

**CITY OF COSTA MESA
PROFESSIONAL SERVICES AGREEMENT
WITH
BOB HOGUE**

THIS PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into this 22, day of May, 2023 ("Effective Date"), by and between the CITY OF COSTA MESA, a municipal corporation ("City"), and BOB HOGUE, a professional artist ("Artist")

RECITALS

- A. City proposes to utilize the services of an Artist as an independent contractor to create two artworks to be displayed in City run facilities, as more fully described herein; and
- B. Artist represents that they have that degree of specialized expertise necessary, and holds all necessary licenses to practice and perform the services herein contemplated; and
- C. City and Artist desire to contract for the specific services described in Exhibit "A" (the "Project") and desire to set forth their rights, duties and liabilities in connection with the services to be performed; and
- D. No official or employee of City has a financial interest, within the provisions of sections 1090-1092 of the California Government Code, in the subject matter of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions contained herein, the parties hereby agree as follows:

1.0 SERVICES PROVIDED BY CONSULTANT

1.1. Scope of Services. Artist shall provide the professional services described in Artist's Proposal, attached hereto as Exhibit "A," and incorporated herein.

1.2. Approval of Design. Artist shall create a Project for the City in good faith and stay true to the proposed and selected design. The Project shall portray the theme and art as presented in the design provided by the Artist. City will review and approve the Artist's final design in accordance with the design and review policies of the City before the Artist starts the Project.

1.3. Professional Practices. All professional services to be provided by the Artist pursuant to this Agreement shall be provided by personnel experienced in their respective fields and in a manner consistent with the standards of care, diligence and skill ordinarily exercised by professional consultants in similar fields and circumstances in accordance with sound professional practices. The Artist also warrants that it is familiar with all laws that may affect its performance of this Agreement and shall advise City of any changes in any laws that may affect the Artist's performance of this Agreement. All equipment, materials, parts, and other components incorporated in the work or services performed pursuant to this Agreement shall be new, or the latest model and of the most suitable grade for the purpose intended. All work shall be performed in a skilled and workmanlike manner.

1.4. Performance to Satisfaction of City. Artist agrees to perform all the work to the complete satisfaction of the City. Evaluations of the work will be done by the City Manager or his or her designee. If the quality of work is not satisfactory, City in its discretion has the right to:

- a) Meet with the Artist to review the quality of the work and resolve the matters of concern;
- b) Require Artist to repeat the work at no additional fee until it is satisfactory; and/or
- c) Terminate the Agreement as hereinafter set forth.

1.5. Warranty. Artist warrants that it shall perform the services required by this Agreement in compliance with all applicable Federal and California employment laws, including, but not limited to, those laws related to minimum hours and wages; occupational health and safety; fair employment and employment practices; workers' compensation insurance and safety in employment; and all other Federal, State and local laws and ordinances applicable to the services required under this Agreement. Artist shall indemnify and hold harmless City from and against all claims, demands, payments, suits, actions, proceedings, and judgments of every nature and description including attorneys' fees and costs, presented, brought, or recovered against City for, or on account of any liability under any of the above-mentioned laws, which may be incurred by reason of the Artist's performance under this Agreement.

1.6. Non-Discrimination. In performing this Agreement, Artist shall not engage in, nor permit its agents to engage in, discrimination in employment of persons because of their race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military or veteran status, except as permitted pursuant to section 12940 of the Government Code.

1.7. Non-Exclusive Agreement. Artist acknowledges that City may enter into agreements with other consultants for services similar to the services that are subject to this Agreement or may have its own employees perform services similar to those services contemplated by this Agreement.

1.8. Delegation and Assignment. This is a personal service contract, and the duties set forth herein shall not be delegated or assigned to any person or entity without the prior written consent of City. Artist may engage a subcontractor(s) as permitted by law and may employ other personnel to perform services contemplated by this Agreement at the Artist's sole cost and expense.

1.9. Confidentiality. Employees of the Artist in the course of their duties may have access to financial, accounting, statistical, and personnel data of private individuals and employees of City. Artist covenants that all data, documents, discussion, or other information developed or received by the Artist or provided for performance of this Agreement are deemed confidential and shall not be disclosed by Artist without written authorization by City. City shall grant such authorization if disclosure is required by law. All City data shall be returned to City upon the termination of this Agreement. Artist's covenant under this Section shall survive the termination of this Agreement.

