance with Consultant's approved Quality Assurance Quality Control Plan ("QAQC Plan") attached hereto as **Exhibit 7**, which will be updated as necessary to include any subsequent revisions approved by the Parties.

B. The Consultant shall submit the QAQC Plan to the City for approval within fourteen (14) calendar days of the issuance of the Notice to Proceed. Consultant will provide reports on regularly scheduled intervals as set forth in the QAQC Plan. In addition to providing the QAQC Plan reports, the Consultant shall address and resolve any City QAQC Plan comments to the City's reasonable satisfaction. In the event the City retains a separate consultant to perform additional QAQC Plan services, the Consultant will provide all necessary information to the City and the separate consultant and will address and resolve any comments from such consultant to the City's reasonable satisfaction. The Consultant shall ensure that its subconsultants comply with the City's QAQC Plan requirements.

C. The QAQC Plan reviews must be performed by a staff member of the Consultant not involved in day-to-day Project tasks. If the Consultant cannot

provide for this independent review, the Consultant must include a QAQC Plan subconsultant on the Project team. The person performing the QAQC Plan reviews shall certify in the final QAQC Report that the final bid/proposal documents have been drafted in full compliance with the QAQC Plan. The Consultant shall also provide documentation verifying that interdisciplinary coordination in the QAQC Plan process has occurred.

D. The Consultant will perform QAQC Plan reviews at intervals during the design phase, as specified in the QAQC Plan, to confirm that the plans, specifications, and drawings satisfy accepted quality standards and meet the requirements of the Project scope. Based on the findings of the QAQC Plan reviews, the Consultant shall, subject to the Owner's approval, perform such Services as are necessary to reconcile the Project scope and budget.

E. As specified in the QAQC Plan, the Consultant will also perform constructability reviews at appropriate intervals during the design phase, using design professionals with construction oversight experience, to ensure that the Project is constructible, cost-effective, biddable, and maintainable. Based on the findings of the constructability reviews, the Consultant shall redesign the Project, as required, to ensure that the Project is constructible, cost-effective, biddable, and maintainable and that the bids/proposals will conform to the Fixed Construction Budget.

F. Acceptance and/or approval of the QAQC Plan documentation by the City is not and will not be construed as a release of the responsibility and liability of the Consultant for the accuracy and competency of its QAQC Plan reviews and final construction documents.

SECTION IX CONSULTANT'S RESPONSIBILITY AND LIABILITY

A. The Consultant covenants to undertake no task for which a professional license or certificate is required unless he or someone under his direction is appropriately licensed. In the event such licensed individual's license expires, is revoked, or is canceled, the Consultant shall inform the City of such event within five working days.

B. The Consultant, acting through its Professional Subconsultants, is responsible for conformance of the Construction Documents with applicable federal and state laws, rules and regulations, City permitting requirements, and current City ordinances, except as otherwise directed.

C. The Consultant is fully responsible for its subconsultants' performance and obligations under this Agreement. The Consultant will, upon the City's written request, assign to the City the Consultant's contractual right to pursue a claim

against any of its subconsultants arising out of the subconsultant's negligent errors or omissions or breach of this Agreement.

D. Indemnification. To the extent allowed by Section 271.904 of the Texas Local Government Code, the Consultant shall indemnify, defend (except in the case of a claim arising under Consultant's professional liability insurance), protect, indemnify and save harmless the City and its officials, agents, and employees from and against all claims, demands, suits, causes of action, loss, damage, attorney's fees, costs, expenses, and liability of every kind and nature whatsoever, for personal injury or death or property damage, to the extent caused by any negligent act, error or omission of the Consultant or any of its subconsultants or any other party for whom Consultant is responsible in connection with the performance of the Services or failure to perform the Services in conformance with the terms and conditions of this Agreement; provided, however, Consultant shall not be responsible for the negligence of any other party.

THIS INDEMNITY SHALL BE BROADLY CONSTRUED TO APPLY TO ALL LIABILITY ATTRIBUTED TO THE CONCURRENT AND SOLE NEGLIGENCE OF CONSULTANT, INCLUDING GROSS NEGLIGENCE, WILFULL MISCONDUCT, AND STRICT LIABILITY, AND SHALL SURVIVE TERMINATION OF THIS AGREEMENT.

F. Patent Indemnity. Consultant shall, at its own expense, defend, or at its option settle, any suit or proceeding brought against the City based on an allegation that the practice or use by the City of any of Consultant's Work Product and engineering criteria such as methods, processes, techniques or procedures ("Process") constitutes an infringement of any United States patent, trade secret, or copyright, provided, if Consultant is notified promptly in writing and given authority, information, and assistance in a timely manner for the defense of said suit or proceeding. Consultant shall pay any fines, penalties, and fees imposed as a result of any such infringement and any damages and costs awarded in any suit or proceeding so defended. If the Process is held to constitute infringement or its use by the City is enjoined, the Consultant will, at its option and its own expense, either: procure for the City the right to continue using said process or, subject to City approval, replace it with a substantially equivalent non-infringing process, or modify the process so it becomes non-infringing.

G. **INSURANCE REQUIREMENTS.** The Consultant agrees during the performance of the services under this Agreement to comply with the insurance requirements described in **Exhibit 3**.

H. Mitigation. The Parties agree to and shall take such reasonable actions as are necessary and prudent to mitigate any actual or potential damages before, during, and after any such occurrence.

I. Cost Reimbursement. In the event that the City sustains actual damages to the extent caused as a result of the Consultant's negligence, the Consultant shall reimburse the City for such costs, including but not limited to the cost of repair or restoration, or the City may withhold any available contract funds to cover the damages. Actual damages flow from the injury in fact and are distinguished from nominal, exemplary or punitive damages. Such damages are not ascertainable until the occurrence of the event. Actual damages may include costs incurred by the City for change orders due to design errors or omissions. The City agrees to provide the Consultant written notification of such actual damages and its itemized costs as the costs are being incurred or as soon as practical thereafter.

J. Excessive Addenda. If the Consultant has generated excessive bidding addenda, either in terms of the nature of the revisions or the actual number of changes due to Consultant's errors or omissions, so as to unnecessarily confuse bidders/proposers and otherwise burden the bid/proposal process, and the City fails to receive a reasonable number of bids/proposals or the bids/proposals are higher than the Fixed Construction Budget, Consultant shall revise the bid/proposal documents and re-advertise the Project at Consultant's sole cost (including printing).

K. Employee Decorum. Any employee of the Consultant or its Subconsultants, who in the City's opinion is incompetent or whose conduct becomes detrimental to the work or coordination with the City, shall upon the City's request be immediately removed from association with the Project.

L. Professional Seal. The Consultant or, as applicable, its Professional Subconsultant(s) shall place its licensed professional's seal of endorsement on all plans, specifications, plats or reports issued by Consultant and furnished to the City, as required by law. The Consultant shall not modify any subconsultant's work after the subconsultant's seal has been affixed except with written consent of the subconsultant.

M. Independent Contractor. Consultant is an independent contractor under this Agreement and neither the Consultant nor any officer, agent, or employee of Consultant shall be classified as a City employee. Consultant is solely responsible for its means, methods, sequencing, techniques, and procedures and the acts, errors and omissions of its employees, sub-consultants and sub-consultants and their respective agents and employees. Nothing in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the City or the Consultant.

M. ACBM & Lead. The Consultant shall not knowingly specify, request or approve for use any asbestos containing materials or lead-based paint without the City's prior written approval. For materials specified on the basis of performance criteria, the Consultant shall include a requirement in the specifications effectively stating that "Asbestos containing materials or lead-based paint are prohibited from being used in the Project." When a specific product is specified, the Consultant shall make best efforts to verify that the product does not include asbestos containing material. The Consultant shall execute a Statement of Non-Inclusion of Asbestos Containing Material, on a form provided by City, both prior to design and upon completion of the Construction Documents Phase.

N. Laboratory Services. If laboratory services are provided for the Project by the Consultant or its subconsultant(s) through this Agreement, these services must be performed by a properly accredited laboratory and the laboratory must be accessible to City for observation of any required testing. The Consultant will provide evidence to the City of such accreditation on an annual basis for the duration of this Agreement.

O. Representation. The Consultant shall be responsible for the completeness and accuracy of its Work Product. Consultant represents that 1) it has exercised, and will continue to exercise, generally applicable standards of professional care, knowledge, skill and judgment in performance of its obligations hereunder, 2) in developing and preparing its drawings, reports, and plans, Consultant shall use sound professional principles and practices in accordance with accepted industry standards and in conformance with the applicable laws, regulations, ordinances, codes and requirements set forth in this Agreement, and 3) if notified of any material errors in the Construction Documents, it shall correct such errors at no additional cost to the City for one (1) full year following completion of construction. The fact that the City has accepted or approved the Consultant's Work Product shall in no way relieve the Consultant of any of its responsibilities. Specific Project representations are set forth in **Exhibit 1**.

P. Third Party Claims. In the event that a Claim is made or brought against Consultant arising out of this Agreement or the Consultant's Services that could materially adversely affect the Consultant's ability to perform its obligations under this Agreement, the Consultant shall give prompt written notice to the City within 10 days of notification of the Claim. Such notice shall state the date of receipt of the Claim, the name of the claimant, the basis for such Claim, and the name of any person against whom the Claim is being made. A copy of such notice shall be sent to the City's Project Manager and to the Austin City Attorney.

SECTION X DISPUTE RESOLUTION

A. Claims. A "Claim" is a demand, as a matter of right, for an adjustment to

the contract amount or the contract time. Either party may notify the other party of a Claim by delivery of written notice within 30 days after the start of the occurrence or event giving rise to the Claim and must state the general nature of the Claim. Written notice of the amount of the Claim with supporting data must be delivered within 30 days after the initial Notice of Claim is delivered and must specifically include the known amounts and/or extensions of time claimed.

