

**AMENDMENT 1 TO THE
AGREEMENT FOR COMMISSION OF PUBLIC ART WORK
BETWEEN THE CITY OF AUSTIN AND THEVERYMANY**

This Amendment 1 to Agreement for Commission of Public Artwork (the “Amendment”) is entered into and effective the 1st day of October, 2020 by and between the City of Austin (the “City”) and THEVERYMANY, LLC located at 124 State St. #3, Brooklyn, NY 11201 (the “Artist”, and together with the City the “Parties”).

RECITALS:

The City and the Artist entered into an *Agreement for Commission of Public Artwork* (the “Agreement”) dated February 19, 2018. Under the Agreement, the Artist agreed to design a work of art described as “a large scale installation that reflects the nature and character of Austin” (the “Work”), to be installed at the Austin-Bergstrom International Airport (ABIA) (the “City Facility”).

The City requires the Artist or subconsultants to review, prior to installation of any artwork, investigations into the subsurface soil conditions for the site located on Presidential Boulevard at Austin-Bergstrom International Airport with the purpose of establishing subsurface conditions, materials at the site and design and construction recommendations for the project’s foundation system.

The Parties desire to modify the Agreement to provide for additional services and documentation by the Artist that are necessary in order to allow construction of the Work to begin.

NOW, THEREFORE, in consideration of the mutual covenants and promises stated in this Amendment, the Parties amend the Agreement as follows:

TERMS:

1. Except as set out in this Amendment, the terms, conditions, warranties, and other obligations of the Agreement remain in full force and effect and are hereby ratified by the Parties.
2. The Artist acknowledges that all payments due to the Artist under Sections 5.2.1 through 5.2.3 totaling \$823,750.00, have been received.
3. The City will pay the Studio an additional \$76,500.00, as follows:
11/25/20 SM a. \$38,250.00 upon full execution of this Amendment.
11.25.2020 MF b. \$38,250.00 within 30 days after art work installation begins at the Site.
4. The additional amounts due under this Amendment are inclusive of all fees, costs, interest, or other expenses incurred by the Artist.
5. In addition to the Artist’s obligations under the Agreement, the Artist, will either directly or through licensed subconsultants as appropriate, will:
 - a. On City’s behalf, Artist will commission a geo-technical engineer to provide soil investigations at Artwork location and prepare a geotechnical

engineering report providing geotechnical recommendations relative to the analysis and evaluations containing relevant past boring logs and location plans. The Artist will have no liability to the City for any such Site information and / or geo-technical information that was developed, produced, generated, or otherwise created by parties other than the Artist, including but not limited to the Artist's engineers, design professionals, or consultants.

- b. Research and review available geotechnical reports for the Site, historical aerial photographs and plans available for the Site, and other geological information.
- c. Analyze and evaluate the data collected from current or prior research, field investigation and laboratory testing.
- d. Extended storage for the fabricated parts of the artwork for up to 1 year
- e. Provide three additional design renderings.
- f. Provide an additional lacquer layer, 3 stage finish, including multiple additional color matching samples to achieve corrosion resistance, physically sound and aesthetically appealing finish.

CITY OF AUSTIN

By: 

Sylnovia Holt-Rabb
Acting Director, EDD

Date: November 23, 2020

Approved as to form:

By: 

Name: Ron Pigott
Assistant City Attorney

Date: November 23, 2020

THEVERYMANY, LLC

By: 

Marc Fornes
Principal/Artist

Date: 10.16.2020

**AGREEMENT FOR COMMISSION OF PUBLIC ART WORK BETWEEN THE CITY
OF AUSTIN AND THEVERYMANY LLC**

This Agreement is entered into this 19 day of Feb, 2018 by and between the Parties.

Section 1. DEFINITIONS

- 1.1. **"Agreement"** means this Agreement for Design and Commission of Public Art Work between the City of Austin and the Artist, entered into by the Parties, including any and all attachments and exhibits.
- 1.2. **"Artist"** means THEVERYMANY, LLC, a company organized and existing under the laws of the State of New York located at 124 State St. #3, Brooklyn, NY 11201.
- 1.3. **"City"** means the City of Austin, a Texas home-rule municipal corporation acting by and through its duly authorized City Manager or her designee.
- 1.4. **"Facility"** means the Austin-Bergstrom International Airport Parking Garage/Administration Building owned, operated, or controlled by the Sponsoring Department and located at 3600 Presidential Boulevard, Austin, Texas 78703.
- 1.5. **"Contract Administrator"** means the Art in Public Places Administrator, the Director of the City's Economic Development Department, or their respective designee.
- 1.6. **"Contract Price"** means the total compensation to be paid to the Artist pursuant to this Agreement, to be paid on such terms as are set out in 4.7.2.
- 1.7. **"Default"** means the willful or negligent failure of one Party to timely and properly fulfill its obligations under this Agreement, and further means the violation by one Party of any material covenants, agreements, or stipulations set out in this Agreement.
- 1.8. **"Effective Date"** means the date on which this Agreement becomes fully effective as between the Parties, and is the date on which the last Party executes this Agreement unless specified elsewhere in this Agreement.
- 1.9. **"Final Design"** means the final design of the Work as previously approved by the City pursuant to Exhibit F.
- 1.10. **"Party"** means either the City or the Artist, and **"Parties"** means the City and the Artist collectively.
- 1.11. **"Project"** means the City construction project at which the Work will be installed.
- 1.12. **"Schedule"** means the full and complete schedule developed and prepared by the Artist, with input and approval from the City, for the design, fabrication, delivery, transportation, and installation of the Work, which schedule complies with the Project completion schedule that the City provides to the Artist, and which schedule may be modified from time to time by the Parties as set out in this Agreement.
- 1.13. **"Site"** means the portion of the Facility at which the Work will be installed, more particularly set out in Exhibit A.
- 1.14. **"Sponsoring Department"** means the Aviation Department of the City.

- 1.15. **“Work”** means an original piece of public art conceived and designed by the **Artist** as set out in this **Agreement**, and more particularly described as a large scale installation that reflects the nature and character of Austin.
- 1.16. Terms not defined in this **Agreement** will have their ordinary and customary meanings, as generally used in the field of public art.

Section 2. EXHIBITS

- 2.1. With the exception of Exhibit F, which is attached for reference only, the following documents are attached to this **Agreement**, and are incorporated into this **Agreement** by reference:

Exhibit A. Facility/Site Plan

Exhibit B. Request for Qualifications

Exhibit C. Artist Qualifications

Exhibit D. Permit Fee Waiver Memo

Exhibit E. Insurance Requirements

Exhibit F. September 8, 2017 Agreement for Design of Public Artwork Between the City of Austin and THEVERYMANY LLC.

