

**CONTRACT FOR THE
COMMISSION OF PUBLIC ART WORK BETWEEN
THE CITY OF AUSTIN AND Tyson Duane Davis**

This Contract for the Commission of Public Art Work is entered into by and between the City of Austin, a home-rule municipality incorporated in the State of Texas, and Tyson Duane Davis, located at 803 Crieff Cross, Pflugerville, TX 78660.

1. DEFINITIONS

The following terms, as used in this Contract, have the meanings identified below. Terms not defined below will have their ordinary and customary meanings, as generally used in the field of public art.

1. **"Artist"** means Tyson Duane Davis.
2. **"City"** means the City of Austin, acting by and through its duly authorized City Manager or designee.
3. **"Contract"** means this contract for Commission of Public Art Work between the **City** and the **Artist**, entered into by the **Parties**, including any and all attachments and exhibits.
4. **"Facility"** means Colony Park District Park owned, operated, or controlled by the **Sponsoring Department** and located at 7400 Loyola Ln. Austin, TX 78724.
5. **"Contract Administrator"** means the Art in Public Places Administrator, the Director of the City's Economic Development Department, or respective designee.
6. **"Contract Price"** means the total compensation to be paid to the **Artist** pursuant to this **Contract**, to be paid on such terms as are set out in 4.7.2.
7. **"Default"** means the willful or negligent failure of one **Party** to timely and properly fulfill its obligations under this **Contract**, and further means the violation by one **Party** of any material covenants, contracts, or stipulations set out in this **Contract**.
8. **"Effective Date"** means the date on which this **Contract** becomes fully effective as between the **Parties**, and is the date on which the last **Party** executes this **Contract**.
9. **"Final Design"** means the final design of the **Work**, as approved by the Arts Commission on December 10, 2019, pursuant to Exhibit G.
10. **"Party"** means either the **City** or the **Artist**, and **"Parties"** means the **City** and the **Artist**, collectively.
11. **"Project"** means the **City** construction project at which the **Work** will be installed.
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 **Contract**.
13. **"Site"** means the portion of the **Facility** at which the **Work** will be installed, more particularly set out in Exhibit A.

14. **"Sponsoring Departments"** means the Parks and Recreation Department of the City.
15. **"Work"** means an original piece of public art conceived, designed, implemented, constructed, and installed by the **Artist** as set out in this **Contract**, and more particularly described as an artwork that as a public exterior artwork that reflects the **Sponsoring Departments'** mission to create safer communities through prevention, preparedness and effective emergency response.

2. EXHIBITS

- 2.1. The following documents are attached to this **Contract**, and are incorporated into this **Contract** by reference:
 - A. Facility/Site Plan
 - B. Request for Qualifications
 - C. Artist Qualifications
 - D. Permit Fee Waiver Memo
 - E. Insurance Requirements
 - F. May 18, 2018 Agreement for Design of Public Artwork Between the City of Austin and Tyson Duane Davis
 - G. Final Design of the Work, approved by the Arts Commission on December 10, 2018

3. BACKGROUND, RECITALS, AND STATEMENT OF PUBLIC PURPOSE

- 3.1. The City is implementing the Art in Public Places Program pursuant to City Code Chapter 7-2, 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 Departments** and the **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 completed the **Final Design**, pursuant to Exhibit F, and attached as Exhibit G, and the City intends for the **Artist** to fabricate the **Work** in accordance with the **Final Design**.
- 3.5. The **Parties** acknowledge that the **Artist's** qualifications, 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 **Contract**.

4. SCOPE OF SERVICES

- 4.1. The **Artist** agrees to provide the following services to the City under this **Contract**:

- 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** as outlined in Exhibit G.
- 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 **Contract**. To the extent such information is available to the **City** or to third parties under the **City's** control, the **City** will promptly provide such information to the **Artist**.
- 4.1.4. The **Artist** will support the **City's** commitment to sustainability throughout the entirety of this **Contract**. 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 all 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 to 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 without modifications, 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 draft **Schedule** within the time period required by the **City** in its notice of rejection.
 - 4.2.1.3. Once approved by the **City**, the **Schedule** will control all review, fabrication, implementation, transportation, installation, and completion of the **Work**.
 - 4.2.1.4. The **Artist** may only make modifications to the approved **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 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. The **City's** determination of the need for, and amount of, any adjustment to the **Contract Price** is final.

