

THIS PRINT COVERS CALENDAR ITEM NO. : 10.3

**SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY**

DIVISION: Central Subway

BRIEF DESCRIPTION:

Approving the SubwayArt18: UMS: Fabrication Campbell/Klotz Artwork Agreement with Demiurge LLC (Demiurge) for fabrication of an artwork designed by Jim Campbell and Werner Klotz for the Union Square Market Street Station Platform of the Central Subway Project for an amount not to exceed \$819,287.



SUMMARY:

- In 2011, the City contracted with Jim Campbell (DBA “White Light Inc.”) and Werner Klotz to provide designs for a suspended stainless steel artwork for the Central Subway Project under the Artist Contract.
- In 2017, the Art Commission conducted a competitive process by which it selected Demiurge LLC to fabricate Campbell and Klotz’s designs.
- The Arts Commission authorized the Director of Cultural Affairs to enter into contract with Demiurge for an amount not to exceed \$819,287 for final development of artwork design specification, fabrication, transportation, and installation consultation of an artwork by artist team of Werner Klotz and Jim Campbell for the platform level of Central Subway Union Square Market Street Station.

ENCLOSURES:

1. SFMTAB Resolution
2. Demiurge LLC Agreement
3. <http://www.centralsubwaysf.com/FSEIS-SEIR>

APPROVALS:

	DATE
DIRECTOR 	10/12/2017
SECRETARY 	10/12/2017

ASSIGNED SFMTAB CALENDAR DATE: October 17, 2017

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PURPOSE

The purpose of this item is to request the SFMTA Board of Directors to approve the agreement with the selected artwork fabricator (Demiurge LLC) for an amount not to exceed \$819,287 for final development of artwork design specifications, fabrication, transportation and installation consultation of an artwork by artist team of Werner Klotz and Jim Campbell for the platform level of Central Subway Union Square Market Street Station.

STRATEGIC GOAL GOALS AND TRANSIT FIRST POLICY PRINCIPLES

This action supports the following SFMTA Strategic Plan Goal and Objectives:

Strategic Plan Goal 3 – Improve the environment and quality of life in San Francisco
Objective 3.3 Allocate capital resources effectively

This item will support the following Transit First Policy Principles:

2. Public transit, including taxis and vanpools, is an economically and environmentally sound alternative to transportation by individual automobiles. Within San Francisco, travel by public transit, by bicycle and on foot must be an attractive alternative to travel by private automobile.

DESCRIPTION

The UMS station is one of the three new subway stations being constructed as part of the Central Subway Project that will extend the Muni Metro T Third Line to provide a direct transit link between the Bayview/Hunter's Point and Mission Bay areas to SoMa, downtown, and Chinatown. The artists, Jim Campbell and Werner Klotz, previously selected through Central Subway competitive art competition, have designed a site-specific stainless steel suspended sculpture that will be attached in sections and suspended from the side walls and struts above the platform level in the Union Square Market Street (UMS) station. This artwork will feature highly polished stainless steel discs on the suspended sculpture which will create a ribbon of light and ambient reflections throughout the platform level of the station. The suspended sculptural scroll will cascade down from the ceiling at one end of the platform, span the entire platform level, and terminate in a loop at the other end of the platform. The length of the sculpture is approximately 270 linear feet.

Selection Process:

The Request for Proposals for a fabricator for this art piece was advertised by the Arts Commission on December 6, 2016 and the final deadline for submission of proposals was March 13, 2017. Proposals were received from the following three fabrication firms: Adirondack Studios, Demiurge LLC and Gizmo Art Production, Inc. A Selection Committee comprised of staff from the Arts Commission, a project architect from the Central Subway Design Group, and the artwork designer evaluated the three written proposals and accompanying fabrication samples. The committee selected Demiurge LLC as the highest-ranking proposer with a

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proposed cost of \$1,502,250.59. The City's independent cost estimate for the work was \$817,000. The parties negotiated the cost to fabricate the artwork for an amount not to exceed \$819,287. The SFMTA's Contract Compliance Office reviewed the scope of the work and determined that there would be no Small Business Enterprise (SBE) participation goal due to the specialized nature of the services solicited, lack of subcontracting opportunities, and limited availability of SBEs to perform the proposed work.

Scope of Contract:

The selected fabricator will work with the artist to further develop the Specifications for the artwork by producing up to ten additional polished and stamped stainless steel samples in consultation with the artist. The fabricator will then fabricate the artwork components in accordance with the artist's instructions and per the drawings and specifications, which include: fabricate custom metal artwork components; assemble and finish artwork into segments; mount hardware onto sculpture segments; and furnish connecting attachment hardware per design. The fabricated artwork and components will be delivered to the Central Subway General Contractor's off-site storage no later than August 31, 2018.

STAKEHOLDER ENGAGEMENT

The Arts Commission conducted outreach to members of the community, arts professionals, Central Subway representatives and other stakeholders during the selection of artists and artwork designs. The proposed artwork was favorably received and the artwork design was approved at three stages of design by the Arts Commission.

ALTERNATIVES CONSIDERED

Disapproval of this fabrication contract by the Board would prevent the installation of integrated artwork within the Union Square Market Station. The selection process to procure the artwork fabrication agreement was administered by the Arts Commission. The agreement was procured through a competitive procurement process in order to insure that Artwork funding is being expended in accordance with FTA Best Management Practices.

FUNDING IMPACT

Funding for Artwork for the Project was provided by FTA New Start Fund, State Transportation Bond Proposition 1A and 1B and Half-Cent Local Sales Taxes, which the SFMTA provides to the San Francisco Arts Commission as required by City Administrative Code Section 3.19 for an art enrichment allocation based on 2% of the eligible construction costs for City and County of San Francisco capital improvement projects. The art enrichment budget for the Central Subway Project's public art program at three subway stations and one platform station is \$14,500,000. The cost of the artwork fabrication by Demiurge LLC in the amount of \$819,287 will come from the Central Subway art enrichment budget. Entering into contract with Demiurge LLC to fabricate the artwork will not increase budgeted costs to the City.

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ENVIRONMENTAL REVIEW

The Central Subway Final Supplemental Environmental Impact Statement / Supplemental Environmental Impact Report (Central Subway SEIS/SEIR) evaluated the environmental impacts of the Central Subway project, including construction of the subway stations. On August 7, 2008, the San Francisco Planning Commission certified the Final SEIR (Case No. 1996.281E). On August 19, 2008 the SFMTA Board of Directors approved Resolution 08-150 adopting Central Subway Project Alternative 3B as the Locally Preferred Alternative, the CEQA Findings, Statement of Overriding Considerations, and the Mitigation Monitoring and Reporting Plan.