Section 3. BACKGROUND, RECITALS, AND STATEMENT OF PUBLIC PURPOSE

- 3.1. The **City** is implementing the Art in Public Places Program pursuant to Chapter 7-2 of the Austin City Code by appropriating certain funds for the establishment of artworks 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 selection process.
- 3.2. The Public Art Fund for the **Sponsoring Department** and its **Facility** has been allocated for the selection, purchase, and placement of a work of art at, in, or near the **Facility**.
- 3.3. The **City**, by and through the Austin Arts Commission and in accordance with the current Art in Public Places Program Guidelines, selected the **Artist** to design, execute, fabricate and install the **Work** at the **Site**.
- 3.4. The **Artist** previously designed the **Final Design** pursuant to Exhibit F, and the **City** intends for the **Artist** to fabricate and install the **Work** in accordance with the **Final Design**.
- 3.5. The **Parties** acknowledge that the **Artist's** qualifications, set out in Exhibit C, were reviewed, approved, and relied on by the Art in Public Places Panel and the Austin Arts Commission prior to execution of this **Agreement**.

Section 4. SCOPE OF SERVICES

- 4.1. The **Artist** agrees to provide the following services to the **City** under this **Agreement**:
 - 4.1.1. The **Artist** will determine the artistic expression, scope, design, color, size, material, and texture of the **Work**, subject to approval by the **City**.
 - 4.1.2. The exact location of the **Site** will be mutually agreed upon by the **Parties**.

- 4.1.3. The **Artist** may request at any time all construction information regarding the **Site**, and any reasonable assistance required by the **Artist** to allow the **Artist** to perform the services required by this **Agreement**. To the extent such information is available to the **City** or to third parties under the **City's** control, the **City**, either through the **Contract Administrator** or through the applicable **Facility** design professional or project manager, will promptly provide such information to the **Artist**. The **Artist** is entitled to rely on the accuracy, completeness and timely delivery of all such information, materials, scaled drawings or other documentation; provided, however, that the **City** will have no liability to the **Artist** for any such information, materials, scale drawings, or other documentation that were developed, produced, generated, or otherwise created by parties other than the **City**, including but not limited to the **City's Project** architects, engineers, design professionals, or consultants.
- 4.1.4. **City** to provide **Artist** with all current drawings and specifications including any revisions prepared by **City's** consultants and subconsultants throughout the time of this agreement.
- 4.1.5. To the extent available to the **City**, the **City** will provide a soil report and an as-built survey of the **Site** to the **Artist**, including subsurface investigations that identify all underground utilities and other subsurface features that may impact the installation of the **Project**. The **Artist** will be entitled to rely on the accuracy and completeness of all such **Site** information provided to the **Artist** under this Section, provided, however, that the **City** will have no liability to the **Artist** for any such **Site** information that was developed, produced, generated, or otherwise created by parties other than the **City**, including but not limited to the **City's Project** architects, engineers, design professionals, or consultants.
- 4.1.6. Notwithstanding the foregoing, in no event shall **Artist** be responsible to search for, test for, investigate the presence of, monitor, remediate, abate, clean up, remove, dispose, contain, treat, detoxify or neutralize asbestos, polychlorinated biphenyls (PCB's), petroleum, other hazardous or toxic materials, radioactive material or any other pollutant within the **Site**. **Artist** shall not be responsible to investigate any subsurface conditions and is entitled to rely on the accuracy of the information concerning the existence and location of underground utilities and other subsurface conditions at the **Project Site** provided by the **City** or the **Project Team**. Any increased costs and/or expenses due to unanticipated subsurface or environmental conditions shall not be the responsibility of the **Artist**.
- 4.1.7. **Artist** shall not be responsible to search for, survey or locate any existing and new underground services present at **Site**. If the costs of fabrication and installation exceed the **Contract Price** due to unforeseen site conditions not disclosed to **Artist** during competition stage and due to no fault of the **Artist**, the **Contract Price** shall be equitably adjusted. The **City**, and not the **Artist**, will initiate any changes to the **Contract Price** under this Section by requesting documentation from the **Artist** of any increased costs sustained by the **Artist** that are solely and directly attributable to the site conditions.
- 4.1.8. The **Artist** will support the **City's** commitment to sustainability throughout the entirety of this **Agreement**. The **City** is dedicated to sustainability, which is defined as finding a balance among three sets of goals: 1) prosperity and jobs, 2) conservation and the

environment, and 3) community health, equity, and cultural vitality. The Artist will take reasonable steps appropriate to the Work to enhance and promote green purchasing, energy conservation, solid waste recycling, green building, resource and water conservation, greenhouse gas reduction, and environmental reporting metrics. On request, the City will coordinate with the Artist to provide information on sustainability opportunities.

4.2. SCHEDULING

4.2.1. After the **Effective Date** and prior to beginning installation of the **Work**, the **Artist** will develop and provide the **City** a tentative **Schedule** in accordance with the project construction schedule, when applicable.

4.2.1.1. The **Artist** will coordinate with the **City** in order to ensure that all relevant dates and times are included and accounted for in the **Schedule**.

4.2.1.2. The **City** will either approve, approve with modifications, or reject the draft **Schedule** submitted by the **Artist**. If the **City** rejects the draft **Schedule** submitted by the **Artist**, the **Artist** will revise and resubmit the **Schedule** within ten (10) days from the date **Artist** receives **City**'s written rejection notice or the time period required by the **City** in its notice of rejection, whichever is greater.

4.2.1.3. Once approved by the **City**, the **Schedule** will act as a guideline for all review, fabrication, implementation, transportation, installation, and completion of the **Work**.

4.2.1.4. Upon fabricator selection **Artist** may be required to make reasonable changes to the draft **Schedule** based on fabricator and sub-contractor availability. After review and approval by the **City**, **Artist** will submit a final **Schedule** for all design, review, fabrication, implementation, transportation, and completion of the **Work**. The **Artist** may only make modifications to the approved final **Schedule** upon written request to, and written approval of, the **City**. The **City** may request from the **Artist** any information or documentation it deems necessary in order to evaluate any request to amend the approved **Schedule**.

4.2.1.5. The **City** may, on its own initiative and at any time, direct any reasonable changes to the approved **Schedule** it deems necessary or appropriate.

4.2.1.6. If the **Artist** is prevented at any time from complying with the **Schedule** through no fault of the **Artist**, the **City** may adjust the **Schedule** to accommodate the **Artist**. If the **City** determines that any delay is a result of the actions of the **City** or any third party in the **City**'s control, or is a result of **Site** conditions or **Project** scheduling for which third parties are responsible, the **City** may, in its sole discretion, adjust the **Contract Price**. The **City**, and not the **Artist**, will initiate any changes to the **Contract Price** under this Section by requesting documentation from the **Artist** of any increased costs sustained by the **Artist** that are solely and directly attributable to the delay.

4.2.1.7. The **Parties** agree to grant each other a reasonable extension of time if any force majeure, Acts of God, flood, riot, civil insurrection, labor strikes, natural disasters, acts of vandalism (including graffiti), or orders of local or federal government render timely performance of the **Parties**' respective obligations. A **Party** invoking

Section 4.2.1.7 must give notice to the other **Party** within ten days of the onset of such performance delay, specifically stating the reasons for the delay. Any performance excused under this section will only be excused for a reasonable duration of the conditions preventing performance. The **Parties** will revise the **Schedule** to reflect any such delays.