4.2.1.7. Each **Party** agrees to excuse the failure of the other **Party** to perform its obligations under this **Contract** to the extent, and for a period of time during which, the failure is caused by an event of Force Majeure. An event of Force Majeure is any event or circumstance which prevents or delays performance of any obligation arising under this **Contract**, but only if and to the extent the event or circumstance is not within the control of the **Party** seeking to have its performance obligation excused and which the **Party** was unable by the exercise of due diligence to avoid or prevent. Events of Force Majeure include acts of God, riots, sabotage, civil disturbances, epidemics, acts of domestic or foreign terrorism, lightning, earthquakes, fires, storms, floods, and landslides. Events of Force Majeure do not include economic or market conditions which affect a **Party's** cost but not its ability to perform. A **Party** invoking this section must give notice to the other **Party** within 10 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 one or more investigations of existing **Site** conditions prior to beginning installation of the **Work**, and will ensure that the **Final Design** appropriately provides for all existing **Site** conditions. 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. The **Schedule** shall take into account proper temperature range for installation of the **Work** according to the materials used. The **City** will not give notice to proceed outside of proper temperature for materials used.

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, 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. In the discretion and at the direction of the **City**, attend 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.
- 4.3.5.4. 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 three quotes for storage at a commercial storage facility, approve one 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 4.4.4
- 4.3.7. Subject to any changes under Section 4.3.4.2, 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.
- 4.3.10. THE ARTIST SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS OFFICERS, APPOINTED OR ELECTED OFFICIALS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS (THE "INDEMNIFIED PARTIES"), AGAINST ALL COSTS, LIABILITIES, DAMAGES,

CLAIMS, SUITS, ACTIONS, AND CAUSES OF ACTIONS ("CLAIMS"), TO THE EXTENT RISING, DIRECTLY OR INDIRECTLY, RELATED TO THE INSTALLATION OF THE **WORK**. CLAIMS TO BE INDEMNIFIED UNDER THIS SECTION INCLUDE CLAIMS FOR BODILY INJURY OR DEATH, OCCUPATIONAL ILLNESS OR DISEASE, LOSS OF SERVICES, WAGES OR INCOME, DAMAGE, DESTRUCTION, OR LOSS OF USE OF PROPERTY, AND WORKERS' COMPENSATION CLAIMS. THE **ARTIST'S** OBLIGATIONS UNDER THIS SECTION ARE NOT EXCUSED IN THE EVENT A CLAIM IS CAUSED IN PART BY THE ALLEGED NEGLIGENCE OR WILLFUL MISCONDUCT OF THE INDEMNIFIED PARTIES. THE **CITY** SHALL GIVE THE **ARTIST** WRITTEN NOTICE OF A CLAIM ASSERTED AGAINST AN INDEMNIFIED PARTY. THE **ARTIST** SHALL ASSUME ON BEHALF OF THE INDEMNIFIED PARTIES AND CONDUCT WITH DUE DILIGENCE AND IN GOOD FAITH THE DEFENSE OF ALL CLAIMS AGAINST THE INDEMNIFIED PARTIES. THE INDEMNIFIED PARTIES SHALL HAVE THE RIGHT (BUT NOT THE OBLIGATION) TO PARTICIPATE IN THE DEFENSE OF ANY CLAIM OR LITIGATION WITH ATTORNEYS OF THEIR OWN SELECTION WITHOUT RELIEVING THE **ARTIST** OF ANY OBLIGATIONS IN THIS **CONTRACT**. IN NO EVENT MAY THE **ARTIST** ADMIT LIABILITY ON THE PART OF AN INDEMNIFIED PARTY WITHOUT THE WRITTEN CONSENT OF **CITY** ATTORNEY. MAINTENANCE OF THE INSURANCE REQUIRED UNDER THIS **CONTRACT** SHALL NOT LIMIT THE **ARTIST'S** OBLIGATIONS UNDER THIS SECTION. THE **ARTIST** SHALL REQUIRE ALL SUBCONTRACTORS TO INDEMNIFY THE **CITY** IN THE SAME MANNER AS PROVIDED IN THIS SECTION.

