Meeting Date: **2/16/2016**

Report Type: Consent

Report ID: 2016-00132

05

City of SACRAMENTO

City Council Report
915 I Street, 1st Floor
www.CityofSacramento.org

Title: Contract to Purchase Artwork for the Golden 1 Center (Continued from 02/09/2016)

Location: District 4

Recommendation: Pass a Motion authorizing the City Manager or City Manager's designee to enter into agreements with 1) Gale Hart for the fabrication and installation of artwork at the Golden 1 Center in an amount not-to-exceed $283,500; and 2) William Fontana for the fabrication and installation of artwork at the Golden 1 Center in an amount not-to-exceed $330,750

Contact: Shelly Willis, Executive Director, (916) 808-3971, Sacramento Metropolitan Arts Commission; Jody Ulich, Director, (916) 808-5105, Convention and Cultural Services

Presenter: None

Department: Convention & Cultural Services

Division: Metro Arts-APP

Dept ID: 17001821

Attachments:

1-Description/Analysis

2-Background

3-William Fontana Contract

4-Gale Hart Contract

City Attorney Review

Approved as to Form
Maila Hansen
2/2/2016 10:48:16 AM

Approvals/Acknowledgements

Department Director or Designee: Jody Ulich - 1/22/2016 9:43:10 AM

Description/Analysis

Issue Detail: As set forth in Section 2.84.130 of the City Code, the Sacramento Metropolitan Arts Commission (SMAC) recommends selection of artwork for the Art in Public Places (APP) program. This report recommends that City Council: 1) authorize the execution of an agreement with Gale Hart for a not-to-exceed amount of $283,500 for the fabrication and installation of artwork to be placed on the south side of the Golden 1 Center along L Street between 5th and 7th Streets and 2) authorize the execution of an agreement with William Fontana for a not-to-exceed amount of $330,750 for the fabrication and installation of artwork to be placed on the north side of the Golden 1 Center plaza between 5th and 7th Streets.

Policy Considerations: SMAC's selection of the above-mentioned artwork for the Golden 1 Center satisfies the APP program policies and procedures and the program goal of site-specific public art.

Economic Impacts: None.

Environmental Considerations: The proposed contracts are part of a project, the Golden 1 Center (P13-065), for which the City Council certified an environmental impact report, and adopted a mitigation-monitoring program, findings of fact, and a statement of overriding considerations on May 20, 2014.

Sustainability: Not applicable.

Commission/Committee Action: In accordance with City Code section 2.84.080(E), SMAC has the authority to make recommendations to the City on all artworks to be acquired by the City either by purchase or gift.

On December 14, 2015, SMAC unanimously approved the designs for the two artworks mentioned above. SMAC recommends that the City purchase these artworks for placement at the Golden 1 Center sites outlined above.

Rationale for Recommendation: SMAC is recommending the purchase of these artworks because they are of the highest artistic quality. The artists were selected pursuant to an open and competitive process, and funding has been set aside for the purchase of these artworks. Finally, these two artists were chosen because they have the ability and experience to complete the projects as proposed.

Financial Considerations: The Golden 1 Center public art program (M17600300) budget is $9.4 million. Of this funding, $1.5 million has been set aside for program administration, the selection, purchase, and placement of art created by regional artists and to pay for the removal of artworks from the K Street Mall. The $1.5 million comes from the Marcy Friedman ESC APP Fund (Fund 2609, $1 million) and the CIP Reimbursable Fund (Fund 3702, $500,000).

San Francisco artist Bill Fontana will design, fabricate, and install his artwork for an amount not-to-exceed $330,750. Sacramento artist Gale Hart will design, fabricate, and install her

artwork for an amount not-to-exceed $283,500. Minimal maintenance is expected for these artworks and the maintenance costs are estimated to be approximately $500 annually.

Local Business Enterprise (LBE): Not applicable.

Background

In accordance with standard Art in Public Places (APP) policies and procedures, the Sacramento Metropolitan Arts Commission (SMAC), at its regularly scheduled meeting on May 1, 2014, appointed a nine-member panel to make recommendations for the Golden 1 Center Public Art Program.

The Golden 1 Center Public Art Program panel members were:

- René de Guzman, Senior Curator of Art, Oakland Museum of California
- Marcy Friedman, Philanthropist; Arts Advocate
- Cheryl Holben, Chair, Sacramento Metropolitan Arts Commission
- Dr. Paul Jacobs, Executive Chairman, QualComm
- Lial Jones, Director, Crocker Art Museum
- Lizzetta LeFalle-Collins, Freelance Curator/Guest Curator, Museum of the African Diaspora
- Annabeth Rosen, Artist; Professor of Art, UC Davis
- Rob Rothblatt, Design Principal, AECOM
- Rachel Teagle, Director, Jan Shrem and Maria Manetti Shrem Museum of Art

On March 10, 2015, the City Council accepted a $1 million donation from Marcy Friedman to purchase work for the Golden 1 Center by regional artists who are based in any of the following counties: Sacramento, El Dorado, Placer, Sutter, Yolo, Amador, Calaveras, San Joaquin, Contra Costa, Solano, Butte, Alameda, Marin, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma. This donation is part of the APP program and has been designated for artwork by regional artists.

On April 15, 2015, the Golden 1 Center Public Art Program panel approved the overall art plan for the Golden 1 Center, including the purchase of artwork by regional artists, as requested by Marcy Friedman. The art plan outlined artwork budgets, designated sites for artworks, and delineated the artist selection process. SMAC approved the art plan on April 29, 2015.

The selection process for the purchase of artwork by regional artists began at the end of May 2015. A Request for Qualifications (RFQ) was widely distributed to artists residing in the northern California counties listed above, and 135 eligible applications were received by the deadline, July 6, 2015. The majority of the artists wished to be considered for more than one of the four sites identified in the art plan.

The panel met again on July 31, 2015, and selected 15 finalists, including Gale Hart and William Fontana, who were chosen to prepare individual proposals which they presented to the panel on October 29, 2015. Although originally considered as a finalist

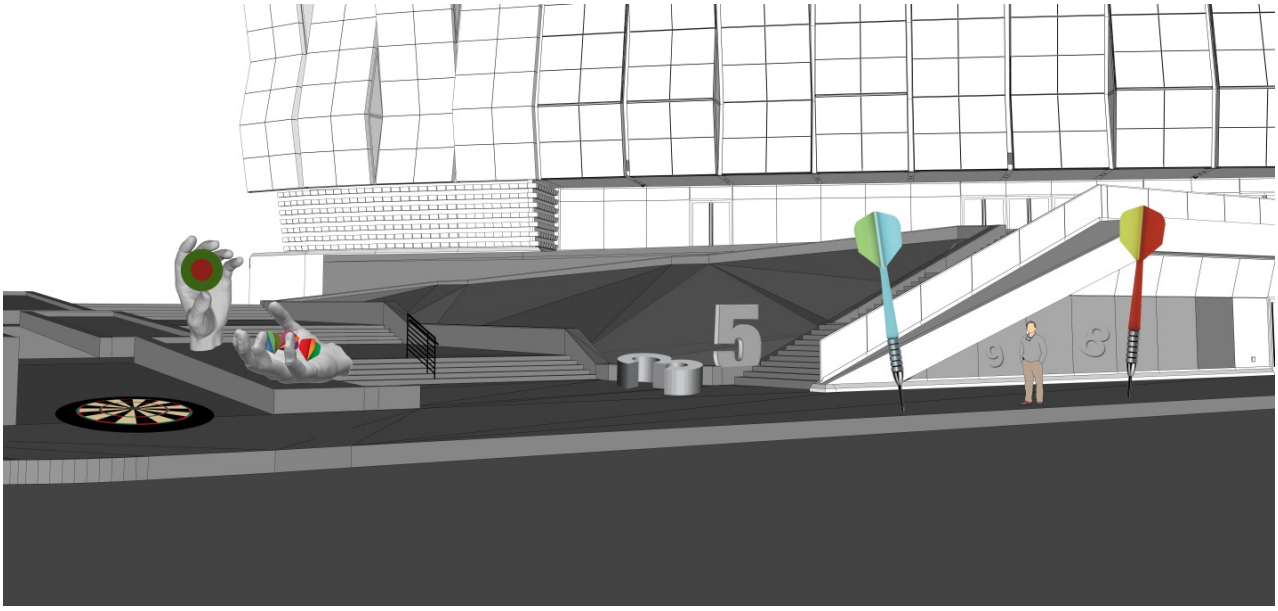
for the 5th – 7th Street plaza, on the north side of the arena, Gale Hart was asked by the panel to develop a proposal for the south side of the arena along L Street between 5th and 7th Streets. She presented her concept on December 8, 2015.

William Fontana was considered a finalist for the L Street site, on the south side of the building, but was asked by the panel to develop a proposal for the north side of the building on the plaza between 5th and 7th Streets. He presented his concept titled "Sonic Passages" on December 8, 2015.

On December 14, 2015, SMAC unanimously approved both artists' concepts. If these contracts are approved by City Council, both artworks will be fabricated and installed at the two sites designated in the art plan.

Description of Artwork by Gale Hart

The artist proposes an artwork to be installed on the south side of the Golden 1 Center along L Street between 5th and 7th Streets. As shown in the figure below, the artwork will be placed on the sidewalk, the building, and at the plaza entrance on the corner of 5th and L Streets. The artist may create bollards that continue this theme. The artist will create oversized components of a dart game including darts and a board, which will be placed flat on the ground. In a separate location, a large sculpted hand holds a bulls-eye between the finger and thumb. A second hand holds several dart tails that make the bullet-like flight of the dart possible. The artist will continue to work with City staff and the building architects to further develop this concept.