On July 15, 2014, when the SFMTA Board of Directors adopted Resolution No. 14-12, the Board found, based on its review of the Final SEIS/SEIR, that no additional environmental review was required under Public Resources Code section 21166. On April 5, 2016, when the SFMTA Board of Directors adopted Resolution No. 16-044, the Board further reviewed and considered the Central Subway Project Final SEIS/SEIR and the record as a whole, finding that there were no substantial project changes and no substantial changes in project circumstances that would require major revisions to the Central Subway Project Final SEIS/SEIR due to the involvement of new significant environmental effects or an increase in the severity of previously identified significant impacts, and there was no new information of substantial importance that would change the conclusions set forth in the Central Subway Project Final SEIS/SEIR.

The environmental review determination is on file with the SFMTA Board of Directors, and may be found in the records of the Planning Department at 1650 Mission Street in San Francisco, and is incorporated herein by reference.

OTHER APPROVALS RECEIVED OR STILL REQUIRED

By Resolution No. 0501-17-103, the Arts Commission authorized the Director of Cultural Affairs to execute this contract with Demiurge LLC for an amount not to exceed \$819,287 for final development of artwork design specifications, fabrication, transportation and installation consultation of an artwork by artist team of Werner Klotz and Jim Campbell for the platform level of Central Subway Union Square Market Street Station.

The City Attorney's Office has reviewed this calendar item.

No other approvals are required for this Contract.

RECOMMENDATION

SFMTA staff recommends that the SFMTA Board of Directors approve the SubwayArt18: UMS: Fabrication Campbell/Klotz Artwork Agreement with Demiurge LLC (Demiurge) for fabrication of an artwork designed by Jim Campbell and Werner Klotz for the Union Square Market Street Station Platform of the Central Subway Project for an amount not to exceed \$819,287.

SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY
BOARD OF DIRECTORS

RESOLUTION No. _____

WHEREAS, The San Francisco Municipal Transportation Agency (SFMTA) and the San Francisco Arts Commission (collectively, “the City”) in 2011 contracted with Jim Campbell (DBA “White Light LLC”) and Werner Klotz (Artist Team) to provide artwork designs for a suspended stainless steel artwork for the Central Subway Project under “SubwayArt04 – UMS Platform Artwork” (Artwork Design Contract); and

WHEREAS, On December 6, 2016, the Arts Commission issued a Request for Proposals (RFP) for Contract SubwayArt18: UMS: Fabrication Campbell/Klotz Artwork, to procure services from an artwork fabricator to produce artwork designed by the Artist Team; and,

WHEREAS, The City received proposals on March 13, 2017 from the following three fabrication firms: Adirondack Studios, Demiurge LLC and Gizmo Art Production, Inc.; and,

WHEREAS, A Selection Committee comprised of staff from the Arts Commission, a project architect from the Central Subway Design Group, and the artwork designer evaluated the three written proposals and accompanying fabrication samples and selected Demiurge LLC as the highest-ranking proposer; and,

WHEREAS, The Central Subway Project was reviewed in the Central Subway Final Supplemental Environmental Impact Statement / Supplemental Environmental Impact Report (Central Subway SEIS/SEIR), certified by the San Francisco Planning Commission on August 7, 2008, and on August 19, 2008, the SFMTA Board of Directors approved Resolution 08-150 adopting Central Subway Project Alternative 3B as the Locally Preferred Alternative, the CEQA Findings, Statement of Overriding Considerations, and the Mitigation Monitoring and Reporting Plan; and,

WHEREAS, On July 15, 2014, when the SFMTA Board of Directors adopted Resolution No. 14-12, the Board found, based on its review of the Final SEIS/SEIR, that no additional environmental review was required under Public Resources Code section 21166; On April 5, 2016, when the SFMTA Board of Directors adopted Resolution No. 16-044, the Board further reviewed and considered the Central Subway Project Final SEIS/SEIR and the record as a whole, finding that there were no substantial project changes and no substantial changes in project circumstances that would require major revisions to the Central Subway Project Final SEIS/SEIR due to the involvement of new significant environmental effects or an increase in the severity of previously identified significant impacts, and there was no new information of substantial importance that would change the conclusions set forth in the Central Subway Project Final SEIS/SEIR; and,

WHEREAS, The environmental review determination is on file with the SFMTA Board of Directors, and may be found in the records of the Planning Department at 1650 Mission Street in San Francisco, and is incorporated herein by reference; and,

WHEREAS, The Arts Commission, under Resolution No. 0501-17-103, has approved the contract with Demiurge LLC for an amount not to exceed \$819,287 for final development of artwork design specifications, fabrication, transportation and installation consultation of an artwork by artist team of Werner Klotz and Jim Campbell for the platform level of Central Subway Union Square Market Street Station; now, therefore be it

RESOLVED, The SFMTA Board of Directors approves the SubwayArt18: UMS: Fabrication Campbell/Klotz Artwork Agreement with Demiurge LLC (Demiurge) for fabrication of artwork designed by Jim Campbell and Werner Klotz for the Union Square Market Street Station Platform of the Central Subway Project for an amount not to exceed \$819,287.

I certify that the foregoing resolution was adopted by the San Francisco Municipal Transportation Agency Board of Directors at its meeting of October 17, 2017.

Secretary to the Board of Directors
San Francisco Municipal Transportation Agency

**City and County of San Francisco
Arts Commission
401 Van Ness Avenue, Suite 325
San Francisco, California 94102**

**PROFESSIONAL SERVICES AGREEMENT BETWEEN THE CITY AND COUNTY OF
SAN FRANCISCO
AND
DEMIURGE LLC
TO PROVIDE ARTWORK FABRICATION FOR THE CENTRAL SUBWAY PROJECT**

This Agreement, dated for convenience as **MAY 30, 2017** is made in the City and County of San Francisco, State of California, by and between **DEMIURGE LLC, 5485 MARION ST. UNIT A, DENVER, CO 80216**, hereinafter referred to as “Fabricator” and the City and County of San Francisco, a municipal corporation, hereinafter referred to as “City,” acting by and through its Municipal Transportation Agency (“SFMTA”) and its Arts Commission (“Commission”), for the purposes and on the terms and conditions set forth below.

Recitals

A. The City desires that the Fabricator fabricate and transport to the City an Artwork to be installed by the City at the [name of station] of the Central Subway Project, Phase 2 of the SFMTA Third Street Light Rail Project (“the Project”).

