



AMERICANS
for the ARTS

ANNOTATED MODEL PUBLIC ART COMMISSION AGREEMENT

JUNE 2005

prepared by the
Public Art Network Council Services Committee

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Introduction

A contract is the cornerstone of the understanding and agreement between an agency or individual commissioning a work of public art and the artist creating the commissioned public art. As the field of public art has grown and matured over the last several decades, various local, state and federal laws regulating contractual agreements have become increasingly sophisticated, complicated and at times difficult to navigate. As a result, public art commissioning agreements, or contracts, have also grown subsequently more complex.

This annotated model agreement addresses many of the most current requirements and considerations of a contractual agreement to commission a work of art and is provided as a service to the field. This document provides discussion of a number of issues and points typically found in a commission agreement and is intended primarily as a reference and educational resource.

This annotated model agreement has been developed by the Services Committee of the Public Art Network (PAN), a program of Americans for the Arts. Special thanks to PAN Council Member and artist Marc Pally who took the lead on this project and who worked closely with PAN Service Committee members Jill Manton and attorney William Gignilliat. Thanks to Greg Esser, Public Art Network Manager, and Renee Piechocki, former Public Art Network Manager, for work on this sample agreement. For drafting the agreement, extra special thanks to Christine Steiner, an experienced arts attorney in the Los Angeles area who was ably assisted by Cassandra Chan and Sureka Weinberg, students from Loyola Law School, Los Angeles. We are grateful for their legal assistance and guidance.

This document is a “work-in-progress” and is not intended to be definitive or comprehensive. Comments, suggestions and other feedback regarding this document are welcome. Such feedback will be reviewed periodically by the Services Committee of the PAN Council for possible inclusion in future updates of this document. To provide feedback, please e-mail pan@artsusa.org.

Reading This Agreement

Model commission agreement language appears in Roman text. Discussion is italicized and is meant to present additional information and interpretation regarding the preceding contract section. The use of [brackets] indicates options or optional language that may apply only in certain situations, or variables that are subject to negotiation and/or determination by and between the commissioning agency and the commissioned artist.

Disclaimer

This Annotated Model Public Art Commission Agreement is made available as a service from Americans for the Arts. Use of this document, or any of its terms and conditions, is wholly voluntary and within the discretion of the contracting parties. This Agreement does not constitute legal advice or create an attorney-client relationship. Americans for the Arts does not warrant the legal efficacy of any term or condition, or of the Agreement as a whole. The law is different from State to State and is subject to varying interpretations by courts.

Both artists and commissioning agencies are advised and encouraged to seek independent legal counsel before entering into a binding agreement. For legal assistance, contact an attorney. A local branch of the Volunteer Lawyers for the Arts may be able to provide assistance in identifying attorneys familiar with the

AGREEMENT FOR COMMISSION OF PUBLIC ARTWORK

THIS AGREEMENT, is entered into this ____ day of _____, 20____, by and between [name of city, state, federal agency or public foundation] (hereinafter the “Agency”), acting by and through the [appropriate department or council] with offices at _____, and [artist’s name or artist’s name d.b.a. business name] (hereinafter the “Artist”) with offices at _____.

WHEREAS, the Agency has implemented [name of art program] pursuant to [applicable local, state or federal laws, ordinances and/or regulations, and/or funding source] by allocating [amount or type of funding] for the establishment and display of artwork in public places; and

WHEREAS, authority lies with the Agency to make payments for the [acquisition, design execution, fabrication, transportation, and/or installation] of artworks, including payments for the support of an artist [selection process, design, execution and/or placement of Art]; and

WHEREAS, the Artist is a recognized artist whose work and reputation make the Artist uniquely qualified to create the Artwork; and

WHEREAS, the Artist was selected by the Agency through [commissioning method or selection procedure] adopted by the Agency to [design, execute, fabricate and/or install] the Artwork, as described in Exhibit 1 in a public space located at _____ (hereinafter the “Site”); and

WHEREAS, the Artist and Agency wish to undertake the obligations expressed herein;

NOW, THEREFORE, in consideration of the above-stated premises and subject to the conditions hereinafter set forth, the parties agree as follows:

Article 1 Scope of Services

1.1 Artist’s Obligations

- a. The Artist shall perform all services and furnish [all supplies, material and/or equipment (specify if not all)] as necessary for the design and fabrication of the Artwork at the Site in accordance with the specified schedule. Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.
- b. The Artist shall determine the artistic expression, design, dimensions and materials of the Artwork, subject to review and acceptance by the Agency as set forth in this Agreement. To ensure that the Artwork as installed shall not interfere with the intended use of the Site, pedestrian and other traffic flow, parking, and safety devices and procedures at the Site, the Artist’s proposal shall be reviewed and approved by the Agency or Commission, other applicable city departments such as Public Works or Parking and Traffic and, where appropriate, the project architect to ensure compliance with these objectives.
- c. The Artist shall prepare the design concept and the corresponding budget described in Section 1.3

of this Agreement. The design concept shall include a description of all materials and products utilized in the Artwork and the required routine care and upkeep involved.

- d. Artist shall attend public information meetings with the general public, attend design and construction coordination meetings with Agency, general contractor, architect and other parties, as appropriate, to communicate about the Artwork and to ensure appropriate integration and/or installation of the Artwork.
- e. The Artist shall complete the fabrication of the Artwork by the scheduled installation date as provided in Section 1.4(b)(i) of this Agreement.
- f. The Artist shall secure any and all required licenses, permits and similar legal authorizations at the Artist's expense as may be necessary for the installation and maintenance of the Artwork at the Site.
- g. The Artist shall arrange the transportation and installation of the Artwork in consultation with the Agency. If the Artist does not install the Artwork himself or herself, Artist shall supervise and approve the installation.
- h. Artist shall provide required insurance in amounts and limits specified in Article 6 and Exhibit 4.
- i. Artist shall provide a list of all subcontractors along with a copy of the agreement between the Artist and each subcontractor.
- j. Artist shall provide a maintenance manual with a description of all materials and products utilized in the Artwork and the required care and upkeep involved.
- k. Artist shall provide photographic documentation of the Artwork.
- l. Artist shall be available with reasonable advance notice for meetings, ceremonies and the like, as necessary.

1.2 Agency's Obligations

- a. The Agency shall perform all obligations in strict compliance with all terms and conditions in this Agreement.
- b. The Agency shall be responsible for providing the Artist, at no expense to the Artist, copies of existing designs, drawings, reports, list of required permits, and other existing relevant data, if any, which is needed by Artist in order to perform.
- c. The Agency shall be responsible for compliance with all applicable laws and regulations, including but not limited to zoning or environmental regulations, and shall explain any limitations imposed by such laws and/or regulations to the Artist.
- d. The Agency shall prepare the Site in accordance with the specifications detailed in the approved design concept in Section 1.3 of this Agreement. The Agency shall be responsible for [all expenses, labor and equipment (specify if not all)] to prepare the Site for the timely transportation and installation of the Artwork. The Agency shall complete the Site preparations by the scheduled installation date as provided in Section 1.4(b)(i) of this Agreement or shall contact the Artist in writing informing him or her of any delays.
- e. The Agency shall provide and install a plaque on or near the Artwork containing a credit to the Artist and a copyright notice substantially in the following form: Copyright © [Artist's name, date of publication].
- f. The Agency shall not permit any use of the Artist's name or misuse of the Artwork which would reflect discredit on the Artist's reputation as an artist or which would violate the spirit of the Artwork, should such use or misuse be within the Agency's control.
- g. The Agency shall be responsible for leading the Artist through the required review process. The Agency shall be responsible for organizing and scheduling meetings with review entities, [listed here, for example, Art Commission, community boards, etc.] and for providing the Artist written instructions for the materials required at such meetings.

Discussion

The roles of the Artist, Agency and any agents (such as architects, structural engineers or general contractors) should be defined in detail. The traditional role of the Artist is that of a designer, fabricator, installer, and supervisor. It is in the best interest of the Agency to consult with a conservator to assess the maintenance and anticipated longevity of the Artist's proposal and its ability to endure at the site.

This Agreement assumes that the Artist will furnish the materials and arrange the transportation and installation of the Artwork. The nature of a particular agreement may define different obligations. For example, the Agency might be expected to provide all supplies, materials and/or equipment; or, for example, the Artist might be expected to prepare the site for installation of the Artwork.

For major construction projects, the Parties may need to retain architects, engineers, general contractors or landscape architects. This Agreement should specify whether the Agency or the Artist engages such experts, and the obligations of such experts should be specified in a separate agreement.

Under section 1.2(d), the Agency is responsible for preparation of the Site and all costs associated therewith. However, some of these costs may be included in the budget described in Section 1.4(a) of this Agreement. The Parties should clearly state the duties and costs each assumes in relation to the Site preparation.

This Agreement assumes that the Artist secures the required licenses, permits and similar legal authorizations with Agency assistance on applicable laws, and list of required permits and other regulations. As the Agency is more likely to be familiar with such requirements, the Agency or a project manager appointed by the Agency should advise the Artist regarding such matters. Agency staff may serve as an advocate and liaison with other departments or jurisdictions involved with the project. The Parties may instead arrange for a third party agent familiar with the process to research the laws and secure the permits.

1.3 Design

a. Concept/Schematic

i. The Artist submitted a design concept/schematic (the "Design") with an accompanying budget, pursuant to a competition organized for the procurement of an Artist to design and fabricate an Artwork suitable for the current project, which Design was selected and approved by the Agency. The Design and Budget shall be attached to this Agreement as Exhibit 1 and Exhibit 2 respectively.

b. Approval

i. Within ___ days after the execution of this agreement, the Agency shall notify the Artist if it requires any revisions to the Design in order to comply with any applicable laws, ordinances and/or regulations or for other reasons including, but not limited to, ensuring the physical integrity of the Artwork or its installation at the Site. If agreed upon by both parties, such revisions will become a part of the Design.

ii. Once the Agency has approved the Design, the Agency will schedule the presentation of the Design to the required approval bodies [List Here]. If the approval bodies require any revisions to the Design, the Agency will submit those in writing to the Artist. The Artist will have ___ days to comply with such revisions. If agreed upon by both parties, such revisions will become a part of the Design.

c. Final/Construction Documents

i. The Artist shall prepare structural drawings detailing every physical feature of the construction of the Artwork and its integration with the Site. These drawings shall indicate any risks involved in the construction, integration and maintenance of the Artwork, as well as any third party subcontractors needed to work on the project.

ii. Where appropriate, the Artist shall present such drawings to a qualified engineer, licensed

by the state and paid by the Artist, for certification that the Artwork will be of adequate structural integrity and the Artist shall provide the Agency with such certification.

iii. Where appropriate, the Artist shall present the Design to a qualified conservator, who will make recommendations on the maintenance of the Artwork, and the Artist shall provide a written copy of the conservator's recommendations to the Agency.