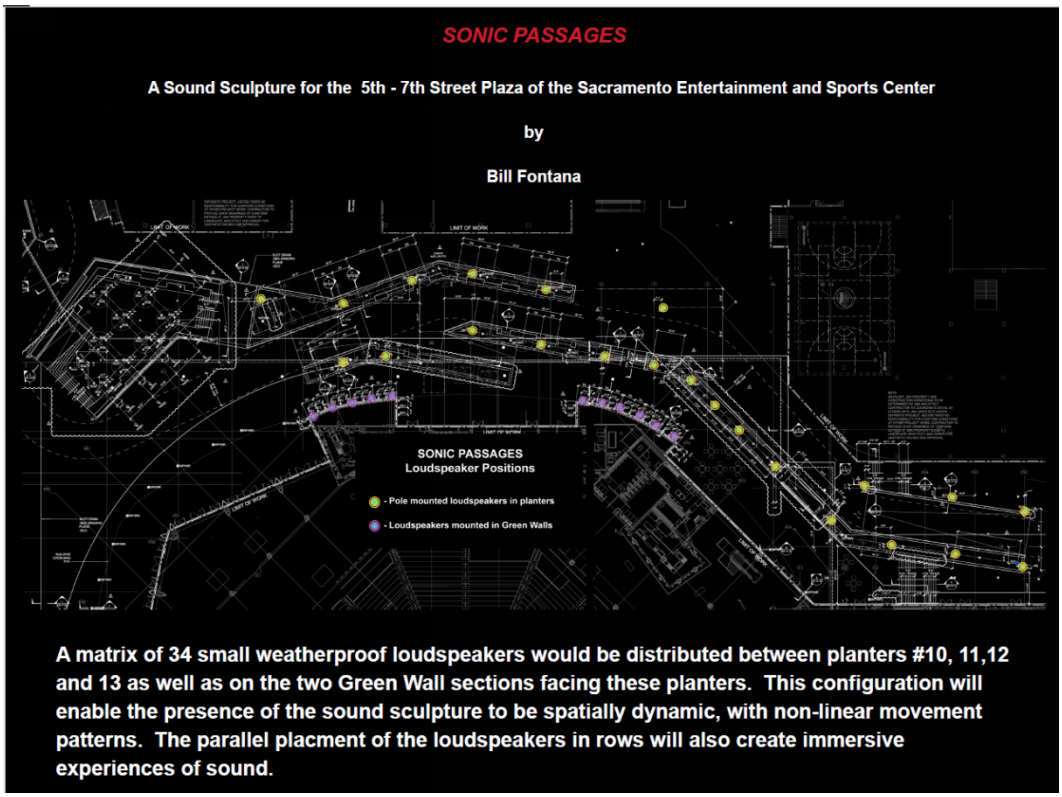


About Gale Hart

From early childhood, Gale Hart has had a fascination with creating objects out of nuts, bolts, scrap metal, and wood. As a self-taught artist, Hart has shown her work throughout the Sacramento region and nationally since the early 1990s including at the Elliott Fouts Gallery, Sacramento; Bash Contemporary, San Francisco; Atelier 31 Gallery, Seattle; Gallery ten472, New York; and the New Leaf Gallery in Sonoma, CA. She conceived, curated, and directed the “Second Annual Circus Show and Other Atrocities” in Sacramento and founded, directed and participated in “A Bitchin’ Space” in Sacramento. Her work has been written about in American Art Collector, the Sacramento Bee, Sacramento News and Review, and Sacramento Magazine.

Description of Artwork by William Fontana

The artist proposes a sound sculpture to be installed on the linear plaza on the north side of the Golden 1 Center. The artwork consists of sound that is distinctly Sacramento. A matrix of 34 small weatherproof loudspeakers will be distributed among the planters on the plaza, and on the two Green Wall sections that face these planters. The configuration will enable the presence of the sound sculpture to be spatially dynamic, with non-linear movement patterns. As shown in the figure below, the parallel placement of the loudspeakers in rows will also create immersive experiences in sound. The movement of sound along the pole-mounted planter speakers will create a listening experience in relation to the green walls and at other times will either be a linear sonic progression, or random and non-linear. The sound mixes will always emerge from and return to silence.



Currently the artist is proposing sound mixes that reflect the building itself. One of Bill Fontana's soundscapes evokes the agricultural landscapes of the Sacramento Valley, suggestive of birds, insects and movement of the plants. Other abstracted sounds are recorded from the game of basketball. Occasionally the natural sounds will mix with the basketball sounds. Other ideas for sound mixes will be developed in the future. The 34-channel sound mixes will be operated as a playlist.

About William Fontana

William Fontana is an American composer and artist who developed an international reputation for his pioneering experiments in sound. Since the early 1970s, Fontana has used sound as a sculptural medium to interact with and transform our perceptions of visual and architectural spaces. His work has been exhibited at the Whitney Museum of American Art; the San Francisco Museum of Modern Art; the Museum Ludwig and the Kolumba Museum, both in Cologne, Germany; the Tate Modern and Tate Britain museums in London; and the National Gallery of Victoria in Melbourne. He also has produced major radio sound art projects for the BBC, National Public Radio, Swedish Radio, Radio France, and others.

Artwork Maintenance

Both artists are cognizant of the highly public locations of their artwork and all materials and fabrication methods will be approved by SMAC staff for durability and longevity. The City will be responsible for the ongoing maintenance of the artwork, which is expected to be approximately $500 annually.

CONTRACT TO PURCHASE ARTWORK

This Agreement is made at Sacramento, California, as of _____ ("Effective Date"), by and between the City of Sacramento, a municipal corporation ("City"), and

William Fontana
2317 Jones Street,
San Francisco, CA 94133
415-345-8655
resoundings@gmail.com

("Artist"). The City and Artist may be referred to collectively as "Parties" or in the singular as "Party," as the context requires.

RECITALS

A. The City has an Art in Public Places ("APP") program as set forth in City Code Chapter 2.84, which requires at least two percent of the total construction costs for eligible projects be spent on artworks in public places. The Sacramento Metropolitan Arts Commission ("SMAC") is charged with providing for the nature, selection, and placement of these artworks.

B. Through the APP program, funds have been allocated for the selection, purchase and placement of artwork for the Golden 1 Center in Sacramento, California: (ECAPS#:M176000302). Funds for this project were allocated based on a donation by Marcy Friedman for the purpose of purchasing art by regional artists for the Golden 1 Center. The artwork was selected through a competitive process and approved by the Sacramento Metropolitan Arts Commission.

C. The artwork is described in Exhibit B, Design Proposal ("Proposal").

NOW THEREFORE, the parties mutually agree as follows:

1. **Scope of Work.** Subject to the terms and conditions set forth in this Agreement, Artist shall:

   A. In accordance with the schedule set forth in Exhibit A, purchase on Artist's account all labor, supplies, materials and equipment required to design and furnish to the City an exterior artwork ("Work") at the Golden 1 Center, and fabricate and deliver the Work at the Golden 1 Center to the satisfaction of City and in substantial conformance with Artist's Proposal.

   B. The Work shall be placed and located as described in the Proposal. As described in Exhibit A, Artist shall install the Work, or arrange to have Turner

Construction Company, or any other necessary related entity, install the Work on Artist's behalf.

C. Artist shall not commence performance of any of the services identified in sections 1.A and 1.B until receiving a written "Notice to Proceed" from the City for each Phase and Milestone of this project.

2. **Payment.**

A. City shall pay Artist up to three hundred and fifteen thousand dollars ($315,000), unless unforeseen and unpredictable circumstances occur, in which case the City may pay Artist an additional contingency ("Contingency") amount of up to fifteen thousand seven hundred fifty dollars ($15,750). However, payment to Artist under this Agreement shall not exceed the total amount of three hundred and thirty thousand seven hundred and fifty dollars ($330,750). The City will reserve the Contingency amount of fifteen thousand seven hundred and fifty dollars ($15,750) to address unforeseen and unpredictable circumstances that are discovered during the fabrication of the Work and are beyond the control of the Artist, as determined by the City in its sole discretion. The Contingency, or a portion thereof, may only be used upon the City's express written authorization. Artist understands it has no right to the Contingency and absent unforeseen and unpredictable circumstances that are beyond the Artist's control, as determined by the City, Artist's total compensation under this Agreement shall not exceed $315,000. Therefore, Artist must design a project in an amount of $315,000 or less, including the Artist's fee in an amount not to exceed fifty-two thousand dollars ($52,000).

B. Payments to Artist shall be made within 30 days after receipt of Artist's invoices. Artist shall be responsible for the cost of supplying all documentation necessary to verify the billings to the satisfaction of City. Artist agrees that City has no obligations regarding commissions or any agreements with galleries or agents with whom Artist may have contracted. City is not responsible for paying sales tax.

C. Payments to Artist will be made as follows:

(1) Fifteen thousand dollars ($15,000) upon submission of certificates of insurance acceptable to the City, execution of this Agreement, and dispatch of the Notice to Proceed.

(2) Fifty-thousand dollars ($50,000) upon completion of Phase 1.

(3) Seventy-five thousand dollars ($75,000) upon completion of Phase 2.

(4) Seventy-five thousand dollars ($75,000) upon completion of Phase 3.a milestone.

(5) Fifty thousand dollars ($50,000) upon completion of Phase 3.b milestone.

(6) Forty-five thousand dollars ($45,000) upon completion of Phase 4. Following consultation with Turner Construction Company or any other necessary related entity, as required in Exhibit A, this amount for installation may be increased or decreased based on how the installation work will be performed.

(7) Five-thousand dollars ($5,000) upon completion of Phase 5.

D. No payment shall be made if Artist is in default of this Agreement or if any milestone or Phase is not completed to the satisfaction of City. City shall be the sole determiner of when a milestone or Phase has been completed to its satisfaction.

E. **Prevailing Wage Requirement**. All or part of the work to be performed under this Agreement constitutes "public works" under California Labor Code section 1720 *et seq.* This Agreement is therefore subject to the provisions of Sacramento City Code Chapter 3.60, Article V, which requires, among other things, that Artist pay not less than the prevailing rate of wages, as determined by the Director of the California Department of Industrial Relations pursuant to California Labor Code section 1773. If payment of the prevailing rate of wages is required, Artist and every lower-tier subcontractor shall submit certified payrolls and labor compliance documentation electronically when and as required by City. Artist is responsible for compliance with Sacramento City Code Chapter 3.60, Article V, and shall include these requirements in every subcontract or subagreement. This Agreement is subject to compliance monitoring and enforcement by the California Department of Industrial Relations, as specified in California Labor Code section 1771.4.

3. **Time of Performance; Documentation of Work.** Time is of the essence in this Agreement. Artist shall dedicate such time and effort as is necessary to fulfill Artist's obligations to completely finish and install or arrange for installation of the Work to the satisfaction of City within the timelines set forth in the Schedule, except as the Work may be delayed by circumstances described in section 19, below. City shall make its staff and contractors reasonably available to Artist for consultation and assistance in order to achieve the purposes of this Agreement. Artist shall provide to the City twenty (20) high resolution (300 dpi minimum) professional quality digital images documenting the processes of Work fabrication and installation, and the completed artwork. Artist shall also provide City with a complete schedule for the maintenance of the Work in the form reflected in Exhibit C hereto.

4. **Artist Warranties**.

A. **Restoration of Work Site**. Artist agrees and warrants that, within 30 days after the Work is accepted by the City, Artist shall restore the Work site (including the entire area affected by the fabrication and installation of the Work) to a state and condition that is substantially similar to that which existed when the Work was begun. Artist further agrees and warrants that, within the period specified herein, Artist shall repair or replace, as is determined necessary by City, and to the reasonable satisfaction of City, all property (real, personal or otherwise), which has been damaged, injured or otherwise adversely affected by the acts or omissions of Artist, Artist's agents, contractors, or employees. Artist shall be solely responsible for all expenses and costs which may be necessary to comply with the requirements of this paragraph, and City shall have no responsibility or liability therefore.

