

**ARTIST'S SERVICES AGREEMENT
CITY OF BELLINGHAM -- TBD**

PREAMBLE:

THIS AGREEMENT is entered into by and between the **CITY OF BELLINGHAM**, a first-class municipal corporation of the State of Washington (hereinafter the "City"), with offices located at City Hall, 210 Lottie Street, Bellingham, Washington, 98225, and **TBD**, TBD (hereinafter the "Artist").

WITNESSETH:

WHEREAS, the City desires to retain the Artist to perform artistic services described herein for a public art project (hereinafter the "Project"); and,

WHEREAS, the Artist has been selected by the City to perform the services described in this Agreement based upon his/her skill and creativity; and,

WHEREAS, the Artist desires to perform the services described in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants herein, the parties do hereby agree as follows:

ARTICLE I

ADMINISTRATION AND SUPERVISION

- 1.1 The Artist shall use his/her best efforts to perform the services required under this Agreement in a satisfactory and competent manner. The Artist shall not, during the period of this Agreement, retain or employ current or former City employees, except retired employees, without the City's written consent. The Artist shall ensure that the terms and conditions of this Agreement shall bind any of the Artist's employees or subcontractor's.
- 1.2 Supervision of the Project for the City shall be the responsibility of Darby Cowles, ("City's Project Manager"), which may be delegated by said City representative upon notice to the Artist. The Artist's contact person is TBD, which may be changed upon notice to the City.

ARTICLE II
SCOPE OF WORK

- 2.1 The City hereby retains the Artist hereunder to perform the services described in the Scope of Work, which is attached as Exhibit A hereto and is incorporated herein by this reference.
- 2.2 The Artist shall begin work under the Scope of Work upon receipt of the City's Notice to Proceed.
- 2.3 This Agreement shall be in effect from the date of final execution. The Project shall be completed by TBD unless said completion date is modified in accordance with section 3.2 below. As this work requires the hand of the artist in its fabrication, in the event of incapacitating injury or illness of the artist, the completion date shall be renegotiated to a mutually agreeable time.

ARTICLE III
CHANGE ORDERS AND ADDITIONAL WORK

- 3.1 Before implementing any changes, the Artist shall present to the City in writing for the City's review and approval any significant changes in the scope, design, color, size, material, utility and support requirements, or texture of the Project. A significant change is any change, which affects installation, scheduling, site preparation, design or maintenance for the work or the concept of the work as represented in the proposal.
- 3.2 Work in addition to, or different from, that provided for in the Scope of Work shall only be allowed by prior authorization in writing, as a modification to this Agreement. Such modifications shall be attached hereto and made a part hereof, and shall be approved in the same manner as this Agreement. Accordingly, the City may submit a written request to the Artist at any time to revise, alter, modify, change, add or delete the tasks in the Scope of Work. If the Artist agrees to the City's written proposal, the new Scope of Work shall be modified in the manner noted above, and shall specify the agreed revisions, alternations, modifications, changes, additions or deletions, including, but not limited to, budget, payment and schedule. If the Artist does not agree with the City's written

proposal, the City shall be entitled to terminate the Agreement under the terms and conditions specified herein.

- 3.3 The Artist shall not charge the City for additional compensation for any services without the City's prior written authorization.