OR

a. Concept/Schematic

i. The Artist was selected pursuant to a competition organized for the procurement of an artist to design and fabricate a Artwork suitable for the current project. Within ____ days of the execution of this Agreement, the Artist shall submit to the Agency the design concept (the "Design") in the form of [detailed color drawings, models, and/or other documents] as are required to present a meaningful representation of the Artwork.

ii. The Artist shall visit, examine, research and consider the Site and surrounding area. If applicable, the Artist shall also consult with representatives of the community and consider their input and concerns.

iii. The Design will include: a description of the method by which the Artwork is to be fabricated and installed; a description of any operational, maintenance and conservation requirements for the Artwork; a description of the placement of the Artwork at the Site and any site preparations that may be required by the Agency including, but not limited to, any changes or modifications to any utility system or structure of the Site as necessary.

iv. The Design must provide sufficient detail to permit the Agency to assure compliance with applicable local, state or federal laws, ordinances and/or regulations.

v. The Artist shall attach to the Design a detailed budget for the design, fabrication and installation of the Artwork, including costs for Site preparation, as described in Section 1.4(a) of this Agreement.

b. Approval

i. Within [____] days after the Artist submits the Design, the Agency shall notify the Artist whether it approves or disapproves of the Design. The Agency shall have discretion in approving outright or with conditions, or rejecting the Design. The Agency shall notify the Artist of any revisions to the Design as are necessary for the Artwork to comply with any applicable laws, ordinances and/or regulations and other reasons including, but not limited to, ensuring the physical integrity of the Artwork or its installation at the Site. If agreed upon by both parties, such revisions will become a part of the accepted Design.

ii. If the Agency disapproves of the Design, the Agency will submit to the Artist in writing the reasons for such disapproval. In such event, the Artist will submit a Revised Design within [____] days after the Agency has notified the Artist of its disapproval. The Artist [will] [will not] be paid an additional fee for the Revised Design.

c. Redesign

i. The Revised Design will reflect changes made to address the Agency's stated reasons for disapproval, as well as any adjustments in the budget or schedule that may be necessary. The Agency shall notify the Artist in writing whether it approves or disapproves of the revised Design within [____] days after the Artist submits the revised design.

ii. If the Artist refuses to revise the Design pursuant to Section 1.3(b)(ii), or if the Artist fails to adequately revise the Design in the judgment of the Agency, this Agreement shall terminate and the parties shall be under no further obligation to each other as of the date of such termination. The

effective date of termination shall be the date the Agency submits its written disapproval of the Revised Design to the Artist. The Agency shall submit to the Artist a written termination notice with the disapproval. The termination notice shall advise the Artist that this Agreement has been terminated pursuant to this Article. The termination notice shall notify the Artist that the Artist is entitled to retain the compensation paid prior to the termination date, and that the Parties are under no further obligation to each other. The termination notice shall confirm that the Artist shall retain ownership of all Designs, Revised Designs and renderings thereof submitted hereunder.

d. Final/Construction Documents

- i. The Artist shall prepare structural drawings detailing every physical feature of the construction of the Artwork and its integration with the Site. These drawings and supplementary documents shall indicate any issues involved in the construction, integration and maintenance of the Artwork, as well as any third party subcontractors needed to work on the project.
- ii. Where appropriate, the Artist shall present such drawings to a qualified engineer, licensed by the state and paid by the Artist, for certification that the Artwork will be of adequate structural integrity and the Artist shall provide the Agency with such certification, signed and stamped by the licensed engineer.
- iii. Where appropriate, the Artist shall present the Design to a qualified conservator, who will make recommendations on the maintenance of the Artwork and the Artist shall provide a written copy of the conservator's recommendations to the Agency.

Discussion

In the Design or Revised Design, the Artist addresses structural considerations, surface integrity, permanence, and protection against theft and vandalism. If the Artwork is designed to be site-specific, the Artist should also include in the description any part of the surrounding area or site which is to be considered part of the Artwork.

The Agency will require that any structural drawings be certified by a qualified engineer, licensed by the state and paid by the Artist as part of the design cost, stating that the Artwork will be of adequate structural integrity (including foundation loads, wind loads, and potential live loads) to ensure the safety and welfare of Agency officers, employees, agents, servants, and the general public. Such drawings will conform to all applicable federal, state and local laws and regulations.

1.4 Budget, Payment Schedule, Construction Schedule and Progress Reports

a. Budget

- i. The Artist shall prepare a budget, which shall include all goods, services and materials, with such costs itemized. The Budget shall be attached to this Agreement as Exhibit 2.
- ii. Calculation of the budget will take into consideration the possible inflation of service and material costs between the date of execution of this Agreement and the anticipated completion date.
- iii. The Artist shall keep a log of the Artist's project hours and shall retain all original receipts pertaining directly to the project.
- iv. 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 previously obtained approval for such costs from the Agency (or such costs were the result of actions or inaction of the Agency).

b. Schedule

- i. The Artist shall notify the Agency of the tentative schedule for the fabrication and

installation of the Artwork, including a schedule for the submission of progress reports and inspections if any. The Schedule may be amended by written agreement.

- ii. A schedule for the payment of budget installments is attached to this Agreement as Exhibit 3.

Discussion

The budget includes itemized costs for materials, the applicable sales tax for such materials; off-site fabrication costs; the Artist's time for coordination, fabrication, supervision of the installation; fees for required licenses, permits, and similar legal authorizations; fees for the labor of assistants; itemized general contractor and subcontractor fees if applicable; consultants' or experts' fees (such as engineers, architects or others) if applicable; insurance; Artist's travel; transportation of the Artwork to Site; itemized installation costs; any applicable local, state or federal taxes; and a [x]% contingency to cover unforeseen costs that may arise. The contract should identify a formula for dispersing sums in the event that there are unused monies from the contingency allocation.

This is not an exhaustive list of expenses to be included in the budget. There may be other costs depending on the nature of the project. The project architect/contractor, if there is one, should advise the Artist on the possible range of some of the costs as well as vendor sources and costs for displaying the Artwork such as framing, lighting, footing, pedestals, seismic retrofitting, extended warranties on media components or mechanical devices. Although the budget is usually a fixed amount, typically 1% of the construction costs for the project, it is necessary to itemize the expenses as the Agency dictates what costs are eligible to be included in the budget as well as how much of the budget may be spent on a particular expense.

The Artist may be tempted to reflect conservative cost estimates in the budget to gain approval, but cost overruns may be incurred by the Artist, leaving the Artist with little to no profit, or even worse debt. It is the Artist's responsibility to account for all costs in the budget to avoid cost overruns. The Artist should be encouraged to describe the costs as realistically as possible. It is advisable for the Artist to properly estimate costs to allow for room for unforeseen expenses. The artist should submit written cost estimates from qualified fabricators for the production of the Artwork.

The Agency has a role in budgeting as well, including the negotiation of construction credits from the Site's budget to the Artist's budget. This budgeting function is particularly important for projects which are integrated into the construction documents and/or can be considered as value-added enhancements above and beyond standard landscape and/or structural elements. Also, if the construction budget for the Site increases, the Agency should be responsible for negotiating whether or not the budget for the Artwork increases as well.

The schedule should clearly state dates by which each stage, duty, or service under this Agreement ought to be completed. For example, the Artist may indicate that the Artwork will be completed by week 50 after the execution of this Agreement and that inspection for final approval of the Artwork must occur by week 51. The schedule binds both Parties, but may be adjusted upon the reasonable request of one of the Parties.

Other parties involved in the project (such as a Department or Agency, general contractor or an architect), if any, should also receive copies of the schedule. If the Site has not yet been constructed it will be necessary to insure proper coordination with all involved parties. Typically, it is the Project Manager who will coordinate schedule planning with other parties. The Project Manager should arrange regularly scheduled project coordination meetings including the general contractor, Artists, other city departments, architect, etc. As construction of the Site progresses, the Parties should keep each other informed of any changes in the schedule for construction of the Site or in the plans or layout of the Site.

1.5 Fabrication Stage

- a. The Artist shall fabricate [and install] the Artwork in substantial conformity with the Design. The Artist may not deviate from the approved design without written approval of the Agency.
- b. The Artist shall take reasonable measures to protect or preserve the integrity of the Artwork such as

The application of protective or anti-graffiti coatings, if applicable, unless the Agency disapproves. If the Artwork is being constructed on-site, the Artist shall avoid creating nuisance conditions arising out of the Artist's operations. Prior to requesting authorization to transport and install the Artwork, the Artist shall be required to provide the Agency with a list of all workers or subcontractors and equipment to be used along with the hours of operation and the scope of work to be performed on site. All additional workers or subcontractors must provide proof of insurance prior to entering the site.

- c. The Agency shall have the right to review the Artwork at reasonable times during the fabrication thereof upon reasonable notice.
- d. If the Agency, upon review of the Artwork, determines that the Artwork does not conform to the Design or Revised Design, the Agency reserves the right to notify the Artist in writing of the deficiencies and that the Agency intends to withhold the next budget installment.
- e. The Artist will promptly cure the Agency's objections and will notify the Agency in writing of completion of the cure. The Agency shall promptly review the Artwork, and upon approval shall release the next budget installment. If the Artist disputes the Agency's determination that the Artwork does not conform, the Artist shall promptly submit reasons in writing to the Agency within [____] days of the Agency's prior notification to the contrary. The Agency shall make reasonable efforts to resolve the dispute with the Artist in good faith. However, final determination as to whether the Artist has complied with the terms of this Agreement shall remain with the Agency.
- f. The Artist shall notify the Agency in writing when fabrication of the Artwork has been completed, and that the Artwork is ready for delivery and installation at the Site if the Artwork was fabricated off-site.
- g. The Agency shall inspect the Artwork within [____] days after receiving notification pursuant to paragraph (f), prior to installation, to determine that the Artwork conforms with the Design and to give final approval of the Artwork. The Agency shall not unreasonably withhold final approval of the fabricated Artwork. In the event that the Agency does withhold final approval, the Agency shall submit the reasons for such disapproval in writing within [____] days of examining the fabricated Artwork. The Artist shall then have [____] days from the date of the Agency's notice of the disapproval to make the necessary adjustments to the fabricated Artwork in accordance with such writing. The Artist shall not be penalized for any delay in the delivery and installation of the Artwork to the Site unless the Artist has willfully and substantially deviated from the Design without the prior approval of the Agency. The Artist shall then be held responsible for any expenses incurred in correcting such deviation.
- h. The Agency shall promptly notify the Artist of any delays impacting installation of the Artwork. Any additional storage fees incurred as a result of such delays are the responsibility of the Agency. The Artist shall be required to inspect the Site prior to the transportation and installation of the Artwork and shall notify the Agency of any adverse Site conditions that will impact the installation of the Artwork which are in need of correction.

Discussion

Paragraph (h) is easily understood when delays are caused by acts of the Agency and/or Agency's Agents. When delays are caused by third parties, i.e. unexpected street widening or sewer repair undertaken by local government, the costs of delay should be born by the Agency which is in a better position to negotiate with public agencies and would be in contact with them.

1.6 Changes to Design

- a. Prior to the execution of any change in the approved design, Artist shall present proposed changes in writing to the Agency for further review and approval. The Artist must provide a detailed description of any significant changes in the artistic expression, design, dimensions and materials of the Artwork that is not permitted by nor in substantial conformity with the already approved design. Such notice will also include a detailed description of any additional costs that may be incurred or changes in the budget. A significant change is any change which materially affects installation, scheduling, site preparation or maintenance of the Artwork or the concept of the Artwork as represented in the Design.
- b. If the Agency approves the changes, the Agency shall promptly notify the Artist in writing. The Agency will also make the required presentations to the approval bodies [List here].
- c. If the Agency disapproves of the changes, the Agency shall promptly notify the Artist in writing and the Artist shall continue to fabricate the Artwork in substantial conformity with the Design.
- d. The Artist's fee shall be equitably adjusted for any increase or decrease in the Artist's cost of, or time required for, performance of any services under this Agreement as a result of revisions made to the Design under Section 1.6(a). Any claim of the Artist for adjustment under this paragraph must be asserted in writing within ___ days after the date of the revision by the Artist.