B. Initial Meeting. Within 30 days of receipt of notice of the amount of the Claim with supporting data, the Parties shall meet to discuss the Claim. If the claimant is not satisfied with the result of the meeting, the claimant must within 30 days (i) submit additional supporting data requested by the other party; (ii) modify its Claim; or (iii) request Alternative Dispute Resolution.

C. Alternative Dispute Resolution. If a dispute continues, the Parties agree to use the following process prior to pursuing any other available legal remedies.

D. Negotiating with Previously Uninvolved Personnel. Either party may request in writing a meeting or meetings with at least one previously uninvolved senior level decision maker of each organization be held within 14 days of such request to negotiate the dispute in good faith. If a previously uninvolved senior level decision maker is unavailable, the Party shall nonetheless provide an appropriate senior level decision maker for the meeting. Negotiations will be concluded within 30 days of the first meeting, unless otherwise mutually agreed, and, if the dispute remains unresolved, the Parties may proceed to Mediation.

E. Mediation. Within 30 days of a request for mediation, the Parties agree to select a mediator trained in mediation skills and knowledgeable of the Consultant's professional discipline, to assist with resolution of the dispute. City and Consultant agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. If the Parties fail to agree on a mediator within 30 days, the Parties will request the Austin Dispute Resolution Center to select a mediator, which selection is binding on the Parties. Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them. The parties hereby agree that mediation, at a minimum, will provide for: (1) conducting an on-site investigation, if appropriate, by the mediator for fact gathering purposes; (2) a meeting of all Parties for the exchange of points of view; and (3) separate meetings between the mediator and each party to the dispute for the formulation of resolution alternatives. The Parties agree to continue to participate in mediation in good faith for up to 30 days from the date of the first mediation session, unless mutually agreed otherwise. If the Parties fail to resolve the dispute through mediation, then each party is released to pursue other available remedies.

F. Consultant - Subconsultant Disputes. The Consultant shall follow procedures paralleling those outlined above in the event of a dispute with a

subconsultant. The City is not a party to the dispute resolution process between the Consultant and subconsultants. However, the City will withhold the amount of subcontractor claims from payments to the Consultant until receiving notification of claim resolution.

SECTION XI OWNERSHIP OF DOCUMENTS

A. Subject to the conditions set forth in **Exhibit 1**, any and all Project documents, including the original drawings, estimates, computer tapes, graphic files, tracings, calculations, analyses, reports, specifications, field notes, data, and other work product ("Work Product") prepared by the Consultant and its Subconsultants are the property of the City and upon completion of the Project shall be delivered to the City in an organized fashion with the Consultant retaining a copy.

B. The Parties agree that the artistic component of the Work Product is subject to the rights of the City and Consultant as described in **Exhibit 1**. The Work Product will otherwise provide the basis for the construction, operation and maintenance of a public facility and the Parties agree that the City will use the Work Product for such purposes. The Consultant will include appropriate provisions in its Subconsultant contracts to achieve the purpose of this section.

C. Subject to the conditions set forth in **Exhibit 1**, any reuse by the Consultant of any such Work Product, without the specific written consent of the City shall be at the Consultant's sole risk and without liability or legal exposure to the City. If the Consultant is terminated, the Consultant will not be liable for the City's use of partially completed designs, plans, or specifications on this Project or any other Project.

D. The Consultant shall provide the City with high quality mylar and digital computer copies of the design on CD (or other City-approved media) of updated drawings and reproducible copies of specifications.

SECTION XII MAINTENANCE OF AND RIGHT OF ACCESS TO RECORDS

A. City's Right to Audit. City will have the right to access and audit Consultant's "Records." Records means all records generated by or on behalf of Consultant and each subconsultant, whether paper, electronic, or other media, which are in any way related to performance of or compliance with this Agreement, including, without limitation: 1) accounting records; 2) written policies and procedures; 3) subcontract files; 4) correspondence; 5) Supplemental Amendments; 6) Sub Consultant Agreements; 7) records necessary to evaluate contract compliance and any claim submitted by Consultant or any of its subconsultants; 8) any other Consultant record that may substantiate any charge

related to this Agreement; and 9) technical work products.

B. **Inspection.** Consultant shall allow City or its authorized representative to inspect, audit, and/or reproduce all Records generated by or on behalf of Consultant and each subconsultant, upon City's written request. Further, Consultant shall allow City or its authorized representative to interview Consultant's employees and its subconsultants and employees.

C. **Record Retention.** Consultant shall retain the Records, and require all its subconsultants to retain their respective Records during the term of this Agreement and for the longest of the following: (i) three years after final payment, (ii) resolution of all audit and litigation matters that City has brought to the attention of Consultant, or (iii) any applicable legal retention period and City will retain its applicable rights during such period.

D. **Facilities.** Consultant must provide suitable facilities during normal business hours for City to inspect, audit, and/or reproduce Records, and to interview any person about the Records.

E. **Subconsultant Records.** Consultant shall insert these audit requirements in its subconsultant Agreements and require each subconsultant to comply with these provisions.

SECTION XIII MISCELLANEOUS

A. **SEVERABILITY.** Any clause, sentence, provision, paragraph, or article of this Agreement held by a court of competent jurisdiction to be invalid, illegal, or ineffective shall not impair, invalidate, or nullify the remainder of this Agreement, but the effect thereof shall be limited to the clause, sentence, provision, paragraph or article so held to be invalid, illegal, or ineffective.

B. **VENUE.** This Agreement is performable in Travis County, Texas, and the venue and jurisdiction of any suit, right, or cause of action arising out of or in connection with this Agreement shall lie exclusively in Travis County, Texas. This Agreement shall be governed by and construed in accordance with Texas law.

C. **NON-DISCRIMINATION IN EMPLOYMENT.** The Consultant agrees to comply, during the performance of the services under this Agreement, with the requirements of Section 5-4-2 "Discrimination in Employment by City Contractors" of the Code of the City of Austin, as set forth in **Exhibit 4**. The Consultant will also provide the City with a copy of its Non-Discrimination Policy, which at a minimum will contain the requirements of Austin City Code Section 5-4-2. In addition, the Consultant will adopt the requirements of Section 5-4-2 to supplement and amend its policy and to supersede any conflict in its policy.

D. **CERTIFICATE OF CONSULTANT.** By its signature below, the Consultant certifies that neither the Consultant nor any members of the Consultant's firm has:

(1) Employed or retained for a commission, percentage, brokerage, contingency fee, or other consideration, any firm or person (other than a bonafide employee working solely for the Consultant) to solicit or secure the work provided by the Agreement.

(2) Agreed, as an expressed or implied condition for obtaining this contract, to employ or retain the services of any firm or person other than in connection with carrying out the work to be performed under this Agreement.

(3) Paid or agreed to pay to any firm, organization, or person (other than a bonafide employee of the Consultant) any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out the work provided under this Agreement.

(4) Violated Article 6 of Chapter 2-7 of the City Code (Anti-Lobbying and Procurement).

The Consultant further agrees that this certification may be furnished to any local, state or federal governmental agencies in connection with this Agreement and for those portions of the Project involving participation of agency grant funds and is subject to all applicable state and federal, criminal and civil laws.

E. **NOTICE.** Any notice to be given hereunder shall be in writing and may be affected by personal delivery in writing or by registered or certified mail, return receipt requested, addressed to the proper party, at the following address:

Consultant: Nader Tehrani
Principal/Lead Artist
NADAAA, Inc.
1920 Washington Street, No. 1
Boston, MA 02118

City: Director
Economic Growth and Redevelopment Services Office
P.O. Box 1088
Austin, Texas 78767

with copy to: City Attorney
P.O. Box 1088
Austin, Texas 78767
Attn: File No. 46830

F. **TAXES.** If the Consultant is delinquent in the payment of City taxes at the time of invoicing, the Consultant hereby assigns any payments to be made for services rendered hereunder to the City for the payment of said delinquent taxes.

G. **SUCCESSORS AND ASSIGNS.** This Agreement shall be binding upon and inure to the benefit of the City and the Consultant and their respective successors, executors, administrators, and assigns. Neither the City nor the Consultant may assign, sublet, or transfer its interest in or obligations under this Agreement without the written consent of the other party.

H. **MBE/WBE COMPLIANCE.** The Consultant shall comply with the City's "Minority-Owned and Women-Owned Business Enterprise" (MBE/WBE) Ordinance set forth in Chapter 2-9A of the Austin City Code. In doing so, the Consultant shall obtain the City's written approval prior to terminating, adding or substituting subconsultants. In the event that the Consultant proposes to terminate, add, substitute, or change any of its identified subconsultants, including any MBE or WBE certified firm, the Consultant shall comply with Chapter 2-9A of the Code and the goals established in the Project solicitation. If the Consultant cannot obtain the services of an acceptable substitute subconsultant firm in compliance with Chapter 2-9A, the Consultant must provide City with written documentation of its good faith efforts to acquire the services of an acceptable substitute subconsultant firm. All requests for a change to the Consultant's MBE/WBE Compliance Plan must include documentation to support the request.

I. **MBE/WBE Program Progressive Sanctions.** The Consultant is subject to progressive sanctions for failure of the Consultant to comply with Austin City Code, Chapter 2-9-A, as amended: "Minority-owned and Women-owned Business Enterprise Procurement Program." Available sanctions for Program violations are set forth in Program rules adopted by the Department of Small and Minority Business Resources (DSMBR), as amended, and may include the following progressive sanctions: (i) a violation letter for the first violation (ii) a period of probation for up to 9 months for the second violation, (iii) a period of suspension from bidding/proposing for up to two years for the third violation, and (iv) debarment for up to five years for the fourth violation. Program violations include:

- .1 providing false or misleading information to the City in connection with the submission of a Bid, responses to request for qualifications or Proposals, Good Faith Efforts documentation, post award compliance, or other Program operations;
- .2 Substituting M/WBE Subcontractors without first receiving approval for such substitutions, which may include the addition of an unapproved Subcontractor and failure to use a Subcontractor listed in the approved Compliance Plan; and

- .3 Failure to comply with the approved Compliance Plan without an approved request for a change, an approved Change Order or other approved change to the Contract.