2.0 COMPENSATION AND BILLING

2.1. Compensation. City agrees to pay a fixed fee in an amount not to exceed three-thousand, five hundred dollars (\$3,500) for all services rendered pursuant to this Agreement, including all modifications and shall include the costs for all design fees and costs; preliminary and final engineering requirements; materials and labor for fabrication, including Artist and subcontractors' costs; consultants, including engineers and specifications writers; transportation of Artwork; installation of Artwork, including any necessary permits; permits and licenses; required insurance; and any sales tax. If the Artist incurs costs in excess of the amount listed in the budget, the Artist shall pay such excess from the Artist's own funds unless the Artist obtains approval in writing for such additional costs from the City.

2.2. Additional Services. Artist shall not receive compensation for any services provided outside the

scope of services specified in the Artist's Proposal unless the City Manager or designee, prior to the Artist performing the additional services, approves such additional services in writing. It is specifically understood that oral requests and/or approvals of such additional services or additional compensation shall be barred and are unenforceable.

2.3. Method of Billing. City agrees to pay the Artist in one (1) installment. Artist may submit the invoice upon completion of the Scope of Services. City agrees to pay the invoice within (30) days from the date City receives said invoice. Any additional services approved and performed pursuant to this Agreement shall be designated as "Additional Services" and shall identify the number of the authorized change order, where applicable, on all invoices.

2.4. Records and Audits. Records of Artist's services relating to this Agreement shall be maintained in accordance with generally recognized accounting principles and shall be made available to City or its Project Manager for inspection and/or audit at mutually convenient times from the Effective Date until three (3) years after termination of this Agreement.

3.0. TIME OF PERFORMANCE

3.1. Commencement and Completion of Work. Unless otherwise agreed upon in writing by the parties, the professional services to be performed pursuant to this Agreement shall commence within five (5) days from the Effective Date of this Agreement. Said services shall be performed in compliance with the Project Schedule approved by the City as set forth in Exhibit A. The Project Schedule may be amended by mutual agreement of the parties. Failure to commence work in a timely manner and/or diligently pursue work to completion may be grounds for termination of this Agreement.

3.2. Excusable Delays. Neither party shall be responsible for delays or lack of performance resulting from acts beyond the reasonable control of the party or parties. Such acts shall include, but not be limited to, acts of God, fire, strikes, pandemics, material shortages, compliance with laws or regulations, riots, acts of war, or any other conditions beyond the reasonable control of a party (each, a "Force Majeure Event"). If a party experiences a Force Majeure Event, the party shall, within five (5) days of the occurrence of the Force Majeure Event, give written notice to the other party stating the nature of the Force Majeure Event, its anticipated duration and any action being taken to avoid or minimize its effect. Any suspension of performance shall be of no greater scope and of no longer duration than is reasonably required and the party experiencing the Force Majeure Event shall use best efforts without being obligated to incur any material expenditure to remedy its inability to perform; provided, however, if the suspension of performance continues for sixty (60) days after the date of the occurrence and such failure to perform would constitute a material breach of this Agreement in the absence of such Force Majeure Event, the parties shall meet and discuss in good faith any amendments to this Agreement to permit the other party to exercise its rights under this Agreement. If the parties are not able to agree on such amendments within thirty (30) days and if suspension of performance continues, such other party may terminate this Agreement immediately by written notice to the party experiencing the Force Majeure Event, in which case neither party shall have any liability to the other except for those rights and liabilities that accrued prior to the date of termination.

4.0 TERM AND TERMINATION

4.1. Term. This Agreement shall commence on the Effective Date and continue for a period of one (1) year, ending on August 30, 2023, unless previously terminated as provided herein or as otherwise agreed to in writing by the parties. Optional extension language: This Agreement may be extended by two (2) additional six (6) month periods upon mutual written agreement of both parties.

4.2. Notice of Termination. The City reserves and has the right and privilege of canceling, suspending or abandoning the execution of all or any part of the work contemplated by this Agreement, with or without cause, at any time, by providing written notice to the Artist. The termination of this Agreement shall be deemed effective upon receipt of the notice of termination. In the event of such termination, Artist shall immediately stop rendering services under this Agreement unless directed otherwise by the City.

4.3. Compensation. In the event of the termination, City shall pay the Artist for reasonable costs incurred and professional services satisfactorily performed up to and including the date of City's written notice of termination. Compensation for work in progress shall be prorated based on the percentage of work completed as the effective date of termination in accordance with the fees set forth herein. In ascertaining the professional services actually rendered hereunder up to the effective date of termination of this Agreement, consideration shall be given to both completed work and work in progress, to complete and incomplete drawings, and to other documents pertaining to the services contemplated herein whether delivered to the City or in the possession of the Artist.

4.4. Documents. In the event of termination of this Agreement, all documents prepared by the Artist in its performance of this Agreement including, but not limited to, finished or unfinished design, development and construction documents, data studies, drawings, maps and reports, shall be delivered to the City within ten (10) days of delivery of termination notice to Consultant, at no cost to City. Any use of uncompleted documents without specific written authorization from Consultant shall be at City's sole risk and without liability or legal expense to the Artist.