- 4.2.2. The **Artist** will perform at least one investigation of existing **Site** conditions prior to beginning installation of the **Work**, and will determine whether the **Final Design** appropriately provides for existing **Site** conditions made known to **Artist** or that are visually observable. The **Artist's** investigation of the existing **Site** conditions shall not include any invasive, destructive or subsurface testing. If the **Artist** believes any differences, discrepancies, errors, omissions, or inconsistencies exist between the **Artist's** inspection and the information provided by the **City** or the **Project** design professionals, the **Artist** must notify the **City** prior to continuing with any installation of the **Work**.

4.3. FABRICATION AND INSTALLATION

- 4.3.1. After the **City** has approved the **Schedule**, the **City** will issue notice to proceed to the **Artist**, which will advise the **Artist** of any required modifications to the **Schedule**.
- 4.3.2. **Artist** shall submit final structural engineering report. Report shall bear engineer's seal and signature.
- 4.3.3. After the **City** provides notice to proceed as set out in Section 4.3.1, the **Artist** will begin fabrication of the **Work** in accordance with the **Schedule**.
- 4.3.4. The **City** will have the right, on notice to the **Artist**, to review the **Work** at reasonable times and locations throughout the **Work's** fabrication. The **Artist** will submit any progress reports requested by the **City** or identified in the **Schedule**.
- 4.3.5. Upon completing fabrication of the **Work** and prior to beginning any transportation or installation, the **Artist** will:
- 4.3.5.1. Notify the **City** that any and all pre-installation fabrication is complete and that the **Artist** is ready to begin installation of the **Work** at the **Site**.
- 4.3.5.2. Conduct any further **Site** inspections necessary to verify that installation of the **Work** can proceed according to the **Final Design**. The **Artist** will immediately notify the **City** of any changes to the **Site** observed since the inspection conducted pursuant to Section 4.2.2 or deviating from the construction documents provided to the **Artist**, and the **Parties** will resolve any such changes via the change procedures set out in Section 4.4 prior to any installation.
- 4.3.5.3. Any revisions to construction documents prepared by **City** or **City's** other consultants that impact site conditions or the installation of the **Artwork**, including without limitation increased fabrication or installation costs, shall be forwarded and made known to the **Artist** without delay. These revisions constitute a change and the **Parties** will resolve any such changes via the change procedures set out in Section 4.4 prior to any installation.
- 4.3.5.4. In the discretion and at the direction of the **City**, attend in person or via conference call one or more pre-installation meetings with one or more of the following: (1) the

AIPP project manager; (2) the **Sponsoring Department** project manager; (3) the general contractor; and (4) the **Project** design professional, all as necessary to allow the **Artist** to adequately plan for delivery and installation of the **Work**. The **City** may, in its sole discretion, require or allow the **Artist** to attend the official pre-construction meeting for the **Project** in order to fulfill this requirement.

4.3.5.5. Obtain all required permits for delivery and installation of the **Work**.

4.3.6. If the **City** fails to provide notice to proceed with installation on the **Work** within the time specified in the **Schedule** despite the fact that the **Artist** is ready and able to begin installation, the **Artist** agrees to store the **Work** at the **Artist's** facility at no cost to the **City**. If the **Artist** is unable to do so, after documenting the inability, the **City** may either: (1) make arrangements for storage of the **Work** at a **City**-controlled or commercial storage facility; or (2) direct the **Artist** to obtain 3 quotes for storage at a commercial storage facility, approve 1 of the quotes obtained by the **Artist**, and agree to reimburse the **Artist** for any direct, out-of-pocket, reasonable transportation and storage costs incurred by the **Artist**. Any reimbursements to which the **City** agrees will be in accordance with Section 4.4.3

4.3.7. Subject to any changes under Section 4.3.5.2, the **Artist** will remain responsible for all expenses, labor, and equipment necessary to prepare the **Site** for installation of the **Work**.

4.3.8. The **Artist** will take all necessary precautions to protect and preserve the integrity and finish of adjacent surfaces and landscaping features while installing the **Work**. If requested by the **City**, the **Artist** will return adjacent surfaces or landscape features impacted by the **Artist's** work to the condition that existed prior to installation of the **Work**.

4.3.9. At all times during the installation of the **Work**, the **Artist** will comply with all posted safety information signs at the **Project**, and will comply with all requirements for use of personal protective equipment. At the **City's** direction, the **Artist** may be required to successfully complete any **Site**-specific, **Project**-specific, or general safety training prior to entering the **Site**. The **Artist** will further comply with any directive necessary for the preservation of life, health, or property that is given by the **City**, the **City's** project managers, the **Project's** design professionals, or any law enforcement or administrative officer with jurisdiction over the **Project** location.

4.4. CHANGES TO THE WORK

4.4.1. At any time before closeout as set out in Section 4.5, the **Artist** may make changes to the **Final Design**, whether for aesthetic, safety, construction, or other reasons, and the **City** may likewise direct the **Artist** to make changes to the **Final Design** for any non-aesthetic reason. Such changes to the **Final Design** or to the **Work** itself will be made in accordance with the procedures set out in this section.

4.4.2. Major changes to the **Final Design** or to the **Work** initiated by the **Artist** require prior approval by the **City**. Major changes include, but are not limited to, changes to the overall scope, layout, imagery, color, shape, size, material, texture, or structural elements of the **Work**. The **Contract Administrator** may reject any proposed major changes for any non-aesthetic reason. If the **City** rejects a major change, the **Artist** will either

continue with the **Final Design** as approved by the City, or will revise and resubmit the proposed major change within 10 days of the City's original rejection. If the City rejects any re-submitted change, this the City may terminate this Agreement for convenience pursuant to Section 10.7.1.

- 4.4.3. All changes initiated and approved under Section 4.4 will be documented via formal written change order signed by both Parties, which will be incorporated into and become a part of the **Final Design**. The City may, in its sole discretion, determine that any change, whether initiated by the City or by the Artist, warrants an adjustment of the **Contract Price** or the **Schedule**, or both. Any adjustment to the **Contract Price** or the **Schedule** must be documented on the same change order on which the work causing the adjustment in the **Contract Price** is documented. If the City does not change **Contract Price**, the Artist will bear the sole risk and cost of any changes to the **Final Design** or to the **Work**.