The Progressive Sanctions will be administered in accordance with the City of Austin Purchasing Office Probation, Suspension, and Debarment Procedures for Vendors, which includes notice and an opportunity for a hearing.

J. **VENDOR REGISTRATION.** The Consultant must be registered to do business with the City and shall be responsible for ensuring that all of its subconsultants are registered as vendors with the City of Austin prior to execution of this Agreement.

K. **ENTIRE AGREEMENT.** This Agreement represents the entire and integrated Agreement between the City and Consultant and supersedes all prior negotiations, representations, or Agreements, either oral or written. This Agreement may be amended only by written instrument signed by both the City and Consultant.

L. **INCORPORATION OF EXHIBITS AND ATTACHMENTS.** All of the following Exhibits referred to in this Agreement are incorporated herein by reference:

- EXHIBIT 1 SUPPLEMENTAL AGREEMENT
- EXHIBIT 2 KEY PERSONNEL AND SUBCONSULTANT RATES
- EXHIBIT 3 INSURANCE REQUIREMENTS
- EXHIBIT 4 NONDISCRIMINATION AFFIDAVIT
- EXHIBIT 5 STAKEHOLDER INPUT PROCESS
- EXHIBIT 6 RESOURCE ALLOCATION PLAN FORM
- EXHIBIT 7 QUALITY ASSURANCE QUALITY CONTROL PLAN FORM

M. **ENTITY STATUS.** By the signature below the Consultant certifies it is lawfully authorized to provide the Services described herein and is lawfully doing business in the State of Texas.

N. **ACKNOWLEDGEMENT.** As a duly authorized representative of Consultant, the signature below acknowledges the Consultant has read and understand this Agreement and that the Consultant and its employees, agents, and representatives have the obligation to ensure compliance with its provisions. Consultant also acknowledges that prior to signing this Contract, Consultant has become thoroughly acquainted with all matters relating to the performance of this Agreement, all applicable laws, and all of the terms and conditions of this Agreement.

O. **NON-APPROPRIATION.** Consultant agrees that the City anticipates paying all obligations under this Agreement from projected revenues of the City. All financial obligations of the City are subject to annual appropriations by its City Council. In the event that the City Council fails to appropriate sufficient funds to pay any of the City's obligations under this Agreement, then such

obligations will automatically terminate, and the Consultant's sole option and remedy shall be to terminate this Agreement by written notice to the City, and neither the City nor the Consultant shall have any further duties or obligations hereunder, except those which expressly survive. If expected funds are requested and not appropriated, the City agrees to use good faith efforts to provide written notice to the Consultant of the non-appropriation.

P. **CUMULATIVE REMEDIES.** In the event of any default or breach of the terms and provisions of this Agreement, the City shall be entitled to any and all remedies at law or in equity, and the exercise of any one remedy shall not constitute an exclusive election of remedies.

Q. **NON-WAIVER.** A waiver by either party of a breach of any term, condition, covenant, obligation or benefit of this Agreement shall not be construed or held to be a waiver of any succeeding, proceeding or other term, condition, covenant, obligation or benefit of this Agreement. The failure of either party to insist in any one or more cases upon the strict performance of any term, condition, covenant, obligation or benefit of this Agreement or to execute any option or right herein contained, shall in no event be construed as a waiver or relinquishment for the future of such term, condition, covenant, obligation or benefit. Any waiver of performance must be in writing and signed by the Parties. No course of conduct or action shall constitute a modification of this Agreement.

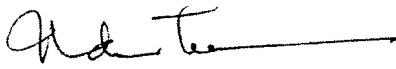
R. **LIABILITY OF CITY OFFICIALS.** No officer, official, or employee of the City shall be charged personally or held liable by or to the Consultant under this Agreement or because of any alleged breach thereof. It is understood that in such matters such persons act solely as agents and representatives of the City.

S. **AUTHORITY.** The undersigned representative of the Consultant represents and warrants that the person signing this Agreement has been duly authorized to do so and that the Consultant has taken all necessary action to approve this Agreement. The Consultant will provide the City with legally sufficient evidence of authority to support the execution of this Agreement.

T. **PERSONAL INTEREST IN CONTRACTS.** No officer, official, or employee of the City, who is involved in the development, evaluation or decision making process of the performance of any solicitation shall have any financial interest, direct or indirect, in the Agreement resulting from the solicitation. Any willful violation of this section shall constitute impropriety in office and any officer or employee with such an interest shall be subject to discipline up to and including dismissal. Any violation of this provision with the knowledge, express or implied of the Consultant shall render the Agreement voidable by the City.

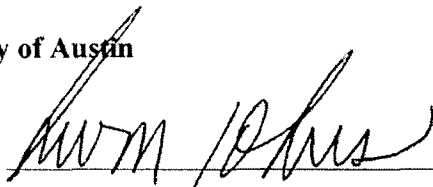
EXECUTED to be effective as of the later date set forth below. Electronic email or facsimile signatures will be treated as originals for the purpose of the execution of this Agreement and associated contract documents.

The Consultant: NADAAA, Inc, a Massachusetts Corporation

By: 
Nader Tehrani, President
Principal/Lead Artist
Authorized Representative

Date: Aug 17., 2011

City of Austin

By: 
Printed Name: Kevin Johns
Title: Director
Date: August 10, 2011

Approved as to form:


Assistant City Attorney

EXHIBIT 2
KEY PERSONNEL AND SUBCONSULTANTS AND HOURLY RATES

Lead Artist/Designer

NADAAA, Inc.

1920 Washington Street, No. 1

Boston, MA 02118

Nader Tehrani, Lead Artist

Daniel Gallagher, Project Manager

Structural Engineering

P.E. Structural Consultants

8436 Spicewood Springs Road

Austin, TX 78759

Lisa Powell, Project Engineer

Landscape Architect

Ten Eyck Landscape Architecture

3112 Windsor Road, No. A375

Austin, TX 78745

Christine Ten Eyck, FASLA

Civil Engineering

Raymond Chan & Associates

4319 James Casey Street, Suite 300

Austin, TX 78745

Raymond Chan

Geotechnical Engineering

Raba-Kistner Consultants

8100 Cameron Road, Suite B-150

Austin, TX 78754

Gabe Ornelas

Survey/SUE

Macia & Associates

5410 S. 1st Street

Austin, TX 78745

Carmelo Macias

Electrical Engineering and Cost Estimating Encotech Engineering Consultants 8500

Bluffstone Cove, Suite 3-BAustin, TX 78759-7811

Ali R. Khataw

EXHIBIT 3 INSURANCE REQUIREMENTS

The Consultant and its Subconsultants shall carry insurance in the types and amounts indicated below for the duration of the Agreement:

1. Workers' Compensation and Employers' Liability Insurance coverage with limits consistent with statutory benefits outlined in the Texas Workers' Compensation Act (Section 401) and minimum policy limits for Employers Liability Insurance of \$100,000 bodily injury each accident, \$500,000 bodily injury by disease policy limit and \$100,000 bodily injury by disease each employee. The Consultant's policy must be issued by an insurer licensed to do business in the State of Texas and include these endorsements in favor of the City:

- (a) Waiver of Subrogation, form WC 420304, or equivalent.
- (b) 30 day Notice of Cancellation, form WC 420601, or equivalent.

2. Commercial General Liability Insurance with a minimum combined bodily injury and property damage per occurrence limit of \$500,000 for coverages A & B. The policy must contain the following provisions:

- (a) Blanket contractual liability coverage for liability assumed under this Agreement and all contracts relative to this Project.
- (b) Independent Contractors coverage.
- (c) City listed as an additional insured, endorsement CG 2010, or equivalent.
- (d) 30 day Notice of Cancellation in favor of the City, endorsement CG 0205, or equivalent.
- (e) Waiver of Transfer Right of Recovery Against Others in favor of the City, endorsement CG 2404, or equivalent.

3. Business Automobile Liability Insurance for all owned, non-owned and hired vehicles with a minimum combined single limit of \$500,000 per accident for bodily injury and property damage. Alternate acceptable limits are \$250,000 bodily injury per person, \$500,000 bodily injury per occurrence and at least \$100,000 property damage liability. The policy shall contain the following endorsements in favor of the City:

- (a) Waiver of Subrogation endorsement TE 2046A, or equivalent.
- (b) 30 day Notice of Cancellation endorsement TE 0202A, or equivalent.
- (c) Additional Insured endorsement TE 9901B, or equivalent.

4. Consultant's (or as appropriate – Subconsultant's) Professional Liability Insurance with a minimum limit of \$1,000,000.00 to pay on behalf of the assured all sums which the assured becomes legally obligated to pay as damages by reason of any negligent act, error, or omission committed with respect to plans, maps, drawings, analyses, reports, surveys, change orders, designs or specifications prepared by the assured. The policy must provide for 30 day notice of cancellation in favor of the City.