Discussion

Paragraph (a) recognizes that the Artist's creativity should not be inhibited, but at the same time, the Artist must recognize that public art commissions are subject to changes in design for a variety of factors.

Changes in the plans or layout of the Site may require modifications to the Design. This is especially true in instances where the Artwork is embedded in the Site, such as when the Artwork is a floor or staircase of a building. The Agency and Artist should consult regarding such modifications to the Design and to the budget. Changes to the accepted proposal must generally be presented in writing and reviewed and approved by the commissioning Agency.

The Artist should retain any receipts, invoices, a journal, or other documents illustrating any additional expense incurred as a result of the revisions. The date of the revision should be defined clearly.

1.7 Installation

- a. Upon the Agency's final approval of the fabricated Artwork, as being in conformity with the Design, the Artist shall deliver [and install] the completed Artwork to the Site in accordance with the schedule provided for in Section 1.4(b). Transportation fees shall be paid by the [_____ indicate Agency or Artist].
- b. The Artist will coordinate closely with the Agency to ascertain that the Site is prepared to receive the Artwork. Artist must notify Agency of any adverse conditions at the Site that would effect or impede the installation of the Artwork. The Artist is responsible for timely installation of the Artwork. The Artist will confer and coordinate with the Agency to ensure timely coordination with the Agency's construction team. Artist may not install the Artwork until authorized to do so by the Agency.
- c. The Artist shall be present to supervise the installation of the Artwork.
- d. Upon written acceptance of the installation, the Artwork shall be deemed to be in the custody of the Agency for purposes of Article 4 and Article 6 of this Agreement.]
- e. Within [_____] days after installation of the Artwork, the Artist shall furnish the Agency with the following photographs of the Artwork as installed:

[The parties may identify documentation such as:

- i) two sets of three 35 mm color slides of the completed Artwork, one taken from each of three different viewpoints;
- ii) Two sets of three different 8" x 10" glossy black and white prints of the Artwork and negatives;
- iii) A set of three digital, 300 dpi, JPG or TIFF files, of the Artwork, provided to the Agency on a CD Rom.] Photographs must be labeled with the name of the Artwork, the date upon which the photograph was taken, and the viewpoint from which the photograph was taken. The Artist shall also furnish the Agency with a full written narrative description of the Artwork.

- f. Upon installation of the Artwork, the Artist shall provide the Agency with written instructions for the appropriate maintenance and preservation of the Artwork along with product data sheets for any material or finish used. The Artwork must be durable, taking into consideration that the Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. Artist must ensure that all maintenance requirements will be reasonable in terms of time and expense. The Agency is responsible for the proper care and maintenance of the Artwork.

Discussion

Section 1.7 identifies the Party responsible for the installation. The duties and obligations of the Parties should be clearly defined.

Section 1.7(d) should only be included in this Agreement if the Artist arranges for the transportation and installation of the Artwork as during this time the Artwork will be in the custody of the Artist. If the Agency arranges and pays for the installation, the Agency will already have custody of the Artwork prior to installation. However, even if the Agency arranges for the transportation and installation of the Artwork, the Artist should be on Site to supervise the installation to ensure proper installation in conformity with the Design. If the Artist is a member of a design team and the Artwork is constructed on the Site, the Artist's role in Site supervision, construction and installation should be described in detail.

The photographic documentation referred to in paragraph (e) is usually required for archival purposes and the photographs to be submitted will depend on the requirements of the Agency.

The period of maintenance under Section 1.7(e) is assumed to be the life of the Artwork. However, this period may be negotiated by the Parties. For example, the Agency may mandate a period of life for the overall project. The Parties may agree that the period of maintenance for the Artwork be the same as that of the project. As artists begin to use more innovative materials and techniques which have not yet been tested by time, the Parties may wish to negotiate a specified period of time for maintenance of the Artwork, such as the life of the project, after which the Agency has the right to relocate, transfer, or destroy the Artwork. If the Agency determines that, through decay, vandalism or other forces, the Artwork has lost its integrity to the point where it should be destroyed, the Agency shall first offer the Artwork to the Artist at the City's cost to destroy the work or the cost to collect and remove the work.

1.8 Approval and Acceptance

- a. The Artist shall notify the Agency in writing when all services as required of both Parties by this Agreement prior to this paragraph have been completed in substantial conformity with the Design.
- b. The Agency shall promptly notify the Artist of its final acceptance of the Artwork within ____ days after the Artist submitted written notice pursuant to paragraph (a) above. The effective date of final acceptance shall be the date the Agency submits written notice to the Artist of its final acceptance

- of the Artwork. The final acceptance shall be understood to mean that the Agency acknowledges completion of the Artwork in substantial conformity with the Design, and that the Agency confirms that all services as required of both Parties by this Agreement prior to paragraph (c) of this section have been completed. Title to the Artwork passes upon final acceptance and final payment.
- c. If the Agency disputes that all the services have been performed, the Agency shall notify the Artist in writing of those services the Artist has failed to perform within ____ days after the Artist submitted written notice pursuant to paragraph (a) above. The Artist shall promptly perform those services indicated by the Agency.
 - d. If the Artist disputes the Agency's determination that not all services have been performed, the Artist shall submit reasons in writing to the Agency within ____ days of the Agency's prior notification to the contrary. The Agency shall make reasonable efforts to resolve the dispute with the Artist in good faith. However, final determination as to whether all services have been performed shall remain with the Agency.
 - e. Upon the resolution of any disputes that arise under paragraphs (c) and (d) of this section, the Agency shall notify the Artist of its final acceptance of the Artwork pursuant to paragraph (b).
 - f. After final acceptance of the Artwork, the Artist shall be available at such time(s) as may be mutually agreed upon by the Agency and the Artist to attend any public meetings and community outreach functions, as well as any inauguration or presentation ceremonies relating to the dedication of the Artwork.
 - i. During such public presentations by the Artist, the Artist shall acknowledge the Agency's role in funding the Artwork.
 - ii. The Agency shall be solely responsible for coordinating public information materials and activities related to public presentations.

Discussion

It is important that disputes be adequately resolved because upon final acceptance, ownership of the Artwork is transferred to the Agency; the insurance obligations transfer to the Agency; the Agency becomes responsible for maintenance of the Artwork; the warranties of quality and condition described in Section 5.2 of this Agreement begin; and this Agreement shall terminate.

Paragraph (f) acknowledges that the Agency may wish to include the Artist in any educational program it has as part of its public art program to educate the public regarding the Artwork, and to facilitate and encourage communication between the Artist and the community. The Agency should state under paragraph (f) any such dates or events such as lectures and art walks upon which the Agency and the Artist have agreed.

Article 2 Taxes

Any state or federal sales, use or excise taxes, or similar charges relating to the services and materials under this Agreement shall be paid by the Artist in a timely fashion. The Agency shall report payments made to the Artist annually to the Internal Revenue Department in a 1099 statement.

Article 3 Term of Agreement

a. Duration

This Agreement shall be effective on the date that this contract has been signed by both parties, and, unless terminated earlier pursuant to such provisions in the Agreement, shall extend until final acceptance by the Agency under Section 1.8(b), or submission of final payment to the Artist by the Agency

under Exhibit 3, whichever is later. Extension of time of performance hereunder may be granted upon the request of one Party and the consent of the other thereto, which consent shall not be unreasonably withheld. Such extension shall be in writing, signed by both parties, and attached to the schedule under section 1.4(b)(i). (which is attached as Exhibit 2?)

b. Force Majeure

The Agency shall grant to the Artist a reasonable extension of time in the event that conditions beyond the Artist's control render timely performance of the Artist's services impossible or unduly burdensome. All such performance obligations shall be suspended for the duration of the condition. Both parties shall take all reasonable steps during the existence of the condition to assure performance of their contractual obligations when the condition no longer exists. Failure to fulfill contractual obligations due to conditions beyond either Party's reasonable control will not be considered a breach of contract, provided that such obligations shall be suspended only for the duration of such conditions.

Discussion

If the Parties negotiate terms and obligations to be conducted after final acceptance, the term of the Agreement shall be adjusted accordingly.

Examples of conditions beyond the reasonable control of the Artist are natural disasters, labor strikes and war. These examples are merely suggestive, and not to be deemed exclusive. The Parties may wish to address additional terms if these are of concern, e.g., disability, unavailability, death of Artist.

Article 4 Risk of Loss

The Artist shall bear the risk of loss or damage to the Artwork until the Agency's final acceptance of the Artwork under Section 1.8(b). The Artist shall take such measures as are reasonably necessary to protect the Artwork from loss or damage. The Agency shall bear the risk of loss or damage to the Artwork prior to final acceptance only if, during such time, the partially or wholly completed Artwork is in the custody, control or supervision of the Agency or its agent(s) for the purposes of transporting, storing, installing or performing other services to the Artwork.

Discussion

It is customary for the Artist to bear the risk of loss as any services performed on or in relation to the Artwork are performed by the Artist or under the Artist's supervision. The Parties may agree that the Agency bear the risk of loss or damage to the Artwork prior to final acceptance if the partially or wholly completed Artwork is in the custody, control or supervision of the Agency or its agent(s) for the purposes of storing, installing on-Site or performing other services to the Artwork.

Article 5 Artist's Representations and Warranties

5.1 Warranties of Title

The Artist represents and warrants that:

- a) the Artwork is solely the result of the artistic effort of the Artist;
- b) except as otherwise disclosed in writing to the Agency, the Artwork is unique and original and does not infringe upon any copyright or the rights of any person;
- c) the Artwork (or duplicate thereof) has not been accepted for sale elsewhere;
- d) the Artist has not sold, assigned, transferred, licensed, granted, encumbered or utilized the Artwork

or any element thereof or any copyright related thereto which may affect or impair the rights granted pursuant to this Agreement;

- e) the Artwork is free and clear of any liens from any source whatsoever.
- f) all Artwork created or performed by the Artist under this Agreement, whether created by the Artist alone or in collaboration with others, shall be wholly original with the Artist and shall not infringe upon or violate the rights of any third party.
- g) the Artist has the full power to enter into and perform this Agreement and to make the grant of rights contained in this Agreement.
- h) all services performed hereunder shall be performed in accordance with all applicable laws, regulations, ordinances, etc. and with all necessary care, skill, and diligence.
- i) these representations and warranties shall survive the termination or other extinction of this Agreement.