4.5. COMPLETION

- 4.5.1. The Artist will give notice to the City that the Artist believes the installation of the **Work** is complete, and will attend an inspection of the **Work** by the City, which may be attended by the City's project manager, the Project's general contractor, the Project's design professionals, and the Sponsoring Department's project manager as necessary in the City's determination.
- 4.5.2. If the City, in consultation with the Project's general contractor and Sponsoring Department's project manager, determines that the **Work** is unsafe, incomplete, or substantially inconsistent with the **Final Design**, the City may take any of the following actions:
- 4.5.2.1. Direct the Artist to correct any unsafe, incomplete, or substantially inconstant condition in the **Work**, at the Artist's cost.
- 4.5.2.2. If the Artist chooses not to correct the **Work**, the City may accept the **Work** as constructed, reserving its right to modify the **Contract Price** to address the unsafe, incomplete, or materially inconsistent conditions.
- 4.5.2.3. Reject the **Work** and terminate this Agreement for cause in the manner set out in Sections 10.6.1.1 through 10.6.1.4, reserving any and all other remedies available to the City under this Agreement or applicable law. If the City terminates this Agreement for cause under this Section, the opportunity to cure provided in Section 10.6.1.2 will not apply.
- 4.5.3. The Artist will be responsible for any and all clean-up of the Site, including the proper recycling or disposal of any unused, excess, or leftover materials not incorporated into the **Work**. If the Artist fails to do so and the City incurs any additional costs necessary to complete the clean-up of the Site, the City will be entitled to deduct all such costs from the final milestone payment.
- 4.5.4. If the City accepts the **Work**, either with or without modifications to the **Contract Price**, the City will issue a Certificate of Completion in a form provided by the City. The issuance of a Certificate of Completion does not waive any other rights or remedies afforded the City in this Agreement.

4.6. CLOSEOUT

4.6.1. Within 30 days after installation of the **Work** is complete and the **City** has accepted the **Work**, the **Artist** will submit to the **City** the following:

4.6.1.1. As-built elevations, plans, material specifications and quantities reflecting the actual installation of the **Work** noting any deviations from the **Final Design**.

4.6.1.2. A Maintenance Plan in a form provided by the **City**.

4.6.1.3. A Final Budget Report in a form provided by the **City**.

4.6.1.4. A Plaque Information Form in a form provided by the **City**.

4.6.2. Within 15 days after the **Artist** completes the services set out in Section 4, the **Contract Administrator** will evaluate the **Artist's** compliance with the terms of this **Agreement**.

4.7. LECTURE

4.7.1. The **Artist** will, if requested by the **City**, attend and present one lecture or other public education event to an audience designated by the **City**, in the format requested by the **City** and on a mutually agreeable date and time during the Scheduling Phase set out in Section 4.2 or the Fabrication and Installation Phase set out in Section 4.3.

4.7.2. The **Artist** acknowledges that the public education event set out in Section 4.7.1 **Error! Reference source not found.** is for the purpose of introducing the **Work** to the citizens of **Austin** and its surrounding communities, and that such public education is an integral part of the **City's** procurement of the **Work** and the installation of the **Work** at the **Site**. As such, the public education event, if required by the **City**, will be without additional compensation to the **Artist**.

Section 5. PAYMENT

5.1. The **Contract Price** for this **Agreement** is \$1,325,000.00.

5.1.1. In exchange and consideration for the **Artist's** agreement to undertake the obligations in this **Agreement**, the **City** agrees to pay the **Artist** the **Contract Price**.

5.1.2. The **Contract Price** may be modified by the **City**, as set out elsewhere in this **Agreement**.

5.1.3. The **Contract Price** is the full compensation owed to the **Artist** under this **Agreement**.

5.1.3.1. Except as expressly provided for elsewhere in this **Agreement**, the **Artist** agrees to be solely responsible for all costs related to design, execution, fabrication, transportation, travel, delivery, mailing, shipping, delivery, site work, lighting specifications, installation, labor, insurance, permitting and licensing, and any other costs incurred by the **Artist** in fulfilling his or her obligations under this **Agreement**. Any additional costs due to existing soil and/or subsurface conditions not known to the **Artist** at the time of entering into the Design Contract shall be excluded and subject to additional charges to be reviewed and approved by the **City**.

5.1.3.2. The **Artist** acknowledges that the **City** is a tax-exempt organization, and that no state or local sales taxes, and no federal excise tax, will be due on the **Work** or the materials and supplies used in the design and fabrication of the **Work**. The **Artist**

acknowledges receipt of a Texas Sales and Use Tax Exemption Certificate Form for use by the **Artist** in the design and completion of the **Work**.

5.1.3.3. For any permits required by **City** ordinance or administrative rule, the **Artist** will seek fee waivers as set out in Exhibit D.

5.2. Payment of the **Contract Price** will be in the following percentages and at the following payment milestones:

5.2.1. Milestone 1 – 15% - \$198,750.00 upon execution of this Agreement.

5.2.2. Milestone 2 – 20% - \$265,000.00 within 30 days after the **City** verifies Production files have been sent for bid.

5.2.3. Milestone 3 – 20% - \$265,000.00 within 30 days after the **City** verifies fabrication of the **Work** is 50% complete.

5.2.4. Milestone 4 – 20% - \$265,000.00 within 30 days after the **City** verifies that fabrication of the **Work** is fully complete.

5.2.5. Milestone 5 – 17.5% - \$231,875.00 within 30 days after the **City** verifies that installation is substantially complete.

5.2.6. Milestone 6 – 7.5% - \$99,375.00 within 30 days after the following:

5.2.6.1. The **City** has confirmed installation of the **Work** is complete.

5.2.6.2. The **Artist** has fulfilled all the requirements of Section 4.6.1

5.2.6.3. The **Artist** has transferred title to the **Work** to the **City**.

5.3. Pursuant to Section 2-8-3 of the Austin City Code, notice of which is acknowledged by the **Artist**, the **City** may withhold payment otherwise due under this **Agreement** in order to offset any debt owed by the **Artist** to the **City**, including but not limited to any tax debt owed by the **Artist** to the **City** pursuant to Article VIII, Section 1 of the Austin City Charter, notice of which is also acknowledged by the **Artist**.

5.4. The **Artist** will provide an Affidavit of Bills Paid in a form provided by the **City** after **Artist** has received final payment noted in 5.2.6.

5.5. If **City** fails to make undisputed payments to **Artist** in accordance with this **Agreement**, such failure shall be considered substantial non-performance and a default. Such default constitutes cause for suspension of performance of the **Work** under this **Agreement**, or at **Artist**'s option, termination of this **Agreement** "For Cause", as such term is defined in Section 10.6 of this **Agreement**. The **Artist** shall give seven (7) days' written notice to **City** before suspending performance of the **Work**. In the event of a suspension of the **Work**, the **Artist** shall have no liability to **City** for delay, impact or other damages of all types and categories caused the **City** because of such suspension. Before resuming performance of the **Work**, the **Artist** shall be paid all undisputed sums due prior to suspension and any expenses incurred in the interruption and resumption of its services, and the **Schedule** shall be equitably adjusted.