5. General Requirements

a. The Consultant must complete and forward the City's standard certificate of insurance or a standard insurance industry form to the City before the Agreement is executed, as verification of coverage required hereunder. The Consultant shall not commence services until the required insurance has been obtained and until such insurance has been reviewed and approved by the City's Project Manager and Contract Procurement Division. Approval of insurance by the City does not relieve or decrease the liability of the Consultant hereunder and must not be construed to be a limitation of liability on the part of the Consultant.

b. Applicable to all insurance policies: If coverage is underwritten on a claims-made basis, the retroactive date must be coincident with or prior to the date of this Agreement and the certificate of insurance must state that the coverage is claims made and the retroactive date. The Consultant shall maintain continuous coverage for the duration of this Agreement and for not less than twenty-four (24) months following substantial completion of the Project. Coverage, including any renewals, must have the same retroactive date as the original policy applicable to the Project. The Consultant shall, on at least an annual basis, provide the City with a certificate of insurance as evidence of such insurance.

c. The Consultant's insurance coverage must be written by companies licensed to do business in the State of Texas at the time the policies are issued and must be written by companies with A.M. Best ratings of B+VII or better. Such insurance may be written by companies approved to do business in the State of Texas with the written approval of the City's Risk Management Department. The City will accept workers' compensation coverage written by the Texas Workers Compensation Insurance Fund.

d. All endorsements naming the City as additional insured, waivers, and notices of cancellation endorsements as well as the certificate of insurance will indicate: City of Austin, Attn: Department of Public Works, Contract Procurement Division, P.O. Box 1088, Austin, Texas 78767.

e. The "other" insurance clause will not apply to the City where the City is an additional insured shown on any policy. It is intended that policies required in the Agreement, covering both the City and the Consultant, be considered primary coverage as applicable.

f. If insurance policies are not written for amounts specified above, the Consultant shall carry Umbrella or Excess Liability Insurance for any differences in amounts specified. If Excess Liability Insurance is provided, it must follow the form of the primary coverage.

g. The City shall be entitled, upon request and without expense, to either receive certified copies of policies and endorsements thereto or review original copies of such policies and endorsements and may make any reasonable requests for deletion or revision or modification of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of the parties hereto or the underwriter on any such policies.

h. The City reserves the right to review the insurance requirements set forth during the effective period of this Agreement and to make reasonable adjustments to insurance coverage, limits and exclusions when deemed necessary and prudent by the City based upon changes in statutory law, court decisions, the claims history of the industry or financial condition of the insurance company as well as the Consultant.

i. The Consultant shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of the Agreement or as required in the Agreement.

j. The Consultant shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. All deductibles or self-insured retentions shall be disclosed on the certificate of insurance.

k. The Consultant shall provide the City thirty (30) calendar days written notice of erosion of the aggregate limits below occurrence limits for all applicable coverages indicated within the Agreement.

l. The insurance coverages required under this Agreement are required minimums and are not intended to limit the responsibility or liability of the Consultant.

m. Consultant shall determine appropriate types and levels of insurance coverage to be provided by subconsultants and advise the subconsultants of the documentation to be provided to Consultant to verify coverage.

EXHIBIT 4

NONDISCRIMINATION CERTIFICATE

City of Austin, Texas

Equal Employment/Fair Housing Office

To: City of Austin, Texas, OWNER

I hereby certify that our firm will comply with and conform to the requirements of Section 5-4-2 "Discrimination in Employment by City Contractors" of the Code of the City of Austin, as reiterated below:

"Discriminatory Employment Practice" means discrimination against an individual because of race, creed color, religion, national origin, sexual orientation, gender identity, disability, sex or age, unless sex or age is a bona fide occupational qualification of employment during an employment action, including recruiting, advertising, hiring, layoff, termination, classification, training or selection for training, promotion, demotion, transfer or compensation.

Sec. 5-4-2 Discriminatory Employment Practices Prohibited. Contractor agrees:

- (B) (1) Not to engage in any discriminatory employment practice defined in this chapter.
- (2) To take affirmative action to insure that applicants are employed, and that employees are treated during employment, without discrimination being practiced against them as defined in this chapter. Such affirmative action shall include, but not be limited to, employment, promotion, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rate of pay or other forms of compensation; and selection for training or any other terms, conditions, or privileges of employment.
- (3) To post in conspicuous places, available to employees and applicants for employment, notices to be provided by Owner's Equal Employment/Fair Housing Office setting forth the provisions of this chapter.
- (4) To state in all solicitations or advertisements for employees placed by or on behalf of Contractor, that all qualified applicants will receive consideration for employment without regard to race, creed, color, religion, national origin, sexual orientation, gender identity, disability, sex or age.
- (5) To obtain a written statement from any labor union or labor organization furnishing labor or service to Contractors in which said union or organization has agreed not to engage in any discriminatory employment practices as defined in this chapter and to take affirmative action to implement policies and provisions of this chapter.
- (6) To cooperate fully with CITY's Equal Employment/Fair Housing Office in connection with any investigation or conciliation effort of said Equal

Employment/Fair Housing Office to insure that the purpose of the provisions against discriminatory employment practices are being carried out.

- (7) To require compliance with provisions of this chapter by all subcontractors having fifteen or more employees who hold any subcontract providing for expenditure of \$2,000.00 or more in connection with any contract with OWNER subject to the terms of this chapter.

For the purposes of this Bid and any resulting Contract, Contractor adopts the provisions of the City's Minimum Standard Nondiscrimination Policy set forth below.

City of Austin

Minimum Standard Nondiscrimination in Employment Policy

As an Equal Employment Opportunity (EEO) employer, the Contractor will conduct its personnel activities in accordance with established federal, state and local EEO laws and regulations.

The Contractor will not discriminate against any applicant or employee based on race, creed, color, national origin, sex, age, religion, veteran status, gender identity, disability, or sexual orientation. This policy covers all aspects of employment, including hiring, placement, upgrading, transfer, demotion, recruitment, recruitment advertising, selection for training and apprenticeship, rates of pay or other forms of compensation, and layoff or termination.

Further, employees who experience discrimination, sexual harassment, or another form of harassment should immediately report it to their supervisor. If this is not a suitable avenue for addressing their complaint, employees are advised to contact another member of management or their human resources representative. No employee shall be discriminated against, harassed, intimidated, nor suffer any reprisal as a result of reporting a violation of this policy. Furthermore, any employee, supervisor, or manager who becomes aware of any such discrimination or harassment should immediately report it to executive management or the human resources office to ensure that such conduct does not continue.

Contractor agrees that to the extent of any inconsistency, omission, or conflict with its current non-discrimination employment policy, the Contractor has expressly adopted the provisions of the City's Minimum Non-Discrimination Policy contained in Section 5-4-2 of the City Code and set forth above, as the Contractor's Non-Discrimination Policy or as an amendment to such Policy and such provisions are intended to not only supplement the Contractor's policy, but will also supersede the Contractor's policy to the extent of any conflict.

*UPON CONTRACT AWARD, THE CONTRACTOR SHALL PROVIDE A COPY TO THE CITY OF THE CONTRACTOR'S NON-DISCRIMINATION POLICY ON COMPANY LETTERHEAD, WHICH CONFORMS IN FORM, SCOPE, AND CONTENT TO THE CITY'S MINIMUM NON-DISCRIMINATION POLICY, AS SET FORTH HEREIN, **OR** THIS NONDISCRIMINATION POLICY, WHICH HAS BEEN ADOPTED BY THE CONTRACTOR FOR ALL PURPOSES (THE FORM OF WHICH HAS BEEN APPROVED BY THE CITY'S EQUAL EMPLOYMENT/FAIR HOUSING OFFICE), WILL BE CONSIDERED THE CONTRACTOR'S NON-DISCRIMINATION POLICY WITHOUT THE REQUIREMENT OF A SEPARATE SUBMITTAL. (<http://www.ci.austin.tx.us/clmd/biddocs.htm>).*

Sanctions:

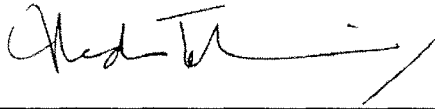
Our firm understands that non-compliance with Chapter 5-4 may result in sanctions, including termination of the contract and suspension or debarment from participation in future City contracts until deemed compliant with the requirements of Chapter 5-4.

Term:

The Contractor agrees that this Section 00630 Non-Discrimination Certificate or the Contractor's separate conforming policy, which the Contractor has executed and filed with the Owner, will remain in force and effect for one year from the date of filing. The Contractor further agrees that, in consideration of the receipt of continued Contract payments, the Contractor's Non-Discrimination Policy will automatically renew from year-to-year for the term of the underlying Contract.

Dated this 1st day of July, 2011.

The Artist/Consultant: NADAAA, Inc.