B. Funding for Artwork for the Project will be derived from Federal Transit Administration grants and other funds granted the SFMTA, which the SFMTA provides to the Commission to administer the art program for the Project.

C. A Request for Qualifications (RFQ) was issued on **DECEMBER 6, 2016** and City selected Fabricator as the highest qualified score pursuant to the RFQ.

D. Fabricator represents and warrants that it is qualified to perform and that it possesses the requisite experience and resources to render the services required by the City as set forth under this Contract.

E. The City and Fabricator intend that this Agreement comply with the regulations of the Federal Transit Administration of the United States Department of Transportation (“FTA”).

F. Approval for said Agreement was obtained from a Civil Service Commission Notice of Action for Contract No. 4062-10/11 on January 3, 2011.

G. The Commission, by Resolution No. **0501-17-103** has authorized the Director of Cultural Affairs to enter into Agreement with Fabricator for the fabrication and transportation of a work of art for the Central Subway Union Square Market Street Station under the following terms and conditions.

Now, therefore, in consideration of the preceding statements, the accuracy of which the parties hereby stipulate, the Fabricator, the SFMTA and Commission, on behalf of City, hereby agree as follows:

Definitions:

Where any word or phrase defined below, or a pronoun used in place thereof, is used in any part of this Agreement or the Contract Documents, it shall have the meaning set forth below:

1. "ADA" means the Americans with Disabilities Act (including all rules and regulations thereunder), Title 24 (California Building Code) and all other applicable federal, state and local disabled access legislation, as the same may be amended, modified or supplemented from time to time.
2. "Additional Work" means Work outside the scope of work of this Agreement, as described in Appendix B to this Agreement.
3. "Agreement" means this agreement, including all addenda, appendices and modifications, whether created now or in the future.
4. "Alter" or "Alteration" means, with respect to the Artwork, to alter, repair, modify, remove, relocate, sell, dispose of, distort, destroy, mutilate, or deface.
5. "Approved Costs" means such costs as are scheduled on Appendix C, including the maximum expenditure authorized for each item.
6. "Architect" means the engineering design firm engaged by the SFMTA to design the portion of the Central Subway Project in which the Art Work will be incorporated or installed.
7. "Artist" shall mean the artist team of Jim Campbell and Werner Klotz
8. "Artist's Design" means the visual, aesthetic, and artistic intent and design of the Artwork incorporated in the Contract Documents approved by the Commission. The most recent design approved by the Commission is incorporated herein by reference, and is binding unless or until changes are approved by resolution of the Commission.
9. "Artwork" means the work of art designed by Artist for the Site under a separate agreement with the City.
10. "Authorization" means an Agreement, properly executed by the Commission and certified by the Controller for the specific funding of this Agreement or any modification thereof.
11. "Budget" means a specific and detailed document identifying the cost of completion of all Work under this Agreement, including all modifications, as further described in Section 4(c).
12. "Central Subway Project" (CSP) or "Project" means the planning, design and construction of the Central Subway Project, Phase 2 of the SFMTA Third Street Light Rail Project.
13. "City" means the City and County of San Francisco, a municipal corporation.
14. "Commission" means the San Francisco Arts Commission.
15. "Committee" means the Visual Arts Committee of the Commission.

16. "Compensable Expense" means an expenditure by Fabricator made in the performance of the Work that is eligible under FTA guidelines and other applicable federal regulations for reimbursement as a legitimate Project expense and approved in advance of expenditure by the Arts Commission.
17. "Conceptual Design" means drawings (in plan and elevation) and/or 3-dimensional models, a written description, proposed materials and samples and cost estimates at 30% design completion. The information provided in Conceptual Design shall be complete enough to fully illustrate the design intent of the Artwork.
18. "Construction Contractor" means the licensed contractor and its subcontractors selected by the City to construct the Central Subway Project or any portion thereof, including installation of the Artwork at the Site.
19. "Construction Documents" means the final and complete architectural, structural, mechanical and engineering Design Development Documents (including drawings, written specifications, structural and engineering calculations at 100% design completion) prepared by Artist or Artist's subcontractors and approved by the Commission that sets forth in detail the design and specifications of the Artwork and its installation, which describe and fix the location, size, materials and character of the Artwork with respect to architectural, structural engineering, mechanical and electrical systems, materials, colors, method of attachment and fabrication methods, and other such elements as may be appropriate. Construction Documents must be signed and stamped by design professionals licensed in the State of California as required by the California Building Code and any local amendments thereto.
20. "Construction Manager" means the Central Subway Partners, a joint venture between AECOM USA and EPC Consultants, engaged by the SFMTA to manage the design and construction of the Project as the Program Manager/Construction Manager consultant.
21. "Contract Documents" means any work, including but not limited to, Conceptual Designs, Design Development Document and Construction Documents, Shop Drawings, Mock-ups, models, engineering calculations, approved installation plans, and all material samples and product data, project budget, and any and all additional documents and submittals produced under this Agreement that the Commission has approved and to which the completed Artwork is expected to conform.
22. "Contract Sum" (or "Total Amount") means all amounts payable by the City to Fabricator under this Agreement, and more specifically described in Section 5.
23. "Controller" means the Controller of City.
24. "Cost-Plus-Fixed-Fee" means an alternate method compensating the Fabricator for Work performed under the Agreement that is not paid by Lump Sum and by which the City reimburses the Fabricator its costs for performing the Work and also pays a Fixed Fee as compensation for having performed the Work.
25. "Days" means working days of the City and County of San Francisco (unless otherwise indicated). The use of the term "days," "working days" or "business days" shall be synonymous.