5.2 Warranties of Quality and Condition

- a. The Artist represents and warrants that all work will be performed in accordance with professional “workmanlike” standards and free from defective or inferior materials and workmanship (including any defects consisting of “inherent vice,” or qualities that cause or accelerate deterioration of the Artwork) for [one] year after the date of final acceptance by the Agency under Section 1.8(b).
- b. The Artist represents and warrants that the Artwork and the materials used are not currently known to be harmful to public health and safety.
- c. The Artist represents and warrants that reasonable maintenance of the Artwork will not require procedures substantially in excess of those described in the maintenance and preservation recommendations submitted by the Artist pursuant to Section 1.7(f).
- d. If within [one] year the Agency observes any breach of warranty described in this Section 5.2 that is curable by the Artist, the Artist shall, at the request of the Agency, cure the breach promptly, satisfactorily and consistent with professional conservation standards, at no expense to the Agency. The Agency shall give notice to the Artist of such breach with reasonable promptness.
- e. If after [one] year the Agency observes any breach of warranty described in this Section 5.2 that is curable by the Artist, the Agency shall contact the Artist to make or supervise repairs or restorations at a reasonable fee during the Artist’s lifetime. The Artist shall have the right of first refusal to make or supervise repairs or restorations. Should the Artist be unavailable or unwilling to accept reasonable compensation under the industry standard, the Agency may seek the services of a qualified restorative conservator and maintenance expert.
- f. If within [one] year the Agency observes a breach of warranty described in this Section 5.2 that is not curable by the Artist, the Artist is responsible for reimbursing the Agency for damages, expenses and loss incurred by the Agency as a result of the breach. However, if the Artist disclosed the risk of this breach in the Proposal and the Agency accepted that it may occur, it shall not be deemed a breach for purposes of this Section 5.2 of this Agreement.]
- g. Acceptable Standard of Display. Artist represents and warrants that:
 - i. General routine cleaning and repair of the Artwork and any associated working parts and/or equipment will maintain the Artwork within an acceptable standard of public display.
 - ii. Foreseeable exposure to the elements and general wear and tear will cause the Artwork to experience only minor repairable damages and will not cause the Artwork to fall below an acceptable standard of public display.
 - iii. With general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the Artwork will not experience irreparable conditions that do not fall within an acceptable standard of public display, including mold, rust,

fracturing, staining, chipping, tearing, abrading and peeling.

iv. **Manufacturer's Warranties.** To the extent the Artwork incorporates products covered by a manufacturer's warranty, Artist shall provide copies of such warranties to the Agency.

The foregoing warranties are conditional, and shall be voided by the failure of the Agency to maintain the Artwork in accordance with the Artist's specifications and the applicable conservation standards. If the Agency fails to maintain the Artwork in good condition, the Artist, in addition to other rights or remedies the Artist may have in equity or at law, shall have the right to disown the Artwork as the Artist's creation and request that all credits be removed from the Artwork and reproductions thereof until the Artwork's condition is satisfactorily repaired.

Discussion

The length of the warranty should take into account the nature of the Artwork, the type of materials and methods used with respect to the Artwork, the conservation record of similar Artworks in similar environments, the period of time during which defects are likely to manifest themselves, the cost of the Artwork and the potential liability involved. Typically the warranty is for one year. However, a longer or shorter period of time may be negotiated depending on the nature of the project.

The Artist's aesthetic choices and goals might be at odds with the Agency's concerns over maintenance and conservation of the Artwork. For example, the materials or equipment that the Artist chooses may be untested or unproven, or might not age in a traditional way. Thus, the Artist should provide a written disclosure of factors that may be at odds with the conservation goals in the Proposal, so that the Agency can make an informed evaluation of the impact of the Artist's choices on the standard warranties. The Agency may also wish to consult with an independent expert to evaluate the materials and techniques used in the Artwork prior to acceptance.

It is particularly important for the Agency to do this in light of varying environmental conditions which may affect materials differently and possibly more adversely under some conditions than others.

Most standard fine arts insurance policies will not cover damage or loss of value sustained as a result of a defect or inherent vice in an Artwork. Defects in design and materials can result in a decrease or total loss in value of the Artwork, expenses for conservation of the Artwork to rectify defects, and even liability for personal injury.

Insurance policies will also not cover normal "wear and tear" costs on an Artwork, which are considered continuing expenses of upkeep undertaken in conservation and maintenance. Thus, the Agency should keep in mind any extraordinary conservation procedures or high-cost maintenance factors.

Article 6 Insurance

6.1 General

- a. The Artist acknowledges that until final acceptance of the Artwork by the Agency under Section 1.8(b), any injury to property or persons caused by the Artist's Artwork or any damage to, theft of, vandalism to, or acts of God affecting the Artist's Artwork are the sole responsibility of the Artist, including, but not limited to, any loss occurring during the creation, storage, transportation or delivery of the Artist's Artwork, regardless of where such loss occurs.
- b. Terms for the procurement and duration of insurance are provided in Exhibit 4.
- c. Required insurance policies are described in Exhibit 4.

6.2 Indemnity

- a. The Artist shall indemnify the Agency, its respective officers, agents, and employees, from any claims brought arising out of the breach of this Agreement or any negligent occurrence which occurs pursuant to the performance of this Agreement by the Artist, its subcontractors, agents or

- employees.
- b. The Agency shall indemnify the Artist, Artist's subcontractors, agents or employees from any claims brought arising out of the breach of this Agreement or any negligent occurrence which occurs pursuant to the performance of this Agreement by the Agency, its respective officers, agents, and employees.
 - c. Each Party shall immediately notify the other of any written claim regarding any matter resulting from or relating to the Party's obligations under this Agreement. Each Party shall cooperate, assist, and consult with the other in the defense or investigation of any such claim arising out of or relating to the performance of this Agreement.
 - d. [The indemnification shall include reasonable attorneys' fees and costs.]
 - e. This indemnification shall survive the termination or expiration of this Agreement.
 - f. Notwithstanding any provision of this Agreement to the contrary, no Party shall recover from a Party to this Agreement in an action, of whatever nature, in contract or tort, any consequential or incidental damages, lost profits, or any type of expectancy damages.

or

Alternate Language: Artist shall indemnify, protect, defend and hold harmless the Agency and its subdivisions, officials, employees and agents (each a "Covered Person") from and against all liabilities, obligations, losses, damages, judgments, costs or expenses (including legal fees and costs of investigation) ("collectively "Losses") arising from, in connection with or caused by: (a) any personal injury or property damage caused, directly or indirectly, by any act or omission of Artist; or (b) any infringement of patent, copyright, trademark, trade secret or other proprietary right caused by Artist. Notwithstanding the foregoing, Artist shall have no obligation under this Section with respect to any Loss that is caused solely by the active negligence or willful misconduct of the Covered Party and is not contributed to by any act or omission (including any failure to perform any duty imposed by law) by Artist. Artist acknowledges and agrees that its obligation to defend in this Section: (i) is an immediate obligation, independent of its other obligations hereunder; (ii) applies to any Loss which actually or potentially falls within the scope of this Section, regardless of whether the applicable allegations are or may be groundless, false or fraudulent; and (iii) arises at and continues after the time the Loss is tendered to Artist.

Discussion

There are two types of indemnification provisions suggested. Only one should be selected. In the first alternative, the Parties have a mutual duty of indemnification. In the second, the Artist indemnifies the Agency. A suitable compromise if the Agency insists on broad indemnification may be for the Artist to agree to indemnify the Agency only in the instance of an adverse judgment and/or for the Artist's liability to not exceed the limits of the liability of the insurance policies required to be maintained by the Artist under this Agreement. Many of the risks associated with construction projects are assumed by licensed professionals such as architects and engineers who, through their licensed status are able to obtain Professional Liability Insurance that covers Errors and Omissions. The Artist, through subcontracting work to these professionals, may benefit from their insurance coverage.

Article 7 Ownership and Intellectual Property Rights

7.1 Title

Title to the Artwork shall pass to the Agency upon the Agency's written final acceptance and

payment for the Artwork pursuant to Section 1 and Exhibit 5. Artist shall provide Agency with a Transfer of Title in substantially the form attached hereto as Exhibit 5.

7.2 Ownership of Documents

One set of presentation materials prepared and submitted under this Agreement shall be retained by the Agency for possible exhibition and to hold for permanent safekeeping.

Discussion

Section 7.2 recognizes the public's interest in documenting the history of the Artwork for archival purposes. An example of a commissioning body sharing this purpose would be the General Services Administration (GSA). Design concepts submitted to the GSA becomes the sole property of the United States government and may be conveyed to the National Museum of American Art for exhibiting purposes and permanent safekeeping. Depending on the circumstances, however, the commissioning body may negotiate for ownership of all [studies, drawings, designs, maquettes and models] submitted by the artist, or elect to return such materials to the Artist.

7.3 Copyright Ownership

The Artist retains all rights under the Copyright Act of 1976, 17 U.S.C. § 101 et seq., as the sole author of the Artwork for the duration of the copyright.

Discussion

The duration of copyright in the United States is currently the life of the author plus 70 years.

7.4 Reproduction Rights

- a. In view of the intention that the final Artwork shall be unique, the Artist shall not make any additional exact duplicate [three]-dimensional reproductions of the final Artwork, nor shall the Artist grant permission to others to do so except with the written permission of the Agency. However, nothing shall prevent the Artist from creating future Artworks in the Artist's manner and style of artistic expression.
- b. The Artist grants to the Agency and its assigns an irrevocable license to make two-dimensional reproductions of the Artwork for non-commercial purposes, including, but not limited to, reproductions used in brochures, media publicity, and exhibition catalogues or other similar publications provided that these rights are exercised in a tasteful and professional manner.
- c. All reproductions by the Agency shall contain a credit to the Artist and a copyright notice in substantially the following form: Copyright © [Artist's name, date of publication].
- d. The Artist shall use the Artist's best efforts in any public showing or resume use of reproductions to give acknowledgment to the Agency in substantially the following form: "an original Artwork commissioned by and in the public art collection of the Agency."
- e. The Artist shall, at the Artist's expense, cause to be registered with the United States Register of Copyrights, a copyright in the Artwork in the Artist's name.
- f. If the Agency wishes to make reproductions of the Artwork for commercial purposes, including, but not limited to, tee shirts, post cards and posters, the Parties shall execute a separate agreement to address the terms of the license granted by the Artist and the royalty the Artist shall receive.
- g. Third Party Infringement. The Agency is not responsible for any third party infringement of Artist's copyright and not responsible for protecting the intellectual property rights of Artist.

Discussion

Section 7.4 protects the Agency's legitimate interest in not having the Artist reproduce identical Artworks for others and permits the Agency to reproduce the Artwork for noncommercial purposes. At the same time, the artist has the right to create future Artworks that include the style, form, "feel," and themes embodied in the Artwork.

The Agency may also require that the Artist shall not, during the performance of this Agreement, disseminate publicity or news releases regarding the Artwork without prior written approval of the Agency.

Article 8 Artist's Rights

8.1 General

- a. The Artist retains all rights under state and federal laws including §106A of the Copyright Act of 1976.
- b. The Agency agrees that it will not intentionally alter, modify, change, destroy or damage the Artwork without first obtaining permission from the Artist.
- c. If any alteration or damage to the Artwork occurs, the Artist shall have the right to disclaim authorship of the Artwork in addition to any remedies the Artist may have in law or equity under this contract. Upon written request, the Agency shall remove the identification plaque and all attributive references to the Artist at its own expense within [___] days of receipt of the notice. No provision of this Agreement shall obligate the Agency to alter or remove any such attributive reference printed or published prior to the Agency's receipt of such notice. The Artist may take such other action as the Artist may choose in order to disavow the Artwork.

Discussion

The protections afforded by the *Visual Artists' Rights Act*, that is, §106A of the Copyright Act of 1976, apply to objects. The applicability of the *Visual Artists' Rights Act* to objects that are integrated into the Site is determined on a case-by-case basis.

The *Visual Artists' Rights Act* states:

"The author of a work of visual art shall have the right:

- 1. to claim authorship of that Artwork, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create.*
- 2. to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and*
- 3. to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right; and to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."*

Some, but not all, states may have also passed legislation independent of the *Visual Artists' Rights Act* to protect the rights of visual artists. For example:

The *New York Authorship Rights Act* provides as follows:

"No person other than the artist or a person acting with the artist's consent shall knowingly display in a place accessible to the public or publish a work of fine art or limited edition multiple of not

more than 300 copies by that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances which would reasonable be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom."

The California Art Preservation Act prohibits intentional "physical defacement, mutilation, alternation or destruction of a work of fine art."