B. **Originality of Work.** Artist warrants that the Work is original and is solely the product of Artist's own creative efforts and does not infringe the rights, including copyrights, of any person or entity. Artist also warrants that, unless otherwise stipulated in writing, the Work is original, that it is an edition of one (1), and that Artist shall not sell, license, perform or reproduce a substantially similar copy of the Work without the prior written consent of City. However, nothing contained herein shall prevent the Artist from creating future works in his style and manner of working.

C. **Work Free from Defects**. Artist shall warrant and maintain the Work free from all faults or defects related to material or workmanship for a period of one year after the Work is accepted by City.

D. **Compliance with all Laws**. Artist agrees to fabricate and install or arrange for installation of the Work in conformance with all applicable laws.

5. **Transfer of Title to Work**. Title to the Work shall remain with Artist until City has accepted the Work as completed and it is installed to the satisfaction of City. When City has so certified, title shall transfer to City. Artist shall bear all risk of loss of the Work until title has been transferred to City, and City agrees to inspect Work and accept Work within thirty (30) days of Artist's notification of completion, unless the provisions of 7(A)(1) or 7(A)(2) apply.

6. **Performance Made Impossible.** In the event it shall become impossible for Artist to complete the Work because of illness, death or injury, this Agreement may be terminated at the sole discretion of City, and, in such event, all completed work, materials, and supplies related to the Work shall be delivered to City and shall, along with the Proposal, become City's sole property. City shall thereafter have no obligation to make any additional or further payments to Artist, and Artist shall have no further or additional claims against City with respect to the Work or such portion thereof as may be completed, or the Proposal, or with respect to any matter whatsoever pertaining to,

affected by or embodied in this Agreement. In the event of such termination, City may take such action as may appear to it appropriate under the circumstances, including, without limitation of the generality of the foregoing, commissioning another artist to complete the Work. In the event that City completes the Work or arranges to have it completed, Artist's name shall be publicly displayed at, on or near the Work, unless Artist and City mutually agree otherwise.

7. **Acceptance of Work.**

A. City agrees to accept the completed Work unless:

(1) The Work was not completed in substantial conformance with the Proposal or the Specifications, or

(2) The Work as completed or any portion thereof does not conform to a reasonable standard of artistic or technical quality. City shall provide its reasons for this finding to Artist in writing no later than ten (10) days after Artist has tendered the Work to the City for City's acceptance. Where the Artist disputes this finding, the dispute may, if the Parties so agree, be submitted to Arts Arbitration and Mediation Services ("A.A.M.S."), of California Lawyers for the Arts, Sacramento for resolution, and any decision by A.A.M.S. shall be binding upon City and Artist and neither shall have any further recourse or cause of action regarding the matters so resolved.

B. Upon the City's refusal to accept the Work for the reasons stated in paragraphs 7(A)(1) or 7(A)(2), City shall have the right to: 1) request that Artist correct the deficiencies in the Work within a reasonable time, or 2) terminate this Agreement and recover all sums previously paid to Artist. Both remedies shall be independent and cumulative and in addition to any other remedy available to the City at law or equity. Enforcement of one such remedy shall not be exclusive nor shall it be deemed an election of such remedy to the exclusion of any other or further remedy. However, nothing contained herein shall limit City's available remedies at law and equity.

C. No payments to Artist shall be deemed as a waiver of City's right to refuse to accept the Work.

8. **City Maintenance of Work.** City agrees to reasonably ensure that the Work is properly maintained and protected. City agrees that it will not intentionally destroy damage, alter, modify or change the Work in any way. If an alteration should occur, either intentionally or unintentionally, the Work will no longer be represented as the work of the Artist without his or her written permission. This does not preclude the City's right to move or remove the Work from display or deaccession the Work. In the event it becomes necessary to change the placement of the Work, City shall confer with Artist concerning

placement, though the ultimate placement of the Work is solely within the City's discretion.

9. **Repair of Work.** In the event repair of the Work is required, City may give Artist the opportunity to perform the repairs for a reasonable fee. In the case of disagreement between City and Artist as to what constitutes a reasonable fee, the fee determined by an independent conservator selected by City shall be considered a reasonable fee. In the event Artist refuses to make the repairs for such fee, City may arrange for repairs by another qualified person. When emergency repairs are necessary in order to prevent the loss of or further damage to the Work, such repairs shall be undertaken or arranged by City without advance notice to Artist, and such repairs shall not constitute an artistic alteration. City shall thereafter notify Artist as soon as is practicable.

10. **Work Authorship.** Artist shall retain the copyright to the Work and the right to claim authorship of the Work. City shall ensure that Artist's name is publicly displayed on, at, or near the Work. In the event the Work is substantially damaged or altered, City shall no longer represent the Work to be the Work of Artist if Artist gives written notice to City that Artist denies authorship of the Work on the grounds stated in this paragraph. In the event City disputes the right of Artist to deny authorship, the matter may be submitted to A.A.M.S for mediation or arbitration. If the parties select arbitration, the determination by A.A.M.S shall be binding upon City and Artist and neither shall have any further recourse or cause of action regarding the matters so determined.

11. **Artist Payment of Contractors and Employees.** In the event Artist hires or contracts with employees, subcontractors, or material suppliers, Artist shall pay these employees, subcontractors, or material suppliers out of the payments made to Artist by City for completion of the phase of work for which the employees, subcontractors, or material suppliers provided labor or materials and provide proof of payment to the City prior to completion of the next phase of work. In the case of nonpayment of wages or other amounts due the employees, subcontractors, or material suppliers herein, City may withhold from Artist out of payments due a sum sufficient to pay such persons the amounts owed by Artist absent evidence satisfactory to the City of a legal basis for such nonpayment. All subcontractors shall be properly licensed pursuant to the Contractors State License Law (Business and Professions Code sections 7000 et seq.). Before performing any work, each subcontractor shall provide to the City and Artist evidence that the subcontractor has workers' compensation insurance coverage.

12. **Indemnity.** Artist shall defend, hold harmless and indemnify City, its officers and employees, and each and every one of them, from and against any and all claims, actions, damages, costs, liabilities, demands, losses, judgments, penalties and expenses of every type and description, including, but not limited to, any fees and/or costs reasonably incurred by City's staff attorneys or outside attorneys and any fees and expenses incurred in enforcing this provision (hereafter collectively referred to as "Claims"), including but not limited to Claims arising from personal injury or death, damage to personal, real or intellectual property or the environment, contractual or other

economic damages, or regulatory penalties, that arise out of, pertain to or relate solely to any negligent act or omission, recklessness or willful misconduct of Artist, its subcontractors or agents, and their respective officers and employees, in connection with performance of or failure to perform this Agreement, whether or not such Claims are litigated, settled or reduced to judgment; provided that the foregoing indemnity does not apply to liability for damages for death or bodily injury to persons, injury to property, or other loss, damage or expense to the extent arising from the sole negligence or willful misconduct of City, its subcontractors or agents, and their respective officers and employees. The existence or acceptance by City of any of the insurance policies or coverages described in this Agreement shall not affect or limit any of City's rights under this Section 12, nor shall the limits of such insurance limit the liability of Artist hereunder. The provisions of this Section 12 shall survive any expiration or termination of this Agreement.

13. **Insurance.** During the entire term of this Agreement, Artist shall maintain the insurance coverage described in this Section 13.

Full compensation for all premiums that Artist is required to pay for the insurance coverage described herein shall be included in the compensation paid to Artist under this Agreement. No additional compensation will be provided for Artist's insurance premiums. Any available insurance proceeds in excess of the specified minimum limits and coverages shall be available to the City.

It is understood and agreed by the Artist that its liability to the City shall not in any way be limited to or affected by the amount of insurance coverage required or carried by the Artist in connection with this Agreement.

A. Minimum Scope & Limits of Insurance Coverage

(1) Commercial General Liability Insurance, providing coverage at least as broad as ISO CGL Form 00 01 on an occurrence basis for bodily injury, including death, of one or more persons, property damage and personal injury, arising out of activities performed by or on behalf of Artists, its sub-consultants, and subcontractors, products and competed operations of Artist, its sub-consultants, and sub-contractors, and premises owned, leased, or used by Artist, its sub-consultants, and subcontractors, with limits of not less than one million dollars ($1,000,000) per occurrence. The policy shall provide contractual liability and products and completed operations coverage for the term of the policy.

(2) Automobile Liability Insurance providing coverage at least as broad as ISO Form CA 00 01 for bodily injury, including death, of one or more persons, property damage and personal injury, with limits of not less than one million dollars ($1,000,000) per accident. The policy shall provide coverage for

owned, non-owned and/or hired autos as appropriate to the operations of the Artist.

No automobile liability insurance shall be required if Artist completes the following certification:

> "I certify that a motor vehicle will not be used in the performance of any work or services under this agreement." BOT (Artist initials)

(3) Workers' Compensation Insurance with statutory limits, and Employers' Liability Insurance with limits of not less than one million dollars ($1,000,000). The Worker's Compensation policy shall include a waiver of subrogation in favor of the City. If no work or services will be performed on or at City facilities or City property, the City representative may waive this requirement by selecting the option below:

> Workers' Compensation waiver of subrogation in favor of the City is not required _____ (City representative initials).

No Workers' Compensation insurance shall be required if Artist completes the following certification:

> "I certify that my business has no employees, and that I do not employ anyone. I am exempt from the legal requirements to provide Workers' Compensation insurance." BOT (Artist initials)

(4) Professional Liability Insurance providing coverage on a claims made basis for errors, omissions or malpractice with limits of not less than one million ($1,000,000) dollars. Professional Liability (Errors and Omissions) insurance:

> Is _____ Is not ✓ *[check one]* required for this Agreement.
>
> If required, such coverage must be continued for at least _____ year(s) following the completion of all Services and Additional Services under this Agreement. The retroactive date must be prior to the date this Agreement is approved or any Services are performed.

B. Additional Insured Coverage

(1) Commercial General Liability Insurance: The City, its officials, employees and volunteers shall be covered by policy terms or endorsement as additional insureds as respects general liability arising out of activities performed by or on behalf of Artist, its sub-consultants, and subcontractors; products and completed operations of Artist, its sub-consultants, and subcontractors; products and completed operations of Artist, its sub-consultants, and

subcontractors; and premises owned, leased or used by Artist, its sub-consultants, and subcontractors.

(2) Automobile Liability Insurance: The City, its officials, employees and volunteers shall be covered by policy terms or endorsement as additional insureds as respects auto liability.

C. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

(1) Except for professional liability, Artist's insurance coverage, including excess coverage, shall be primary insurance as respects City, its officials, employees and volunteers. Any insurance or self-insurance maintained by City, its officials, employees or volunteers shall be in excess of Artist's insurance and shall not contribute with it.

(2) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, its officials, employees or volunteers.

(3) Coverage shall state that Artist's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

(4) City will be provided with thirty (30) days written notice of cancellation or material change in the policy language or terms.

D. Acceptability of Insurance

Insurance shall be placed with insurers with a Bests' rating of not less than A:VI. Self-insured retentions, policy terms or other variations that do not comply with the requirements of this Section 13 must be declared to and approved by the City's Risk Management Division in writing prior to execution of this Agreement.