5.0 FURTHER TERMS AND CONDITIONS

5.1. Changes and Amendments of Terms. City reserves the right to change, through negotiation, any portion of the work required under this Agreement, or amend such other terms and conditions which may become necessary. Any such revisions shall be accomplished in the following manner:

5.1.1 For any change which does not materially affect the scope of work or any other term or condition included under this Agreement, a *Change Notice* shall be prepared and signed by the City Project Manager and Artist.

5.1.2 For any revision which materially affects the scope of work, price, or any term and condition included in the Agreement, a negotiated amendment to the Agreement shall be executed by Artist and City's Chief Executive Officer or his designee.

5.1.3 For any change affecting Artist's project personnel, Artist shall submit written notification and request to effect the change to the City Project Manager. The City Project Manager or designee may accept or reject Artist's written notification and request.

5.2. Risk of Loss. Except as otherwise provided herein, all risk of destruction or damage to the Artwork or any part thereof from any cause whatsoever shall be borne by the Artist until written Acceptance of the Artwork by the City. The Artist shall, at Artist's sole expense, rebuild, repair, and/or restore any portion of the Artwork which has been damaged. Artist shall not be responsible for repairing any

damage caused by jobsite contractors or subcontractors not under the Artist's contractual control or supervision.

5.3. City Acceptance of the Artwork. As a condition precedent to Acceptance, the Artist shall notify City's Project Manager in writing that the Artwork has been delivered to the Premises ("Completion Notice"). The Completion Notice shall include final written instructions concerning maintenance requirements for the Artwork. Within thirty (30) days of City's receipt of the Completion Notice, City shall notify Artist in writing that the Artwork is Accepted as completed and installed as required by this Agreement ("Acceptance Notice"), or if the Artwork does not meet this Agreement's requirements, City shall notify Artist of the defects ("Defect Notice"). Such Defect Notice shall include clearly stated grounds with reference to objective criteria identifying deviations from original designs as approved.

5.4. Artist's Representations and Warranties. Warranties provided to the Artist by any subcontractor shall be for not less than one (1) year [or more if applicable] from the date the Artwork is Accepted by the City, and Artist shall require that all of its subcontractors shall allow the assignment of these warranties to the City.

5.4.1. The Artist represents and warrants to the City that the Artwork will not require maintenance substantially in excess of that described in the maintenance recommendations to be provided by the Artist pursuant to this Agreement.

5.4.2. The Artist represents to the City that the Artwork is solely the result of the artistic efforts of the Artist, and that it will be installed free and clear of any liens, claims or other encumbrances of any type from any source whatsoever.

5.4.3. The personal skill, judgment and creativity of the Artist is an essential element of this Agreement. Therefore, although the parties recognize that the Artist may employ qualified personnel to work under the Artist's supervision, the Artist shall not assign, transfer or subcontract the creative and artistic portions of the Artwork to another party without prior written consent of the City.

5.4.4. The Artist represents and warrants to the City that the Artwork is unique and an edition of one and does not infringe upon any copyright of any person or entity, and that the Artist will not execute or authorize another to execute another work of art of the same theme and/or design, dimensions, and/or materials as the Artwork commissioned pursuant to this Agreement. This warranty shall continue in effect for a period of the life of the Artist.

5.4.5. The Artist agrees to cooperate in making or permitting adjustments to the Artwork if necessary to eliminate any potential safety hazards, as determined by the City in its sole discretion, which become apparent within one (1) year of the date the Artwork is Accepted by the City.

5.5. City's Responsibility After Acceptance. The City recognizes that the maintenance of the Artwork is essential to the integrity of the Artwork and agrees that it will take reasonable efforts to see that it is properly maintained, taking into account the written maintenance guidelines of the Artist delivered with the Completion Notice. The City reserves the right to make minor or emergency repairs without consultation with the Artist provided the work is performed in accordance with recognized principles of conservation. In the event the City desires to make repairs to or to restore the Artwork during the Artist's lifetime and such work does not comply with the Artist's written maintenance guidelines, the City shall make a good faith effort to notify the Artist in writing at least thirty (30) days in advance to request

that Artist advise City about the proposed repair or restoration, and Artist shall have a right to reasonable compensation with respect to such advice and/or services provided.