26. "Department of Transportation" (DOT) means the federal agency Department of Transportation.
27. "Director of Cultural Affairs" means the Director of Cultural Affairs for the Commission.
28. "Design Development Documents" means the design documents generated by the Artist and submitted to the Commission for review, comment and approval during the course of the design of the Artwork. The content of Design Development Documents shall be determined by the Commission, and may include colored drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the Artwork, that describe the size and character of the Artwork with respect to its relationship to the Site, including architectural, structural, mechanical and electrical systems, materials and other elements as may be appropriate, describe how the Artwork will be installed at the Site, mock-ups, final color and materials samples, proposed fabrication methods, feasibility studies and final cost estimates at design completion.
29. "Fabricate" means the creation of the Artwork from the materials and in the manner and design specified by the Artist in the approved Design Documents, completed and ready for installation at the Site.
30. "Fabricator" means Demiurge LLC, the fabricator of the Artwork.
31. "Fabricator's Proposal" means the approved fabrication cost and timeline as proposed by the Fabricator in response to the RFP.
32. "FTA" means the Federal Transit Administration, a department of the federal Department of Transportation.
33. "Force Majeure" with respect to a delay in or prevention of performance means (a) any strike, lockout or other labor or industrial disturbance (whether or not on the part of the employees of either party), civil disturbance, future order claiming jurisdiction, act of the public enemy, war, riot, sabotage, blockade, embargo, inability to secure customary materials, supplies or labor through ordinary sources by reason of regulation or order of any government or regulatory body; (b) any changes in any applicable laws or the interpretation thereof; or (c) any flood, washout, explosion, or any other cause beyond the reasonable control of the party from whom performance is required.
34. "General Contractor" means Tutor Perini Corporation, the general contractor hired by City to construct the capital improvement for the Site.
35. "Lump Sum" means a method of compensating the Fabricator for Work under the Agreement that is a payment of an all-inclusive prefixed amount of compensation agreed by the Parties for completion of Milestones or other Work specified in the Agreement or an amendment to the Agreement. A Lump Sum payment amount is inclusive of and compensates the Fabricator for all Reimbursable Expenses, Overhead, and the Fabricator's Fee.
36. "Milestone" means a description of Work to be accomplished by date(s) certain, set out in Appendix D of this Agreement.

37. "Mock-ups" or "Samples" means illustrations such as standard schedules, performance charts, instructions, brochures, diagrams, and physical samples of all or any portion of the Work, and other information furnished by Artist and/or Fabricator to illustrate materials or equipment for all or any portion of the Work. The purpose of the Mock-ups and Samples is to provide physical examples that illustrate materials, equipment or workmanship and establish the standards by which the Work will be judged.
38. "Overhead" means the costs incurred by Fabricator in supporting its Work on the Project that are not specifically listed as Reimbursable Expenses.
39. "Party" means an entity bound by this Agreement.
40. "Parties" mean all entities bound by this Agreement.
41. "Project" means the Third Street Light Rail Project, Phase 2, Central Subway.
42. "Public Work" means a construction project, erection, installation or other element of a construction project deemed a public work under S.F. Administrative Code Section 6.1(I), as currently written or as may be amended from time to time.
43. "Reimbursable Expense" means an expenditure by the Fabricator, including Salary Burden, that the Arts Commission shall reimburse to the extent that such expenditure is necessary for the Project and meets all applicable requirements of this Agreement, including approval in advance of expenditure by the Arts Commission.
44. "Request for Information" (RFI) means a request from a Construction Contractor for clarification or interpretation of a Contract Document or design document prepared by or under the direction of the Fabricator under this Agreement.
45. "Request for Proposals" (RFP) means the Request for Qualifications issued by the Arts Commission on December 6, 2017
46. "Salary Burden" means the full cost of payroll taxes and employee benefits, such as health and dental care insurance, vacation, leave, retirement and pension that are provided to employees in addition to wages.
47. "Scope of Services" or "Work" means the services, tasks, and deliverables that the Fabricator will provide to the Arts Commission under this Agreement, as outlined in Appendix B of this Agreement.
48. "SFMTA" means the San Francisco Municipal Transportation Agency, created under Article 8A of the City's Charter.
49. "Shop Drawings" means drawings, diagrams and other data specifically prepared by Fabricator or Fabricator's subcontractors, fabricators, manufacturers, suppliers, Construction Contractor, or distributors illustrating in detail exactly how the work, or any element thereof, is to be fabricated and installed. Shop Drawings shall be signed and stamped by a licensed design professional unless this requirement is specifically waived by the Commission.
50. "Small Business Enterprise"(SBE) means a for-profit, small business concern with a three (3) year average gross revenue not exceeding Twelve Million Dollars (\$12,000,000) and is certified under any of the following programs: the State of

California's Small Business Program ("State Program"), the City and County of San Francisco's LBE Program ("City Program"), or the California Unified Certification Program ("Federal DBE Program").

51. "Site" means the Project location where the Artwork is to be installed, which for this Agreement is the Central Subway Union Square Market Street Station – Platform Level.
52. "Work" means the work of Fabricator necessary, incidental or otherwise pertaining to the performance of the services and deliverables required under this Agreement. In addition to all other services and deliverables required, Work shall include the fabrication, delivery and consultation concerning installation of the Artwork. (See Scope of Work.)

Whenever the words "as directed," "as required," "as permitted," or words of like effect are used, it shall be understood as the direction, requirement, or permission of the Commission or the SFMTA, as provided herein. The words "sufficient," "necessary," or "proper," and the like, mean sufficient, necessary or proper in the judgment of the Commission. The words "approval," "acceptable," "satisfactory," or words of like import, means approved by, or acceptable to, or satisfactory to the Commission or of the SFMTA, as provided herein, unless otherwise indicated by the context. The terms "include," "included" or "including" and similar terms shall be deemed to be followed by the words "without limitation."

1. Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non- Appropriation.

This Agreement is subject to the budget and fiscal provisions of City's Charter. Charges will accrue only after prior written authorization certified by the Controller. City's obligation under this Agreement shall not at any time exceed the amount certified for the purpose and period stated in such certification.

This Agreement will terminate without penalty, liability or expense of any kind to City at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated.

City has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. City budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. The Controller is not authorized to make payments on any contract for which funds have not been certified as available in the budget or by supplemental appropriation. Fabricator's assumption of risk of possible non-appropriation is part of the consideration for this Agreement.

This Section 1 controls against any and all other provisions of this agreement.

2. Term of the Agreement.

The term of this Agreement shall be from July 14, 2017 to December 31, 2018, unless

extended by subsequent contract modification pursuant to the contract modification requirements in this Agreement. Notwithstanding the above, this Agreement may be extended by mutual written agreement of the parties for a period not to exceed two years beyond the initial term, provided that such extension does not create a contract with a total aggregate term of more than 9 years.

3. Effective Date of Agreement.

This Agreement shall become effective when the Controller has certified to the availability of funds and Fabricator has been notified in writing.

4. Services Fabricator Agrees to Perform; Procedure for Execution of Work; Budget; Consultation.

a. Services. As more specifically provided in Appendix B “Services to be Provided by Fabricator,” Fabricator agrees to fabricate, deliver and consult in the handling and installation by the Construction Contractor of the Artwork for the Central Subway Project, as well as any services provided in any subsequent modification to this Agreement. This Contract is a professional services contract. It is not a public works or construction contract subject to Chapter 6 of San Francisco Administrative Code or to the California Public Contract Code.

b. Procedure for Execution of Work.