By: _____
Nader Tehrani, President
Principal/Lead Artist
Authorized Representative

Date: July 1, 2011

PROFESSIONAL SERVICES AGREEMENT

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EXHIBIT 1
PROJECT SCOPE AND DEVELOPMENT
AUSTIN ENERGY
SEAHOLM ELECTRICAL SUBSTATION WALL AIPP PROJECT

1.1. General.

a. The scope of the Project includes design of a wall that will be approximately 1,200 linear feet in length with a height that can vary from 12' to 25' and must meet all safety and security specifications required by Austin Energy, the City of Austin, and any other regulatory agency with jurisdiction over the Project. The Art Work will be constructed as a component of the City's contract for the construction of the functional elements of the Project,

b. In addition to the services outlined in the Professional Services Agreement, the Artist and its subconsultants are required to provide the following services, i) conduct and document design input with City Staff and project stakeholders per the Approved Stakeholder Input Process (**Exhibit 5**); ii) review, further develop and finalize the project goals in liaison with staff; iii) make design progress presentations to the project stakeholders, Austin Energy and Art in Public Places Panel per the Approved Stakeholder Input Process (**Exhibit 5**); iv) communicate artistic and engineering design concepts through traditional sketches as well as state-of-the-art multi-media presentations; and v) develop a maintenance plan for the completed design.

c. Upon execution of this Agreement, Artist shall promptly furnish to the City a written schedule and Resource Allocation Plan for completion of design and construction of the Art Work and Project, based upon the Project Milestones indicated in Section 1.10, including a schedule for the submission of progress reports. Changes to the Approved Schedule may only be made by written agreement between the Artist and the City.

d. The Artist and/or its Professional Subconsultants shall perform and/or provide all services for the development of the design of the Art Work and the Project, the development of construction documents for the integrated Project, and construction administration services, as described herein, including meeting with City staff and City designated Project Stakeholders as described in Exhibit 5. The Artist shall appear personally at up to four meetings / presentations, which at a minimum will include the first "Design Forum" meeting with all stakeholders and the presentation of the schematic design to City Council, and to otherwise be mutually identified with City (provided that at one or two of the other meetings the Artist may be represented by NADAAA's project manager, Daniel Gallagher).

e. The Artist shall determine the artistic expression, scope, design, color, size, material, and texture of the Art Work, while coordinating the necessary Professional Services for the integration of the Art Work into the Project.

f. The Artist and/or its Professional Subconsultants shall make a series of presentations at critical stages in the design development process for the Art Work and Project to the City and others in accordance with the Approved Stakeholder Input Process (**Exhibit 5**) and Approved Schedule.

g. The Artist shall perform or provide its services in conjunction and coordination with its Artist led team of Professional Subconsultants and the selected construction contractor in the development and construction of the Work and Project in accordance with the Approved Schedule.

h. The Artist acknowledges and agrees that it will not perform any services for which a professional license is required in Texas, unless and until it is in full compliance with Texas law, rules and regulations.

1.2 Phase A: Preliminary Phase Services

a. As part of the Preliminary Phase, the CONSULTANT shall meet with City Staff and Stakeholders per the Stakeholder Input Process (see Exhibit 5) to establish the design program narrative describing major functional elements and requirements and relationships between the elements, site development requirements, code requirements, aesthetic requirements and other special considerations. Basic Services of the CONSULTANT will include programming efforts such as reviewing existing site conditions, attending meetings and taking other actions as necessary to establish the scope of the PROJECT as dictated by the CITY'S needs and the Fixed Construction Budget as described in Section VII of the Agreement.

b. The CONSULTANT shall provide a preliminary evaluation of the CITY'S operating program and the PROJECT preliminary construction cost estimate (margin of error of $\pm 40\%$) (Class D), each in terms of the other, and shall review with the CITY alternative approaches to design and construction of the PROJECT.

c. For all Phase A services, the CONSULTANT shall follow the Approved Schedule and meet all milestone requirements specified Section 1.10 and the PROJECT RAP.

d. For all Phase A services, the CONSULTANT shall provide all required QAQC documentation.

1.3 Phase B: Design Phase Services

a. Schematic Design Phase

(i). Based on mutually agreed upon design program and PROJECT Class D construction cost estimate requirements, the CONSULTANT shall prepare, for approval by the CITY, Schematic Design Documents consisting of (i) site plan, (ii) plans, (iii) sections, (iv) exterior elevations, (v) mechanical/electrical plans as required, (vi) subconsultant schematic drawings, (vii) description of project components, and (viii) through its Subconsultants, an Opinion of Probable Construction Cost (Class C cost estimate, with a margin of error of $\pm 25\%$) based on current area, volume or other unit costs.

(ii) The CONSULTANT shall prepare preliminary specifications for the CITY's review.

b. Design Development Phase

(i) Based on the approved Schematic Design Documents and any adjustments authorized by the CITY in the program or Fixed Construction Budget as described in Section VII of the Agreement, the CONSULTANT shall prepare for CITY's approval, design development documents consisting of drawings and other documents to fix and describe the size and character of the entire PROJECT as to the engineering and artistic design and all components and elements.

(iii) The CONSULTANT shall prepare detailed specifications using the CITY'S standard specifications for elements of the PROJECT that relate to horizontal construction and work in the right-of-way. Any revisions or special provisions to these standard specifications must be submitted to the CITY for written approval. The CONSULTANT shall use MasterSpec or CSI for vertical construction elements of the PROJECT. The CONSULTANT will prepare any special specifications relating to vertical construction that are appropriate for the PROJECT and will submit those items to the CITY for review.

(iv) During the Construction Document phase the Artist will consult with the City's contracted arts conservator to assess the materials and maintenance requirements of the proposed artwork. The City shall provide a conservation report for the Consultant's review and comments. This conservation report will address potential conservation issues or concerns and must be signed by the City's contracted arts conservator. The City will prepare a revised report, and the Consultant shall incorporate any revisions or resolutions to the design resulting from comments to the report;

(v) Artist will provide a written maintenance plan to the City including technical information about the materials, strength, durability, and maintenance requirements of the proposed Art Work and any associated equipment and fixtures which become an integrated part of the Art Work and Project. The City's arts conservator will also review and provide comments on the proposed maintenance plan and, to the extent required, the Artist will prepare a revised maintenance plan for the City's review and approval;

(vi) The CONSULTANT shall, through its Subconsultants, submit to the CITY an updated written Opinion of Probable Construction Cost (Class B construction cost estimate, with a margin of error of $\pm 10\%$). If this estimate exceeds the Fixed Construction Budget as described in Section 3, the CONSULTANT shall consult with the CITY as to what action is to be taken if the CITY requires revisions to the PROJECT scope to reduce the PROJECT cost as required to stay within the Fixed Construction Budget. The CONSULTANT shall then make such revision to the PROJECT construction documents at no additional cost to the CITY.

(vii) The CONSULTANT shall, if required, prepare a Storm Water Pollution Prevention Plan (SWPPP) using the standard City template and submit to the CITY. All engineering computations shall be certified by a Registered Professional Engineer specializing in Civil Engineering. All SWPPPs submitted on or after October 4, 2010 shall also be signed by a Certified Professional in Erosion and Sedimentation Control [(CPESC)(<http://cpesc.org/>)]. If the SWPPP itself contains engineering calculations, then the Registered Professional Engineer must also seal and sign the SWPPP. All drainage calculations shall be done in accordance with the guidelines in the City's Drainage Criteria Manual.

c. Construction Documents Phase

(i) Based on the approved design development documents and any further adjustments in the scope or quality of the PROJECT or in the Fixed Construction Budget authorized by the CITY, the CONSULTANT shall prepare construction documents in compliance with the CITY's requirements. Drawings shall include plan views, sections and details clearly defining and describing the intent of the improvement, limits of work, sequencing requirements, access routes, environmental-protection requirements, and contractor staging and storage areas. The CITY's relevant Standard Details shall be included in the drawings if in the Consultant's professional judgment the CITY's Standard Details are sufficient for the PROJECT. If they are not, the CONSULTANT shall prepare Special Details and obtain the CITY's written approval before including the Special Details in the Construction Documents.

(ii) Construction Document Drawings will be prepared with computer aided design and drawing technology utilizing one of the following standard formats: Arc/Info (export), DXF (.DXF), IGDS (.DGN). The guidelines established in the *AIA CAD LAYER GUIDELINES*, published by the American Institute of Architects Press, will be used for sheet layering. Drawing sheet size will be **24" X 36"** and minimum lettering size will be **1/8"** unless otherwise approved.

(iii) The CONSULTANT will, in accordance with the applicable standard of professional skill and care, design barrier-free buildings and facilities in accordance with the Americans with Disabilities Act, Texas Accessibility Standards, and all applicable laws and regulations. The CONSULTANT shall record in writing the major proceedings of each planning conference with the Architectural Barriers Office, Texas Department of Licensing and Registration and submit reports, including written Variances of Requirements, to the CITY for filing. The CITY will be responsible for payment of required permit fees and the costs of variances.

(iv) **Eight (8)** sets of the proposed Construction Documents (review sets) will be furnished, at the CONSULTANT'S expense, for the CITY'S review and approval at two (2) intervals specified by the CITY before reproducing copies for bidding/proposal purposes. Document sets may be submitted in mutually agreed-upon electronic format.

(v) The CONSULTANT shall, through its Subconsultants, provide to the CITY an updated written Opinion of Probable Construction Cost (Class A estimate, with a margin of error of $\pm 5\%$) based upon prevailing market conditions within one week from date of submittal of **Eight (8)** review sets of the final (100%) Construction Documents to the CITY. If this Class A construction cost estimate exceeds the Fixed Construction Budget as described in Section 3, the CONSULTANT shall consult with the CITY as to what action is to be taken if the CITY requires revisions to the PROJECT scope to reduce the PROJECT cost as required to stay within the Fixed Construction Budget. The CONSULTANT shall then make such revision to the PROJECT construction documents at no additional cost to the CITY. Any additional cost estimating above what is required as basic services in the Agreement will be compensated as additional services.

(vi) Following the return of marked up Construction Documents (or separate comment list) from the CITY, the CONSULTANT shall make final modifications and corrections to Construction Documents as called to the CONSULTANT'S attention by the CITY; the CONSULTANT shall resubmit corrected Construction Documents to the CITY for approval. If implementation of the CITY'S review comments will have an adverse effect (schedule, budget, safety or other) on the PROJECT, the CONSULTANT shall immediately notify the CITY in writing with an explanation of such adverse effect; the CITY shall respond to the CONSULTANT'S comments in writing.

(vii) Final Bid/Proposal Documents, which incorporate the CITY's comments described in 1.3.c.vi, will be furnished to the CITY at least fourteen (14) calendar days prior to advertising the PROJECT for bids/proposals. Bid/Proposal Documents will not be printed until CITY authorizes the CONSULTANT to do so.