5.5.1. While it is the intent of the City to permanently retain and publicly display the Artwork, circumstances may arise that would make it prudent for the City to remove the Artwork from public display. Artist hereby acknowledges that the Artwork, when installed, will be incorporated within and made a part of the Premises in such a way that removing the Artwork from the Premises may cause destruction, distortion, mutilation or other modification of the Artwork. Artist agrees that the City shall have the absolute right incidental to its ownership of the Premises and the Artwork to remove, relocate, replace, transport, or store in whole or in part (such actions being referred to herein as "Removal"), or to alter, change, modify, or destroy (such actions being referred to herein as "Alterations"), the Artwork at such times as the City shall deem necessary in order to exercise its powers and responsibilities with regard to the Premises. The City shall make a good faith effort to notify the Artist in writing at least thirty (30) days in advance of such Removal or Alteration to discuss methods of removal, transportation and conservation, and Artist shall have a right to reasonable compensation with respect to advice and/or services provided in support of such Removal or Alteration.

5.5.2. In the event the City determines that the Artwork presents an imminent hazard to the public, the City may remove the Artwork without prior consultation with the Artist. The City shall make a good faith effort to notify the Artist within thirty (30) days of such removal to discuss options for the final disposition, reinstallation, maintenance or deaccession of the Artwork.

5.5.3. In the event the City decides to deaccession the Artwork, the Artist shall have the first right of refusal to purchase the Artwork, providing it is not integrated into a larger piece or a structure, and/or can be removed without destruction of the artwork. The City shall follow the procedures for deaccession identified in the Civic Art Policies and Procedures.

6.0 STATEMENT OF WORK/DELIVERABLES

The goal of the parties is the installation of Artwork which represents the creative talents of the Artist and satisfies the specifications of City staff. The parties recognize that they must consult closely in order to accomplish this goal, and that changes in the design may become desirable as the Artwork is fabricated and/or installed. Material and conceptual changes may be made to design of the Artwork as proposed herein by the Artist prior to the City's Acceptance of the Artwork (such as changes in the Artwork's material, color, size, relative scale and placement as compared to the preliminary design therefore that was most recently accepted or approved by the City) but only after the Artist has given written notice of such desired changes to the City Project Manager and has received written approval of each such change. Upon reasonable prior notice to the Artist, the City, its Project Manager and/or the City's agents shall have a right to make reasonable inspections and reviews of the Artist's progress with respect to the Artwork.

7.0 GENERAL PROVISIONS

7.1. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to any matter referenced herein and supersedes any and all other prior writings and oral negotiations. This Agreement may be modified only in writing, and signed by the parties in interest at the time of such modification. The terms of this Agreement shall prevail over any inconsistent provision in any other contract document appurtenant hereto, including exhibits to this Agreement.

7.2. Representatives. The City Manager or his or her designee shall be the representative of City for purposes of this Agreement and may issue all consents, approvals, directives and agreements on behalf of the City, called for by this Agreement, except as otherwise expressly provided in this Agreement.

Artist shall designate a representative for purposes of this Agreement who shall be authorized to issue all consents, approvals, directives and agreements on behalf of Artist called for by this Agreement, except as otherwise expressly provided in this Agreement.

7.3. Project Managers. City shall designate a Project Manager to work directly with the Artist in the performance of this Agreement.

Artist shall designate a Project Manager who shall represent it and be its agent in all consultations with City during the term of this Agreement. Artist or its Project Manager shall attend and assist in all coordination meetings called by City.

7.4. Notices. Any notices, documents, correspondence or other communications concerning this Agreement or the work hereunder may be provided by personal delivery or mail and shall be addressed as set forth below. Such communication shall be deemed served or delivered: (a) at the time of delivery if such communication is sent by personal delivery, and (b) 48 hours after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail.

IF TO ARTIST:

Bill Anderson

[REDACTED]

Tel: [REDACTED]

IF TO CITY:

City of Costa Mesa

77 Fair Dr.

Costa Mesa, CA 92626

Tel: (714) 754- 5322

Attn: Laurette Garner

Courtesy copy to:

City of Costa Mesa

77 Fair Dr.

Costa Mesa, CA 92626

Attn: Finance Dept. | Purchasing

7.5. Drug-Free Workplace Policy. Artist shall provide a drug-free workplace by complying with all provisions set forth in City's Council Policy 100-5, attached hereto as Exhibit "B" and incorporated herein by reference. Artist's failure to conform to the requirements set forth in Council Policy 100-5 shall constitute a material breach of this Agreement and shall be cause for immediate termination of this Agreement by City.

7.6. Attorneys' Fees. In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

7.7. Governing Law. This Agreement shall be governed by and construed under the laws of the State of California without giving effect to that body of laws pertaining to conflict of laws. In the event of any legal action to enforce or interpret this Agreement, the parties hereto agree that the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California.