(1) As more specifically described in Appendix B to this Agreement, it is the general intent of the parties that Fabricator will complete the fabrication and delivery and consult during installation of the Artwork, provided that City determines, in its sole discretion, to go forward with the completion of the Artwork. The Work shall be completed in separately defined, successive stages (“Phases”). In addition to the Phase(s) set forth in Appendix B at the time this initial Agreement is entered into, the parties may modify this Agreement to include subsequent Phases. Each Phase shall be governed by this Agreement, and by any modifications to this Agreement setting forth specific terms and conditions governing each Phase of Work. Each modification will include the Phase for which the Commission has given authorization, the scope of work covered by that Phase, the schedule of deliverables, insurance requirements, and payment terms.

(2) By authorizing Phase 1, the Commission is not obligated to authorize any subsequent Phase or other work. Subject to the limitations contained in this Agreement, the Commission may terminate this Agreement at any time.

(3) Fabricator shall not commence any Phase nor incur any expense in anticipation of commencing any Phase unless the Commission has given prior written authorization and the Controller has certified the availability of funds. Prior to beginning each Phase, Fabricator shall obtain the necessary approval of the previous Phase. In no event shall City be liable for any claims or damages arising from Fabricator’s unauthorized actions.

(4) The parties may negotiate any Additional Work to be performed under this Agreement, which shall not be effective unless and until memorialized in a written

modification to this Agreement executed as provided herein.

(5) The City may terminate the Work at any time, during or between Phases, with or without cause. If the City terminates the Work for convenience (without cause), the Fabricator shall be paid the amount(s) agreed for completed Milestones and for preapproved and documented Reimbursable Expenses reasonably and actually incurred up to the date of termination, in accordance with Section 21 of this Agreement.

c. Consultation. Fabricator agrees to cooperate in good faith with the Commission and to be available as reasonably necessary for consultation with the Commission, Architect, Artist, Client, and General Fabricator during all stages of the Work. Commission agrees to facilitate cooperation and arrange for and coordinate all necessary consultation among the Commission, Artist, Architect, Client, Fabricator and General Contractor. As directed by the Commission, the Fabricator shall assist the SFMTA and its design consultants and Construction Manager with preparation of drawings, specifications and other documents that may be necessary for the preparation of construction contract modifications and responses to Requests For Information (RFIs) from the Construction Contractor. The Fabricator's consultation with the Artist, Architect, SFMTA and Commission, and preparation of contract documents and responses to RFIs are within the Contract Sum

(1) Fabricator shall copy Commission on all correspondence between Fabricator and Artist, Architect, SFMTA, Construction Manager, or Construction Contractor in which Commission is not a party. Fabricator shall make no verbal agreements and /or understandings that are arrived at in conversations or meetings between Artist and Architect, SFMTA, Construction Management Team and/or Construction Contractor to which Commission is not a party. Fabricator understands that taking any and all actions based on such agreements may result in such agreements not being honored.

(2) The Fabricator shall request in writing to the Arts Commission any information and data it will require from the SFMTA, the Construction Contractor or the Architect for its Work. The Fabricator shall identify the timing and priority for which this information and data will be required in its request for that information. The Fabricator shall plan its work to allow adequate time for the City to provide the requested information. The Fabricator shall respond promptly, but in no case more than **eight working days**, to any request for information from the Arts Commission.

(3) The Fabricator shall not alter any aspect of the Artwork as approved by the Arts Commission and SFMTA without prior written permission from the Art Commission. The Fabricator shall be entirely responsible for any costs incurred by the City associated with any changes in their Artwork that have not be specifically approved by the Arts Commission in writing in advance of making such changes.

d. Installation Support Services. As described in Appendix B, the Fabricator shall be available to consult as directed by the Commission with the Commission, the Construction Contractor and the SFMTA as to installation of the Artwork at the Site. Said Installation Support Services shall include but are not limited to consulting as to the proper means and methods of installation of the Artwork, inspection of the site prior to installation, and inspection of the installed Artwork to confirm it meets the requirements

of the Artist's approved design.

5. Compensation.

a. Total Amount.

(1) The Total Amount payable to Fabricator under this Agreement (the "Contract Sum") for all Work performed by Fabricator, shall not exceed **EIGHT HUNDRED NINETEEN THOUSAND TWO HUNDRED EIGHTY-SEVEN AND NO PENNIES (\$819,287.00)** unless this Agreement is amended as provided herein. Payment of the full Contract Sum is not guaranteed; to receive the full Contract Sum the Fabricator shall fully perform all Work described in this Agreement in compliance with the standards of performance described herein. All compensation due to Fabricator for Work performed under this Agreement shall be made in accordance with Appendices C and D, attached hereto.

(2) The Contract Sum is inclusive of the Fabricator's Fee and all Reimbursable Expenses, including but not limited to direct labor costs, other direct costs and indirect costs for all Work performed under this Agreement, subject only to authorized adjustments as specifically provided in this Agreement. In the event the Fabricator incurs costs in excess of the Contract Sum (as adjusted) that is not due to actions or directives of the City or the City's engineering consultants or contractors, the Fabricator shall pay such excess from the Fabricator's Fee or its own funds, and City shall not be required to pay any part of such excess, and the Fabricator shall have no claim against City on account thereof. Out of the total Contract Sum, Fabricator shall be responsible for paying all of Fabricator's costs and expenses associated with the Work, including Overhead, the costs of suppliers, subcontractors, fees, taxes, permits, insurance, transportation to and from meetings, and all other Reimbursable Expenses associated with the scope of the Work specified in this Agreement.

b. Milestones; Calculation of Compensation. Compensation shall be made to Fabricator in the amounts and based upon Fabricator's successful completion, in the sole reasonable discretion of the Director of Cultural Affairs, of the Milestones described in Appendix D to this Agreement. No charges shall be incurred under this Agreement nor shall any payments become due to Fabricator until deliverables, services, or both, required under this Agreement are received from Fabricator and approved by the Commission as being in accordance with this Agreement. City may withhold payment to Fabricator in any instance in which Fabricator has failed or refused to satisfy any material obligation provided for under this Agreement.

c. Change in Scope of Services. If the Scope of Services of any Phase or other portion of the Project is reduced, that reduction shall be memorialized in an amendment to the Agreement, and the amount for that Work shall be reduced, as negotiated by the Parties, but such reduction shall not be less than the proportional value of the reduced Work, as measured by the value of that Work set out in Attachment C (Summary of Fees) to this Agreement or other agreed document setting out the relative value of tasks. If the Scope of Services is increased, then the Parties will negotiate an appropriate amount for the Additional Services. Any negotiations for changes in the scope of services shall be subject to the agreement of the Commission and the Fabricator. The Fabricator shall do

no work in addition to or beyond the scope of the services set forth and contemplated by this Agreement unless and until it is authorized to do so by the issuance to it of a "Modification of Contract," duly executed and approved.