ARTICLE IV
COMPENSATION

- 4.1 The maximum payable to the Artist under this Agreement is \$130,000.
- 4.2 The Artist shall be paid for work and services satisfactorily rendered pursuant to this Agreement and any valid modifications thereto. Said payment shall be full compensation for work performed and services rendered, for all supervision, labor, supplies, materials, equipment or use thereof, taxes, and for all other necessary incidentals.
- 4.3 In the event the Artist incurs costs in excess of the maximum payable hereunder, the City shall not be responsible for any part of said excess and shall not be liable therefore.
- 4.4 Artist will be paid on the basis of invoices for work satisfactorily completed. Invoices shall be submitted to the Project Manager for approval prior to payment. The City shall pay all satisfactory invoices within forty-five (45) calendar days of receipt. No final payment shall be made until the City accepts the project. See the Scope of Work for Schedule of Payments.
- 4.5 If the City determines the invoiced work does not meet the specifications hereunder and that it intends to withhold payment, the City shall provide the Artist with written notice within thirty (30) days of receipt of the invoice. The City's written notice shall specify the failure of the Artist's performance. The Artist shall then have fifteen (15) calendar days to remedy the defect and meet the standards hereunder to the City's satisfaction or to advise the City that the Artist disputes the City's determination. In the event of such a dispute, the dispute will be settled in accordance with the provisions of Article XIII of this Agreement.

- 4.6 No payment to the Artist for any work shall constitute a waiver or release by the City of any claims, rights, or remedies of any nature that the City may have against the Artist hereunder or by law, nor shall such payment constitute a waiver, remission or discharge by the City of any failure or fault of the Artist to satisfactorily perform the Project work as required in this Agreement.

ARTICLE V
ARTIST'S RESPONSIBILITIES

- 5.1 The Artist agrees that an essential element of this Agreement is the skill and creativity of the Artist. Therefore, the Artist shall not assign the creative or artistic portions of the work to another party in any manner without the City's written consent. The City shall be entitled to immediately terminate this Agreement for breach of this provision, which shall be deemed a material breach.
- 5.2 The Artist shall be responsible for the timely completion and quality of the services specified in the Scope of Work. The Artist shall be responsible for designing the Project so that it can be completed without exceeding the construction budget or the completion date. The Artist shall correct or revise any errors, omissions, or other deficiencies in his/her performance without additional compensation. The City shall provide the Artist written notice of the Artist's error(s), omission(s), or other deficiencies and allow the Artist seven days to correct the deficiency. If the Artist fails to remedy the problem to the City's satisfaction, the City shall be allowed to terminate this Agreement.
- 5.3 In the event the Artist's services are integrated into, combined or otherwise coordinated with services of third parties not within the Artist's control, the Artist shall not be responsible for such third party services. If any part of the Artist's work depends upon the work of the City or a third party for proper execution or results, the Artist shall, prior to proceeding with the work, promptly report to the City any apparent discrepancies or other defects in such third party's work or performance. The Artist shall not be responsible for any liability or failure to fulfill his/her obligations because of such third party discrepancies or defects, provided the Artist notified the City upon discovery of the discrepancies or defects. The Artist's failure to report a discrepancy or defect shall constitute an

acceptance of the third party's work as fit and proper. Nothing in this section shall limit the Artist's responsibility to take all reasonable steps to coordinate his/her work with any third party.

5.4 If the Artist is involved in the execution, fabrication, transportation, inspection and/or installation of the Project, the following shall apply:

5.4.1 The Artist shall ensure that the work site is reasonably clean and safe. Upon completion of the Project, the Artist shall remove his/her equipment, excess materials, etc., promptly. More details regarding the state of the work site may be contained in the Scope of Work.

5.4.2 The Artist shall notify the City of his/her planned work schedule and ensure that s/he will not interfere with any City operation, construction or maintenance project. The City will use its best efforts to ensure that the City's projects do not interfere with the Artist completing this contract. If the City's other projects delay the Artist's performance hereunder, the Artist may renegotiate this Agreement to seek compensation for any additional costs or expenses caused by said delay.

5.5 The Artist shall be duly licensed (including Business Registration with the City of Bellingham) and shall comply with all applicable laws, ordinances, and codes of the State and local governments.

ARTICLE VI

CITY'S RESPONSIBILITIES

6.1 The City shall reasonably assure that the work is properly maintained and protected taking into account the Artist's recommendations as delineated in the Artist's maintenance criteria, which the Artist shall provide not later than the time of the Project's completion.