Section 6. SUBCONTRACTING

- 6.1. The **Artist** may not subcontract all or substantially all of the services to be provided under this **Agreement**. The **Artist** may subcontract portions of the services to be provided under this **Agreement**, at the **Artist's** sole expense, subject to the following limitations:
 - 6.1.1. The **Artist's** use of subcontractors may not affect the design, appearance, fabrication methodology, or visual quality of the **Work**.
 - 6.1.2. The **Artist** will at all times supervise the work performed by subcontractors.
 - 6.1.3. The **Artist** will remain fully responsible to the **City** and third parties for the actions of any subcontractors engaged by the **Artist**.
 - 6.1.4. Prior to the **Artist** entering into subcontracts, the **Artist** will provide to the **City** an outline of possible subcontracts and further subcontracts as needed in the fabrication and installation of the **Work**.
 - 6.1.5. Any subcontract with fabricators and / or installers must be in writing, must attach this **Agreement** as an exhibit, and must acknowledge the supremacy of this **Agreement** in the case of any conflict between the two. All subcontractors will remain subject to the terms of this **Agreement** at all times.
 - 6.1.6. The **Artist** will require of each subcontractor, as a condition to entering into each subcontract, that the subcontractor will comply with the **City's** insurance requirements as set out in Exhibit E. The **Artist** will further obtain, on demand from the **City**, a certificate or certificates of insurance sufficient to satisfy the **City** that each subcontractor is in compliance with the insurance requirements of this **Agreement**.
- 6.2. In an effort to further stimulate and positively impact the local economy, the **Artist** will make reasonable efforts, which the **Artist** will document on request by the **City**, to:
 - 6.2.1. Provide minority-owned, women-owned, and local small businesses an equal opportunity to participate as suppliers for materials and labor services acquired or used by the **Artist** for the commission of the **Work**.
 - 6.2.2. Recruit residents of the Austin metropolitan area for available subcontracting opportunities.

Section 7. REPRESENTATIONS AND WARRANTIES

7.1. WARRANTIES OF TITLE

- 7.1.1. The **Artist** warrants that the **Work** is and will be original creations of the **Artist**.
- 7.1.2. The **Artist** warrants and represents that the **Artist** has obtained, or will obtain prior to any incorporation or use, the written approval and consent of any required third party for the use of any portion of the **Final Design** or the **Work** that is not the original work of the **Artist**. The **Artist** agrees to defend, indemnify, and hold harmless the **City**, including the **City's** officers, employees, agents, and contractors, from and against all claims, losses, damages, actions, or expenses of every type and description, including attorneys' fees, to which they may be subjected arising out of the **City's** use or possession of the **Final Design** during the approval process or by reason of an alleged or actual copyright violation or other lack of ownership, authorship, or originality.

7.2. WARRANTIES OF QUALITIES AND CONDITIONS

7.2.1. Except as otherwise disclosed to the City in writing, the Artist represents and warrants, from the Effective Date through a date one year following the City's acceptance of the Work, that:

7.2.1.1. The execution and fabrication of the Work will be performed in a good and workmanlike manner.

7.2.1.2. The Work, as fabricated and delivered, will be free of defects in material and workmanship, including any defects consisting of "inherent vice" or qualities that may cause or accelerate deterioration of the Work.

7.2.1.3. Reasonable maintenance of the Work will not require procedures substantially in excess of those described in the Final Maintenance Plan required by Section 4.6.1.2.

7.2.2. The City will give notice to the Artist of any observed breach of these representations and warranties. Once notified by the City, the Artist will, at no cost to the City, promptly cure the breach or breaches consistent with professional conservation standards, including but not limited to cure by means of repair or re-fabrication of the Work or any necessary portion of the Work provided that the City can demonstrate that the Work has been maintained as per Artist's maintenance instructions.

7.2.3. The warranties described above exclude damage caused by fire, smoke, extraordinary weather conditions, natural catastrophe, abuse, vandalism, modification, improper or insufficient maintenance, improper operation, or normal wear and tear.

Section 8. OWNERSHIP, PUBLICITY, AND INTELLECTUAL PROPERTY RIGHTS

8.1. The Artist will remain the owners of the Work until title transfers to the City as follows:

8.1.1. Within 10 days of the City's acceptance of the Work, the City will issue to the Artist a Transfer of Title for Public Artwork in a form provided by the City.

8.1.2. All design documents, models, calculations, information and other materials prepared by Artist for this project, in physical and/or electronic form, are "Instruments of Service". The Artist shall be deemed the author and owner of the Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights and patent rights. Artist grants to City a perpetual, irrevocable, royalty-free, non-exclusive license to reproduce Artist's Instruments of Service solely for purposes of using, maintaining, and promoting the Artwork, provided that the City is not in default of its payment obligations under this Agreement. Any termination of this Agreement prior to completion of the Project shall terminate this license.

8.2. The Parties will proactively collaborate to identify and pursue any appropriate and beneficial publicity for the Work.

8.2.1. For purposes of this Agreement, publicity means the manner, method, timing, and content of all efforts to generate public knowledge of, understanding of, and interest in the Work, including but not limited to any interviews, flyers, brochures, posters, mailings, advertisements, emails, social media postings, blog postings, electronic communications or presentations of any type, live or prerecorded television or other

video presentations or commercials, live presentations, radio interviews or advertisements, and any other publications of any other kind and in any medium.

- 8.2.2. The **Parties** will each use their best efforts to arrange for publicity for the **Work**.
- 8.2.3. The **Parties** will identify various media for prospective publication of the **Work** throughout the course of the design, so that publicity for the **Work** may begin prior to or immediately upon completion.
- 8.2.4. The **Artist** shall have the right to publicize photographic or artistic representations of the **Artwork** and its location in **Artist's** promotional, publicity and marketing materials. The **Artist** shall be given reasonable access to the completed **Project** and/or the **City's** photographs and renderings giving credit to the photographer. During this contract and for a duration of one year post acceptance of the **Work**, if the **Artist** intends to use any third party for any such publication, or intend to submit to any interview with a third party, the **Artist** must give notice to the **City** prior to any such action.
- 8.2.5. The **Artist** agrees to be available at such times and places as reasonably required by the **City** in order to attend any ceremonies relating to the transfer of the **Work** to the **City**.
- 8.2.6. The **City**, at its expense and in consultation with the **Artist**, will arrange for the preparation and installation at the **Site** of a plaque identifying the **Artist**, the title of the **Work**, and the year of completion. The **Artist** shall have the right to review the design and content of the plaque and suggest changes as required.
- 8.3. The **Artist** will retain all reproduction rights afforded by the Copyright Act of 1976, as currently codified and amended, and any other reproduction rights in and to the **Work** except as limited in this **Agreement**.
 - 8.3.1. The **Artist** may not make any additional exact duplicate or three-dimensional scale reproductions of the **Work**, and may not grant permission to do so to any third parties except with the prior written permission of the **City**.
 - 8.3.2. The **Artist** grants to the **City** and its assigns an irrevocable license to make two-dimensional reproductions of the **Work** for any municipal or public purpose, including but not limited to any publicity the **City** deems appropriate or beneficial.
 - 8.3.3. Any reproductions of the **Work** made by the **City** will credit the **Artist** and will contain a copyright notice substantially in the form "© MARC FORNES/THEVERYMANY, LLC, 2018." Any reproductions of the **Work** made by the **Artist** will credit the **City** and will contain a notice in the form "An original work owned and commissioned by the City of Austin."
 - 8.3.4. Notwithstanding anything to the contrary in this Section 8, this **Agreement**, or any other agreements relating to the **Work**, the **City's** rights as denoted herein does not include or extend to the **City's** grant of a license or permission in any form whatsoever to any contractors, subcontractors, fabricators, consultants or other **Project** participants to make or use any photographs, drawings, films, videos or any other graphic or visual representation of the **Work**. In this regard, the **City** may not grant any such license or permission unless it obtains the **Artist's** prior written consent.