d. Additional Work. Where the City designates Additional Work to be performed, the Parties shall negotiate a reasonable Lump Sum amount as full compensation for the Additional Work, which shall include a budget for the Additional Work that **covers all additional Fabricator's fee and all additional costs and expenses incurred by Fabricator arising from the Additional Work** to be paid upon the Fabricator's completion of the Additional Work to the satisfaction of the Commission.

e. Cost Plus Fixed Fee Payment. For all Additional Work that the City does not designate as Lump Sum or for which the parties cannot agree on price, the City may direct the Fabricator to perform said Additional Work and reimburse Fabricator for Reimbursable Expenses (allowable costs) provided and approved by the Commission in the Budget and pay an additional Fabricator's Fee proportionate to the value of the Work. Compensation for Cost-plus-Fixed-Fee Work will be computed as the sum of Reimbursable Expenses actually incurred by Fabricator in performing the Additional Work and a reasonable additional Fabricator's Fee.

f. Transfer of Unused Funds. Fabricator may request City's approval to transfer unused funds from one subtask to another subtask within the same main task to cover the unexpected shortfall of another subtask provided that the need for additional funds to complete the subtask is not due to Fabricator's poor management or planning. Fabricator may request City's approval to transfer unused funds from one task(s) to other tasks to cover the unexpected shortfall of the other Tasks, provided that (1) the task(s) from which the funds are transferred out of (including all subtasks within the task(s)) is at least ninety-five percent (95%) complete; (2) the funds are no longer necessary for the original task(s) for which the funds were allotted; and (3) the main reason for the task(s) requiring additional funds is not due to Fabricator's poor management or planning. Such request must be made in writing to the Program Manager at least 15 calendar days in advance of the need to transfer funds across subtasks. City's approval of subtask or task amount changes will not be unreasonably withheld. City's approval shall be by the Commission's Program Manager.

g. Non-Reimbursable Expenses. Whether an amount is paid as Lump Sum or otherwise, Fabricator shall be compensated only for those Reimbursable Expenses authorized in Attachment C. If an expense is not a Reimbursable Expense, the City shall have no obligation to compensate Fabricator for it. Computer usage, facsimile and telecommunication expenses shall not be accounted as Reimbursable Expenses. Fabricator and subcontractor personnel entertainment or personal expenses of any kind shall not be considered a Reimbursable Expense. Office and field supplies/ expenses are not reimbursable expenses unless said supplies can be demonstrated to be out of the ordinary and used exclusively for this Project.

h. Prepayment. Unless the SFMTA and Commission give specific written authorization, Fabricator shall not submit invoices and the City shall not pay or otherwise reimburse Fabricator for costs of any kind that the Fabricator has not actually incurred

and paid prior to date of invoice.

i. Refunds, Rebates and Credits. Fabricator shall assign to the City any refunds, rebates or credits accruing the Fabricator that are allocable to costs for which the City has paid or has otherwise reimbursed the Fabricator or for which the Fabricator will submit an invoice.

j. Payment of Invoices. Compensation shall be made within 45 days that the Commission, in its sole discretion, concludes the Milestone or other undisputed portion of Work approved for payment has been performed. City shall make payment to Fabricator at the address specified in Section 25 (Notices to the Parties). All amounts paid by City to Fabricator shall be subject to audit by City.

k. No Interest on Late Payments. In no event shall City be liable for interest or late charges for any late payments.

l. Payment Limitations.

(1) No charges shall be incurred under this Agreement nor shall any payments become due to Fabricator until all Work Product and other services required under this Agreement are received from Fabricator and approved by the SFMTA as being in accordance with this Agreement.

(2) The City may reasonably withhold payment to the Fabricator pending resolution, in an amount equal to questioned, disputed, or disapproved amounts, or for work not satisfactorily completed or delivered as required by this Agreement or for amounts incurred by the City in connection with the Fabricator's negligent errors or omissions. Payments for undisputed amounts due on the same or other invoice shall not be unreasonably withheld or delayed.

(3) The Fabricator shall avoid when possible submitting more than one invoice per month unless the submittal of any additional invoice for completed and approved Work and services is agreed to by the Arts Commission in writing and in advance of the expenditure.

m. Project Suspension or Termination.

(1) If the Project is suspended for more than one hundred eighty (180) days or abandoned in whole or in part, the Fabricator shall be compensated for services satisfactorily performed prior to receipt of written notice from the City of such suspension or abandonment. If the Project is resumed after being suspended for more than one hundred eighty (180) days, the Fabricator's compensation for the remainder of the services to be provided for the Project shall be equitably adjusted based on the Fabricator's demonstrated increased costs.

(2) In the event that the City terminates the Agreement for fault, the City may reduce any amount earned or otherwise due the Fabricator by the sum of any additional costs the City has or will incur as a result of the Fabricator's default.

n. Final Payment. Final payment of any balance earned by the Fabricator for Project work will be made within ninety (90) days after all of the following:

- (1) Satisfactory completion of all work required by this Agreement;
- (2) Receipt by the Arts Commission and the SFMTA of the Work Product not previously delivered;
- (3) Delivery of all equipment/materials purchased specifically for the project where the Arts Commission or SFMTA has reimbursed the Fabricator for such costs;
- (4) Receipt by the Arts Commission or the SFMTA of a fully executed final statement of amounts paid to and owed to each subcontractor under this Agreement;
- (5) Such audit and verification as SFMTA may deem necessary; and,

Execution and delivery by the Fabricator of a release of all claims against the City arising under or by virtue of this Agreement, other than such claims, if any, as may be specifically exempted by the Fabricator from the operation of the release in stated amounts to be set forth therein.

o. Additional Work. If the Fabricator considers any work or services that the Commission directs Fabricator to perform to be outside the Scope of Services of this Agreement, the Fabricator shall notify the Commission, in writing within five (5) Days of discovering such extra work or services to request authorization to perform the Additional Work. If the Fabricator proceeds to do work that it perceives to be Additional Work without first obtaining City's written approval in as provided herein, regardless of the amount or value of the Additional Work, the City shall have no obligation to reimburse Fabricator for that Additional Work. Eagerness to respond to the City's comments or concerns, expediency, schedule constraints will not be acceptable reasons to proceed with Additional Work without City's prior written approval.