7.8. Assignment. Artist shall not voluntarily or by operation of law assign, transfer, sublet or encumber all or any part of Consultant's interest in this Agreement without City's prior written consent. Any attempted assignment, transfer, subletting or encumbrance shall be void and shall constitute a breach of this Agreement and cause for termination of this Agreement. Regardless of City's consent, no subletting or assignment shall release the Artist of the Artist's obligation to perform all other obligations to be performed by the Artist hereunder for the term of this Agreement.

7.9. Property of City. All materials supplied or created under this Agreement in connection with the Project are the sole property of City. Upon the completion of the Project, the Project shall become the exclusive right and ownership of the City and the Artist shall have no rights in connection the Project's continued existence. City shall have all rights and obligations in connection with any maintenance and/or removal of the Project. Artist hereby relinquishes all such rights in the Project except for as provided in Section 7.12.

7.10. Indemnification and Hold Harmless. Artist agrees to defend, indemnify, hold free and harmless the City, its elected officials, officers, agents and employees, at Artist's sole expense, from and against any and all claims, actions, suits or other legal proceedings brought against the City, its elected officials, officers, agents and employees arising out of the performance of the Artist, its employees, and/or authorized subcontractors, of the work undertaken pursuant to this Agreement. The defense obligation provided for hereunder shall apply without any advance showing of negligence or wrongdoing by the Artist, its employees, and/or authorized subcontractors, but shall be required whenever any claim, action, complaint, or suit asserts as its basis the negligence, errors, omissions or misconduct of the Artist, its employees, and/or authorized subcontractors, and/or whenever any claim, action, complaint or suit asserts liability against the City, its elected officials, officers, agents and employees based upon the work performed by the Artist, its employees, and/or authorized subcontractors under this Agreement, whether or not the Artist, its employees, and/or authorized subcontractors are specifically named or otherwise asserted to be liable. Notwithstanding the foregoing, the Artist shall not be liable for the defense or indemnification of the City for claims, actions, complaints or suits arising out of the sole active negligence or willful misconduct of the City. This provision shall supersede and replace all other indemnity provisions contained either in the City's specifications or Artist's Proposal, which shall be of no force and effect.

7.11. Patent Fees and Royalties. Artist shall pay all license fees and royalties and assume all costs incident to the use, in the performance of the work or the incorporation in the work of any invention, design, process, program, product or device which is the subject of patent rights or copyrights held by others. If a particular invention, design, process, program, product or device is specified in the contract documents for use in the performance of the work and if, to the actual knowledge of City, its use is subject to patent rights or copyrights calling for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by City in the contract documents. Artist shall indemnify and hold harmless City and anyone directly or indirectly employed by City from and against all claims, damages, losses and expenses (including attorneys' fees) arising out of any infringement of patent rights or copyrights incident to the use in the performance of the work, or resulting from the incorporation in the work of any invention, design, process, program, product or device not specified in the contract documents, and shall defend all such claims in connection with any alleged infringement of such rights.

7.12. Intellectual Property Rights. Except for title, control and possession by City of the Project, including the ability for removal of the Project, or as otherwise provided by this Agreement herein, pursuant to the Copyright Act of 1976 (17 U.S.C. §101 et seq. as amended, and any successor act) the Artist shall retain the copyright and associated intellectual property rights in and to the Project resulting from this Agreement. Nothing herein shall obligate City to enforce or defend Consultant's copyright or other intellectual property rights. Notwithstanding the foregoing, the City shall have the right, at its sole discretion, to enforce or defend its own use and rights to the Project as noted in this Agreement.

Artist grants to City in perpetuity an irrevocable and exclusive worldwide license to reproduce, to distribute, and/or to display two- or three-dimensional reproductions of the Project in any commercial or noncommercial manner whatsoever, related to the Project. The Artist hereby grants to the City the right to reproduce and retain copies of the Project produced and used by the Artist for the purposes of (1) fulfilling its responsibilities as owner of the Project; and (2) public exhibition related to the display of the Project. For the purpose of this limitation, the representation, distribution, and display of the Project or materials designed solely to promote the City, its services, or to attract visitors or businesses including, without limitation:

- Public display in conjunction with the Project and related events;
- Reproduction on Project promotional items, such as print ads, postcards, posters, buttons, applications, and a web site;
- Educational, public relations, and/or art promotion purposes;
- Publications of images of the Project in City-produced brochures and pamphlets;
- Reproduction in exhibition catalogues, books, slides, photographs, postcards, posters, and calendars;
- Publication in art magazines, art books, and newspapers;
- Publication in books and magazines not primarily devoted to art but of an educational, historical, or critical nature; and
- Television programs for educational and/or informational purposes.
- Because the Project in its final dimension will be unique, Consultant shall not make any additional exact duplicate, two or three-dimensional reproductions of the final Project, nor shall Artist grant permission to others to do so except with City's written permission. Should City grant the right of reproduction to the Artist or another, City shall be entitled to thirty percent (30%) of the net proceeds that Artist or others may receive for such reproduction.