In addition, if the work is to be installed, attached or incorporated within a structure, the Parties should determine at the outset whether it is considered a part of the building or a separate work of art. Generally, works that are part of a building can be photographed (or otherwise represented) by third parties such as commercial photographers, film companies, and the like, without copyright violation, whereas separate works require the copyright owner's permission to reproduce. In either case, where the artist retains the copyright, the Agency should require a broad license to reproduce the work.

[Option I]

8.2 Alterations of Site or Removal of Artwork

- a. The Agency shall notify the Artist of any proposed significant alteration of the Site that would affect the intended character and appearance of the Artwork. The Agency shall make a good faith effort to consult with the Artist in the planning and execution of any such alteration. The Agency shall make a reasonable effort to maintain the integrity of the Artwork.
- b. The Agency agrees not to arbitrarily remove or relocate the Artwork without first making a good faith effort to contact the Artist. The Artist shall not unreasonably withhold approval of removal or relocation of the Artwork. Should the Artist agree to such removal or relocation, the Artist shall provide the Agency with written handling instructions. In the event that the Artist is deceased or unable to otherwise give the Artist's consent, the current owner of the copyright of the Artwork shall not unreasonably withhold permission, keeping in mind the intentions of the Artist at the time of commission and fabrication.

[OR]

[Option II]

8.2 Alterations of Site or Removal of Artwork

- a. The Agency shall notify the Artist in writing upon [adoption of a plan of construction or alteration of the Site] which would entail removal or relocation of the Artwork which might result in the Artwork being destroyed, distorted or modified. The Artist shall be granted the right of consultation regarding the removal or relocation of the Artwork. If the Artwork cannot be successfully removed or relocated as determined by the Agency, the Artist may disavow the Artwork or have the Artwork returned to the Artist at the Artist's expense.
- b. The Artwork may be removed or relocated or destroyed by the Agency should the Artist and the Agency not reach mutual agreement on the removal or relocation of the Artwork after a period not to exceed [90] days after written notice to the Artist. During the [90] day period, the Parties shall engage in good faith negotiations concerning the Artwork's removal or relocation.
- c. In the event of changes in building codes or zoning laws or regulations that cause the Artwork to be in conflict with such codes, laws or regulations, the Agency may authorize the removal or

relocation of the Artwork without the Artist's prior permission. In the alternative, the Agency may commission the Artist by a separate agreement to make any necessary changes to the Artwork to render it in conformity with such codes, laws or regulations.

- d. If the Agency reasonably determines that the Artwork presents imminent harm or hazard to the public, other than as a result of the Agency's failure to maintain the Artwork as required under this Agreement, the Agency may authorize the removal of the Artwork without the prior approval of the Artist.
- e. This clause is intended to replace and substitute for the rights of the Artist under the Visual Artists' Rights Act to the extent that any portion of this Agreement is in direct conflict with those rights. The parties acknowledge that this Agreement supersedes that law to the extent that this Agreement is in direct conflict therewith.

Discussion

Section 8.2 takes into consideration that the Artwork is site-specific. Site-specific means that the Artist designed the Artwork specifically to be displayed at a particular Site and only that Site. The meaning of the Artwork is directly tied into the Site. A change in location of the Artwork may alter its meaning as imagined by the Artist or alter the Artist's statement as imbued in the Artwork.

The two alternative options provided above in Section 8.2 take into consideration that the Agency, such as a public university, may insist on an unencumbered right to remove, relocate or destroy the Artwork to ensure that any current or future construction at the Site is not hindered.

Article 9 Permanent Record

The Agency shall maintain on permanent file a record of this agreement and of the location and disposition of the Artwork.

Article 10 Artist as an Independent Contractor

The Artist agrees to perform all Artwork under this Agreement as an independent contractor and not as an agent or employee of the Agency. The Artist acknowledges and agrees that the Artist shall not hold himself or herself out as an authorized agent of the Agency with the power to bind in any manner.

The Artist shall provide the Agency with the Artist's Tax Identification Number and any proof of such number as requested by the Agency.

Discussion

Some municipalities require that all workers be paid prevailing union wages, which is a minimum hourly wage established by statute to be paid to employees. Artists must be aware of any such requirements so that they can take them into account in the preparation of a feasible budget.

Article 11 Nondiscrimination

The Artist shall not discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin, in connection with or related to the performance of this Agreement.

Article 12 Assignment of Artwork

The Artwork and services required of the Artist are personal and shall not be assigned, sublet or transferred. Any attempt by the Artist to assign this Agreement or any rights, duties or obligations arising hereunder shall be void and of no effect unless prior written consent is given by the Agency. The Agency shall have the right to assign or transfer any and all of the Agency's rights and obligations under this Agreement, subject to the Artist's consent, if ownership of the Site is transferred; if the Artist refuses to give consent, this Agreement shall terminate.

Article 13 Termination

- a. Either Party may terminate this Agreement without recourse by the other where performance is rendered impossible or impracticable for reasons beyond such Party's reasonable control such as, but not limited to, acts of nature; war or warlike operations; superior governmental regulation or control, public emergency or strike or other labor disturbance. Notice of termination of this Agreement shall be given to the non-terminating Party in writing not less than [____] days prior to the effective date of termination.
- b. The Agency may terminate this Agreement without cause upon [____] days written notice to the Artist. The Agency shall pay the Artist for services performed and commitments made prior to the date of termination, consistent with the schedule of payments set forth in Exhibit 3 of this Agreement. The Artist shall have the right to an equitable adjustment in the fee for services performed and expenses incurred beyond those for which the Artist has been compensated to date under Exhibit 3 with allowance for lost opportunities, unless the parties come to a settlement otherwise.
- c. If either Party to this agreement shall willfully or negligently fail to fulfill in a timely and proper manner, or otherwise violate any of the covenants, agreements or stipulations material to this Agreement, the other Party shall thereupon have the right to terminate this Agreement by giving written notice to the defaulting Party of its intent to terminate specifying the grounds for termination. The defaulting Party shall have [____] days after the effective date of the notice to cure the default. If it is not cured by that time, this Agreement shall terminate.
- d. If the Artist defaults [for cause other than death or incapacitation], the Artist shall return to the Agency all funds provided by the Agency in excess of expenses already incurred. The Artist shall provide an accounting. All finished and unfinished drawings, sketches, photographs and other Artwork products prepared and submitted or prepared for submission by the Artist under this Agreement shall be retained by the Artist. [The Agency [shall] retain the right to have the Artwork completed, fabricated, executed, delivered and installed.] However, the Artist shall retain the copyright in the Artwork and all rights under Article 7 and Article 8.
- e. If the Agency defaults, the Agency shall promptly compensate the Artist for all services performed by the Artist prior to termination. The Agency shall pay the Artist for services performed and commitments made prior to the date of termination, consistent with the schedule of payments set forth in Exhibit 3. The Artist shall have the right to an equitable adjustment in the fee for services performed and expenses incurred beyond those for which the Artist has been compensated to date with reasonable allowance for lost opportunities. The Artist shall retain possession and title to the [studies, drawings, designs, maquettes and models] already prepared and submitted or prepared for submission to the Agency by the Artist under this Agreement prior to the date of termination.
- f. Upon notice of termination, the Artist and his subcontractors shall cease all services affected.

Discussion

Failure to pay an installment constitutes a violation of this Agreement in accordance with paragraph (e) of Article 13.

Services performed beyond those for which the Artist has been compensated to date are services the Artist has performed, after receiving a payment installment for services previously performed, but performed prior to the forthcoming installment.

The Artist should keep track of the number of hours the Artist has expended in performance of this Agreement in addition to expenses incurred in the performance of this Agreement in the event that a dispute arises as to the amount of compensation that is equitable for the services performed beyond those for which the Artist has been compensated to date and for additional expenses the Artist has incurred in performance of this Agreement such as the purchase of materials.

[Article 14 Death or Incapacity]

If the Artist becomes unable to complete this Agreement due to death or incapacitation, such death or incapacity will not be deemed a breach of this Agreement or a default on the part of the Artist for the purpose of Article 13. However, nothing in this Article shall obligate the Agency to accept the Artwork.

- a. In the event of incapacity, the Artist shall assign the Artist's obligations and services under this contract to another artist provided that the , in the Agency's sole discretion, approves of the new artist. Alternatively, the Agency may elect to terminate this Agreement. The Artist shall retain all rights under Article 7 and Article 8. The Artwork and any reproductions thereof shall contain a credit to the Artist and a copyright notice in substantially the following form: Copyright © [Artist's name, date of publication].
- b. In the event of death, this Agreement shall terminate effective the date of death. The Artist's heirs shall retain all rights under Article 6 and Article 7. [The Artist's executor shall deliver to the Agency the Artwork in whatever form or degree of completion it may be at the time. Title to the Artwork shall then transfer to the Agency. However, the Artwork shall not be represented to be the completed Artwork of the Artist unless the Agency is otherwise directed by the Artist's estate.]

Article 15 Notices and Documents

Notices required under this Agreement shall be delivered personally or through the [registered or certified mail, return receipt requested] mail, postage prepaid, to the addresses stated below, or to any other address as may be noticed by a Party:

For the Agency: [Agency]
 [mailing address]
 [City, State, Zip]

For the Artist: [Artist]
 [mailing address]
 [City, State, Zip]

Notice shall be deemed effective on the date personally delivered or, if mailed, [three (3) days] after the postmarked date.

Article 16 Waiver

The Parties agree that a waiver of any breach of violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term of condition.

Article 17 Audit

The Agency shall maintain records of all documents, notices, checks, and other records required or produced under this Agreement or related thereto. The Artist agrees to the maintenance of such records for archival purposes. Such records shall be made available for inspection or audit, at any time during regular business hours, upon written request by [the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers]. Copies of such documents shall be provided to the Agency for inspection when it is practical to do so. Access to such records and documents shall also be granted to any Party authorized by the Artist, the Artist's representatives, or the Artist's successors-in-interest. The Agency will comply with any open records law applicable to these records.

Discussion

Some jurisdictions require the Artist to maintain all such records. In this case the Artist is generally required to maintain the records for a period of 3 years from the date of acceptance or the date final payment is made. Those records that are subject to an audit shall be maintained until the audit is resolved, even if this period extends beyond the 3 years stated.

Article 18 Conflict of Interest

The Artist and the Agency shall avoid all conflicts of interest or appearance of conflicts of interest in the performance of this Agreement.

Article 19 Arbitration

If, during the creation of the Artwork, its installation and subsequent existence, either Party breaches this Agreement, each Party agrees to submit to arbitration upon the request of the other provided that the breach is not cured within a reasonable time under paragraph (c) of Article 13.

If an ambiguity arises regarding this Agreement upon which the parties cannot agree or a dispute arises as to the completion of a provision, the Parties shall submit to [arbitration] [mediation].

Each Party agrees to be responsible for its own attorney's fees except as otherwise provided by statute.

Discussion

Arbitration is a type of alternative dispute resolution. It is done in lieu of filing an action in court. An advantage may be that it is less time consuming than a lawsuit. However, there are drawbacks that must be considered such as fees which can potentially be more than the filing fee of a lawsuit and that arbitration decisions are often final whereas a lawsuit judgment can be appealed.