6. Guaranteed Maximum Costs.

The City's obligation hereunder shall not at any time exceed the amount certified by the Controller for the purpose and period stated in such certification.

Except as may be provided by laws governing emergency procedures, officers and employees of City are not authorized to request, and City is not required to reimburse Fabricator for, commodities or services beyond the scope of this Agreement unless the changed scope is authorized by written amendment of this Agreement and is approved as required by law.

Officers and employees of City are not authorized to offer or promise, nor is City required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which this Agreement is certified without certification of the additional amount by the Controller.

7. Payments; Invoice Format; Suppliers and Subcontractors.

a. Fabricator Invoices. Invoices furnished by the Fabricator under this Agreement must be in a form acceptable to the Controller. At a minimum, invoices must identify the Fabricator as **DEMIURGE LLC**, the contract project as Central Subway **UNION SQUARE MARKET STREET STATION** Artwork Fabrication and include the date of transaction, name and address of Fabricator, interim payment number for which compensation is requested, and amount requested. The Fabricator must submit an original invoice, which must be accompanied by pre-printed and itemized receipts. City shall make payment to the Fabricator at the address listed for notices in this Agreement. All amounts paid by City to Fabricator shall be subject to audit by City and other agencies with jurisdiction over the Project and Project funding.

b. Supplier and Subcontractor Invoices. Fabricator shall provide the Commission with the name, address and telephone number of suppliers and subcontractors whose total invoices are expected to exceed One Thousand Dollars (\$1,000.00) prior to Fabricator beginning work under this Agreement, or as such expenses are incurred by Fabricator after certification of this Agreement.

c. Activity Reports. The Fabricator shall submit status reports with its invoices for payment, describing all Milestones and other Work completed by the Fabricator and subcontractors during the period billed and copies of all invoices for Reimbursable Expenses relating thereto.

8. Submitting False Claims; Monetary Penalties.

Pursuant to San Francisco Administrative Code sections 6.80 to 6.83 and 21.35, and pursuant to applicable federal law, any Fabricator, subcontractor or consultant who submits a false claim shall be liable to the City for the statutory penalties set forth in those ordinances and statutes, including but not limited to statutory fines, treble damages, costs and attorney's fees. The text of Sections 6.80 to 6.83 and 21.35, along with the entire San Francisco Administrative Code are available on the web at <http://www.municode.com/Library/clientCodePage.aspx?clientID=4201>. Any Fabricator, subcontractor or consultant will be deemed to have submitted a false claim to the City if the Fabricator, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of the City a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City; (c) conspires to defraud the City by getting a false claim allowed or paid by the City; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the City; or (e) is a beneficiary of an inadvertent submission of a false claim to the City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City within a reasonable time after discovery of the false claim. Fabricator agrees that remedies under local law are cumulative and in addition to the remedies and penalties provided for false claims under federal law.

9. Disallowance, Disputed Amounts, and Debarment.

a. If Fabricator claims or receives payment from City for a service, reimbursement for

which is later disallowed by the State of California or United States Government, Fabricator shall promptly refund the disallowed amount to City upon City's request. At its option, City may offset the amount disallowed from any payment due or to become due to Fabricator under this Agreement or any other agreement between the Fabricator and the City.

b. Any Compensation or reimbursement received by Fabricator under this Agreement does not constitute a final decision or waiver of decision by the City as to whether said payment meets the terms and requirements of this Agreement. If following audit or other review, the City determines that the Fabricator and/or subconsultants are not entitled to certain compensation requested or received, the City shall notify the Fabricator stating the reasons therefore.

c. Acceptance of the Artwork, or any portion of the Work under this Agreement, will not alter Fabricator's or a subconsultant's obligations to return any funds due the City as a result of later refunds, corrections, or other transactions, nor alter the SFMTA or its funding agencies' rights to disallow or otherwise not recognize costs on the basis a later audit or other review. The City may reasonably withhold payment to the Fabricator pending resolution, in an amount equal to questioned, disputed or disapproved amounts, or for work not satisfactorily completed or delivered as required by this Agreement or for amounts incurred by the City in connection with the Fabricator's negligent errors or omissions. Payments for other amounts due on the same or other invoice shall not be unreasonably withheld or delayed.

d. By executing this Agreement, Fabricator certifies that Fabricator is not suspended, debarred or otherwise excluded from participation in federal assistance programs. Fabricator acknowledges that this certification of eligibility to receive federal funds is a material term of the Agreement.

10. Taxes.

a. Except as specifically provided herein, any taxes levied upon the Agreement, the transaction, or the equipment or services delivered under this Agreement, including possessory interest taxes and California sales and use taxes, shall be paid by Fabricator. To the extent allowed by law, the costs to Fabricator of sales, use, and possessory interest taxes arising out of the Work performed under this Agreement are Reimbursable Expenses.

b. Fabricator recognizes and understands that this Agreement may create a "possessory interest" for property tax purposes. Generally, such a possessory interest is not created unless the Agreement entitles the Fabricator to possession, occupancy, or use of City property for private gain. Only agencies with jurisdiction over tax matters have the authority to determine if a possessory interest has been created; the Commission and SFMTA have no authority to make such determination. If a taxing authority determines that a possessory interest is created, then the following shall apply:

(1) Fabricator, on behalf of himself and any permitted successors and assigns, recognizes and understands that Fabricator, and any permitted successors and assigns, may be subject to real property tax assessments on the possessory interest;

(2) Fabricator, on behalf of himself and any permitted successors and assigns, recognizes and understands that the creation, extension, renewal, or assignment of this Agreement may result in a “change in ownership” for purposes of real property taxes, and therefore may result in a revaluation of any possessory interest created by this Agreement. Fabricator accordingly agrees on behalf of itself and its permitted successors and assigns to report on behalf of City to the County Assessor the information required by Revenue and Taxation Code section 480.5, as amended from time to time, and any successor provision.

(3) Fabricator, on behalf of herself/himself and any permitted successors and assigns, recognizes and understands that other events also may cause a change of ownership of the possessory interest and result in the revaluation of the possessory interest (see, e.g., Rev. & Tax. Code section 64, as amended from time to time). Fabricator accordingly agrees on behalf of itself and its permitted successors and assigns to report any change in ownership to the County Assessor, the State Board of Equalization or other public agency as required by law.

(4) Fabricator further agrees to provide such other information as may be requested by City to enable City to comply with any reporting requirements for possessory interests that are imposed by applicable law.