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. Minor changes to the **Final Design** or to the **Work** initiated by the **Artist** do not require prior approval by the **City**, but do require notice to the **City**. Minor changes are changes that do not impact the overall scope, layout, color, shape, size, material, texture, or structural elements of the **Work**. The **City** retains the right to reject any minor changes for non-aesthetic reasons. The **City** will retain sole discretion to determine what constitutes a minor or major change.
- 4.4.3. 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 change for any 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 **Contract** for convenience pursuant to Section 11.2.1., if the **Artist** will not revert to the **Final Design** without the proposed changes.

- 4.4.4. 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** when 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 Departments'** 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 Departments'** project manager, determines that the **Work** is unsafe, incomplete, or materially inconsistent with the **Final Design**, the **City** may take any of the following actions:
 - 4.5.2.1. Accept the **Work** as constructed, reserving its right to modify the **Contract Price** to address the unsafe, incomplete, or materially inconsistent conditions.
 - 4.5.2.2. Direct the **Artist** to correct any unsafe, incomplete, or materially inconsistent condition in the **Work**, at the **Artist's** cost, reserving the **City's** right to modify the **Contract Price** in order to account for any delays caused by the deficiencies. The **Artist** will bear the sole risk that the time required to comply with the **City's** directions will exceed the time allotted under the **Schedule**.
 - 4.5.2.3. Reject the **Work** and terminate this **Contract** for cause in the manner set out in Sections 11.1.1.1 through 11.1.1.4, reserving any and all other remedies available to the **City** under this **Contract** or applicable law. If the **City** terminates this **Contract** for cause under this Section, the opportunity to cure provided in Section 11.1.1.2 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 **Contract**.

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

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

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

4.6.1.4. An Affidavit of Bills Paid in a form provided by the **City**.

4.6.2. Within 30 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 **Contract**.

4.7. LECTURE

4.7.1. The **Artist** will, if requested by the **City**, attend and present at least 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.

4.7.2. The **Artist** acknowledges that the public education event, set out in Section 4.7.1, 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**, may be without additional compensation to the **Artist**.

5. PAYMENT

5.1. The **Contract Price** for this **Contract** is \$31,600.

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

5.1.2. The **Contract Price** may be modified by the **City** in its sole discretion.

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

5.1.3.1. Except as expressly provided for elsewhere in this **Contract**, the **Artist** agrees to be solely responsible for all costs related to design, execution, fabrication, transportation, travel, delivery, mailing, shipping, delivery, installation, lighting, labor, insurance, permitting and licensing, and any other costs incurred by the **Artist** in fulfilling all obligations under this **Contract**.

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 – 30% upon execution of this Contract.

5.2.2. Milestone 2 – 15% within 30 days after the **City** verifies that site work and fabrication of the **Work** is 50% complete.

5.2.3. Milestone 3 – 25% within 30 days after the **City** verifies that fabrication of the **Work** is fully complete.

5.2.4. Milestone 4 – 15% within 30 days after the **City** verifies that the site work including lighting is fully complete.

5.2.5. Milestone 5 – 15% within 35 days after the latest of the following:

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

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

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

5.3. Pursuant to City Code Section 2-8-3, notice of which is acknowledged by the **Artist**, the **City** may withhold payment otherwise due under this **Contract** 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**.

6. SUBCONTRACTING

6.1. The **Artist** may subcontract portions of the services to be provided under this **Contract**, 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** is responsible for all 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. No subcontractor may further subcontract or subdivide any portion of its subcontract.