Section 9. INSURANCE AND RISK OF LOSS

- 9.1. The **Artist** will bear all risk of loss and damage to the **Work** until title transfers to the **City** as set out in Section 8.1.1
- 9.2. The **Artist** agrees to carry insurance in the types and amounts indicated in Exhibit E.
 - 9.2.1. Workers' Compensation and Employers' Liability insurance coverage must be in place before the **Artist** begins any work on the **Site**, including but not limited to installation of the **Work** and any predicate **Site** preparation.
 - 9.2.2. Any required Commercial General Liability insurance coverage and Automobile Liability insurance coverage required in Exhibit E must be in place no later than 30 days after the **Effective Date**.
 - 9.2.3. Professional Liability insurance coverage for any design professional must be in place at the time the design professional places his or her seal on design drawings as required in Exhibit E.
 - 9.2.4. Approval by the **City** of any insurance obtained by the **Artist** will not diminish or decrease the liability of the **Artist** under this **Agreement**.
- 9.3. The **Artist** is not required to obtain any performance bond or other performance security.

Section 10. MAINTENANCE, REPAIRS, AND ALTERATIONS

- 10.1. The **City** recognizes that maintenance of the **Work** on a regular basis is essential to the integrity of the **Work**.
 - 10.1.1. The **City** will reasonably assure that the **Work** is properly maintained and protected, taking into account the maintenance plan prepared by the **Artist** under Section 4.6.1.2.
 - 10.1.2. The **City** agrees, within reason and always subject to the availability of revenue in any given fiscal year, to protect and maintain the **Work** against the ravages of time, vandalism, and the elements.
- 10.2. The **City** will have the sole right to determine whether, when, and to what extent any repairs or restorations of the **Work** will occur.
 - 10.2.1. During the **Artist's** lifetime, and to the extent practicable, the **City** will give the **Artist** the right to both approve of and make or supervise all major repairs and restorations. If the **Artist** withholds, conditions, or delays approval for any repair or restoration of the **Work**, or does not agree to make or supervise the repairs or restorations, the **City** may make such repairs or restorations as it deems necessary for the preservation of the **Work**, and may solicit bids and award contracts for the services to other qualified professionals in order to do so.
 - 10.2.2. All repairs and restorations, whether by the **City** or by the **Artist**, will be made in accordance with then-current, generally accepted principles of conservation.
 - 10.2.3. The **City** may undertake emergency repairs to the **Work** without prior notice to the **Artist** whenever necessary to protect the integrity of, or to prevent the loss of or further damage to, the **Work**. Such emergency repairs will not be deemed to constitute artistic alteration of the **Work** or a breach of this **Agreement**. The **City** will provide notice to the **Artist** of such emergency repairs as soon as practical.

10.3. The **Artist** acknowledges that the **Work**, when installed, will be incorporated within and made a part of the **Facility** in such a way that removal of the **Work** from the **Facility**, or destruction, alteration, or modification of the **Facility**, may cause destruction, distortion, mutilation, obscuration, or other alterations to the **Work**.

10.3.1. The **City** will attempt in good faith to notify the **Artist** prior to undertaking any alterations to the **Work**.

10.3.2. To the extent Section 10.3 is inconsistent with any rights, including moral rights, that would otherwise be provided to the **Artist** by applicable law, including the 1990 Visual Artists' Rights Act as codified and amended, the **Artist** acknowledges receiving notice of this provision and waives any right to preservation of the **Work** provided by those laws. The **Artist** will retain the right to disclaim authorship of the **Work** to the extent allowed by the 1990 Visual Artists' Rights Act as codified and amended.

10.3.3. If the **Work** is freestanding, or is incorporated into the **Facility** in a way that it could be removed without damaging or destroying either the **Work** or the **Facility**, the **City** will give notice to the **Artist** of its intent to remove the **Work**. The **Artist** will be entitled to remove the **Work** from the **Facility** at the **Artist's** sole expense, and will have 90 days from the date the **City** gives notice to remove the **Work**. If the **Artist** fails to remove the **Work** within 90 days of the **City's** notice to the **Artist**, the **City** will be entitled to remove and dispose of the **Work** by any means, including destruction of the **Work**.

10.3.4. The **City** agrees not to willfully destroy, damage, or modify the **Work**, except as set out in this **Agreement**.

10.3.5. If the **Work** becomes substantially damaged or altered, the **City** will no longer represent the **Work** as that of the **Artist**, but only if the **Artist** gives notice to the **City** that it is the **Artist's** position to deny authorship on the grounds that the **Work** has become substantially damaged or altered.

10.3.6. The **City** will have the right at any time to either move the **Work** or remove it from public display. The **City** will also have the right, in its discretion and at any time, to sell, trade, or otherwise transfer ownership of the **Work**.

10.4. The obligations of the **City**, and the rights of the **Artist**, set out in Section 10 will not survive the deaths or legal incapacities of the **Artist**.

10.5. Nothing in Section 10 limits other rights or remedies that may be available to the **Artist** now or in the future.

TERMINATION

10.6. TERMINATION FOR CAUSE

10.6.1. A **Party** may terminate this **Agreement** for cause due to the **Default** of the other **Party**.

10.6.1.1. Prior to terminating this **Agreement** for cause, the terminating **Party** must give notice to the other **Party** of its intent to terminate for cause, specifically citing each item of **Default** that forms the basis for termination.