There are also alternative dispute mechanisms, such as mediation, in which a third party aids in negotiating a settlement (as opposed to delivering a judgment as in arbitration or a lawsuit). An example of a dispute resolution clause is as follows:

“Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, is subject to mediation. If an ambiguity arises regarding this Agreement upon which the parties cannot agree or a dispute arises as to completion of a provision, the parties shall submit to mediation. A Party desiring mediation shall give notice (containing a general description of the controversy) to the other Party and designating by name and address a mediation service. The other Party shall agree to use the mediation service unless within five (5) days from the date of said notice they select and provide the service including the name and address of a second mediation service. The selected mediation service shall mediate the dispute between the parties.

- a. *Any claim, controversy, dispute or other matter in question arising out of or related to this Agreement, or the breach of this Agreement, shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either Party in any court. If the matter relates to or is the subject of a lien arising out of the Artist’s services, the Artist may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by arbitration.*
- b. *The Agency and the Artist shall endeavor to resolve claims, controversies, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with Mediation Rules of the American Arbitration Association currently in effect. A Party desiring mediation shall give notice (containing a general description of the controversy) to the other Party who shall within 3 business days provide a written response. The parties shall then meet with no more than one representative present to advise them for not less than one hour to determine if they can resolve the dispute through direct discussion. If the meeting does not resolve the dispute, each shall submit to the other Party within 3 days of their meeting a confidential written proposal for settlement. If they still cannot agree on the resolution to the dispute, the Party first requesting mediation shall designate by name and address a qualified mediator or mediation service which the other Party shall accept within 3 business days or the parties shall agree to use another mediation service, and if they cannot agree either may file for mediation in writing with the other Party to this Agreement and with the American Arbitration Association within 5 business days. The selected or AAA designated mediation service shall mediate the dispute between the parties.*
- c. *A Party’s request for mediation may be made concurrently with the filing of a demand for arbitration but, in that event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of ninety (90) days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.*
- d. *The Parties shall share equally the mediator’s fee and costs of mediation including any filing fees. Each Party agrees to be responsible for their own attorney’s fees except as otherwise provided herein or by statute. The mediation shall be held in the place where the artwork is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.*
- e. *Notwithstanding any provision of this Agreement to the contrary, any damage award to a Party on account of a Party’s breach of this Agreement, with the exception of the Artist’s duty under Article 6 to procure and maintain insurance, shall not exceed an amount equal to the sum of the payments in Exhibit 3.”*

Article 20 Amendments

No alteration, change or modification of the terms of this Agreement shall be valid unless made in writing and signed by both Parties hereto.

Article 21 Conflicts of Law

If any term, covenant, condition or provision of this Agreement, or the application thereof to any

person or circumstance, shall be held by a court of competent jurisdiction or arbitration panel or mediation procedure to be in conflict with the laws, rules, and/or regulations of the United States or the State of [_____], invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby to the extent the remainder of the terms, covenants, conditions or provisions of this Agreement are capable of execution.

Discussion

The Parties should keep in mind that the laws of any jurisdiction do evolve and change over time. While this is unlikely to happen during the duration of this Agreement, those provisions which survive the termination or expiration of this Agreement may be affected or become in conflict with the current law(s). Inability of one of the Parties to comply with one of the provisions of this Agreement due to a change in the law should not be considered a breach of that provision or of this Agreement.

Article 22 Choice of Law

This contract shall be governed by the laws of the State of [_____] both as to interpretation and performance.

Discussion

This provision is important because artists and owners can be from different states, and states can have very different laws governing the provisions of a particular contract which may be more or less favorable to one Party or the other.

Conditions for choice of law might include: where the agreement was made, where the artwork is fabricated, where the artwork is installed, where most of the performance of the agreement occurred, who had bargaining power, or if there is a governing contract provision.

Article 23 Entire Agreement

This Agreement, including the exhibits, comprises all of the covenants, promises, agreements, and conditions between the parties. No verbal agreements or conversations between the Parties prior to the execution of this Agreement shall affect or modify any of the terms or obligations.

For Agency:

For Artist:

Name

Title

Date

Name

Title

Date

Exhibit 1

Description of the Artwork

[This exhibit should provide a detailed narrative describing the proposed artwork with explicit detail regarding the overall form or design, scale, dimensions, color, and surface treatment of the Artwork.]

Exhibit 2Artwork Budget

[The estimated budget for the proposed artwork should be inserted here. The following sample budget worksheet is a guide to some of the costs the budget might include.]

SAMPLE BUDGET WORKSHEET

The following sample budget worksheet, provided by the Phoenix Office of Arts and Culture, is intended to assist artists in planning and developing an estimated budget for public art projects. The following worksheet is intended as a guide only and is not necessarily inclusive of all costs which may be incurred when undertaking a public art project. Not all costs listed will pertain to every project. A contingency of ten percent (10%) of the project total is highly encouraged to cover unexpected costs. The artist's fee is generally 15%–20% of the total project budget for design and fabrication projects. This fee may vary based on the actual work undertaken by the artist and according to the experience and reputation of the artist. The fee is generally intended to cover the creative work of the artist in developing the project concept. The fee is separate from and does not cover the artist's labor if the artist is responsible for fabrication of the project. Eligible project costs may vary from program to program.

ARTIST FEE (suggested 15%–20% of total project budget)

FINAL DESIGN DEVELOPMENT

Includes final proposal, engineering and/or architectural documents, budget and schedule.

Hourly fee for design

Engineering

TRAVEL

Airfare

Car Rental

Per Diem

INSURANCE

(not all insurance is required for each project)

Artwork

Inland Marine

General Liability

Workers' Compensation

Automobile/Hired Vehicle

PROFESSIONAL CONSULTANT FEES

Architect

Structural Engineer

Electrical Engineer

Conservator

Other

(Consultants must be licensed in the State of Arizona)

ADMINISTRATIVE EXPENSES

Shop Drawings and Contract Documents

Studio Costs

Correspondence
Phone/Fax
Artist Resource Guide i Page 11
Supplies
Copyright Registration
Project Documentation (in progress and completed)

MATERIALS AND SUPPLIES

(itemize all anticipated aspects and components with per unit and total cost estimates)

FABRICATION COSTS

(include and itemize all portions of subcontracted work and work to be completed by artist)

SITE PREPARATION

(do not include costs covered by the Agency or others)

TRANSPORTATION

Materials and finished work to the site
Storage
Other

INSTALLATION COSTS

Labor
Equipment (crane, scaffolding, or other)
Base or Mounting Devices and Components
Traffic Barricades/Control
Off-duty police
Landscaping
Site Restoration
Electrical modifications

ADDITIONAL LIGHTING

Design
Fixtures
Bulbs
Site Preparation
Installation

PERMITS AND TAXES

Sales Tax
Use Tax
Development Services Permit

OTHER COSTS

CONTINGENCY

(suggested 10% of project total)

TOTAL

Exhibit 3

Payment Schedule

Payment Schedule

The Agency shall pay the Artist a fixed fee of \$_____, which shall constitute full and complete compensation for all the services performed and materials furnished by the Artist under this Agreement. Payment shall be made in accordance with the following scheduled installments, each installment representing full and final payment for all services and materials provided prior to payment thereof:

- a. _____ upon the execution of this Agreement, recognizing that the Artist will invest time and expense in preparing the Design as set forth under Section 1.3;
- [b. _____ upon submission of the Design as set forth under Section 1.3;]
- [c. _____ upon the Agency's notification to the Artist of its approval of the Design as set forth under Section 1.3;]
- d. _____ within ____ days after the Artist notifies the Agency that the Artwork is fabricated and ready for delivery and installation at the Site as set forth under Section 1.5(f);
- [e. _____ within ____ days after the Artist provides the Agency with photographic documentation and written instructions for the maintenance and preservation of the Artwork as set forth under Section 1.7(e) and (f).]
- f. _____ upon [or within ____ days after] final acceptance of the Artwork by the Agency as set forth under Section 1.8(e).

Discussion

The installment payments can also be expressed as a percentage of the fixed fee. Some jurisdictions may desire that the Artist submit an invoice for each installment.

Where the Agency and the Artist share the expense of materials or labor, the installments may be prorated as the expenses are incurred. The Artist may also submit invoices to the Agency in such cases at specified intervals to be reimbursed a specified number of days after the Artist submits the invoice.

Under paragraph (d), the Agency may desire to compensate the Artist after the Agency has approved the Artwork.

The Parties may specify a period of time after which an installment must be submitted. This takes into consideration that the Agency may desire time to inspect and approve goods and services; unless the bid specification, purchase order, or contract specifies otherwise. This is in recognition of the fact that the Agency may have to deliver a request for payment (voucher) to a separate financing office, department, or entity. The imposition of an interest penalty may be desired to ensure that the Agency promptly conducts whatever inspection is desired and processes the installment.

A sample interest provision is:

"If payment of an installment has not been made to the Artist within ____ days of the stated date of payment for each respective installment without cause, a separate interest penalty of [.03333]% per day will be due and payable, in addition to the invoice amount, to the Artist. Interest penalties of less than \$1 will not be enforced."

Where the Agency requires that the Artist submit an invoice for payment, invoices which have to be returned to the Artist because of preparation errors may result in delay in payment, and should not be subject to an interest penalty. Invoice payment requirements do not start until a properly completed invoice is provided to the Agency.

Sample Payment Schedule:

<u>Payment</u>	<u>Amount</u>	<u>Percentage of Total</u>
1	\$1,000	10%
2	\$3,000	30%
3	\$3,000	30%
4	\$2,000	20%
5	\$1,000	10%
<i>Total Amount Not To Exceed</i>	<i>\$10,000</i>	<i>100%</i>

Exhibit 4

Insurance

Insurance – General

- a. The Artist shall procure and maintain for the duration of this Agreement, at the Artist's expense, insurance in the kinds and amounts as provided in this Exhibit 4 with insurance companies authorized to do business in [name of city or state]. The required insurance shall cover the Artist's employees, agents, contractors or subcontractors. The Agency, its officials, employees, agents and contractors shall be named as additional insureds. The coverage shall contain no special limitations on the scope of protection afforded to the Agency, its officials, employees, agents and contractors.
- b. The duration of the general liability insurance described in Exhibit 4 shall extend for ___ years after the termination of this Agreement.
- c. The Artist and the Artist's subcontractors' insurance coverage shall be the primary insurance as respects the Agency, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the Agency, its officials, employees, agents and contractors shall be in excess of the Artist's or the Artist's subcontractors' insurance and shall not contribute with the Artist's or the Artist's subcontractors' insurance. The coverage shall state that the Artist's or the Artist's subcontractors insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- d. Prior to undertaking any Artwork under this Agreement, the Artist, at no expense to the Agency, shall furnish to the Agency a certificate of insurance with original endorsements affecting coverage for each of the insurance policies provided in Exhibit 4. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates must be current and the Artist must submit replacement or renewal certificates of insurance for all the policies expiring during the term of this Agreement. Each certificate shall clearly indicate that the Artist has obtained insurance in the type, amount, and classification as specified in Exhibit 4 and that no material changes, cancellation, suspension or reduction in limits of insurance shall be effective except after [30] days prior written notice to the Agency. Each certificate shall indicate that the subcontractors are additional insureds or the Artist shall furnish separate certificates for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated in this Agreement, including, but not limited to, naming the parties as additional insureds.
- e. Any deductibles or self-insured retentions must be declared to, and approved by, the Agency. At the option of the Agency, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the Agency, its officials, employees, agents and contractors; or the Artist shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in the amount of \$[_____].
- f. Despite any changes to or cancellation of insurance, the Artist remains responsible for maintaining the required insurance coverage for the duration of the Agreement.
- g. Failure of the Artist to comply with any of the terms of this Article 6 shall be considered a material breach of this Agreement and cause for its immediate termination.
- [h. Should the Artist not be able to secure acceptable insurance coverage, the Agency may place coverage at cost to the Artist on behalf of the Artist on a project basis.]