(viii) Acceptance and approval of the Construction Documents by the CITY will not constitute nor be deemed a release of the responsibilities and liability of the CONSULTANT for the accuracy and competency of its designs, Drawings, Specifications or other documents and services performed under this AGREEMENT. No approvals or acceptance by or on behalf of the CITY will be deemed an assumption of such responsibility by the CITY for any defect, error or omission in said designs, Drawings, Specifications or other documents prepared by the CONSULTANT. The CONSULTANT agrees at its own expense to rework documents as necessary to correct its designs, Drawings, Specifications or documents found to be in error.

(ix) Unless otherwise stipulated, the CONSULTANT shall, upon completion of Construction Documents, provide drawings for the CITY'S use in publicizing the PROJECT. Drawings will be 8-1/2" X 11" as follows: (1) location map; (2) floor plan(s) naming major spaces and noting the total square footage; (3) major building elevation; and (4) site plan. In the event that the PROJECT scope does not involve floor plan, site plan and elevation considerations, drawings illustrative of the scope will be provided.

(x) Only if requested by CITY, the CONSULTANT shall, following the CITY'S approval of the Construction Documents and the Class A construction cost estimate, assist the CITY in determining what additional information on Contractor qualifications may be required to be submitted by the bidders/proposers with their bids/proposals.

(xi) For all Phase B services, the CONSULTANT must design the Construction Documents for compliance with the applicable laws, rules, and regulations of City, State and federal governments. The CONSULTANT must request variances or waivers of any such requirements as appropriate.

(xii) For all Phase B services, the CONSULTANT shall follow the approved schedule and meet all milestone requirements specified in the PROJECT RAP.

(xiii) For all Phase B services, the CONSULTANT shall provide all required QCP documentation.

1.4 Phase C: Bid/Proposal-Award-Execution Phase Services

a) Only if requested by CITY, the CONSULTANT shall assist the CITY in the advertisement of the PROJECT for construction bids or proposals. CONSULTANT services may include distributing bid/proposal documents, maintaining a record of bid or proposal document issuance and receipt, and receiving bid/proposal document deposits. Bid/proposal deposit checks shall be made payable to the CITY and those deposits not returned to bidders/proposers shall be given to the CITY.

b) Only if requested by CITY, the CONSULTANT shall participate in or conduct a pre-bid/proposal conference, prepare addenda, and attend bid/proposal opening.

c) Unless otherwise notified by CITY, the CONSULTANT shall assist the CITY in analyzing Contractor bids or proposals and qualifications. If requested by CITY, the CONSULTANT shall furnish to the CITY a recommendation regarding the responsibility of the bidder(s) or best value within seven (7) calendar days following bid/proposal opening.

d) If the apparent lowest responsible bidder's or best value proposer's construction cost of the PROJECT (or component thereof) is greater than the Fixed Construction Budget (or appropriate portion thereof), the CITY may elect not to award the PROJECT (or component thereof) construction contract. As directed by the CITY, the CONSULTANT will determine revisions to the PROJECT to reduce the PROJECT cost as required to stay within approved or authorized cost limitations. The CONSULTANT shall then make such revision to the PROJECT construction documents at no additional cost to the CITY.

e) For all Phase C services, the CONSULTANT shall follow the approved schedule and meet all milestone requirements specified in the PROJECT RAP.

1.5 Phase D: Construction Phase Services

a) The CONSULTANT will be the CITY's Representative during the Construction Phase, and shall advise and consult with the CITY. Instructions to the Contractor will be forwarded through the CONSULTANT. The CONSULTANT will have authority to act on behalf of the CITY only to the extent provided in this Section 1.5 Phase D Construction Phase Services.

b) The Construction Phase will commence with the construction contract execution and will terminate on the date of final completion of the construction PROJECT, based on the completion milestone established for the construction Contract Time. The final completion date includes any time extensions granted to the Contractor by the CITY, but in no case will time extensions exceed the approved PROJECT Resource Allocation Plan (RAP). Site visits and other services occurring more than 120 days after the scheduled date of substantial completion shall be compensated as Additional Services, except to the extent that such delay is caused by the negligence or nonperformance of Consultant, provided the Artist will continue to provide warranty period basic services.

c) Unless otherwise provided in this AGREEMENT and incorporated in the Contract Documents, the CONSULTANT shall administer the construction contract as set forth below and in the CITY's General Conditions of the Construction Contract Agreement, Section 00700, except to the extent that the latter conflicts or is inconsistent with this Agreement.

d) The CONSULTANT shall participate in and document the proceedings of the preconstruction conference.

e) The CONSULTANT and/or its Professional Subconsultant(s) shall visit the site to observe the progress and quality of the Work and to determine if the Work is proceeding in accordance with the Contract Documents. The team's visits to the site shall be at intervals appropriate to the stage of construction, on average weekly over the course of the construction period. The CONSULTANT or its Professional Subconsultant shall record observations made on each job site visit, including regularly scheduled project meetings, and shall submit a written weekly report to the CITY.

f) Reports must include: list of subcontractors on-site by week as reported by Contractor, trades at work, approximate manpower, temperature/weather conditions, any variations from Contract Documents, any defective Work, percentage of contract time used compared with percentage of completion of construction, updates to the PROJECT RAP, estimated contract completion date, and other meaningful information. Reports for periods when no Work is in progress will state "No Work in Progress".

g) The CONSULTANT will furnish reports to the CITY within five (5) calendar days of the end of the work week of the observations or the report will be considered late and the CITY may withhold payment until the reports are received.

h) In addition, the CONSULTANT'S subconsultants shall visit the site at appropriate stages of the Work related to their area of specialty, shall record observations made on each job site visit and shall submit reports to the CONSULTANT to be incorporated in the CONSULTANT's reports to the CITY. The CONSULTANT'S subconsultants shall also attend those progress meetings when the Contractor's Application for Payment includes requests for areas of Work related to their discipline.

i) The CONSULTANT shall review the Contractor's Application for Payment, based on CONSULTANT's observations on site, evaluate the request, and recommend to CITY the amount to be paid to the Contractor.

j) The CONSULTANT's signature on the Application for Payment constitutes a representation by the CONSULTANT to the CITY that, to the best of its information, knowledge, and belief, the work is proceeding in general accordance with the Contract Documents, and that the Contractor has progressed to the construction schedule point indicated and is entitled to payment in the amount certified. The CONSULTANT is not responsible for work that is the Contractor's responsibility as defined in the Contractor's contract with the CITY, or for verifying the Contractor's use of funds.

k) The CONSULTANT shall respond within seven (7) calendar days (unless the CITY grants a time extension), to all requests for information, claims, disputes and other matters in question between the CITY and the Contractor relating to the execution or progress of the work or the interpretation of the Contract Documents. Interpretations and decisions of the CONSULTANT will be in written form, accompanied by drawings as appropriate.

l) If any work does not conform to the Contract Documents, the CONSULTANT shall, within 24 hours of the CONSULTANT's observation, recommend the rejection of any such work to the CITY in writing. At any point during the Construction Phase, the CONSULTANT may recommend that the CITY require special inspection or testing of the Work in accordance with the provisions of the Contract Documents.

m) The CONSULTANT shall review, approve, or take other appropriate action upon Contractor submittals such as Shop Drawings, product data and samples.

The CONSULTANT shall provide a written response to the Contractor within fourteen (14) calendar days (unless a time extension is granted by the CITY) to avoid a delay in the WORK.

n) The CONSULTANT's review is for the limited purpose of confirming conformance with information given and the design concept expressed in the Contract Documents. The CONSULTANT is not responsible for work or requirements that are the Contractor's responsibility as defined in the Contractor's contract with the CITY.

o) Unless otherwise specifically stated by the CONSULTANT, the CONSULTANT's review will not constitute approval of safety precautions, construction means, methods, techniques, sequences or procedures, all of which are the sole responsibility of the Contractor.

p) The CONSULTANT may rely upon professional certifications of performance characteristics of materials, systems or equipment if such certifications are required by the Contract Documents.

q) The CONSULTANT shall prepare Change Orders for the CITY'S approval and execution in accordance with the Contract Documents. The CONSULTANT will have authority to order minor changes in the Work which are consistent with the intent of the Contract Documents, but do not involve an adjustment to the Contract Amount or an extension of the Contract Time. The CITY shall receive copies of any such Field Orders approved by the CONSULTANT.

r) Upon receipt of Contractor's notification that the Work has been substantially completed, the CONSULTANT and its subconsultants shall work with the Contractor to verify the PROJECT is ready for the CITY's inspection within seven (7) calendar days unless the CITY approves a time extension. The CONSULTANT shall provide written notification to the CITY that the Work has been completed and is ready for the CITY's inspection. The CITY shall schedule a CITY inspection to be attended by the CONSULTANT and its subconsultants.

s) Within twenty-four (24) hours of the CITY's inspection, the Contractor shall provide a draft written punchlist of items that need to be addressed prior to the Final Completion date specified in the construction contract. The CONSULTANT shall review and comment on the draft punchlist, and provide the Contractor a final written punchlist within three (3) calendar days of the CITY's inspection.

t) When the contract requirements for substantial completion have been met, the CONSULTANT shall prepare and issue a Certificate of Substantial Completion within three (3) calendar days.

u) The CONSULTANT shall review all warranties, guarantees, bonds, equipment operating instructions, and similar required material and documents for general compliance with the Contract Documents and shall present them to the CITY. Upon receipt of Contractor's written notice that the Work is ready for final inspection and acceptance and receipt of a final Application for Payment from the Contractor, the CONSULTANT shall make an on-site review within seven (7) calendar days. When the Work is found to be acceptable by the CITY, the CONSULTANT shall, within seven (7) calendar days, sign the final Application for Payment signifying that the Work has been completed in general accordance with the terms and conditions of the Contract Documents and that final payment is due the Contractor.

v) For all Phase D services, the CONSULTANT shall follow the approved schedule and meet all milestone requirements specified in the PROJECT RAP.

w) *Construction Project Representation Beyond Basic Services*

(i) If the CITY and CONSULTANT agree that more extensive representation at the Site is needed, the CONSULTANT shall provide one or more PROJECT Representatives to assist the CONSULTANT in carrying out such responsibilities at the PROJECT or work site. The PROJECT RAP must be revised accordingly.