6.1.5. Any subcontract must be in writing, must attach this **Contract** as an exhibit, and must acknowledge the supremacy of this **Contract** in the case of any conflict between the two. All subcontractors will remain subject to the terms of this **Contract** at all times.

6.1.6. Prior to the **Artist** entering into any subcontracts, the **Artist** will notify the **City** of the **Artist**'s intent to do so, identifying the proposed subcontractor or subcontractors, the proposed scope or scopes of work, and the dollar amount of each subcontract. The **City** may reject any one or more subcontractor proposed by the **Artist**.

6.1.7. 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 **Contract**.

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.

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 refabrication of the **Work** or any necessary portion of the **Work**.

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. On issuance of the Transfer of Title for Public Artwork, the **City** will also take title in and to any and all drawings, renderings, maquettes, sketches, models, and any other documents and materials created by the **Artist** in furtherance of the **Final Design** or the **Work**. The **Artist** will promptly deliver to the **City** all such materials that are still in the **Artist's** possession.
- 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 **Contract**, 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** will inform the **City** as soon as the **Artist** is contacted by the media regarding 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** and 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.
- 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 **Contract**.
- 8.3.1. The **Artist** may not make any additional exact duplicate or 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 "© **Artist's** name, 20__." 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."

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. Commercial General Liability insurance coverage and Automobile Liability insurance coverage must be in place no later than 30 days after the **Effective Date**.
 - 9.2.3. Approval by the **City** of any insurance obtained by the **Artist** will not diminish or decrease the liability of the **Artist** under this **Contract**.
- 9.3. The **Artist** is not required to obtain any performance bond or other performance security.

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 **Contract**. 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 **Contract**.
- 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**.

11. TERMINATION

11.1. TERMINATION FOR CAUSE

11.1.1. A **Party** may terminate this **Contract** for cause due to the **Default** of the other **Party**.

11.1.1.1. Prior to terminating this **Contract** 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.

11.1.1.2. A **Party** receiving notice of **Default** from the other **Party** will have 15 calendar days from the date notice is received to cure all items of **Default** set out in the notice.

11.1.1.3. Any termination for cause will automatically become effective on the 16th calendar day after receipt of notice of **Default** if the notified **Party** fails to cure all items of **Default** identified, without the need for any further action by the terminating **Party**.

11.1.1.4. 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 **Contract**.

11.1.2. In addition to Section 11.1.1, the **City** may terminate this **Contract** for cause if:

11.1.2.1. 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 in order to secure favorable treatment with respect to the awarding, amending, or making of any determinations with respect to the performance of this **Contract**. Termination for cause under this Section will be in the manner set out in Sections 11.1.1.1 through 11.1.1.4, except that the **Artist** will not be entitled to any right to cure provided by Section 11.1.1.2. If the **City** terminates this **Contract** under Section 11.1.2.1, 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.

11.1.2.2. The **Artist** dies or become physically or legally incapacitated during the term of this **Contract**. Termination for cause under Section 11.1.2.2 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, models, 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**.

11.2. TERMINATION FOR CONVENIENCE

11.2.1. Either **Party** may terminate this **Contract** for convenience.

11.2.2. 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 11.2.1, the **City** will reimburse the **Artist** for amounts expended under this **Contract** within 30 calendar days of the **Artist's** submission of receipts documenting such material purchases.

11.3. FUNDING

11.3.1. 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 **Contract**, which are set out in Section 3. If the **City** does not appropriate funds for this **Contract**, or if there are no other lawfully available funds for this **Contract**, this **Contract** is void, and will terminate immediately on notice to the **Artist**.

11.3.2. 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 **Contract**, or of the reduction of any appropriation to an amount insufficient to permit the **City** to pay its obligations under this **Contract**.

11.3.3. If this **Contract** is voided according to Section 11.3.1, the **Artist** will be entitled to retain any payments made prior to termination for which funds were properly appropriated.