E. Verification of Coverage

(1) Artist shall furnish City with certificates and required endorsements evidencing the insurance required. The certificates and endorsements shall be forwarded to the APP Administrator. Copies of policies shall be delivered to the City on demand. Certificates of insurance shall be signed by an authorized representative of the insurance carrier.

(2) For all insurance policy renewals during the term of this Agreement, Artist shall send insurance certificates reflecting the policy renewals directly to:

City of Sacramento
c/o Ebix RCS
Reference #: (This number will be provided by EBIX after Agreement approval.)
PO Box 257
Portland, MI 48875-0257

(3) The City may withdraw its offer of contract or terminate this Agreement if the certificates of insurance and endorsements required have not been provided prior to execution of this Agreement or when demanded by City. The City may withhold payments to Artist and/or terminate the Agreement if the insurance is canceled or Artist otherwise ceases to be insured as required herein.

F. Subcontractors

Artist shall require and verify that all subcontractors maintain insurance coverage that meets the minimum scope and limits of insurance coverage specified in subparagraph A, above.

14. **Copyright.** Artist expressly reserves every right available to Artist at common law or under the Federal Copyright Act to control the making and dissemination of copies or reproduction of the Work except as those rights are limited by this Agreement. Artist agrees to give a credit substantially in the following form: "Original owned by the City of Sacramento" in any public showing of reproductions of the Work. Artist authorizes City and its assigns to make photographs, drawings, and other two-dimensional reproductions of the Work without prior consent of Artist if used solely for non-commercial purposes, advertising, descriptive brochures, and similar purposes. All reproductions by City shall contain a copyright notice substantially in the following form: "©, Artist's name, date", in such a manner and location as shall comply with the U.S. Copyright laws.

15. **Waiver of VARA and CAPA Rights.** With the exception of Artist's rights as to third parties, Artist waives any and all rights Artist may have with respect to the Work under the federal Visual Artists Rights Act of 1990 (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 et seq.), and any other local, state, federal or international laws that convey rights of the same nature as those conveyed under 17 U.S.C. §106A, Cal. Civil Code §§987 et seq., or any other type of moral right protecting the integrity of works of art.

16. **Location of Work.** The final location of the Work shall be determined by the City's architect or engineer following consultation with Artist.

17. **Dispute Resolution.** If any dispute is submitted to a third party for resolution, all fees, expenses, and costs connected therewith shall be borne jointly and equally by City and

Artist. The previous sentence notwithstanding, each party shall bear their own attorneys' fees and costs. Each and every obligation under this Agreement to submit any matter to a third party for resolution is conditioned upon the foregoing two sentences of this paragraph. If any matter is to be submitted to A.A.M.S, and if at the time such submission is called for, A.A.M.S is not in existence or is not able or willing to provide such resolution service, then the matter shall be submitted for resolution to the American Arbitration Association in accordance with their procedures then in use.

18. **Artist Change of Address.** Artist shall notify SMAC in writing of any change of address. Failure to do so shall constitute a waiver of Artist's rights under this Agreement during the time of the omission. Any waiver of a right pursuant to this Agreement for failure to maintain Artist's current address may be cured prospectively only by notifying SMAC of Artist's current address. All rights of Artist pursuant to this Agreement shall be personal to Artist and shall terminate upon either the legal disability or incompetence of Artist or upon the death of Artist, except as provided Artist under copyright laws.

19. **Excuse from Performance.**

(A) In the event Artist's performance of any of his obligations or undertakings under this Agreement is delayed, interrupted, or prevented by an act of God, unforeseen conditions, unusually severe weather, or occurrences that are beyond the control of either party to this Agreement, Artist shall be excused from any further performance for whatever period of time after the occurrence necessary to remedy the effects of that occurrence. Artist shall notify City in writing within ten (10) days after any occurrence described in this section that may delay Artist performance. City shall amend the Schedule when, in its determination, Artist's performance has been excused, and the delay or interruption has resulted in a material change in the time for performance.

(B) In the event that the installation site has not been adequately prepared for receipt of the Work as scheduled, or delivery or installation is delayed due to a material failure on the part of the City or its subcontractors, then the City shall promptly act to address the problem(s) identified by Artist. In such events, timelines for performance by Artist shall be extended as needed, provided, that none of the delays are caused in whole or in part by Artist. Site preparation by City shall not include site measurements, which shall be the sole responsibility of Artist.

20. **Public Lecture.** If requested by the City, Artist will give one public art lecture regarding the Work after the installation of the Work is completed. Arrangements are to be approved in advance by the APP Administrator.

21. **Maquette.** As part of this Agreement, Artist will provide the City of Sacramento, APP program one (1) Maquette and/or drawing of the proposed artwork.

22. **Exhibits.** All exhibits referred to herein are attached hereto and are by this reference incorporated as if set forth fully herein.

23. **Entire Agreement.** This document, including all Exhibits, contains the entire agreement between the parties and supersedes whatever oral or written understanding they may have had prior to the execution of this Agreement. No alteration to the terms of this Agreement shall be valid unless approved in writing by Artist, and by City, in accordance with applicable provisions of the Sacramento City Code.

24. **Severability.** If any portion of this Agreement or the application thereof to any person or circumstance shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

25. **No Waiver.** Neither City acceptance of, or payment for, any work performed by Artist, nor any waiver by either party of any default, breach or condition precedent, shall be construed as a waiver of any provision of this Agreement, nor as a waiver of any other default, breach or condition precedent or any other right hereunder.

26. **Choice of Law; Venue.** This Agreement shall be governed, construed and enforced in accordance with the laws of the State of California. Venue of any litigation arising out of or connected with this Agreement shall lie exclusively in the state trial court or Federal District Court located in Sacramento County in the State of California, and the parties consent to jurisdiction over their persons and over the subject matter of any such litigation in such courts, and consent to service of process issued by such courts.

27. **Assignment Prohibited.** The expertise and experience of Artist are material considerations for this Agreement. Artist shall not assign any right or obligation pursuant to this Agreement without the written consent of the City. Any attempted or purported assignment without City's written consent shall be void and of no effect.

28. **Binding Effect.** This Agreement shall be binding on the heirs, executors, administrators, successors and assigns of the parties, subject to the provisions of Section 27, above.

29. **Term; Suspension; Termination.**

    A. This Agreement shall become effective on the date that it is approved by both parties, set forth on the first page of the Agreement, and shall continue in effect until both parties have fully performed their respective obligations under this Agreement, unless sooner terminated as provided herein.

    B. City shall have the right at any time to temporarily suspend Artist's performance hereunder, in whole or in part, by giving a written notice of suspension to Artist.

If City gives such notice of suspension, Artist shall immediately suspend its activities under this Agreement, as specified in such notice.

C. City shall have the right to terminate this Agreement at any time by giving a written notice of termination to Artist. If City gives such notice of termination, Artist shall immediately cease rendering services pursuant to this Agreement. If City terminates this Agreement:

(1) Artist shall, not later than five days after such notice of termination, deliver to City copies of all information prepared pursuant to this Agreement.

(2) City shall pay Artist the reasonable value of services rendered by Artist prior to termination; provided, however, City shall not in any manner be liable for lost profits that might have been made by Artist had the Agreement not been terminated. In this regard, Artist shall furnish to City such financial information as in the judgment of the City is necessary for City to determine the reasonable value of the services rendered by Artist. The foregoing is cumulative and does not affect any right or remedy that City may have in law or equity.

[*Signature Page Follows*]

CITY OF SACRAMENTO
A Municipal Corporation

By: _____
Print Name: Jody Ulich
Title: Director, Convention and Cultural Services Department

For: John F. Shirey, City Manager

APPROVED AS TO FORM:

_____
Deputy City Attorney

ATTEST:

_____
City Clerk

ARTIST:

_____
William Fontana (signature)

_____
Federal I.D. No.

_____
State I.D. No.

1022897
City of Sacramento Business Op. Tax Cert. No.

TYPE OF BUSINESS ENTITY *(check one)*:

X Individual/Sole Proprietor
____ Partnership
____ Corporation (may require 2 signatures)
____ Limited Liability Company
____ Other (please specify: _____)

Attachments
Exhibit A - Schedule for Completion of Work
Exhibit B - Design Proposal
Exhibit C - Maintenance Report

EXHIBIT A: SCHEDULE FOR COMPLETION OF WORK

The following schedule shall be adhered to in the design, fabrication and installation of Work:

Start Date: Upon receipt of a Notice to Proceed from the City, which is contingent on the City obtaining the necessary legal rights to access the Work site.

Phase 1: to be completed 2 months after receipt of the Notice to Proceed

Description: Delivery of the following:

- engineering drawings
- estimates from suppliers and fabricators documenting project expenses
- receipt of required permits
- a detailed written description of the fabrication and installation methods
- a detailed fabrication and installation schedule ("Installation Schedule"), describing Artist's specific timelines for completing the Work.

Phase 2: to be completed 4 months after City approval of Phase I

Description: Approval by City of sound content, design, programming and engineering

Phase 3: to be completed 2 months after City payment for completion of Phase 2

Description: Fabrication of Artwork

Milestone 3a is 50 percent completion of artwork fabrication, and approval by APP staff

Milestone 3b is 100 percent completion of artwork fabrication, and approval by APP staff before transportation to site.

- Artist shall fabricate the Artwork in accordance with all Proposal drawings and Construction drawings approved by the City. To the extent that any specification for the Artwork is not identified in the Final Proposal or in the Construction Documents, Artist shall seek the City's prior approval of these specifications before commencing with fabrication of the Artwork.

- Artist shall notify the City when the Artwork is at 50%, and 100% completion. City must review and approve Artwork at each phase before Artist proceeds with the succeeding phase.

Phase 4 to be completed 1 month after City payment for completion of Phase 3 Milestone 3.b is received by the Artist.

Description: Complete installation. Artist shall consult with Turner Construction Company or any other necessary related entity prior to installation, and at Artist's sole expense, arrange for installation by either (1) the required contractors of Turner Construction Company or any other necessary related entity, or (2) Artist's contractors following approval by Turner Construction Company or any other necessary related entity. The Work shall be installed at the location as described in the Proposal and in accordance with the installation methods approved by the City.

Phase 5 to be completed 1 month after Phase 4 is completed.

Description: Upon completion and installation of the Work, and acceptance of the Work by City, Artist shall satisfactory complete the Maintenance Report attached hereto as Exhibit C, and submit 20 digital images of the completed artwork to City. If requested by the City, Artist will deliver one Public Lecture within one year of project completion on a date to be mutually determined by the Artist and SMAC staff.