6.2 The City shall not intentionally damage, alter, modify, or structurally change the Project without first making reasonable efforts to notify the Artist. However, the City shall have the right to entirely remove or relocate the Project, in its sole discretion.

6.3 The City shall have the right to determine, after consultation with a professional conservator, when and if repairs and/or restoration is necessary.

**ARTICLE VII
WARRANTIES**

- 7.1 The Artist warrants that the design and work being commissioned is the original product of his/her own creative efforts and that, unless otherwise stipulated, the Artist shall not sell or reproduce the work or allow others to do so without the City's prior written consent.
- 7.2 The Artist shall guarantee that the Project is free from faults of material and workmanship for a period of after the Project is complete and accepted by the City in writing and that the Project shall be free and clear of any liens from any source whatsoever. This guarantee applies to all foreseeable uses of the Project. This guarantee shall apply to that work which is entirely that of the Artist's or persons responsible to him/her, as installed, and shall not apply to material or workmanship in which the Artist has no control or to materials purchased, acquired or installed by any person or entity other than the Artist or someone responsible to the Artist. This guarantee shall also apply to work which is partly that of the Artist and partly that of the City or a third party, but only for the portion of the fault that can be reasonably attributed to the Artist's work.

**ARTICLE VIII
TERMINATION AND REDUCTION IN FUNDING**

- 8.1 Should either party hereto believe that the other has failed to substantially perform all or a material part of its obligations under the Agreement, it shall deliver written notice to that effect to the other, specifying the alleged default and giving the other party fifteen (15) calendar days to cure such default. Thereafter, should the default not be remedied to the satisfaction of the non-defaulting party, this Agreement may be terminated upon seven (7) calendar days written notice (delivered by certified mail).
- 8.2 In addition to the termination under Section 8.1, the City shall have the right to terminate this Agreement for any reason.
- 8.3 In the event of termination hereunder, the Artist shall be paid an amount, in the discretion of the City's Project Manager, which takes into account actual costs incurred by the Artist in performing the project work to the date of termination, the amount of work originally required which was satisfactorily completed to the date of termination, the cost to the City of completing the work itself or of employing another firm to complete it and the inconvenience and time which may be required to do so, along with any other factors

which affect the value to the City of the project work which has been performed to the date of termination. In no event shall the Artist receive an amount based on anticipated profit on unperformed services or other work.

- 8.4 On the giving of notice of termination by either party, the Artist shall immediately begin winding down its services in anticipation of the termination, and shall be prepared to deliver to the City all data, drawings, specifications, calculations, reports, estimates or other documents and all equipment, materials and other items purchased specifically for the Project where the City has reimbursed the Artist for such costs.
- 8.5 In the event that funding is withdrawn, reduced or limited in any way after the effective date of this Agreement due to City budgetary constraints or economic downturn resulting in reduced revenues, and prior to its normal completion, the City may summarily terminate the Agreement as to the funds withdrawn, reduced or limited notwithstanding any other termination provisions of this Agreement. If the level of funding withdrawn, reduced or limited is so great that the City deems that the continuation of the services covered by this Agreement is no longer in the best interest of the City, the City may summarily terminate this Agreement in whole notwithstanding any other termination provision of this Agreement. Termination under this Section shall be effective upon receipt of written notice thereof.
- 8.6 In the event of the death of a member, partner, or officer of the Artist, or any of its supervisory personnel assigned to the Project, the surviving members of the Artist hereby agrees to complete the work under the terms of this Agreement if requested to do so by the City in its sole discretion. Alternatively, the City may terminate the Agreement in its sole discretion.
- 8.7 Termination of this Agreement shall not prevent the City from invoking those provisions herein necessary to protect or enforce its rights hereunder, which provisions shall survive termination.

ARTICLE IX

INTELLECTUAL PROPERTY RIGHTS

- 9.1 All designs, sketches, models, or other work identified as products in the attached Scope of Work shall become property of the City for the purpose of implementing the Project.