12. NOTICES

- 12.1. Unless explicitly stated elsewhere in this **Contract**, all notices must be given in writing in the manner set out in this Section in order to be effective.
- 12.2. Any notice required or allowed to be given or to be served in connection with this **Contract** must be in writing, and will be deemed delivered and received on the earlier of the date actually received or a date that is:
- 12.2.1. Three calendar days after being deposited in the United States mail, if sent via certified mail, properly addressed and with postage prepaid;
- 12.2.2. The date delivery is originally scheduled to occur, if sent via a reputable overnight courier service; or
- 12.2.3. 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.
- 12.3. Notice to each **Party** must be given as follows:

The City:

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

The Artist:

Tyson Duane Davis
803 Crieff Cross
Pflugerville, TX 78660

With copies to:

Susan Lambe
Art in Public Places Administrator
Economic Development Department
City of Austin
P. O. Box 1088
Austin, TX 78767
Phone: 512-974-7852
Facsimile: 512-974-6379

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

- 12.4. 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' written notice.

- 12.5. The **Artist** will give written notice to the **City** of any changes to the **Artist's** address(es). If the **City** gives notice to the **Artist** in the manner set out in Section 12 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(es) on file with the **City** and the **City** is unable to locate the **Artist** for purposes of giving the notices required in this **Contract**, 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 **Contract** and may not form the basis for any claims for damages or injunctive relief by the **Artist** against the **City**.

13. EQUAL OPPORTUNITY

- 13.1. For the duration of this **Contract**, including any maintenance or repair provided by the **Artist** under Section 10, the **Artist** will:
- 13.1.1. 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.
 - 13.1.2. 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.
 - 13.1.3. 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 13.
 - 13.1.4. 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.
 - 13.1.5. 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 13 and any applicable rules and regulations.
- 13.2. If the **Artist** fails to comply with Sections 13.1, the **City** may terminate this **Contract** for cause, or may suspend this **Contract** in whole or in part, and the **Artist** may be debarred from further contracts with the **City**.

14. MISCELLANEOUS PROVISIONS

- 14.1. The **Artist** acknowledges that:
- 14.1.1. The recitals set out in Section 3 form the basis upon which the **City** has agreed to enter into this **Contract**.
 - 14.1.2. The recitals set out in Section 3 are each a material inducement to the **City** to enter into this **Contract**.

- 14.1.3. The **City** would not have entered into this **Contract** but for the truth of each recital set out in Section 3.
- 14.2. The **Artist** will comply with all Federal, State, and **City** statutes, ordinances, and regulations applicable to the **Artist's** services under this **Contract**.
- 14.3. The **City** will maintain on permanent file a record of this **Contract** 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.
- 14.4. The **Artist** agrees and acknowledges that the **Artist** is an independent contractor of the **City** for all purposes during the existence of this **Contract**, and is neither an agent, nor partner, nor employee of the **City**.
- 14.4.1. 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.
- 14.4.2. No **City** employee or official will supervise the **Artist**, nor will the **Artist** supervise any **City** employee or official.
- 14.4.3. The **Artist** acknowledges that this **Contract** creates no obligation of the **City** to enter into any joint venture, joint enterprise, partnership, or other legal business relationship regarding the **Work**.
- 14.5. This **Contract** constitutes the entire agreement between the **Parties**, and supersedes any prior oral or written agreements and understandings regarding the **Work**. This **Contract** may only be modified or amended by written amendment signed by both **Parties** and approved by appropriate action of the **City**.
- 14.6. The election of one remedy under this **Contract** or applicable law does not prevent either **Party** from pursuing any other right or remedy set out in this **Contract** 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.
- 14.7. If a dispute arises between the **Parties** regarding performance under this **Contract** 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.
- 14.8. The **Artist** may not assign this **Contract**, or any rights under this **Contract**, without express written permission from the **City**, which permission will be in the sole discretion of the **City**.
- 14.9. The **Artist** acknowledges that neither the execution of this **Contract** 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 functions.
- 14.10. This **Contract** 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 **Contract**.