City requires written notice of the Artist's use of the Project for personal publicity, retrospective exhibits, and other non-commercial purposes. The Artist shall acknowledge City's role in funding the Project in all public presentations and written, printed, or electronic publication of information regarding the Project. The Artist shall use their best effort to include a credit reading substantially "An original work funded by the City of Costa Mesa, California" in any such showing under the Artist's control.

All reproductions of the Project by the City shall contain a credit to the Artist and a copyright notice substantially in the following form: "(CONSULTANT NAME HERE)" © 2022."

City shall have the right to use the Artist's name, likeness, and biographical information, in connection with the display or reproduction and distribution of the Project including all advertising and promotional materials regarding City. Consultant shall be reasonably available to attend inauguration or presentation ceremonies relating to the public any dedication of the Project.

In the event the City's use of the Project creates trademark, service mark, or trade dress rights in connection with the Project, City shall have an exclusive and irrevocable right in such trademark, service mark, or trade dress.

Artist shall receive authorship credit in connection with Project or any authorized reproductions thereof. City will include the Artist's name and the copyright symbol will appear on or near the image on all printed materials.

The provisions of this Section shall survive the expiration of this Agreement.

7.13. Independent Contractor. Artist is and shall be acting at all times as an independent contractor and not as an employee of City. Artist shall have no power to incur any debt, obligation, or liability on behalf of City or otherwise act on behalf of City as an agent. Neither City nor any of its agents shall have control over the conduct of the Artist or any of the Artist's employees, except as set forth in this Agreement. Artist shall not, at any time, or in any manner, represent that it or any of its agents or employees are in any manner agents or employees of City. Artist shall secure, at its sole expense, and be responsible for any and all payment of Income Tax, Social Security, State Disability Insurance Compensation, Unemployment Compensation, and other payroll deductions for Consultant and its officers, agents, and employees, and all business licenses, if any are required, in connection with the services to be performed hereunder. Artist shall indemnify and hold City harmless from any and all taxes, assessments, penalties, and interest asserted against City by reason of the independent contractor relationship created by this Agreement. Artist further agrees to indemnify and hold City harmless from any failure of the Artist to comply with the applicable worker's compensation laws. City shall have the right to offset against the amount of any fees due to the Artist under this Agreement any amount due to City from the Artist as a result of the Artist's failure to promptly pay to City any reimbursement or indemnification arising under this paragraph.

7.14. PERS Eligibility Indemnification. In the event that the Artist or any employee, agent, or subcontractor of the Artist providing services under this Agreement claims, or is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the City, Artist shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of the Artist or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, Artist and any of its employees, agents, and subcontractors providing service under this

Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in PERS as an employee of City and entitlement to any contribution to be paid by City for employer contribution and/or employee contributions for PERS benefits.

7.15. Cooperation. In the event any claim or action is brought against City relating to the Artist's performance or services rendered under this Agreement, Artist shall render any reasonable assistance and cooperation which City might require.

7.16. Ownership of Documents. All findings, reports, documents, information and data including, but not limited to, computer tapes or discs, files and tapes furnished or prepared by the Artist or any of its subcontractors in the course of performance of this Agreement, shall be and remain the sole property of City. Artist agrees that any such documents or information shall not be made available to any individual or organization without the prior consent of City. Any use of such documents for other projects not contemplated by this Agreement, and any use of incomplete documents, shall be at the sole risk of City and without liability or legal exposure to the Artist. City shall indemnify and hold harmless the Artist from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from City's use of such documents for other projects not contemplated by this Agreement or use of incomplete documents furnished by the Artist. Artist shall deliver to City any findings, reports, documents, information, data, in any form, including but not limited to, computer tapes, discs, files, audio tapes or any other Project related items as requested by City or its authorized representative, at no additional cost to the City.

7.17. Public Records Act Disclosure. Artist has been advised and is aware that this Agreement and all reports, documents, information and data, including, but not limited to, computer tapes, discs or files furnished or prepared by the Artist, or any of its subcontractors, pursuant to this Agreement and provided to City may be subject to public disclosure as required by the California Public Records Act (California Government Code section 6250 et seq.). Exceptions to public disclosure may be those documents or information that qualify as trade secrets, as that term is defined in the California Government Code section 6254.7, and of which the Artist informs City of such trade secret. The City will endeavor to maintain as confidential all information obtained by it that is designated as a trade secret. The City shall not, in any way, be liable or responsible for the disclosure of any trade secret including, without limitation, those records so marked if disclosure is deemed to be required by law or by order of the Court.