Insurance Policies

- a. Commercial General Liability insurance policy, written on an occurrence form, including all the usual coverages known as:
- i) premises / operations liability
 - ii) products / completed operations
 - iii) personal / advertising injury
 - iv) contractual liability
 - [v] broad-form property damage]
 - [vi] independent contractor's liability]
- Said policy must provide the following minimum coverage:
- i) \$[1,000,000] combined single limit per occurrence for bodily injury, personal injury and property damage.
 - ii) \$[1,000,000] annual aggregate
- b. Automobile liability insurance policy, including coverage for owned, non-owned, leased or hired vehicles, providing the following minimum coverage:
- i) bodily injury liability of \$[50,000] for each person,
 - ii) \$[300,000] per occurrence,
 - iii) property damage liability of \$[25,000] for each occurrence.
- The Artist agrees to keep in good standing a valid driver's license at all times, where appropriate, during the term of this Agreement.
- [c. Transportation/Cartage insurance all-risk. Coverage must include loading, transportation and unloading of the Artwork. If the Artwork is to be loaded, transported or unloaded by a person or entity other than the Artist, the insurance coverage must cover that person or entity. The minimum limit shall be the total amount of compensation paid to Artist through the date of loading under Exhibit 3.]
- [d. All Risk Installation insurance which covers physical damage to or destruction of the Artwork. If the Artwork is to be installed by a person or entity other than the Artist, the insurance coverage must cover that person or entity. The minimum limit shall be the total amount of compensation paid to Artist through the date of the beginning of installation of the Artwork under Exhibit 3.]
- [e. Worker's Compensation and Employers' Liability insurance in accordance with the statutory requirements of the State of _____ providing coverage for any and all employees of Artist. The Artist shall require all subcontractors to carry this coverage also. The minimum coverage for the Worker's Compensation and Employers' Liability insurance shall be \$[100,000]. If, however, the Artist does not have any employees as defined by state statutes and regulations and does not wish to cover himself or herself for Worker's Compensation, the Artist shall sign the following statement:

["I, do not have, nor intend to have for the full term of this Agreement, any employees. Furthermore, I do not wish to obtain or be covered under any Worker's Compensation insurance coverage and, therefore, am signing this statement in lieu of providing the above require Worker's Compensation coverage."]

(Artist's signature)

(Print Artist's name)

Exhibit 5

Transfer of Title

STATE OF _____

COUNTY OF _____

TRANSFER OF TITLE

FOR VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged, the undersigned Artist located at the address noted below does hereby sell, transfer and convey to the Agency, located in _____, _____, its assigns and successors, all right, title and interest in the ownership of the Artwork commissioned by Agreement of _____ and as described therein.

Title: _____.

Location: _____.

IN WITNESS WHEREOF, Artist has executed this written transfer of title on this the ____ day of _____, 20__.

WITNESS

ARTIST

Sworn to and subscribed
before me this ____ day
of _____, 20__.

ADDRESS

SOC. SEC. NO. _____

NOTARY PUBLIC
My Commission Expires: _____
(NOTARY SEAL)

Appendix 1 – Insurance Overview
PUBLIC ART CONTRACTS: PROTECTIONS AGAINST LOSS
Provided by the Public Art Network Services Committee
Prepared by the San Francisco Arts Commission
and the City of San Francisco Risk Manager

Introduction

Governmental agencies and other “deep pocket” organizations are frequently the target of lawsuits because of their considerable assets. Such organizations tend to be zealous in requiring specific contractual guarantees as well as insurance and bond coverage in order to minimize their risk of loss.

This document is provided as a service to the public art field in order to aid in the understanding of Risk of Loss, and the common forms of protection against loss. It covers standard contractual language along with definitions of Insurance, Bonds, and some of the associated clauses associated with Risk of Loss, including Hold Harmless, Incidental and Consequential Damages and Indemnification. The contract language is taken from the City of San Francisco’s standard contract. Descriptions are based on information provided by San Francisco’s Risk Manager. The laws and practices of other states and local agencies may vary considerably from this standard.

The document includes:

A definition of Risk of Loss, which is the justification for certain contract language as well as all insurance and bonds.

Insurance and bonding requirements to be found in most public art contracts, with descriptions and explanations of when the insurance or bond is required, why it is needed and whom or what it protects. Explanations of the legal concepts of Hold Harmless, Incidental and Consequential Damages, and Indemnification.

Standard insurance certificate and endorsement, annotated.

Please consider this as a starting point. We invite further comments, additions and questions.

I. RISK OF LOSS DETERMINES INSURANCE AND BOND REQUIREMENTS

The type and amount of Insurance Coverage or Bonding is determined by assessing the risk of loss, or potential *liability*. The risk will be more for an artwork fabricated far from the installation site, transported across the country and installed in a thirty-foot ceiling, than for an artwork of the same dollar value that is assembled on site and installed on a floor. Similarly, the liability may be different depending upon the type of work being undertaken: fabrication, transportation or installation. In most situations, it will be the responsibility of an agency’s Risk Manager to assess the level of risk.

Rules of thumb in determining risk:

The more people involved the more risk. (For instance, an artist working with many subcontractors incurs more risk than if working alone in the studio.)

Risk is generally higher during transportation or movement.

The value of a public artwork is generally considered the cost of the contract.

Risk is also determined by whether one can afford the loss.

Risk Transfer

Once the risk of loss has been determined, then the question becomes how to transfer the risk to someone else besides the contracting Agency. Risk of loss can be transferred through a bond, through insurance and/or through an indemnification clause. The risk may be transferred to the Artist or a bonding company. Artists can and should transfer the risk further, to their subcontractors, by requiring them to abide by the terms of their contract with respect to liability and to obtain insurance that names the art project and/or the Artist and the Agency as Additional Insureds.

II. INSURANCE

Insurance coverage protects the financial assets of the policy holder, or *Named Insured* (the Artist), as well as any other party when the policy is endorsed to name that party as *Additional Insured*. Coverage does not limit an Artist's liability with respect to Indemnification. (See section on indemnification, below).

In order to prove the existence of the required insurance, Artists and their Subcontractors are required to submit copies of Insurance Certificates and separate Endorsements naming the Agency and all of its employees, agents and assigns, as well as any others to be covered as Additional Insureds. (See examples below).

Many public art contracts require that Artists and/or their subcontractors carry the following types of insurance coverage:

Worker's Compensation

"Workers Compensation Insurance, in statutory amounts with Employers' Liability Limits not less than \$1,000,000 each accident. Artist shall obtain such insurance prior to certification of this Agreement. To the extent Artist warrants, in writing, that Artist is not an employer and has no employees as defined by the [STATE] Labor Code Sections [SECTION #], Artist need not provide to the City proof of Workers Compensation insurance."

Discussion

In most States, State Law requires that every individual or company that has even a single employee must carry Worker's Compensation Insurance to cover job-related injuries or illness. The IRS has final authority over whether a worker is or is not an employee. Many contracts allow the Artist to submit a letter stating that she or he has no employees in order for this provision to be waived.

This insurance protects Agencies because an employee of an Artist or his Subcontractor doing business with the Agency can file a Workers' Compensation Claim against the Agency should the employer go out of business, not carry coverage or become bankrupt. The employee must have been injured while performing work under the Artist's contract.

Professional Liability Insurance

"Professional Liability Insurance for all design professionals (such as architects, landscape architects or engineers) who provide Artist with any signed stamped drawing or calculations. Such insurance shall have limits not less than \$1 million for each claim with respect to negligent acts, errors and omissions, and any deductible may not exceed \$50,000 each claim. Artist or Artist's subcontractors shall obtain such insurance when Artist subcontracts for any work from such a design professional, and prior to the submittal of Construction Documents.

Any design professional required to obtain professional liability insurance must maintain proof of insurance for the term of this Agreement.”

Discussion

This insurance protects both Artists and Agencies in the event that a design professional or other worker makes an error or omission that causes the failure of the artwork or installation. Design professionals commonly carry Professional Liability Insurance. It is standard in the business. Agencies may require others to carry a similar type of insurance known as Errors and Omissions Insurance, which can be costly, although the coverage limits may be modified based on the perceived level of risk. The insurance certificate must name to the specific art project in order for the policy to cover it. If not project specific, insurance companies will pay up to a total amount of coverage for either one or multiple claims but no further.

General Liability Insurance

“General Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations. Artist shall obtain such insurance prior to fabricating, transporting or installing the Work at the Site.”

Discussion

General Liability Insurance is typically required after the completion of design, as fabrication is commenced, and is maintained through the completion of the project. This insurance is typically carried by both the Artist and the Artist’s subcontractors, whether or not the Artist has actual care and control of the Artwork during the subcontractor’s work. Agencies may also require that the insurance remain in force for several years after project completion to cover possible failure of the Artwork. The insurance covers operations, which could harm the public, such as property damage or bodily injury. It protects both the Artist and the Agency from financial loss in the event of a claim for damages due to physical injury or damage to property such as a cut caused by a sharp edge or spilled paint during installation. Specific policies will vary in the types of coverage that they provide. Coverage categories may include, but are not limited to: Contractual Liability, Personal Injury, Broadform coverage of Real Property, Collapse or Explosion, Work performed by Subcontractors, Products and Completed Operations, and Intellectual Property.

Liability Insurance can be on an occurrence policy basis, meaning that the insurance covers all of the contractors’ activities that occur during anytime the policy is or was in force, or a claims made basis, which limits filing claims only to the policy year and claims must be reported within that policy year. Agencies prefer that insurance be on an occurrence form, rather than a claims made form, although the former may be difficult to obtain.

Agencies and Artists are covered by Liability Insurance only if the Insurance carrier issues a document endorsing the policy to name the Agency and Artist as Additional Insureds.

Automobile Liability Insurance: If Artist is an individual, Personal Automobile Liability Insurance with limits not less than \$100,000/\$300,000 each occurrence. If Artist or Artist’s Subcontractor is a corporation or other legal entity, Business Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable, unless a lesser amount is approved by City’s Risk Manager. Artist

shall obtain such insurance prior to certification of this Agreement.

Discussion

This insurance covers both Agencies and Artists. If an Artist or Subcontractor is using a vehicle to perform contract-related work, even if it is only to attend project meetings, any accident caused could be linked to the project. A claim could be made against both the Agency and the Artist. Many insurance companies will not name an Agency as additional insureds on personal automobile liability policies and may not provide personal liability coverage beyond 100,000 to \$300,000. In San Francisco, we were able to revise our contract through discussion with the Risk Manager to allow only personal liability insurance if the Artist is an individual and not a business.

Property (Fine Arts) Insurance, or Insurance Against Loss

“Fine Arts Insurance or other insurance against loss in an amount to be specified in a subsequent contract modification. Artist shall obtain such insurance prior to commencing fabrication of the Artwork.”

Discussion

Many Agencies provide progress payments to assist Artists with the costs of producing the artwork prior to its completion and acceptance by the Agency. If the work is lost, damaged or stolen while in the care of the Artist, Property Insurance, if properly endorsed, would recompense the Agency, which would determine the disposition of the funds to either restore, replace or abandon the Artwork. Subcontractors who carry this insurance would protect the assets of both the Artist and the Agency by naming them as Additional Insureds.