- 14.11. This **Contract** will be interpreted in accordance with the laws of the State of Texas, without regard for any conflict of laws provisions.
- 14.12. The **Parties** agree that exclusive jurisdiction and venue for any suit arising out of this **Contract** will be in the District Court for Travis County, Texas.
- 14.13. The provisions of this **Contract** are drafted with the intention of giving full effect to each provision and to the intent of the **Parties**.
- 14.14. Any section, subsection, provision, or portion of this **Contract** that is subsequently deemed contrary to applicable law is struck from this **Contract**, and the remainder of this **Contract** will continue in full force and effect.
- 14.15. Any principal of contract construction that requires interpretation of any ambiguities in this **Contract** against one **Party** or the other is inapplicable to this **Contract**.
- 14.16. Each **Party** warrants that it has the right and authority to make and enter into this **Contract**, and to grant the rights set out in this **Contract**.
- 14.17. Section titles set out in this **Contract** are for convenience only, and impose no limitations on the provisions of this **Contract**.
- 14.18. Unless otherwise set out in a specific section of this **Contract**, all time frames set out in days in this **Contract** are in calendar days.
- 14.19. 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 **Contract**.
- 14.19.1. For the purposes of this Section only, the terms "company" and "boycott Israel" have the meaning assigned by Texas Government Code section 2270.001.
- 14.19.2. If the **Artist** qualifies as a "company", then the **Artist** verifies that it:
- (a) does not "boycott Israel"; and
 - (b) will not "boycott Israel" during the term of this **Contract**.
- 14.19.3. The Artists' obligations under this Section, if any exist, will automatically cease or be reduced to the extent that the requirements of Chapter 2270, Texas Government Code, 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 Contract.

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CITY OF AUSTIN

Date: 1.11.2019

By: Sylvia Holt-Rabb

Sylvia Holt-Rabb
Assistant Director
Economic Development Department

Approved as to form:

R. Rabb
Assistant City Attorney

ARTIST

Date: 01/10/2019

By: Tyson Duane Davis
Tyson Duane Davis

The Contractor agrees to prohibit retaliation, discharge or otherwise discrimination against any employee or applicant for employment who has inquired about, discussed or disclosed their compensation.

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 and non-retaliation 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 THE CITY A COPY OF THE CONTRACTOR'S NON-DISCRIMINATION AND NON-RETALIATION POLICIES ON COMPANY LETTERHEAD, WHICH CONFORMS IN FORM, SCOPE, AND CONTENT TO THE CITY'S MINIMUM NON-DISCRIMINATION AND NON-RETALIATION POLICIES, AS SET FORTH HEREIN, OR THIS NON-DISCRIMINATION AND NON-RETALIATION POLICY, WHICH HAS BEEN ADOPTED BY THE CONTRACTOR FOR ALL PURPOSES WILL BE CONSIDERED THE CONTRACTOR'S NON-DISCRIMINATION AND NON-RETALIATION POLICY WITHOUT THE REQUIREMENT OF A SEPARATE SUBMITTAL.

Sanctions:

Our firm understands that non-compliance with Chapter 5-4 and the City's Non-Retaliation Policy 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 and the Non-Retaliation Policy.

Term:

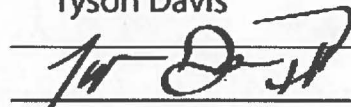
The Contractor agrees that this Section 0800 Non-Discrimination and Non-Retaliation Certificate of the Contractor's separate conforming policy, which the Contractor has executed and filed with the City, will remain in force and effect for one year from the date of filing. The Contractor further agrees that, in consideration of the receipt of continued Contract payment, the Contractor's Non-Discrimination and Non-Retaliation Policy will automatically renew from year-to-year for the term of the underlying Contract.

Dated this 4th day of February, 2019

CONTRACTOR
Authorized
Signature

Title

Tyson Davis



Artist