7.18. Conflict of Interest. Artist and its officers, employees, associates and subconsultants, if any, will comply with all conflict of interest statutes of the State of California applicable to the Artist's services under this agreement, including, but not limited to, the Political Reform Act (Government Code sections 81000, et seq.) and Government Code section 1090. During the term of this Agreement, Artist and its officers, employees, associates and subconsultants shall not, without the prior written approval of the City Representative, perform work for another person or entity for whom the Artist is not currently performing work that would require the Artist or one of its officers, employees, associates or subconsultants to abstain from a decision under this Agreement pursuant to a conflict of interest statute.

7.19. Responsibility for Errors. Artist shall be responsible for its work and results under this Agreement. The Artist, when requested, shall furnish clarification and/or explanation as may be required by the City's representative, regarding any services rendered under this Agreement at no additional cost to City. In the event that an error or omission attributable to the Artist occurs, then Artist shall, at no cost to City, provide all necessary design drawings, estimates and other Artist professional services necessary to rectify and correct the matter to the sole satisfaction of City and to participate in any meeting required

with regard to the correction.

7.20. Prohibited Employment. Artist will not employ any regular employee of City while this Agreement is in effect.

7.21. Order of Precedence. In the event of an inconsistency in this Agreement and any of the attached Exhibits, the terms set forth in this Agreement shall prevail. If, and to the extent this Agreement incorporates by reference any provision of any document, such provision shall be deemed a part of this Agreement. Nevertheless, if there is any conflict among the terms and conditions of this Agreement and those of any such provision or provisions so incorporated by reference, this Agreement shall govern over the document referenced.

this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

7.22. Costs. Each party shall bear its own costs and fees incurred in the preparation and negotiation of this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

7.23. Binding Effect. This Agreement binds and benefits the parties and their respective permitted successors and assigns.

7.24. No Third-Party Beneficiary Rights. This Agreement is entered into for the sole benefit of City and the Artist and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

7.25. Headings. Paragraphs and subparagraph headings contained in this Agreement are included solely for convenience and are not intended to modify, explain or to be a full or accurate description of the content thereof and shall not in any way affect the meaning or interpretation of this Agreement.

7.26. Construction. The parties have participated jointly in the negotiation and drafting of this Agreement and have had an adequate opportunity to review each and every provision of the Agreement and submit the same to counsel or other consultants for review and comment, in the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

7.27. Amendments. Only a writing executed by the parties hereto or their respective successors and assigns may amend this Agreement.

7.28. Waiver. The delay or failure of either party at any time to require performance or compliance by the other of any of its obligations or agreements shall in no way be deemed a waiver of those rights to require such performance or compliance. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom enforcement of a waiver is sought. The waiver of any right or remedy in respect to any occurrence or event shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event, nor shall any waiver constitute a continuing waiver.

7.29. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other

circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party, is materially impaired, which determination made by the presiding court or arbitrator of competent jurisdiction shall be binding, then both parties agree to substitute such provision(s) through good faith negotiations.

7.30. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. All counterparts shall be construed together and shall constitute one agreement.

7.31. Corporate Authority. The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that by doing so the parties hereto are formally bound to the provisions of this Agreement.

[Signatures appear on following page.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their respective authorized officers, as of the date first above written.

CONSULTANT (Artist)

Bob Hogue
Signature

4-27-23
Date

Bob Hogue, ARTIST
[Name and Title]

[REDACTED]
Social Security or Taxpayer ID Number

CITY OF COSTA MESA

Carol Molina
Carol Molina
Purchasing Officer

8/22/23
Date

ATTEST:



Brenda Green
Brenda Green
City Clerk

8/24/2023
Date

APPROVED AS TO FORM:

Kimberly Hall Barlow
Kimberly Hall
Barlow
City Attorney

8/23/23
Date

APPROVED AS TO INSURANCE:

Ruth Wang
Ruth Wang
Risk Management

8/14/23
Date

APPROVE AS TO CONTENT:

Laurette Garner
Laurette Garner
Project Manager

5/10/23
Date

DEPARTMENTAL APPROVAL:

Jason Minter
Jason Minter
Parks and Community Services Director

5/23/23
Date

EXHIBIT A SCOPE OF WORK

PROJECT DESCRIPTION, SCOPE OF WORK, SCHEDULE, COSTS, FABRICATION AND INSTALLATION

PROJECT: Costa Mesa Themed Commissioned Artwork for City Facilities

PROJECT BACKGROUND AND DESCRIPTION STATEMENT

The project is to create one 30 " by 30 " acrylic, mixed media Costa Mesa themed artwork for display in City facilities.