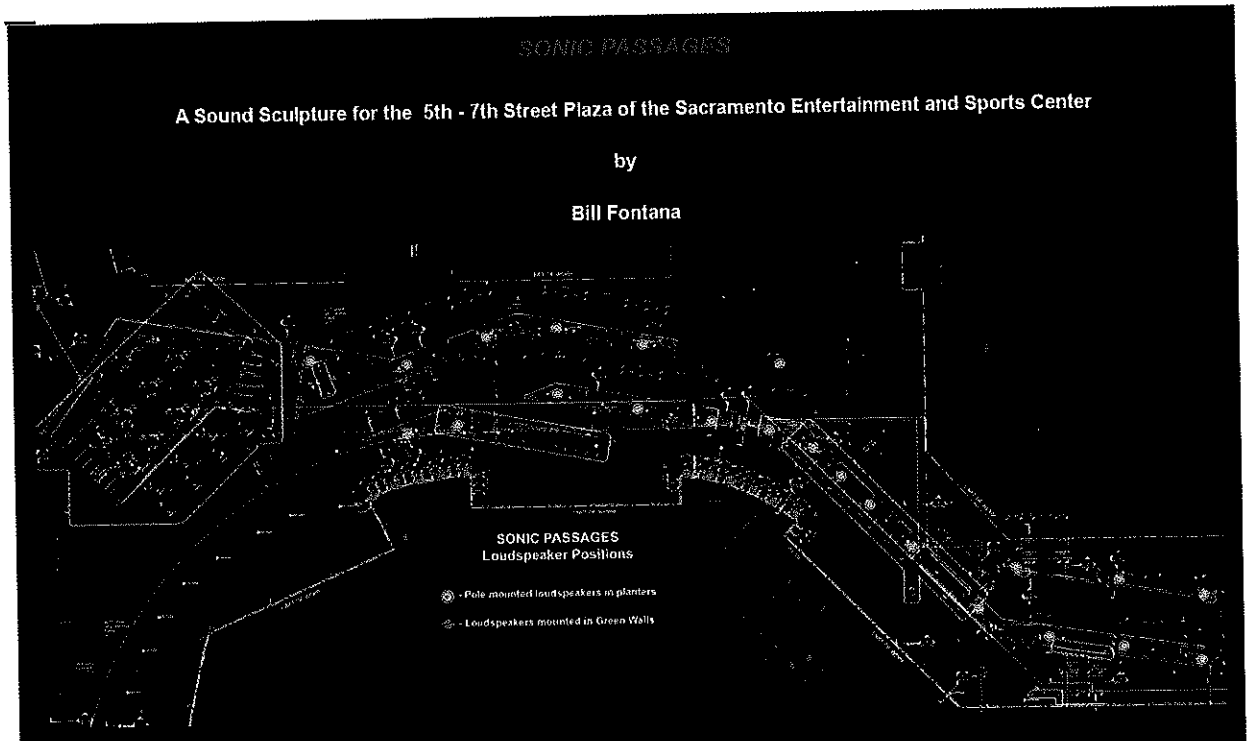
In no event shall Artist begin work on any Milestone or Phase without first receiving a written Notice to Proceed from City.

EXHIBIT B

DESIGN PROPOSAL

The artist is proposing a matrix of 34 small weatherproof loudspeakers that will be distributed among the planters on the plaza, and on the two Green Wall sections that face these planters. The configuration will enable the presence of the sound sculpture to be spatially dynamic, with non-linear movement patterns. The parallel placement of the loudspeakers in rows will also create immersive experiences in sound. The movement of sound along the pole-mounted planter speakers will create an immersive listening experience in relation to the green walls and at other times will either be a linear sonic progression or random and non-linear. The musical form of these mixes will always emerge from and return to silence.

Currently the artist is proposing sound mixes that reflect the building itself. The Living Walls of Plants evoke the agricultural landscapes of the Sacramento Valley, suggestive of birds, insects and movement of the plants. Other abstracted sounds are recorded from the game of basketball itself. Occasionally the natural sounds will mix with the basketball sounds. Other ideas for sound mixes will be developed in the future. The 34-channel sound mixes will be operated as a playlist.



A matrix of 34 small weatherproof loudspeakers would be distributed between planters #10, 11,12 and 13 as well as on the two Green Wall sections facing these planters. This configuration will enable the presence of the sound sculpture to be spatially dynamic, with non-linear movement patterns. The parallel placment of the loudspeakers in rows will also create immersive experiences of sound.

EXHIBIT C

MAINTENANCE REPORT

Artist:_____

Address:_____

_____

Home Phone:_____ Work Phone:_____

Studio Phone:_____

1. Title of the Artwork:_____

2. Medium or material:_____

3. Edition information, if applicable:_____

4. Date and place executed:_____

5. Collaborating artist(s), if applicable._____

_____

6. Maker(s) other than Artist (fabricators, technicians), if applicable. Include names, addresses, phone numbers and element worked on.

_____

_____

7. Location of signature and copyright mark, if it occurs.

_____

_____

8. Exhibitions pertaining only to the above-named work, if any.

_____

9. Published reviews or articles concerning the above named work.

10. Dimensions (please measure in both inches and centimeters; record height first, then width, then depth if needed or diameter; if a work is irregular or circular in shape, state as such in parenthesis; if work involves multiple pieces, measure the significant parts as well as the whole; measure the work separately from the frame or pedestal; include the dimensions of the frame or pedestal.)

11. Materials used in the execution of the Artwork (be technical and specific).

12. Technique or construction methods used in the execution of the Artwork (attach fabrication drawings, if necessary).

13. Material finish on the Artwork (glaze, paint color and type, sanding, grit, tool pattern, patina, surface sealer, etc.

14. Foundation/installation structure (include armature bolt/pin size, grout, etc.).

15. Handling instructions.

16. Artist's statement about the Artwork (concept, message, relationship to site, etc.).

17. Describe recommended general routine maintenance and care for the Artwork (cleaning agent(s), procedure(s) timetable, etc.).

18. Special handling and/or storage instructions.

19. Special cautions or concerns regarding the Artwork.

20. Packing, shipping or storage instructions (should the need arise).

CONTRACT TO PURCHASE ARTWORK

This Agreement is made at Sacramento, California, as of _____ ("Effective Date"), by and between the City of Sacramento, a municipal corporation ("City"), and

Gale Hart
2114 19th Street,
Sacramento, CA 95818
916-448-5090
gale@galehart.com

("Artist"). The City and Artist may be referred to collectively as "Parties" or in the singular as "Party," as the context requires.

RECITALS

A. The City has an Art in Public Places ("APP") program as set forth in City Code Chapter 2.84, which requires at least two percent of the total construction costs for eligible projects be spent on artworks in public places. The Sacramento Metropolitan Arts Commission ("SMAC") is charged with providing for the nature, selection, and placement of these artworks.

B. Through the APP program, funds have been allocated for the selection, purchase and placement of artwork for the Golden 1 Center in Sacramento, California: (ECAPS#:M176000302). Funds for this project were allocated based on a donation by Marcy Friedman for the purpose of purchasing art by regional artists for the Golden 1 Center. The artwork was selected through a competitive process and approved by the Sacramento Metropolitan Arts Commission.

C. The artwork is described in Exhibit B, Design Proposal.

NOW THEREFORE, the Parties mutually agree as follows:

1. **Scope of Work.** Subject to the terms and conditions set forth in this Agreement, Artist shall:

   A. In accordance with the schedule set forth in Exhibit A, purchase on Artist's account all labor, supplies, materials and equipment required to design and furnish to the City an exterior artwork ("Work") at the Golden 1 Center, and fabricate and deliver the Work at the Golden 1 Center to the satisfaction of City and in substantial conformance with Artist's Design Proposal ("Proposal").

   B. The Work shall be placed and located as described in the Proposal. As described in Exhibit A, Artist shall install the Work, or arrange to have Turner

Construction Company, or any other necessary related entity, install the Work on Artist's behalf.

C. Artist shall not commence performance of any of the services identified in sections 1.A and 1.B until receiving a written "Notice to Proceed" from the City for each Phase and Milestone of this project.

2. **Payment.**

A. City shall pay Artist up to two hundred and seventy thousand dollars ($270,000), unless unforeseen and unpredictable circumstances occur, in which case the City may pay Artist an additional contingency ("Contingency") amount of up to thirteen thousand five hundred dollars ($13,500). However, payment to Artist under this Agreement shall not exceed the total amount of two hundred and eighty three thousand dollars ($283,500). The City will reserve the Contingency amount of thirteen thousand five hundred dollars ($13,500) to address unforeseen and unpredictable circumstances that are discovered during the fabrication of the Work and are beyond the control of the Artist, as determined by the City in its sole discretion.

The Contingency, or a portion thereof, may only be used upon the City's express written authorization. Artist understands it has no right to the Contingency and absent unforeseen and unpredictable circumstances that are beyond the Artist's control, as determined by the City, Artist's total compensation under this Agreement shall not exceed $270,000. Therefore, Artist must design a project in an amount of $270,000 or less, including the Artist's fee in an amount not to exceed fifty-two thousand dollars ($52,000).

B. Payments to Artist shall be made within 30 days after receipt of Artist's invoices. Artist shall be responsible for the cost of supplying all documentation necessary to verify the billings to the satisfaction of City. Artist agrees that City has no obligations regarding commissions or any agreements with galleries or agents with whom Artist may have contracted. City is not responsible for paying sales tax.

C. Payments to Artist will be made upon completion of the following tasks outlined in Exhibit A:

(1) Twenty thousand dollars ($20,000) upon submission of certificates of insurance acceptable to the City, execution of this Agreement, and dispatch of the Notice to Proceed.

(2) Seventy-five thousand dollars ($75,000) upon completion of Phase 1.

(3) Seventy thousand dollars ($70,000) upon completion of Phase 2.a milestone.

(4) Seventy thousand dollars ($70,000) upon completion of Phase 2.b milestone.

(5) Thirty thousand dollars ($30,000) upon completion of Phase 3. Following consultation with Turner Construction Company or any other necessary related entity, as required in Exhibit A, this amount for installation may be increased or decreased based on how the installation work will be performed.

(6) Five-thousand dollars ($5,000) upon completion of Phase 4.

D. No payment shall be made if Artist is in default of this Agreement or if any milestone or Phase is not completed to the satisfaction of City. City shall be the sole determiner of when a milestone or Phase has been completed to its satisfaction.

E. **Prevailing Wage Requirement**. All or part of the work to be performed under this Agreement constitutes "public works" under California Labor Code section 1720 *et seq.* This Agreement is therefore subject to the provisions of Sacramento City Code Chapter 3.60, Article V, which requires, among other things, that Artist pay not less than the prevailing rate of wages, as determined by the Director of the California Department of Industrial Relations pursuant to California Labor Code section 1773. If payment of the prevailing rate of wages is required, Artist and every lower-tier subcontractor shall submit certified payrolls and labor compliance documentation electronically when and as required by City. Artist is responsible for compliance with Sacramento City Code Chapter 3.60, Article V, and shall include these requirements in every subcontract or subagreement. This Agreement is subject to compliance monitoring and enforcement by the California Department of Industrial Relations, as specified in California Labor Code section 1771.4.