- 10.6.1.2. A **Party** receiving notice of **Default** from the other **Party** will have 30 days from the date notice is received to cure all items of **Default** set out in the notice.
- 10.6.1.3. Any termination for cause will automatically become effective on the 31st day after receipt of notice of **Default** if the notified **Party** fails to cure all items of **Default** identified or has undertaken steps reasonably calculated to cure the items of **Default**, without the need for any further action by the terminating **Party**.
- 10.6.1.4. Termination for cause will not relieve the terminated **Party** of any liability for damages resulting from a breach or a violation of the terms of this **Agreement**.
- 10.6.1.5. Upon any **Termination** for Cause by the **City**, **City** will pay **Artist** all fees and costs incurred up to and including the date of **Termination**, and said payment shall be made by **City** no later than 30 days from the date the **Artist** submits a final invoice after receiving notice of **Termination**. In addition, **Artist** shall be entitled to retain all payments made by **City** prior to the date of **Termination**.
- 10.6.2. In addition to Section 10.6.1, the **City** may terminate this **Agreement** for cause if:
- 10.6.2.1. The **Artist**, including any agent or representative of the **Artist**, provides or offers to provide any gratuities in the form of entertainment, gifts, or otherwise to any **City** official or employee with a view toward securing favorable treatment with respect to the awarding, amending, or making of any determinations with respect to the performance of this **Agreement**. Termination for cause under Section 10.6.2.1 will be in the manner set out in Sections 10.6.1.1 through 10.6.1.4, except that the **Artist** will not be entitled to any right to cure provided by Section 10.6.1.2. If the **City** terminates this **Agreement** under Section 10.6.2.1, the **City** will, in addition to all other rights and remedies, be entitled to recover from the **Artist** an amount equal to the cost incurred by the **Artist** or the agent or representative of the **Artist** in providing such gratuities.
- 10.6.2.2. The **Artist** dies or becomes physically or legally incapacitated during the term of this **Agreement**. Termination for cause under Section 10.6.2.2 will only require notice to the **Artist** or the **Artist's** legal successor or guardian, as applicable. The **City** will not seek reimbursement from the **Artist's** estate for any payment made to the **Artist** but not expended prior to the **Artist's** incapacity or death. All finished and unfinished drawings, sketches, photographs, and work will become property of the **City**. If, prior to the **Artist's** death or incapacity, the **Final Design** is approved by the **City** or the **Work** has progressed to the point of fabrication, the **City** may complete the **Work**, giving due regard to the **Artist's** intended results and giving proper credit and acknowledgement to the **Artist**.

10.7. TERMINATION FOR CONVENIENCE

- 10.7.1. Either **Party** may terminate this **Agreement** for convenience.
- 10.7.2. If the **City** approves reimbursements for purchases of materials used for the development of the design in excess of the payments the **Artist** received prior to the **City's** termination for convenience pursuant to Section 10.7.1., the **City** will reimburse the **Artist** for amounts expended under this **Agreement** within 30 days of the **Artist's** submission of receipts documenting such material purchase.

- 10.7.3. Upon Termination for Convenience, City will pay Artist all fees and costs incurred up to and including the date of Termination, and said payment shall be made by City no later than 30 days from the date the Artist submits a final invoice after receiving notice of Termination. In addition, Artist shall be entitled to retain all payments made by City prior to the date of Termination.

10.8. FUNDING

- 10.8.1. The Artist acknowledges that the City has provided notice that the City's payment obligations to the Artist are payable only from funds appropriated or available for the purpose of this Agreement, which are set out in Section 3. If the City does not appropriate funds for this Agreement, or if there are no other lawfully available funds for this Agreement, this Agreement is void, and will terminate immediately on notice to the Artist.
- 10.8.2. The City will provide the Artist notice of the failure of the City to make an adequate appropriation for any fiscal year to pay the amounts due under this Agreement, or of the reduction of any appropriation to an amount insufficient to permit the City to pay its obligations under this Agreement.
- 10.8.3. If this Agreement is voided according to Section 10.8.1, the Artist will be entitled to retain any payments made prior to termination for which funds were properly appropriated.

Section 11. NOTICES

- 11.1. Unless explicitly stated elsewhere in this Agreement, all notices must be given in writing in the manner set out in Section 11 in order to be effective.
- 11.2. Any notice required or allowed to be given or to be served in connection with this Agreement must be in writing, and will be deemed delivered and received on the earlier of the date actually received or a date that is:
- 11.2.1. Three days after being deposited in the United States mail, if sent via certified mail, properly addressed and with postage prepaid;
- 11.2.2. The date delivery is originally scheduled to occur, if sent via a reputable overnight courier service; or
- 11.2.3. The date sent via facsimile transmission, provided the receiving Party has designated a fax number below and the sending party has a fax-generated verification of the date and time of transmission and the fax number to which the notice was sent.
- 11.3. Notice to each Party must be given as follows:

[##REMAINDER OF PAGE INTENTIONALLY LEFT BLANK##]

P. O. Box 1088
Austin, TX 78767
Phone: 512-974-7852
Facsimile: 512-974-6379

The City:

Economic Development Department
ATTN: Sylvania Holt-Rabb, Assistant
Director City of Austin
P. O. Box 1088
Austin, TX 78767
Phone: 512-974-7739
Facsimile: 512-974-7825

City of Austin Law Department
ATTN: City Attorney
City of Austin
P. O. Box 1088
Austin, TX 78767

The Artist:

THEVERYMANY, LLC

With copies to:

Economic Development Department
ATTN: Susan Lambe, Art in Public
Places Administrator
City of Austin

Attn: Marc Fornes
124 State St. #3
Brooklyn, New York 11201

- 11.4. The **Parties** will each have the right to change their respective addresses for notice purposes, and will have the right to specify as its address any other address within the United States of America by giving the other **Party** at least five days' notice.
- 11.5. The **Artist** will give notice to the **City** of any changes to the **Artist's** address. If the **City** gives notice to the **Artist** in the manner set out in Section 11 and such notice is returned to the **City** as undeliverable, the **City** will make every reasonable effort to locate the **Artist** in order to give notice to the **Artist** of issues affecting or relating to the **Artist's** rights. If the **Artist** fails to update the **Artist's** address on file with the **City** and the **City** is unable to locate the **Artist** for purposes of giving the notices required in this **Agreement**, the **Artist** will be deemed to have waived any rights afforded to the **Artist** under Section 10. If the **Artist** subsequently reestablishes contact with the **City** after a waiver of the rights set out in Section 10, the **Artist** will regain those rights to the extent they are still susceptible of being exercised, in light of the remediation, repair, or removal already undertaken by the **City**. Any actions taken by the **City** prior to the **Artist's** reestablishment of contact with the **City** are prospectively ratified by this **Agreement** and may not form the basis for any claims for damages or injunctive relief by the **Artist** against the **City**.

Section 12. EQUAL OPPORTUNITY

12.1. For the duration of this **Agreement**, including any maintenance or repair provided by the **Artist** under Section 10, the **Artist** will:

- 12.1.1. Take no action to discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability, including but not limited to actions taken to employ, promote, demote, transfer, recruit, or pay or otherwise compensate, or select for training.
 - 12.1.2. Take affirmative action to ensure that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.
 - 12.1.3. Post in conspicuous places, available to all employees and applicants for employment, notices to be provided by the **City** setting out the provisions of Section 12.
 - 12.1.4. State, in all solicitations or advertisements for employment placed by or on behalf of the **Artist**, that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.
 - 12.1.5. Furnish any information and reports requested by the **City**, and allow the **City** access to its books, records, and accounts for purposes of investigation to ascertain compliance with Section 12 and any applicable rules and regulations.
- 12.2. If the **Artist** fails to comply with Sections 12.1, the **City** may terminate this **Agreement** for cause, or may suspend this **Agreement** in whole or in part, and the **Artist** may be debarred from further agreements with the **City**.