The City has many facilities with viewable wall space to display artwork. In the past, the fifth floor of City Hall has traditionally hosted rotating exhibitions featuring local artists. In more recent months, the wall space available has diminished and for many community members the space is inaccessible due to limited City Hall hours and the privacy the fifth floor requires to conduct business. Moving forward, the fifth floor will display commissioned artworks themed after the landmarks of Costa Mesa. Artists will be paid for their artwork(s) and the work will remain on the fifth floor on a semi-permanent basis (options to relocate the artwork to different walls in other City run facilities may be considered).

Bob Hogue is a longtime resident of Orange County and has volunteered his time to the City of Costa Mesa and the previous Cultural Arts Committee (now replaced by a new Arts Commission) in years past. Bill will be creating two of the first newly commissioned artworks as part of a new Civic Art Collection.

Civic Art Collection: A Civic Art Collection is comprised of artworks that have been accessioned by a public entity.

ARTIST Overall Responsibilities:

1. ARTIST shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in ARTIST'S work that stray from the original proposal and shall fulfill other reasonable requests for changes to the design, form and content of artwork as requested by the Arts Specialist and other stakeholders.
2. ARTIST will adhere to the schedule provided by the Arts Specialist. Schedules are subject to change. The Arts Specialist will notify the ARTIST of schedule changes. Unless otherwise agreed in a written Agreement by and between the CITY and ARTIST, payment amount to the ARTIST shall not increase if schedule changes.
3. ARTIST acknowledges that an essential element of the ARTIST'S services is coordination with the Arts Specialist and other stakeholders as assigned.
4. All communication by the ARTIST with CITY departmental representatives, community members and elected officials and their staffs must be coordinated through the Laurette Garner, Arts Specialist, (714) 754-5322 or laurette.garner@costamesaca.gov.
5. ARTIST shall perform all services and furnish all supplies, materials and equipment as necessary for the fabrication of the Artwork, including but not limited to: materials, labor, tools, equipment, subcontractors, transportation and shipping and all other items incidental to producing a complete and acceptable Artwork.
6. ARTIST will present to the Arts Specialist, written requests for any significant changes to the scope, design, color, size, material or texture of the artwork not substantially conforming with approved

- original proposal. A significant change is one that affects design, installation, scheduling, site preparation or maintenance of Artwork, or concept of artwork, as represented in the original proposal.
7. ARTIST is responsible to store finished Artwork at ARTIST's own expense until the CITY is ready for the Artwork to be installed. Installation shall not be unreasonably delayed by the CITY, so that ARTIST will not be required to store the Artwork for an unreasonable period.
 8. ARTIST will review and provide comments on draft text and images of the Artwork and or the project for the CITY Parks & Community Services website and any print materials, such as postcards or brochures.
 9. ARTIST will make every effort to attend dedication events for the Artwork and or the project.
 10. ARTIST will provide a Conceptual Design for the CITY. SEE ATTACHMENT 1
 11. ARTIST will provide an Artist Biography. SEE ATTACHMENT 2
 12. ARTIST will provide a Summary Statement for the Artwork and or project. SEE ATTACHMENT 3
 13. ARTIST should register Artwork for copyright purposes. SEE ATTACHMENT 4
 14. ARTIST will submit an invoice to the CITY. SEE ATTACHMENT 5

CITY Overall Responsibilities:

1. CITY will set and coordinate meetings between the ARTIST and other stakeholders, as needed to complete this scope of work.
2. CITY will review the design, drawings and specifications submitted by the ARTIST to ensure conformance with applicable codes, regulations and other requirements. CITY retains the right, but not the obligation, to conduct any such review, which is intended for the sole purpose of protecting the CITY's interests, only. ARTIST acknowledges that CITY's review does not confirm or warrant that conditions are safe or that ARTIST's work complies with regulatory requirements.
3. The CITY, through its Public Works Department will be responsible for installation of the Artwork.
4. Whenever possible, Artwork shall be delivered to the premises, designated location and immediately installed.
5. CITY shall inform the ARTIST of changes to the schedule, especially those changes which impact delivery of Artwork.
6. CITY shall provide for the ARTIST's review, draft text and images on the Artwork and project for the CITY's website and print materials, such as post-cards or brochures.
7. CITY is responsible for providing professional photography of the Artwork.
8. CITY is responsible for the fabrication and installation of plaque based on CITY's aesthetic preferences for the project.
9. CITY will make every effort to inform the ARTIST of dedication events for the Artwork and or the project.
10. The Parks & Community Services Department will coordinate inquiries from the media regarding the Artwork, especially in association with dedication event.
11. CITY will have the sole determination of the Artwork, including, but not limited to the design, creation timeline, and installation of the Artwork.