(ii) Such PROJECT Representatives will be selected with the written approval of the CITY, employed and directed by the CONSULTANT, and the CONSULTANT will be compensated, as an Additional Service, as mutually agreed between the CITY and the CONSULTANT.

1.6 Phase E: Post-Construction Phase Services

a) The Post-Construction Phase Services will include, but not be limited to, the following: (1) producing Record Documents for the CITY; (2) notifying the Contractor of defective Work and requesting corrective action; (3) preparing correspondence and other written data as necessary to document, clarify, and resolve discrepancies; and (4) meeting with the Contractor at the PROJECT site or other local places when requested by the CITY.

b) Upon receipt from the Contractor of its details of "as-built" deviations from Contract Documents, as described below, CONSULTANT shall produce Record Documents for the CITY'S use within thirty (30) calendar days. The CONSULTANT will ensure that the record drawings of construction incorporate all compiled change orders, change directives, and field orders issued by Consultant. The CONSULTANT will ensure that a Texas Professional Engineer's seal, as applicable, is affixed and signed on each document, stamped and identified as "RECORD DOCUMENTS", that signifies the recorded changes have been transferred. The CONSULTANT may indicate that its Record Documents are based upon the Contractor's as-builts and its site observations and are limited to its actual knowledge and observations. To the extent that the selected Project Contractor has the capability of doing so, the Contractor's as-built information shall be provided in AutoCad 2000 or other electronic file format acceptable to CONSULTANT. Otherwise, the CONSULTANT and the Contractor will coordinate on the production of final as-builts as set forth herein. ***[Note: This requirement for electronic documentation, if applicable, should be inserted in Section 6.10 of the General Conditions of the construction contract.]***

c) The CONSULTANT shall submit electronic files on CD-ROM, or other comparable durable electronic media with CITY's approval one (1) set of mylar, one (1) set of full-size print PROJECT drawings, and two (2) sets of one-half size print PROJECT drawings that are considered Record Documents to CITY. Copies of PROJECT drawings that may be relied upon by the CITY are limited to the printed copies ("hard copies") that are signed and sealed by the CONSULTANT. Drawings will be accurate in scale and dimensions and will reflect the final as-constructed condition of the PROJECT in accordance with subsection (b).

d) Within 30 days after the Substantial Completion of the Art Work and the Project, the Artist shall furnish the City with the following photographs of the installed Art Work: (i) one (1) set of color high-resolution (at least 300 dpi at 8 x 10 inches) digital images of the completed Art Work, including at least three different viewpoints and details of each elevation; and (ii) one (1) set of color low-resolution (no smaller than 72 dpi, and no larger than 100 dpi) digital images of the completed Art Work, including at least three different viewpoints and details of each elevation; and (iii) one (1) set of glossy archival prints from the high-resolution digital files of the completed Art Work, including at least three different viewpoints and details of each elevation.

e. The Artist shall be available at such time(s) as may be agreed upon to attend any inauguration or presentation ceremonies relating to the transfer of the Art Work to the City. The City shall use its best efforts to arrange for publicity for the completed Art Work in appropriate art publications and otherwise as may be determined between the Parties as soon as practicable following installation.

f) For projects that include improvements or modifications to CITY's Austin Water Utility system or facilities, drawings included in the Record Documents will include all dimensions and calculations in English units.

g) For projects that include improvements or modifications to facilities or resources owned by the Austin Water Utility, the CONSULTANT shall provide the CITY updated Asset Retirement Request Form(s) based on project as-built drawings. For projects involving new taggable assets, the CONSULTANT shall also provide to CITY an updated list of new assets installed or delivered as part of the PROJECT. These form(s) and information will be provided to CITY at the time of the as-built submittal.

h) Subject to the limitations of Section 1.6.k, below, under Basic Service, the CONSULTANT shall assist and represent the CITY through the post-construction period on matters involving defective Work. The CONSULTANT shall communicate with and assist the Contractor as necessary to correct all deficiencies within seven (7) calendar days of notification by the CONSULTANT for a specific correction.

i) The CONSULTANT shall require its subconsultants to provide assistance as necessary during the post-construction period stipulated in the approved PROJECT Resource Allocation Plan (RAP).

j) The CONSULTANT shall perform an on-site review of the Work, accompanied by its subconsultants, no less than thirty (30) calendar days before the one year anniversary of the date of Substantial Completion. Based on the site review, the CONSULTANT shall prepare, within seven (7) calendar days, a list of items needing correction and direct the Contractor to resolve them within a specified time frame. After determining that deficiencies have been corrected, the CONSULTANT shall so notify the CITY in writing within seven (7) calendar days. This notification by the CONSULTANT does not release the Contractor from its responsibilities set forth in the Contract Documents and will not be construed as an implied or express warranty or representation by the CONSULTANT that there are not other deficiencies on the PROJECT.

k) Under Basic Services, the CONSULTANT and its subconsultants agree to provide Post-Construction Phase services as specified in the approved PROJECT RAP. The CONSULTANT shall provide accounting for time expended under Basic Services at the time these services are provided. Additional time for extended warranty period services not included in Basic Services will be considered Additional Services in accordance with Paragraph 1.7 and paid for in accordance with the RAP. To the extent that services by CONSULTANT more than 120 days after substantial completion are caused by the Contractor's nonperformance or deficiency, such services shall be deemed an Additional Service, provided CONSULTANT will continue to provide warranty period basic services.

l) For all PHASE E services, the CONSULTANT shall follow the approved schedule and meet all milestone requirements specified in the PROJECT RAP.

1.7 Additional Services

a) Additional Services authorized in writing by the CITY will be paid for by the CITY as provided in this AGREEMENT, in addition to the compensation for Basic Services. Additional Services authorized by the CITY in writing will be incorporated in the PROJECT RAP, and all applicable articles of the AGREEMENT will apply to the Additional Services. If CONSULTANT identifies a need for Additional Services, the CONSULTANT will submit a proposal for those services to the CITY within fourteen (14) calendar days of identifying the need.

b) The following services are Additional Services:

(i) Making revisions in Drawings, Specifications, or other documents in connection with Change Orders, unless such Change Orders are caused by errors, omissions or other factors within the CONSULTANT's control.

(ii) Making revisions in Drawings, Specifications or other documents when such revisions are required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents.

(iii) Providing design services of subconsultants not included in original scope of Basic Services for the PROJECT.

(iv) Providing any other services not otherwise included in this AGREEMENT or not customarily furnished in accordance with generally accepted, regional consulting practices, including but not limited to, the following items:

- Land development and feasibility studies.
- Contacts with neighborhood associations, boards, and/or committees related to land acquisition issues, beyond that described in **Exhibit 5** as a Basic Service.
- Engineering of and coordination of off-site construction.
- Special subconsultant services (environmental, archaeological, acoustical, asbestos removal, hydrological, traffic, computer and audio/visual design, etc.)
- Special investigations, including environmental impact studies, that involve detailed consideration of operation, maintenance and overhead expenses; rate schedules; earnings and expense statements; special feasibility studies; appraisals; evaluations; and material audits or inventories required for certifications of force account construction performed by Contractor or CITY.
- Detailed mill, shop and/or laboratory inspection of materials and/or equipment
- Legal or other dispute resolution proceedings, unless the CONSULTANT is a party to the proceedings.

- Services caused by the default or nonperformance of the Contractor or any subcontractor, except with respect to investigating and rejecting minor defective work and providing reasonable assistance with reviewing change orders prepared by Contractor.
- Additional cost estimating.

(v) Revising Drawings, Specifications or other documents when such revisions are inconsistent with, or contradict, prior approvals or instructions given to the CONSULTANT by the CITY, or are caused by material changes in the Project size, scope, quality, or complexity.

c) For all Additional Services, the CONSULTANT shall follow the approved schedule and meet all milestone requirements specified in the PROJECT RAP.

d) The following services are not Additional Services:

(i) Any revisions required for failure to adhere to the Fixed Construction Budget;

(ii) Minor requests for information by the CITY or the Contractor that clearly do not require extensive work by the CONSULTANT.

1.8 Risk of Loss. To the extent the Artist is fabricating, delivering, and installing the Art Work, the Artist bears the risk of loss or damage to the Art Work prior to the City's final acceptance, and the Artist shall take any measures as are necessary to protect the Art Work from loss or damage until the City's final acceptance, including but not limited to the purchase of property loss insurance; except, that the risk of loss or damage shall be borne by the City prior to final acceptance during such periods of time as the partially or wholly completed Art Work is in the custody, control or supervision of the City or its agents for the purposes of moving, storing, or performing any other ancillary services to the Art Work. The risk of loss transfers to the City upon Final Acceptance of the Art Work.

1.9 Title/Ownership. Title to the Art Work will pass to the City upon final acceptance. The City shall take ownership of and title to all documents and drawings constituting the design of the Art Work upon its final acceptance.