The Artist shall retain the copyright and all other rights in and to the work, subject to section 7.1, provided that the Artist grants to the City an irrevocable license to graphically depict the work in any non-commercial manner whatsoever. For the purpose of this limitation, the graphic depiction of the work on materials designed to promote the City shall be deemed to be a non-commercial use. By signing this Agreement, the Artist covenants and agrees to grant the City said non-commercial irrevocable license.

- 9.2 Acid Ball embellishments In consideration for the design's use, the City agrees to notify the Artist of any future City projects in which the City may want to incorporate the theme in sufficient time to allow the Artist to submit a bid for the project. This provision does not guarantee the Artist's bid will be accepted.
- 9.3 Upon the City's acceptance of the Project, the City shall have all ownership and possession rights to the Project, except for those intellectual property rights delineated hereinabove.
- 9.4 As the Project is to be unique, the Artist shall not make any additional duplicate three-dimensional reproductions of the Project without the City's written authorization.
- 9.5 If the proposed design for the Project is not implemented, all rights to the proposed work shall revert to the Artist.

ARTICLE X

ACCOUNTING AND AUDIT

The Artist agrees to keep records of all financial matters pertaining to this Agreement in accordance with generally accepted accounting principles. The financial records shall be made available to representatives of the City or any other governmental agency with jurisdiction for audit, at such reasonable times and places as the City shall designate.

ARTICLE XI

CONTINGENT FEES, GRATUITIES AND CONFLICTS OF INTEREST

- 11.1 No member, officer, or employee of the City or of its governing body shall have any interest, direct or indirect, in this Agreement or the proceeds therefrom.

- 11.2 The Artist warrants and covenants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees.
- 11.3 The Artist warrants and covenants s/he has no direct or indirect pecuniary or proprietary interest, or that the Artist shall not acquire any such interest, which conflicts in any manner with the performance of the services required hereunder. Nor shall the Artist employ any person or agent having any such interest. If any such conflict of interest shall arise, the Artist shall immediately disclose the conflicting interest to the City and take necessary action to immediately eliminate the conflict or, alternatively, the Agreement may be terminated by either party without liability.
- 11.4 The City shall provide written notification to the Artist if it believes a conflicting interest exists. The Artist shall respond to said notice in writing within ten (10) days of receipt of the City's notice with a detailed written explanation or answer to any facts, allegations, or questions contained in the City's notice.

ARTICLE XII

LEGAL RELATIONS AND INSURANCE

- 12.1 The Artist agrees to defend the City, hold it harmless, and indemnify it as to all claims, suits, costs, fees and liability arising out of the acts or work of the Artist, its employees, subcontractors, or agents (including field work) pursuant to this Agreement, where such liability is incurred as a result of the actions or omissions of such parties. Artist will obtain and maintain in force at least the following minimum insurance coverages covering all activity under this Agreement, and as to which the City shall be named as additional insured:

• Worker's Compensation	Statutory Amount
• Automobile Liability	\$1,000,000
• Broad Form Comprehensive General Liability	\$1,000,000/occurrence \$2,000,000 aggregate

Said insurance shall be primary and noncontributory with any other insurance for

which the City is a named insured.

Artist specifically and expressly waives any immunity that may be granted it under the Washington State Industrial Insurance Act, Title 51 RCW. Further, the indemnification obligation under this contract shall not be limited in any way by any limitation on benefits payable to or for any third party under the workers' compensation acts.

An insurance certificate showing the coverage required under this paragraph 12 will be submitted to the City for approval at least annually.

The City and its officials and employees shall be named as additional insureds on all liability insurance policies (together with the required endorsement), except professional liability insurance. A current insurance certificate giving proof of the foregoing coverages is attached to this contract and updated certificates shall be provided to the City on an annual basis.