3. **Time of Performance; Documentation of Work.** Time is of the essence in this Agreement. Artist shall dedicate such time and effort as is necessary to fulfill Artist's obligations to completely finish and install or arrange for installation of the Work to the satisfaction of City within the timelines set forth in the Schedule, except as the Work may be delayed by circumstances described in section 19, below. City shall make its staff and contractors reasonably available to Artist for consultation and assistance in order to achieve the purposes of this Agreement. Artist shall provide to the City twenty (20) high resolution (300 dpi minimum) professional quality digital images documenting the processes of Work fabrication and installation, and the completed Work. Artist shall also provide City with a complete schedule for maintenance of the Work in the form reflected in Exhibit C hereto.

4. **Artist Warranties.**

A. **Restoration of Work Site**. Artist agrees and warrants that, within 30 days after the Work is accepted by the City, Artist shall restore the Work site (including the entire area affected by the fabrication and installation of the Work) to a state and condition that is substantially similar to that which existed when the Work was begun. Artist further agrees and warrants that, within the period specified herein, Artist shall repair or replace, as is determined necessary by City, and to the reasonable satisfaction of City, all property (real, personal or otherwise), which has been damaged, injured or otherwise adversely affected by the acts or omissions of Artist, Artist's agents, contractors, or employees. Artist shall be solely responsible for all expenses and costs which may be necessary to comply with the requirements of this paragraph, and City shall have no responsibility or liability therefore.

B. **Originality of Work.** Artist warrants that the Work is original and is solely the product of Artist's own creative efforts and does not infringe the rights, including copyrights, of any person or entity. Artist also warrants that, unless otherwise stipulated in writing, the Work is original, that it is an edition of one (1), and that Artist shall not sell, license, perform or reproduce a substantially similar copy of the Work without the prior written consent of City. However, nothing contained herein shall prevent the Artist from creating future works in his style and manner of working.

C. **Work Free from Defects**. Artist shall warrant and maintain the Work free from all faults or defects related to material or workmanship for a period of one year after the Work is accepted by City.

D. **Compliance with all Laws**. Artist agrees to fabricate and install or arrange for installation of the Work in conformance with all applicable laws.

5. **Transfer of Title to Work**. Title to the Work shall remain with Artist until City has accepted the Work as completed and it is installed to the satisfaction of City. When City has so certified, title shall transfer to City. Artist shall bear all risk of loss of the Work until title has been transferred to City, and City agrees to inspect Work and accept Work within thirty (30) days of Artist's notification of completion, unless the provisions of 7(A)(1) or 7(A)(2) apply.

6. **Performance Made Impossible.** In the event it shall become impossible for Artist to complete the Work because of illness, death or injury, this Agreement may be terminated at the sole discretion of City, and, in such event, all completed work, materials, and supplies related to the Work shall be delivered to City and shall, along with the Proposal, become City's sole property. City shall thereafter have no obligation to make any additional or further payments to Artist, and Artist shall have no further or

additional claims against City with respect to the Work or such portion thereof as may be completed, or the Proposal, or with respect to any matter whatsoever pertaining to, affected by or embodied in this Agreement. In the event of such termination, City may take such action as may appear to it appropriate under the circumstances, including, without limitation of the generality of the foregoing, commissioning another artist to complete the Work. In the event that City completes the Work or arranges to have it completed, Artist's name shall be publicly displayed at, on or near the Work, unless Artist and City mutually agree otherwise.

7. **Acceptance of Work.**

A. City agrees to accept the completed Work unless:

(1) The Work was not completed in substantial conformance with the Proposal or the Specifications, or

(2) The Work as completed or any portion thereof does not conform to a reasonable standard of artistic or technical quality. City shall provide its reasons for this finding to Artist in writing no later than ten (10) days after Artist has tendered the Work to the City for City's acceptance. Where the Artist disputes this finding, the dispute may, if the Parties so agree, be submitted to Arts Arbitration and Mediation Services ("A.A.M.S."), of California Lawyers for the Arts, Sacramento for resolution, and any decision by A.A.M.S. shall be binding upon City and Artist and neither shall have any further recourse or cause of action regarding the matters so resolved.

B. Upon the City's refusal to accept the Work for the reasons stated in paragraphs 7(A)(1) or 7(A)(2), City shall have the right to: 1) request that Artist correct the deficiencies in the Work within a reasonable time, or 2) terminate this Agreement and recover all sums previously paid to Artist. Both remedies shall be independent and cumulative and in addition to any other remedy available to the City at law or equity. Enforcement of one such remedy shall not be exclusive nor shall it be deemed an election of such remedy to the exclusion of any other or further remedy. However, nothing contained herein shall limit City's available remedies at law and equity.

C. No payments to Artist shall be deemed as a waiver of City's right to refuse to accept the Work.

8. **City Maintenance of Work.** City agrees to reasonably ensure that the Work is properly maintained and protected. City agrees that it will not intentionally destroy damage, alter, modify or change the Work in any way. If an alteration should occur, either intentionally or unintentionally, the Work will no longer be represented as the work of the Artist without his or her written permission. This does not preclude the City's right to move or

remove the Work from display or deaccession the Work. In the event it becomes necessary to change the placement of the Work, City shall confer with Artist concerning placement, though the ultimate placement of the Work is solely within the City's discretion.

9. **Repair of Work.** In the event repair of the Work is required, City may give Artist the opportunity to perform the repairs for a reasonable fee. In the case of disagreement between City and Artist as to what constitutes a reasonable fee, the fee determined by an independent conservator selected by City shall be considered a reasonable fee. In the event Artist refuses to make the repairs for such fee, City may arrange for repairs by another qualified person. When emergency repairs are necessary in order to prevent the loss of or further damage to the Work, such repairs shall be undertaken or arranged by City without advance notice to Artist, and such repairs shall not constitute an artistic alteration. City shall thereafter notify Artist as soon as is practicable.

10. **Work Authorship.** Artist shall retain the copyright to the Work and the right to claim authorship of the Work. City shall ensure that Artist's name is publicly displayed on, at, or near the Work. In the event the Work is substantially damaged or altered, City shall no longer represent the Work to be the Work of Artist if Artist gives written notice to City that Artist denies authorship of the Work on the grounds stated in this paragraph. In the event City disputes the right of Artist to deny authorship, the matter may be submitted to A.A.M.S for mediation or arbitration. If the parties select arbitration, the determination by A.A.M.S shall be binding upon City and Artist and neither shall have any further recourse or cause of action regarding the matters so determined.

11. **Artist Payment of Contractors and Employees.** In the event Artist hires or contracts with employees, subcontractors, or material suppliers, Artist shall pay these employees, subcontractors, or material suppliers out of the payments made to Artist by City for completion of the phase of work for which the employees, subcontractors, or material suppliers provided labor or materials and provide proof of payment to the City prior to completion of the next phase of work. In the case of nonpayment of wages or other amounts due the employees, subcontractors, or material suppliers herein, City may withhold from Artist out of payments due a sum sufficient to pay such persons the amounts owed by Artist absent evidence satisfactory to the City of a legal basis for such nonpayment. All subcontractors shall be properly licensed pursuant to the Contractors State License Law (Business and Professions Code sections 7000 et seq.). Before performing any work, each subcontractor shall provide to the City and Artist evidence that the subcontractor has workers' compensation insurance coverage.

12. **Indemnity.** Artist shall defend, hold harmless and indemnify City, its officers and employees, and each and every one of them, from and against any and all claims, actions, damages, costs, liabilities, demands, losses, judgments, penalties and expenses of every type and description, including, but not limited to, any fees and/or costs reasonably incurred by City's staff attorneys or outside attorneys and any fees and expenses incurred in enforcing this provision (hereafter collectively referred to as

"Claims"), including but not limited to Claims arising from personal injury or death, damage to personal, real or intellectual property or the environment, contractual or other economic damages, or regulatory penalties, that arise out of, pertain to or relate solely to any negligent act or omission, recklessness or willful misconduct of Artist, its subcontractors or agents, and their respective officers and employees, in connection with performance of or failure to perform this Agreement, whether or not such Claims are litigated, settled or reduced to judgment; provided that the foregoing indemnity does not apply to liability for damages for death or bodily injury to persons, injury to property, or other loss, damage or expense to the extent arising from the sole negligence or willful misconduct of City, its subcontractors or agents, and their respective officers and employees. The existence or acceptance by City of any of the insurance policies or coverages described in this Agreement shall not affect or limit any of City's rights under this Section 12, nor shall the limits of such insurance limit the liability of Artist hereunder. The provisions of this Section 12 shall survive any expiration or termination of this Agreement.

13. **Insurance.** During the entire term of this Agreement, Artist shall maintain the insurance coverage described in this Section 13.

Full compensation for all premiums that Artist is required to pay for the insurance coverage described herein shall be included in the compensation paid to Artist under this Agreement. No additional compensation will be provided for Artist's insurance premiums. Any available insurance proceeds in excess of the specified minimum limits and coverages shall be available to the City.

It is understood and agreed by the Artist that its liability to the City shall not in any way be limited to or affected by the amount of insurance coverage required or carried by the Artist in connection with this Agreement.

A. Minimum Scope & Limits of Insurance Coverage

(1) Commercial General Liability Insurance, providing coverage at least as broad as ISO CGL Form 00 01 on an occurrence basis for bodily injury, including death, of one or more persons, property damage and personal injury, arising out of activities performed by or on behalf of Artists, its sub-consultants, and subcontractors, products and competed operations of Artist, its sub-consultants, and sub-contractors, and premises owned, leased, or used by Artist, its sub-consultants, and subcontractors, with limits of not less than one million dollars ($1,000,000) per occurrence. The policy shall provide contractual liability and products and completed operations coverage for the term of the policy.

(2) Automobile Liability Insurance providing coverage at least as broad as ISO Form CA 00 01 for bodily injury, including death, of one or more persons, property damage and personal injury, with limits of not less than one million

dollars ($1,000,000) per accident. The policy shall provide coverage for owned, non-owned and/or hired autos as appropriate to the operations of the Artist.

No automobile liability insurance shall be required if Artist completes the following certification:

> "I certify that a motor vehicle will not be used in the performance of any work or services under this agreement." ___ (Artist initials)

(3) Workers' Compensation Insurance with statutory limits, and Employers' Liability Insurance with limits of not less than one million dollars ($1,000,000). The Worker's Compensation policy shall include a waiver of subrogation in favor of the City. If no work or services will be performed on or at City facilities or City property, the City representative may waive this requirement by selecting the option below:

> Workers' Compensation waiver of subrogation in favor of the City is not required ___ (City representative initials).