Section 13. MISCELLANEOUS PROVISIONS

13.1. The **Artist** acknowledges that:

- 13.1.1. The recitals set out in Section 3 form the basis upon which the **City** has agreed to enter into this **Agreement**.
 - 13.1.2. The recitals set out in Section 3 are each a material inducement to the **City** to enter into this **Agreement**.
 - 13.1.3. The **City** would not have entered into this **Agreement** but for the truth of each recital set out in Section 3.
- 13.2. The **Artist** will comply with all Federal, State, and **City** statutes, ordinances, and regulations applicable to the **Artist's** services under this **Agreement**.
- 13.3. The **City** will maintain on permanent file a record of this **Agreement** and of the location and disposition of the **Work** while it is in the **City's** possession or control, in accordance with applicable record retention laws.
- 13.4. The **Artist** agrees and acknowledges that the **Artist** is an independent contractor of the **City** for all purposes during the existence of this **Agreement**, and is neither an agent, nor a partner, nor an employee of the **City**.

- 13.4.1. The City will not be responsible for withholding, reporting, or paying employment taxes or other similar levies for the Artist that may be required by the United States Internal Revenue Service or other State or Federal agencies.
- 13.4.2. No City employee or official will supervise the Artist, nor will the Artist supervise any City employee or official.
- 13.4.3. The Artist acknowledges that this Agreement creates no obligation of the City to enter into any joint venture, joint enterprise, partnership, or other legal business relationship regarding the Work.
- 13.5. This Agreement constitutes the entire agreement between the Parties, and supersedes any prior oral or written agreements and understandings regarding the Work. This Agreement may only be modified or amended by written amendment signed by both Parties and approved by appropriate action of the City.
- 13.6. The election of one remedy under this Agreement or applicable law does not prevent either Party from pursuing any other right or remedy set out in this Agreement or under applicable law. No waiver of performance by either Party will act as a continuing waiver of any subsequent Default. The payment of any part of the Contract Price after a Default will not act as a waiver of any right, or as acceptance of defective performance.
- 13.7. If a dispute arises between the Parties regarding performance under this Agreement that the Parties are unable to resolve through negotiation, the Parties agree that the dispute will be submitted for mediation with the Travis County Dispute Resolution Center before any suit is filed. If the mediation does not successfully resolve the dispute, each Party is free to pursue other remedies available to them.
- 13.8. The Artist may not assign this Agreement, or any rights under this Agreement, without express written permission from the City, which permission will be in the sole discretion of the City.
- 13.9. The Artist acknowledges that neither the execution of this Agreement by the City nor any conduct of any representative of the City will be deemed to waive any applicable immunity or defense that would otherwise be available to the City against claims arising in the exercise of its governmental function.
- 13.10. This Agreement may be executed in one or more copies and in one or more counterparts, each of which will be considered an original but all of which are a singular Agreement.
- 13.11. This Agreement will be interpreted in accordance with the laws of the State of Texas, without regard for any conflict of laws provisions.
- 13.12. The Parties agree that exclusive jurisdiction and venue for any suit arising out of this Agreement will be in the District Court for Travis County, Texas.
- 13.13. The provisions of this Agreement are drafted with the intention of giving full effect to each provision and to the intent of the Parties.
- 13.14. Any section, subsection, provision, or portion of this Agreement that is subsequently deemed contrary to applicable law is struck from this Agreement, and the remainder of this Agreement will continue in full force and effect.

13.15. Any principal of contract construction that requires interpretation of any ambiguities in this Agreement against one Party or the other is inapplicable to this Agreement.

13.16. Each Party warrants that it has the right and authority to make and enter into this Agreement, and to grant the rights set out in this Agreement.

13.17. Section titles set out in this Agreement are for convenience only, and impose no limitations on the provisions of this Agreement.

13.18. Unless otherwise set out in a specific section of this Agreement, all time frames set out in days in this Agreement are in calendar days.

13.19. Pursuant to Texas Government Code section 2270.002, the City is prohibited from contracting with any "company" for goods or services unless the following verification is included in this Agreement.

13.19.1. For the purposes of this Section only, the terms "company" and "boycott Israel" have the meaning assigned by Texas Government Code section 2270.001.

13.19.2. If the Artist qualifies as a "company", then the Artist verifies that he:

(a) does not "boycott Israel"; and

(b) will not "boycott Israel" during the term of this Agreement.

13.19.3. The Artist warrants to the City that he is a "company", and therefore is subject to the verification requirements of Texas Government Code chapter 2270.

13.19.4. The Artists' obligations under this Section, if any exist, will automatically cease or be reduced to the extent that the requirements of Texas Government Code chapter 2270 are subsequently repealed, reduced, or declared unenforceable or invalid in whole or in part by any court or tribunal of competent jurisdiction or by the Texas Attorney General, without any further impact on the validity or continuity of this Agreement.

Section 14. WAIVER OF CONSEQUENTIAL DAMAGES, LIMITATION OF LIABILITY

14.01 Neither Party shall be liable to the other for any indirect, special, or consequential damages arising in connection with a breach of this Contract.

14.02 The City agrees, to the fullest extent permitted by law, to limit the liability of the Artist to City for any and all claims, losses, costs, damages of any nature whatsoever, and claims expenses from any cause or causes, arising out of, resulting from or in any way related to the negligent acts of or breach of contract by Artist or its fabricators, installers, professional engineering consultants, and transportation carriers so that the total aggregate liability of the Artist and its subcontractors, fabricators, installers, professional engineering consultants, and transportation carriers shall not exceed 100% of the minimum insurance coverage requirements of this Contract. It is intended that this limitation applies to any and all liability or cause of action described herein, regardless of legal theory alleged unless otherwise prohibited by law.

14.03 The Artist acknowledges that the City is subject at all times to the Texas Public Information Act, currently codified at Chapter 552 of the Texas Government Code. If the Artist wishes to designate any particular information submitted to the City as confidential, the Artist must clearly mark each such document, and each page of such documents, as "CONFIDENTIAL". To the extent permitted by the Texas Public Information Act, the City will not voluntarily disclose such information to any third party. If the City receives a request under the Texas Public Information Act for any information or documentation designated by the Artist as confidential, the City will take no position on the Artist's claim of confidentiality, and the Artist alone will bear sole responsibility for asserting the confidential nature of such information to the Office of the Texas Attorney General. The Artist acknowledges that the City is subject to any final determination made by the Office of the Texas Attorney General regarding the confidential nature of any particular document or piece of information.

CITY OF AUSTIN

Date:

2.19.2019

By:

Sylvia Holt-Rabb
Assistant Director
Economic Development Department

Approved as to form:

R. Holt

Assistant City Attorney

ARTIST

Date: 02.08.2019

By:

Marc Fornes

Owner

THEVERYMANY, LLC