1.10 Project Schedule/Milestones. It is anticipated that the Consultant's services will be performed in accordance with the following timeline:

Mid-July 2011

“Design Forum” meeting(s)

4 weeks

Schematic Design begins

4 weeks

Schematic Design review

8 weeks	Design Development
4 weeks	Design Development review
12 weeks	Construction Documents
4 weeks	Construction Documents review
May 1, 2012	Construction Documents complete
16 weeks	Contractor solicitation process
September 1, 2012	Start construction
September 1, 2013	Complete construction

ARTICLE 2

PAYMENT

a. The Artist will be paid monthly in proportion to services performed within each phase of services up to the following amounts indicated for each phase of work:

a. Schematic Design	\$38,893.00 (20%)
b. Design Development	\$29,169.75 (15%)
c. Construction Documents	\$68,062.75 (35%)
d. Bidding and Negotiations	\$9,723.25 (5%)
e. Construction Administration	\$38,893.00 (20%)
f. Post Construction	\$9,723.25 (5%)

(i) No advance payment will be paid to the Artist prior to rendering services.

b. The Artist will be responsible for and compensated for the following Project related reimbursable expenses as part of the not to be exceeded amount of compensation set forth in Paragraph III.A. of the Agreement:

- (i) Shipping or mailing of all reports, drawings, specifications, and other items in connection with the Project;
- (ii) Reproductions, printing, binding, collating and handling of reports, and drawings and specifications or other project-related work products as required by this Agreement (provided that all deliverables may be supplemented in mutually agreed-upon electronic format and provided further that the City will identify an approved City vendor, the Consultant will coordinate its requirements for such services through the vendor, and the City will pay for such costs through its contract with the approved City vendor);
- (iii) costs of travel by Artist and subconsultants related to required on-site meetings and presentations, to the extent that such meetings and presentations are listed as Basic Services in Exhibit 5;
- (iv) Expense of any insurance coverage or limits required under this Agreement;
- (vi) all office expenses associated with carrying out the Project including long-distance telephone and facsimile charges.;

- (v) development of one set of professional models and renderings required for use at all the presentations specified in Exhibit 5;
- (vii) Photography as required by this Agreement.

ARTICLE 4

ART WORK REPRESENTATIONS

3.1. Representations of Title. The Artist shall develop a design for the Art Work that is the original product of his own creative efforts. **The Artist represents that the design of the Art Work is and will be original and agrees to defend (except in the case of the claim arising under Consultant's professional liability insurance), indemnify and hold harmless, the City, its officers, employees, agents and contractors, and each and every one of them, from and against all claims, losses, damages, actions or expenses of every type and description, including attorney's fees, to which they may be subjected arising out of the City's use, or possession of the design during the approval process, in each case to the extent caused by reason of an actual copyright violation or other lack of ownership, authorship or originality of the Art Work.**

3.2. Warranties of Quality and Conditions. To the extent that the Artist fabricates and installs the Art Work, the Artist represents and warrants, that: a. the execution and fabrication of the Art Work will be performed in a workmanlike manner; and b. the Art Work, as fabricated and delivered, will be free of defects in material and workmanship, including any defects consisting of "inherent vice" or qualities which cause or accelerate deterioration of the Art Work. In addition, the Artist warrants that reasonable maintenance of the Art Work will not require procedures substantially in excess of those described in the final maintenance recommendations to be submitted by the Artist to the City hereunder. The warranties described herein shall survive for a period of one year after final acceptance of the Art Work. The City shall give written notice to the Artist of any observed breach with reasonable promptness. The Artist shall, at the written request of the City, and at no cost to the City, promptly cure such breach consistent with professional conservation standards, including but not limited to repair or refabrication of the Art Work or any necessary portion of the Art Work. Notwithstanding the foregoing, the parties acknowledge that the Art Work is intended to be integral to the design and construction of the Project, and that it will not be fabricated or installed by the Artist.

ARTICLE 4

PERFORMANCE AND PAYMENT BONDS

The Artist may be required by the City to post a payment bond, if the Artist fabricates and installs the Art Work and the value of the Art Work exceeds \$50,000, and a performance bond, if the Artist fabricates and installs the Art Work and the value of the Art Work exceeds \$100,000, otherwise any requirement for bonds for the Project shall be the responsibility of the construction contractor for the City. Notwithstanding the

foregoing, the parties acknowledge that the Art Work is intended to be integral to the design and construction of the Project, and that it will not be fabricated or installed by the Artist.

ARTICLE 5

REPRODUCTION RIGHTS

5.1. General. The Artist retains all reproduction rights under the Copyright Act of 1976, 17 U.S.C. §§ 101 et. seq., and all other rights in and to the Art Work except as such rights are limited by this Section 6. In view of the intention that the Art Work in its final form shall be unique, the Artist shall not make any additional exact duplicate or three-dimensional reproductions of the final design of the Art Work, nor shall the Artist grant permission to others to do so except with the prior written permission of the City. The Artist grants to the City and its assigns an irrevocable license to make two-dimensional reproductions of the Art Work for any purpose, including, but not limited to, reproductions used in advertising, brochures, stationery, media publicity, and catalogues or other similar publications.

5.2. Notice. All reproductions of the Art Work by the City shall contain a credit to the Artist and a copyright notice substantially in the following form: "© Artist's name, 20__."

5.3. Credit to City. The Artist shall provide a credit reading substantially, "an original Art Work owned and commissioned by the City of Austin," in any public showing of reproductions of the Art Work which are under the Artist's control.

ARTICLE 6

ARTIST'S RIGHTS

6.1. Identification. The City shall, at its expense and in consultation with Artist, prepare and install at the Site, a plaque identifying the Artist, the title of the Art Work, and the year of completion.

6.2. Maintenance. The City recognizes that maintenance of the Art Work on a regular basis is essential to the integrity of the Art Work. The City shall reasonably assure that the Art Work is properly maintained and protected, taking into account the maintenance instructions provided by Artist, and shall reasonably protect and maintain the Art Work against the ravages of time, vandalism, and the elements. The Artist understands that the City will conduct such maintenance as current available revenue allows in any given fiscal year.

6.3. Repairs and Restoration.

- a. The City shall have the right to determine, when and if repairs and

restorations to the Art Work will be made. During the Artist's lifetime and to the extent practicable, the City shall give the Artist the right to approve all major repairs and restorations; provided, however, the Artist shall not unreasonably withhold, condition or delay approval for any repair or restoration of the Art Work. Should Artist unreasonably withhold, condition or delay approval of any intended major repair or restoration, the City shall have the right to make such repair or restoration. To the extent practicable, the Artist, during the Artist's lifetime, shall be given the opportunity to make or personally supervise major repairs and restorations and shall be paid a reasonable fee for any such services, provided that the City and the Artist shall agree in writing, prior to commencement of any significant repairs and restorations, upon the Artist's fee for such services. Should the Artist fail to agree to make or supervise the repairs and restorations, the City shall have the right to solicit bids/proposals and award contracts for the services to other qualified professionals.

b. All repairs and restorations shall be made in accordance with recognized principles of conservation.

c. When emergency repairs are necessary in order to protect the integrity of the Art Work or the Project, prevent the loss of or further damage to the Art Work or the Project, these emergency repairs may be undertaken or arranged by the City without advance written notice to the Artist, and these repairs shall not be deemed to constitute artistic alteration or a breach of this Agreement. The City will provide written notice to the Artist of such emergency repairs as soon as practical.

6.4. Alteration of the Art Work or of the Site.

a. Artist acknowledges that the Art Work, when installed, may be incorporated within and made a part of the Project in such a way that removing the Art Work from the Project or the destruction or modification of the Project may cause the destruction, distortion, mutilation or other modification of the Art Work. The City shall make a good faith effort to provide the Artist with prior written notice of the City's intent to undertake any alteration(s) to the Art Work. To the extent this Section is inconsistent with federal law or any applicable moral rights belonging to the Artist, including the 1990 Visual Artists' Rights Act, Artist acknowledge receiving notice of this provision and waives any right to preservation of the Art Work provided by those laws. Artist shall retain any right to disclaim authorship of the Art Work as set forth in the 1990 Visual Artists' Rights Act.

b. In the event that the Art Work is freestanding, or incorporated into a building, structure or realty such that it may be removed without damaging or destroying the Art Work or the building or structure, the Artist shall be given written notice and ninety (90) days to remove the Art Work at his or her sole expense. If Artist fails to remove the Art Work, the City shall have the right to remove and dispose of the Art Work by any means, including its destruction.

c. The City agrees it will not willfully destroy, damage, or modify the Art Work, except as provided above.

d. In the event the Art Work is substantially damaged or altered, the City shall no longer represent the Art Work as that of the Artist if the Artist gives written notice to the City that it is the Artist's position to deny authorship on the grounds stated in this Subsection.

e. The City shall at all times have the right to move the Art Work, or remove it from public display. The City shall also have the right to sell or trade the Art Work in its discretion.

6.5. Permanent Record. The City shall maintain on permanent file a record of this Agreement and of the location and disposition of the Art Work while in the City's possession or control.

6.6. Artist's Address. The Artist shall notify the City of changes in Artist's addresses. The failure to do so, if such failure prevents the City from locating or giving notice to the Artist as provided in this Agreement, shall be deemed a waiver by the Artist of the right subsequently to enforce these provisions of Article 7 that require the express approval of the Artist. Notwithstanding this provision, the City shall make every reasonable effort to locate the Artist when matters arise relating to the Artist's rights.

6.7. Surviving Covenants. The covenants and obligations set forth in this Article 7 shall not survive the death or legal incapacity of the Artist.

6.8. Additional Rights and Remedies. Nothing contained in this Article 7 shall be construed as a limitation on such other rights and remedies available to the Artist as an artist under applicable law.

ARTICLE 7

ADDITIONAL TERMINATION RIGHTS

a. Termination for Incapacity. In the event of Lead Artist's death or incapacity, the City shall have the right to terminate this Agreement for cause on payment to Consultant for all work and services performed prior to such death or incapacity. All finished and unfinished work product will be delivered to and become property of the City. If the City had approved the design prior to such death or incapacity or if the Art Work has progressed to the point of fabrication, the City shall have the right to complete the Art Work and the Project. Due regard shall be made for Artist's intended results and proper credit and acknowledgement shall be given to Artist unless the Artist or the Artist's representative disclaim authorship.