No Workers' Compensation insurance shall be required if Artist completes the following certification:

> "I certify that my business has no employees, and that I do not employ anyone. I am exempt from the legal requirements to provide Workers' Compensation insurance." ___ (Artist initials)

(4) Professional Liability Insurance providing coverage on a claims made basis for errors, omissions or malpractice with limits of not less than one million ($1,000,000) dollars. Professional Liability (Errors and Omissions) insurance:

> Is ___ Is not ✓ *[check one]* required for this Agreement.
>
> If required, such coverage must be continued for at least ___ year(s) following the completion of all Services and Additional Services under this Agreement. The retroactive date must be prior to the date this Agreement is approved or any Services are performed.

B. Additional Insured Coverage

(1) Commercial General Liability Insurance: The City, its officials, employees and volunteers shall be covered by policy terms or endorsement as additional insureds as respects general liability arising out of activities performed by or on behalf of Artist, its sub-consultants, and subcontractors; products and completed operations of Artist, its sub-consultants, and subcontractors;

products and completed operations of Artist, its sub-consultants, and subcontractors; and premises owned, leased or used by Artist, its sub-consultants, and subcontractors.

(2) Automobile Liability Insurance: The City, its officials, employees and volunteers shall be covered by policy terms or endorsement as additional insureds as respects auto liability.

C. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

(1) Except for professional liability, Artist's insurance coverage, including excess coverage, shall be primary insurance as respects City, its officials, employees and volunteers. Any insurance or self-insurance maintained by City, its officials, employees or volunteers shall be in excess of Artist's insurance and shall not contribute with it.

(2) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, its officials, employees or volunteers.

(3) Coverage shall state that Artist's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

(4) City will be provided with thirty (30) days written notice of cancellation or material change in the policy language or terms.

D. Acceptability of Insurance

Insurance shall be placed with insurers with a Bests' rating of not less than A:VI. Self-insured retentions, policy terms or other variations that do not comply with the requirements of this Section 13 must be declared to and approved by the City's Risk Management Division in writing prior to execution of this Agreement.

E. Verification of Coverage

(1) Artist shall furnish City with certificates and required endorsements evidencing the insurance required. The certificates and endorsements shall be forwarded to the APP Administrator. Copies of policies shall be delivered to the City on demand. Certificates of insurance shall be signed by an authorized representative of the insurance carrier.

(2) For all insurance policy renewals during the term of this Agreement, Artist shall send insurance certificates reflecting the policy renewals directly to:

City of Sacramento
c/o Ebix RCS
Reference #: (This number will be provided by EBIX after Agreement approval.)
PO Box 257
Portland, MI 48875-0257

(3) The City may withdraw its offer of contract or terminate this Agreement if the certificates of insurance and endorsements required have not been provided prior to execution of this Agreement or when demanded by City. The City may withhold payments to Artist and/or terminate the Agreement if the insurance is canceled or Artist otherwise ceases to be insured as required herein.

F. Subcontractors

Artist shall require and verify that all subcontractors maintain insurance coverage that meets the minimum scope and limits of insurance coverage specified in subparagraph A, above.

14. **Copyright.** Artist expressly reserves every right available to Artist at common law or under the Federal Copyright Act to control the making and dissemination of copies or reproduction of the Work except as those rights are limited by this Agreement. Artist agrees to give a credit substantially in the following form: "Original owned by the City of Sacramento" in any public showing of reproductions of the Work. Artist authorizes City and its assigns to make photographs, drawings, and other two-dimensional reproductions of the Work without prior consent of Artist if used solely for non-commercial purposes, advertising, descriptive brochures, and similar purposes. All reproductions by City shall contain a copyright notice substantially in the following form: "©, Artist's name, date", in such a manner and location as shall comply with the U.S. Copyright laws.

15. **Waiver of VARA and CAPA Rights.** With the exception of Artist's rights as to third parties, Artist waives any and all rights Artist may have with respect to the Work under the federal Visual Artists Rights Act of 1990 (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 et seq.), and any other local, state, federal or international laws that convey rights of the same nature as those conveyed under 17 U.S.C. §106A, Cal. Civil Code §§987 et seq., or any other type of moral right protecting the integrity of works of art.

16. **Location of Work.** The final location of the Work shall be determined by the City's architect or engineer following consultation with Artist.

17. **Dispute Resolution.** If any dispute is submitted to a third party for resolution, all fees, expenses, and costs connected therewith shall be borne jointly and equally by City and Artist. The previous sentence notwithstanding, each party shall bear their own attorneys' fees and costs. Each and every obligation under this Agreement to submit any matter to a third party for resolution is conditioned upon the foregoing two sentences of this paragraph. If any matter is to be submitted to A.A.M.S, and if at the time such submission is called for, A.A.M.S is not in existence or is not able or willing to provide such resolution service, then the matter shall be submitted for resolution to the American Arbitration Association in accordance with their procedures then in use.

18. **Artist Change of Address.** Artist shall notify SMAC in writing of any change of address. Failure to do so shall constitute a waiver of Artist's rights under this Agreement during the time of the omission. Any waiver of a right pursuant to this Agreement for failure to maintain Artist's current address may be cured prospectively only by notifying SMAC of Artist's current address. All rights of Artist pursuant to this Agreement shall be personal to Artist and shall terminate upon either the legal disability or incompetence of Artist or upon the death of Artist, except as provided Artist under copyright laws.

19. **Excuse from Performance.**

    (A) In the event Artist's performance of any of his obligations or undertakings under this Agreement is delayed, interrupted, or prevented by an act of God, unforeseen conditions, unusually severe weather, or occurrences that are beyond the control of either party to this Agreement, Artist shall be excused from any further performance for whatever period of time after the occurrence necessary to remedy the effects of that occurrence. Artist shall notify City in writing within ten (10) days after any occurrence described in this section that may delay Artist performance. City shall amend the Schedule when, in its determination, Artist's performance has been excused, and the delay or interruption has resulted in a material change in the time for performance.

    (B) In the event that the installation site has not been adequately prepared for receipt of the Work as scheduled, or delivery or installation is delayed due to a material failure on the part of the City or its subcontractors, then the City shall promptly act to address the problem(s) identified by Artist. In such events, timelines for performance by Artist shall be extended as needed, provided, that none of the delays are caused in whole or in part by Artist. Site preparation by City shall not include site measurements, which shall be the sole responsibility of Artist.

20. **Public Lecture.** If requested by the City, Artist will give one public art lecture regarding the Work after the installation of the Work is completed. Arrangements are to be approved in advance by the APP Administrator.

21. **Maquette.** As part of this Agreement, Artist will provide the City of Sacramento, APP program one (1) Maquette and/or drawing of the proposed artwork.

22. **Exhibits.** All exhibits referred to herein are attached hereto and are by this reference incorporated as if set forth fully herein.

23. **Entire Agreement.** This document, including all Exhibits, contains the entire agreement between the parties and supersedes whatever oral or written understanding they may have had prior to the execution of this Agreement. No alteration to the terms of this Agreement shall be valid unless approved in writing by Artist, and by City, in accordance with applicable provisions of the Sacramento City Code.

24. **Severability.** If any portion of this Agreement or the application thereof to any person or circumstance shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

25. **No Waiver.** Neither City acceptance of, or payment for, any work performed by Artist, nor any waiver by either party of any default, breach or condition precedent, shall be construed as a waiver of any provision of this Agreement, nor as a waiver of any other default, breach or condition precedent or any other right hereunder.

26. **Choice of Law; Venue.** This Agreement shall be governed, construed and enforced in accordance with the laws of the State of California. Venue of any litigation arising out of or connected with this Agreement shall lie exclusively in the state trial court or Federal District Court located in Sacramento County in the State of California, and the parties consent to jurisdiction over their persons and over the subject matter of any such litigation in such courts, and consent to service of process issued by such courts.

27. **Assignment Prohibited.** The expertise and experience of Artist are material considerations for this Agreement. Artist shall not assign any right or obligation pursuant to this Agreement without the written consent of the City. Any attempted or purported assignment without City's written consent shall be void and of no effect.

28. **Binding Effect.** This Agreement shall be binding on the heirs, executors, administrators, successors and assigns of the parties, subject to the provisions of Section 27, above.

29. **Term; Suspension; Termination.**

    A. This Agreement shall become effective on the date that it is approved by both parties, set forth on the first page of the Agreement, and shall continue in effect until both parties have fully performed their respective obligations under this Agreement, unless sooner terminated as provided herein.

    B. City shall have the right at any time to temporarily suspend Artist's performance hereunder, in whole or in part, by giving a written notice of suspension to Artist.

If City gives such notice of suspension, Artist shall immediately suspend its activities under this Agreement, as specified in such notice.

C. City shall have the right to terminate this Agreement at any time by giving a written notice of termination to Artist. If City gives such notice of termination, Artist shall immediately cease rendering services pursuant to this Agreement. If City terminates this Agreement:

(1) Artist shall, not later than five days after such notice of termination, deliver to City copies of all information prepared pursuant to this Agreement.

(2) City shall pay Artist the reasonable value of services rendered by Artist prior to termination; provided, however, City shall not in any manner be liable for lost profits that might have been made by Artist had the Agreement not been terminated. In this regard, Artist shall furnish to City such financial information as in the judgment of the City is necessary for City to determine the reasonable value of the services rendered by Artist. The foregoing is cumulative and does not affect any right or remedy that City may have in law or equity.

[*Signature Page Follows*]

CITY OF SACRAMENTO
A Municipal Corporation

By: _____
Print Name: Jody Ulich
Title: Director, Convention & Cultural Services Department

For: John F. Shirey, City Manager

APPROVED AS TO FORM:

_____
Deputy City Attorney

ATTEST:

_____
City Clerk

ARTIST:

_____
Gale Hart (signature)

_____
Federal I.D. No.

_____
State I.D. No.

10122291
City of Sacramento Business Op. Tax Cert. No.

TYPE OF BUSINESS ENTITY *(check one)*:

✓ Individual/Sole Proprietor
_____ Partnership
_____ Corporation (may require 2 signatures)
_____ Limited Liability Company
_____ Other (please specify: _____)

Attachments
Exhibit A - Schedule for Completion of Work
Exhibit B - Design Proposal
Exhibit C - Maintenance Report

EXHIBIT A: SCHEDULE FOR COMPLETION OF WORK

The following schedule shall be adhered to in the design, fabrication and installation of the Work:

Start Date: Upon receipt of a Notice to Proceed from the City, which is contingent on the City obtaining the necessary legal rights to access the Work site.

Phase 1: to be completed 2 months after receipt of the Notice to Proceed

Description: Delivery of the following:

- engineering drawings
- estimates from suppliers and fabricators documenting project expenses
- receipt of required permits
- a Final Design Proposal ("Final Proposal") for the Artwork in substantial conformance with the conceptual Design Proposal attached hereto as Exhibit B. The Final Design Proposal shall include:

    a. Details and location of the Work including an indication of form, scale and proposed materials.
    b. A detailed written description of the fabrication and installation methods ("Installation Specification").
    c. A detailed fabrication and installation schedule ("Installation Schedule"), describing Artist's specific timelines for completing the Work.
    d. A project budget
    e. Artist, at City's option, shall be available to present the Final Proposal, at one or more project meetings, to City staff, SMAC, the Project Architect, or other individuals and organizations, as needed. Artist agrees to collaborate closely with City through in-person meetings and other necessary means of communication to thoroughly integrate the Final Proposal into the architectural design of the Golden 1 Center.
    f. The City may approve, with minor changes, or disapprove the Final Proposal. In the event that the City disapproves the Final Proposal, or approves it with minor changes, the Artist, upon written notification by the City, shall respond to the changes in writing and submit up to two design modifications to the Final Proposal. Artist recognizes and agrees that the City will review the Final Proposal as revised and may make additional requests for changes regarding the revised Final Proposal.