- 12.2 Artist shall be responsible for all risk of loss or damage until the City finally accepts the Project.
- 12.3 Artist shall ensure that all civil, architectural, structural, mechanical and electrical work, if any, is completed in conformance with professional safety and material standards.
- 12.4 Neither the Artist nor personnel employed by the Artist shall acquire any rights or status in the City's employment, nor shall they be deemed employees or agents of the City for any purpose other than as specified herein. Artist shall be deemed an independent contractor and shall be responsible in full for payment of its employees, including worker's compensation, insurance, payroll deductions, and all related costs. Further, Artist represents that it is customarily in the business of providing the services described in this Agreement, has its own place of business, is eligible for and does file with the Internal Revenue Service a schedule of business expenses, has established or will timely establish an account with the State Department of Revenue and has received a unified business identifier number, and maintains a separate set of books and records for such business.

- 12.5 Neither party shall assign, delegate or transfer any or all of its interests in this Agreement without first obtaining the written consent of the other party.
- 12.6 The parties' rights and remedies contained herein are in addition to any other rights and remedies provided by law.
- 12.7 This Agreement has been and shall be considered as having been made and delivered within the State of Washington, and shall be governed by the laws of the State of Washington both as to interpretation and performance. Any action in law or equity, or judicial proceeding for the enforcement of this Agreement or any of the provisions contained therein, shall be instituted and maintained only in Whatcom County Superior Court, Bellingham, Washington.
- 12.8 In the event either party brings any action to enforce any provision of this Agreement or is required to defend any action brought by the other party with respect to this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorneys' fees.

ARTICLE XIII
DISPUTE RESOLUTION

- 13.1 All claims, disputes, and other matters in question between the City and the Artist arising out of or relating to this Agreement or its breach, shall be first brought to the attention of the Project Manager for resolution. The parties covenant to work and meet in good faith to resolve any disputes or claims.
- 13.2 If the parties can not informally resolve their differences between themselves, the parties agree to submit the dispute to non-binding mediation. The parties may either agree to name one mediator or, if they can not agree on one mediator, they may each pick one mediator and the two mediators selected by the parties shall select a third mediator. Each party shall be responsible for its own mediation costs and the mediator's costs shall be split evenly.

ARTICLE XIV
NOTICE

- 14.1 The Artist shall promptly notify the City of address changes. The Artist's failure to do so shall be deemed a waiver by the Artist of the right to enforce those provisions of this

Agreement that require the Artist's consultation or approval. Notwithstanding this provision, the City will make a reasonable effort to locate the Artist when such matters arise.

- 14.2 Any notice required to be given hereunder shall be directed to the party at the address set forth in the Preamble. Notice shall be deemed issued and effective upon receipt thereof or forty-eight hours after mailing. Facsimile service shall be effective provided the sending party produces the facsimile confirmation sheet demonstrating the facsimile was sent and the number the notice was faxed to.

ARTICLE XV
MISCELLANEOUS PROVISIONS

- 15.1 This Agreement and its attachments contain all covenants, stipulations and provisions agreed upon by the parties. No agent or representative of either party has the authority to make, and the parties shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein. No changes, amendments, or modifications of the terms and conditions hereof shall be valid unless reduced to writing and signed by the parties.
- 15.2 If any term or condition of this contract or the application thereof to any person(s) or circumstances is held invalid, such invalidity shall not affect other terms, conditions or applications which can be given effect without the invalid term, condition or application. To this end, the terms and conditions of this contract are declared severable.
- 15.3 Waiver of any breach or condition of this Agreement shall not be deemed a waiver of any prior or subsequent breach. No terms or conditions of this Agreement shall be held to be waived, modified or deleted except by a written instrument signed by the parties hereto.

EXECUTED, this the _____ day of _____ 2016, for the Artist, **TBD**.

TBD

EXECUTED, this the _____ day of _____ 2016, for the **CITY OF BELLINGHAM**:

Approved as to Form:

Office of the City Attorney

Mayor

Attest:

Finance Director

Department Head