There are four types of policies covering real and personal property: basic form, broad form, special form and all risks. The first two cover named perils only, while the third covers any direct damage not specifically excluded. The fourth covers any direct damage not specifically excluded and provides the broadest coverage. Most Agencies require special form or all-risk insurance.

III. BONDS

In California, any public works contract in excess of \$25,000 requires a Labor and Materials Bond. Agencies can make the distinction between an artwork that is considered a “public works project” if the artwork provides an essential component of a building without which it cannot function. Examples of such functional work would include a door, gate, glass wall, or floor. Individual stand alone artworks do not generally require bonds. Few Artists and small contractors have the assets and organizational infrastructure required to obtain a bond. As an alternative, they may pledge material assets to the Agency that can be forfeited if they do not fulfill the terms of their contracts.

Bond Language

a. Labor and Materials Bond. If specified in a subsequent modification, either (1) the labor and materials costs associated with construction are expected to exceed \$25,000 and this Agreement is for a “public work” as defined by California Civil Code §3100, or (2) a bond is required in the Commission’s discretion. In either case, Artist is required to obtain a payment bond in the amount specified in a subsequent modification. Such bond must include such terms and conditions as are

required by City's Risk Manager.

b. Performance Bond. Where appropriate, City may require that Artist obtain a performance bond in an amount specified by City. Such bond must include such terms and conditions as are required by City's Risk Manager.

c. The bonds shall name as dual obligees Artist, City and County of San Francisco, and the specific project. In the event of Artist or any of Artist's subcontractors' failure to perform, Artist shall assign all rights under any Performance and Payment or Labor and Materials bond in favor of City.

Discussion

A bond is a surety, meaning that the Artist's responsibility (but not risk) is assumed by the bonding company. A surety is a commitment by a bonding agency to be liable for the default or failure of duty of another. An Agency would file a claim with a bond company if the Artist or Subcontractor defaults, or fails to perform per the contract agreement.

Bonds can be for any length of time, but are not indefinite. Some bonds are written on a "continued until canceled" basis, although currently most bonds are written on an annual basis. A bond is secured by the material assets and professional standing of the Artist. Few Artists and small contractors have the assets and organizational infrastructure required to obtain a bond. As an alternative, they may pledge material assets to the Agency that can be forfeited if they do not fulfill the terms of their contracts.

Bonds have different ratings, which describes the quality and financial security of the bonding company. A-XIII rated bonds are preferred, however some B-rated bonds are also acceptable.

Commonly required bonds include:

Performance Bond

A performance bond guarantees payment to complete a project should an Artist be unable to complete the project due to the Artist's actions. The bond amount is based on the cost of the contract.

Labor and Materials Bond

A Labor and Materials Bond guarantees payment to persons or companies that worked on or supplied materials or labor to an artist's project. The bond amount is based on the Artist's calculation of labor and materials costs at the outset of the project.

Maintenance Bond

A Maintenance Bond covers the period starting from when the Agency accepts the artwork to the end of the term of the bond. This bond covers items that are defective and need to be redone. The term of the bond depends upon the bonding market.

Bid Bond

A Bid Bond ensures that an Artist will perform the work for the agreed upon price.

IV. BASIC PROTECTION - INDEMNIFICATION, INCIDENTAL AND CONSEQUENTIAL DAMAGES, HOLD HARMLESS

In addition to the insurance and bonding protections described above, public art contracts include further protection for the contracting Agency, protection that remains in effect whether or not the Artist obtains insurance or a bond. The effect of this language is to place the liability for the Artwork and the attendant operations entirely in the hands of the Artist or his or her subcontractors. Artists themselves can and should be protected by passing these responsibilities on to subcontractors, by stipulating that both the Agency and the Artist be named as Additional Insureds on the subcontractor's insurance policies.

Indemnification

"To the fullest extent permitted by law, Artist shall assume the defense of, indemnify and save harmless City and its officers and employees (collectively "Indemnitees") for any claim, loss, damage, injury (including, without limitation, injury to or death of an employee of Artist or Artist's subcontractors) and liability of every kind, nature and description (including, without limitation, incidental and consequential damages, court costs, attorneys' fees and costs of investigation) that arise directly or indirectly, in whole or in part, from: (1) the services under this Agreement, or any part thereof, (2) any act or omission of Artist, any consultant or subcontractor to Artist, anyone directly or indirectly employed by them, or anyone that they control (collectively "Liabilities"). The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City. Artist assumes no liability whatsoever for the sole negligence or willful misconduct of any Indemnitee or contractors of any Indemnitee. Multiple party liability shall be determined pursuant to comparative fault principles in the State of California.

Artist's indemnification obligations for claims involving "Professional Liability" (claims involving acts, errors, or omissions in the rendering of professional services) and "Economic Loss Only" (claims involving economic loss which are not connected with bodily injury or physical damage to property) shall be limited to the proportionate extent of Artist's negligence or other breach of duty.

Artist shall indemnify and hold City harmless from all loss and liability (including attorneys' fees, court costs and all other litigation expenses) for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark and all other intellectual property claims of any person or persons in consequence of City's acceptance of Artist's Work or the use by City, or any of its officers or agents, of articles or services to be supplied in the performance of this Agreement. Such obligation shall apply where City's use of Artist's work is authorized under this or any subsequent agreement between the parties."

Discussion

An indemnification clause secures (covers) one party (the Agency) against a loss caused by another (the Artist). An Artist, being in the unique position of controlling the construction of an artwork, will defend, (provide legal defense) and pay any claim should the Agency, which has no control over the construction of the artwork, be sued for any action that the Artist commits.

Indemnification applies to liability for a loss shifted from a non-responsible party to a party who is responsible. With the liability goes the flow of dollars or payment. In other words, the non-responsible party (the Agency) pays the responsible party (Artist) not only for the end product or service but also for assuming the

indemnification in relation to the product or service.

Hold Harmless (or save harmless-see Indemnification, above)

A hold harmless agreement is a contractual arrangement whereby one party assumes liability inherent in a situation and as a result relieves the other party of responsibility. For example, if an artist designs and fabricates a sculpture that has the potential of collapsing or causing harm to others (even if the sculpture has no potential or known risk or danger), and the Agency has no part in the design or fabrication, the Artist would relieve the Agency of any responsibility (liability) for the collapse or harm.

Incidental and Consequential Damages; Liquidated Damages

Incidental and Consequential Damages: “Artist shall be responsible for incidental and consequential damages resulting in whole or in part from Artist’s acts or omissions. Nothing in this Agreement shall constitute a waiver or limitation of any rights that City may have under applicable law.”

Liquidated Damages: “By entering into this Agreement, Artist acknowledges that in the event the Work is delayed beyond the scheduled milestones and timelines provided in this Agreement, City may suffer actual damages that will be extremely difficult to determine. Commission may determine that specification of liquidated damages is appropriate for some or all phases of Work under this Agreement and, if so, shall specify the amount of liquidated damages in the appropriate phase of Work. Artist agrees that the specified sum of damages per day for each calendar day of delay beyond scheduled milestones and timelines is not a penalty, but is a reasonable estimate of the loss that City will incur based on the delay, established in light of the circumstances existing at the time this Agreement was awarded.

City may deduct a sum representing the liquidated damages from any money due to Artist. Such deductions shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Artist’s failure to deliver to City within the time fixed or such extensions of time permitted in writing by the Commission.”

Discussion

Incidental and Consequential and Liquidated damages are monetary penalties assessed due to delay, breach of contract or failure of an artwork. They are generally found in public art contracts, however they may be waived based on the Artist’s scope of work.

Incidental Damages

Incidental Damages are the reasonable expenses that occur should the other party breach a contract. Expenses might include transportation costs, additional administrative charges, and the cost of mitigating the delay or breach of contract.

Consequential Damages

Consequential Damages do not come directly or immediately from an act but are those damages that come from special circumstances that could or could not be foreseeable as a result of the original act. An example would be the failure of a pump on a fountain specified by an Artist’s subcontractor. The resulting algae growth and required cleanup that results from the failure of the pump is a consequential damage.

c. *Liquidated Damages (Penalty Clause)*

Liquidated Damages can apply to the amount of damages set by a legal judgment. Liquidated Damages can

also be determined within the contractual agreement between the parties to the contract, as the amount to be recovered by either party, should the other party breach the agreement. For instance, an Artist may be assessed a penalty (\$10 - \$25) for every day that the delivery of the artwork is delayed. The terms of the damages must be carefully described in the contract.

INSURANCE FORMS

CERTIFICATES OF INSURANCE

(Prepared by the San Francisco Risk Manager)

The following are the twenty-one (21) key points of requirement on a certificate of insurance. Each point is coordinated with a number on the sample certificate of insurance that follows. A certificate of insurance is clearly labeled as such.

1. Look for the date of issue. This box must be filled. If not, question the validity of the certificate.
2. Pay careful attention to this item, it identifies the limits of the certificate and does not amend the policy. Remember, "additional insured" status amends a policy.
3. The insurance broker's name, address and telephone number must be inserted since this is the point of contact should there be a need for additional policy information.
4. This area contains the contractor's name, address and other identifying information.
5. Companies affording coverage should be identified according to the type of insurance offered. This item coordinates with Item 7.
6. This is a certification statement that connects the insured to the types of coverages identified.
7. This column identifies the types of coverages and may outline specific areas of coverage within a specific policy.
8. The policy number goes here. Check the policy number to determine which types of policies include which types of coverages.
- 9 & 10. The policy start date and the policy expiration date show the coverage period. Any contract outside of the coverage period is not allowed until proof of coverage is presented which places the contract within the coverage period.
11. The limits columns identify the dollar limits of coverage under various conditions.
12. The focus here is claims made vs. occurrence coverage. This relates directly to the contract insurance language and affects the dollar limit of coverage.
13. There are various automobile coverage requirements. This box identifies coverages based on contract requirements.
14. These coverages may be used to complete general liability, or automobile contractual coverage requirements.
15. Worker's Compensation coverage is required if the contractor has a single employee. If the contractor has no employees, the contractor may elect not to carry this coverage. In this circumstance, Risk Management may grant a waiver to this coverage.
16. These coverages are as appropriate, according to the contract.
17. This is the message center for certificates. The most critical item to verify in this area is that the correct "additional insureds" are properly identified. The acceptable minimal language is, "The City and County of San Francisco and its officers, employees and agents are named as additional insureds."
18. When you see the additional insured language, be sure to look for a policy endorsement. See Item 2. Additional insured status or named insured status alters the policy.
19. The Certificate Holder is the City: however, to prevent the certificate from meandering around the City, always include a notice or attention sentence in the contract. This item must be completed by the broker.

20. At times, underwriters will not accept the language as written in the contract. Should that occur, Risk Management will make a determination as to acceptability.
21. Do not accept a certificate that is unsigned. Send it back to the broker with a notation. An unsigned certificate is no certificate.

POLICY NUMBER: [REDACTED]
[REDACTED]

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED -- OWNERS, LESSEES OR
CONTRACTORS (FORM B)**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

**San Francisco Arts Commission
City and County of San Francisco
25 Van Ness Avenue, Suite #240
San Francisco, California 94102**

Job: San Francisco Art Commission

(If no entry appear above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

IF YOU ARE REQUIRED BY A WRITTEN CONTRACT TO PROVIDE PRIMARY INSURANCE, THIS POLICY SHALL BE PRIMARY AS RESPECTS YOUR NEGLIGENCE AND CONDITION 4. OTHER INSURANCE DOES NOT APPLY, BUT ONLY WITH RESPECTS TO COVERAGE PROVIDED BY THIS POLICY.