Phase 2: to be completed 6 months after City approval of Phase 1

Description: Fabrication of Artwork

Milestone 2a: 50 percent completion of Artwork fabrication and approval by APP staff.

Milestone 2b: 100 percent completion of Artwork fabrication and approval by APP staff before transportation to site.

a. Artist shall fabricate the Artwork in accordance with all Final Proposal drawings and Construction Drawings approved by the City. To the extent that any specification for the Artwork is not identified in the Final Proposal or in the Construction Drawings, Artist shall seek the City's prior approval of these specifications before commencing with fabrication of the Artwork.

b. Artist shall notify the City when the Artwork is at 50 percent and 100 percent completion. City must review and approve Artwork at each phase before Artist proceeds with the succeeding phase.

Phase 3: to be completed 1 month after City payment for completion of Phase 2b is received by the Artist.

Description: Complete installation. Artist shall consult with Turner Construction Company or any other necessary related entity prior to installation, and at Artist's sole expense, arrange for installation by either (1) the required contractors of Turner Construction Company or any other necessary related entity, or (2) Artist's contractors following approval by Turner Construction Company or any other necessary related entity. The Work shall be installed at the location as described in the Final Proposal and in accordance with the installation methods approved by the City.

Phase 4: to be completed 1 month after Phase 3 is completed.

Description: Upon completion and installation of the Work, and acceptance of the Work by City, Artist shall satisfactory complete the Maintenance Report attached hereto as Exhibit C, and submit 20 digital images of the fabrication and installation of the Artwork, and the completed Artwork to City. If requested by the City, Artist will deliver one Public Lecture within one year of project completion on a date to be mutually determined by the Artist and SMAC staff.

In no event shall Artist begin work on any Milestone or Phase without first receiving a written Notice to Proceed from City.

EXHIBIT B

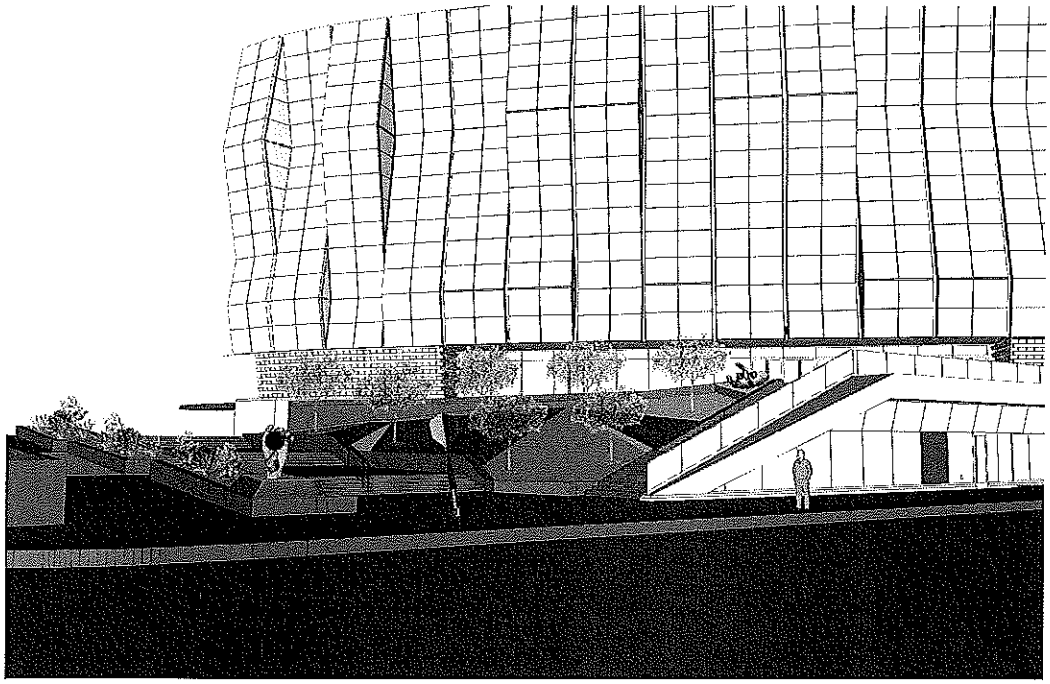
DESIGN PROPOSAL

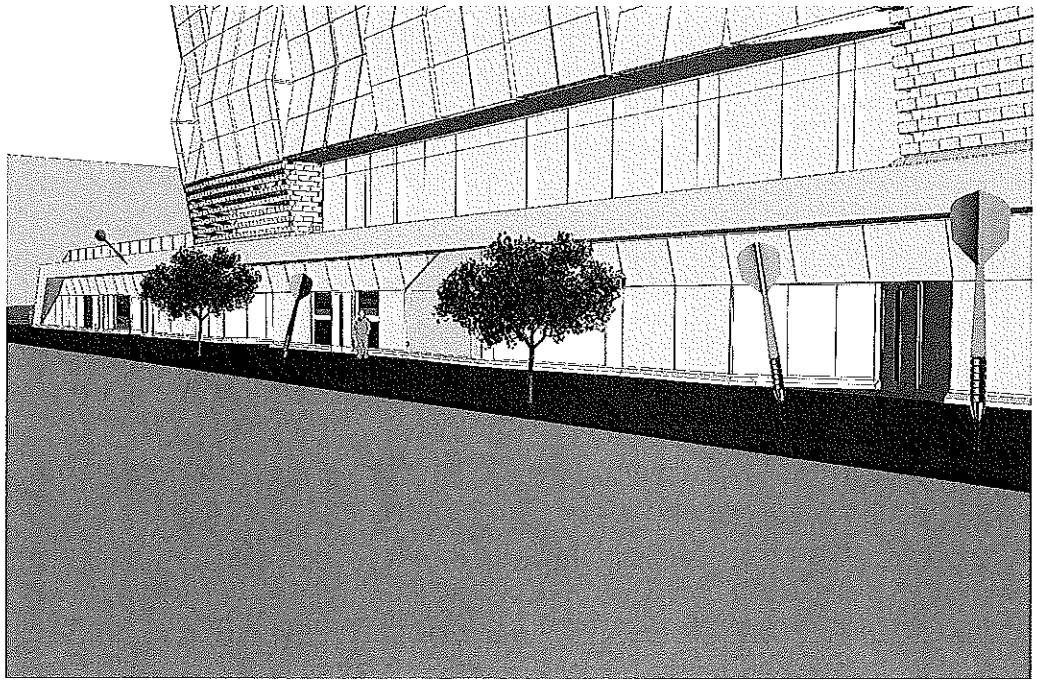
The artist proposes a series of sculptures for the Golden 1 Center. The artwork is an assortment of sculptures that symbolize a traditional dart game with game pieces in a state of disarray. Congruently, the narrative dismantles the American sports culture.

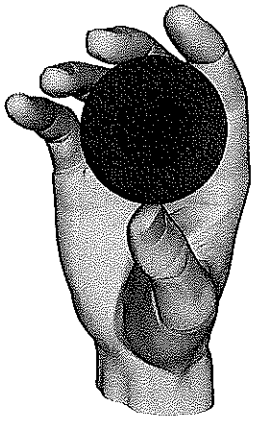
The project consists of a dartboard, lacking a bulls-eye and numbers, lying flat on the ground. This signifies that there is no way to keep score and that the competitive aspect has been eliminated. In a separate location, a sculpted hand holds a bulls-eye between the finger and thumb. This pose depicts an almost daring position while prompting a challenger to respond. Another possible interpretation alludes to domination or control of the game, or questioning the status quo. A second hand holds several dart tails that make the bullet-like flight of the dart possible. One might ask: Is this a prank, foul place or cheating? Who took away the means to toss the dart?

In an earlier America, sports distracted us from the hardships and complexity of life. Team sports fostered virtue, discipline and cooperation. We understood that we needed our rivals to sharpen us. Today, sports delivers connection and pride, but what about issues of violence, racism, sexism, doping, consumerism, and denying information about the physical risks? There is the tradition of sports stars getting away with more than they should. Do we have fans now, or customers? The focus seems not on the game, but what we get from playing it. "Missing the Mark" mischievously inquires: Are we playing fair?

The artist will continue to work with city staff and the building architects to further develop this concept.







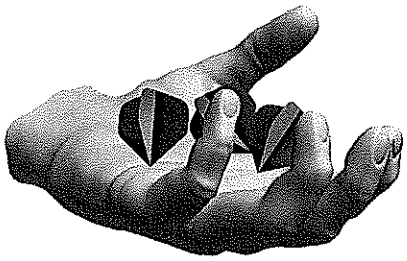


EXHIBIT C

MAINTENANCE REPORT

Artist:_____

Address:_____

_____

Home Phone:_____ Work Phone:_____

Studio Phone:_____

1. Title of the Artwork:_____

2. Medium or material:_____

3. Edition information, if applicable:_____

4. Date and place executed:_____

5. Collaborating artist(s), if applicable._____

_____

6. Maker(s) other than Artist (fabricators, technicians), if applicable. Include names, addresses, phone numbers and element worked on.

_____

_____

7. Location of signature and copyright mark, if it occurs.

_____

_____

8. Exhibitions pertaining only to the above-named work, if any.

_____

_____

9. Published reviews or articles concerning the above named work.

_____

_____

10. Dimensions (please measure in both inches and centimeters; record height first, then width, then depth if needed or diameter; if a work is irregular or circular in shape, state as such in parenthesis; if work involves multiple pieces, measure the significant parts as well as the whole; measure the work separately from the frame or pedestal; include the dimensions of the frame or pedestal.)

_____

_____

11. Materials used in the execution of the Artwork (be technical and specific).

_____

_____

12. Technique or construction methods used in the execution of the Artwork (attach fabrication drawings, if necessary).

_____

_____

13. Material finish on the Artwork (glaze, paint color and type, sanding, grit, tool pattern, patina, surface sealer, etc.

_____

_____

14. Foundation/installation structure (include armature bolt/pin size, grout, etc.).

15. Handling instructions.

16. Artist's statement about the Artwork (concept, message, relationship to site, etc.).

17. Describe recommended general routine maintenance and care for the Artwork (cleaning agent(s), procedure(s) timetable, etc.).

18. Special handling and/or storage instructions.

19. Special cautions or concerns regarding the Artwork.

20. Packing, shipping or storage instructions (should the need arise).