(5) The Commission and the SFMTA consider Fabricator's presence on SFMTA property while performing Work under this Contract to be necessary to the Work and a convenience to the Project. Taxes for any possessory interest created by the Fabricator's presence on SFMTA property will be considered a Reimbursable Expense.

11. Payment Does Not Imply Acceptance of Work; Approval and Final Acceptance.

a. Payment Does Not Imply Acceptance of Work. The issuance of any payment for Milestone(s), other progress payment or final payment by the City or the receipt thereof by the Fabricator shall in no way lessen the liability of the Fabricator to correct unsatisfactory Work or materials, although the unsatisfactory nature of such Work may or may not have been apparent or detected at the time such payment was made. Work that does not conform to the requirements of this Agreement may be rejected by City and in such case must be replaced or performed again by Fabricator without delay.

b. Correction of Errors. Upon notice from Commission or the SFMTA, and as determined in the sole discretion of the Commission or the SFMTA, the Fabricator shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in such plans, designs, drawings, specifications, reports, and other services; and, in the event of any deficiencies in such plans, designs drawings, specifications, reports, or other services resulting from the Fabricator's professional negligence, whether or not said deficiencies have been brought to the attention of the Commission, the Fabricator shall indemnify and reimburse the City for the cost of the corrective remedial work (including, without limitation, design, demolition, and construction) necessary to correct any such deficiencies and the consequences of such deficiencies caused by said professional negligence.

c. Approval and Final Acceptance.

(1) Approval. The granting or withholding of any approval by the Commission shall be determined by the Commission in its sole and reasonable discretion. However, the Commission shall approve all deliverables if they conform to plans or Contract Documents previously approved by the Commission. If the Commission withholds approval of any deliverables or Phase, in addition to other rights or remedies available to the Commission under the Agreement or applicable law, the Commission shall have the right to terminate this Agreement immediately and shall have no further obligations under this Agreement.

(2) Final Acceptance. Fabricator shall advise the Commission in writing when Fabricator has completed all obligations, services and deliverables under this Agreement and all modifications. The Commission promptly shall send a Notice of Response identifying in writing any obligations, services or deliverables that Fabricator has not satisfactorily met, any defects in Fabricator's performance, and the requirements for Fabricator to cure any such default. Fabricator shall have **30 days** from dispatch of the Notice of Response to cure any defects in Fabricator's performance identified in the Commission's Notice of Response. The Artwork shall not be finally accepted by City unless the Commission has issued a resolution of Final Acceptance. City shall make a good faith effort to make a determination as to Final Acceptance promptly.

(3) Civic Art Collection. Upon Final Acceptance, the Artwork shall become part of the Civic Art Collection.

11A. Bonds. - Left Blank by Agreement of the Parties

11A. Licensed Contractor Requirements.

The fabrication of the Artwork is not a Public Work. The Artwork will be erected, installed and incorporated into the Project by the Construction Contractor, not the Fabricator. Fabricator's responsibilities as to installation of the Artwork shall be limited to consultation with the City and the Construction Contractor only.

11B. Contract Work Hours and Safety Standards

a. Overtime requirements. The Fabricator and any subcontractor contracting for any part of the Work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

b. Violation, Liability for Unpaid Wages; Liquidated Damages. In the event of any violation of the clause set forth in paragraph a of this section the Fabricator and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Fabricator and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or

mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph a of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph a of this section.

c. Withholding for Unpaid Wages and Liquidated Damages. The City shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Fabricator or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this section.

d. Subcontracts. The Fabricator or subcontractor shall insert in any subcontracts the clauses set forth in paragraphs A through D of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in this section.

12. Qualified Personnel.

Work under this Agreement shall be performed only by competent personnel under the supervision of and in the employment of Fabricator. Fabricator will comply with City's reasonable requests regarding assignment of personnel, but all personnel, including those assigned at City's request, must be supervised by Fabricator. Fabricator shall commit adequate resources to complete the project within the project schedule specified in this Agreement.

13. Responsibility for Equipment.

City is not responsible for any damage to persons or property, including Artwork, as a result of the use, misuse or failure of any equipment used by Fabricator, or by any of its employees, even though such equipment be furnished, rented or loaned to Fabricator by City. Fabricator, rather than City, is responsible for site conditions and the health and safety of Fabricator's employees, subcontractors and agents, and all other persons that work on or visit the Site at the invitation of Fabricator.

14. Independent Contractor; Payment of Taxes and Other Expenses.

a. Independent Contractor. Fabricator shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which Fabricator performs the services and work requested by City under this Agreement. Fabricator is liable for the acts and omissions of itself, its employees and its agents. Nothing in this Agreement shall be construed as creating an employment or agency relationship between City and Fabricator.

Any terms in this Agreement referring to direction from City or the Commission shall be construed as providing for direction as to policy and the result of Fabricator's work only, and not as to the means by which such a result is obtained.

b. Payment of Taxes and Other Expenses. Should City, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that Fabricator is an employee for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by Fabricator which can be applied against this liability). City shall then forward those amounts to the relevant taxing authority.

Should a relevant taxing authority determine a liability for past services performed by Fabricator for City, upon notification of such fact by City, Fabricator shall promptly remit such amount due or arrange with City to have the amount due withheld from future payments to Fabricator under this Agreement (again, offsetting any credits for amounts already paid by Fabricator which can be applied against this liability).

A determination of employment status pursuant to the preceding two paragraphs shall be solely for the purposes of the particular tax in question, and for all other purposes of this Agreement, Fabricator shall not be considered an employee of City. Notwithstanding the foregoing, should any court, arbitrator, or administrative authority determine that Fabricator is an employee for any other purpose, then Fabricator agrees to a reduction in City's financial liability so that City's total expenses under this Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that Fabricator was not an employee.

15. Insurance.

a. Required Insurance. Without in any way limiting Fabricator's liability pursuant to Section 16, the "Indemnification and General Liability" section of this Agreement, Fabricator shall maintain, or cause to be maintained, in force insurance in the following amounts and coverages shall maintain all required insurance continuously throughout the term of this Agreement until Final Acceptance of the Work by resolution of the Arts Commission. The Director of Cultural Affairs, with the approval of the City's Risk Manager, may authorize in writing the release of an interest in such insurance at an earlier date.

(1) **Workers Compensation**, in statutory amounts with Employers' Liability Limits not less than \$1,000,000 each accident, injury or illness. Fabricator shall obtain such insurance prior to certification of this Agreement. To the extent Fabricator warrants, in writing, that Fabricator is not an employer and has no employees as defined by the California Labor Code Sections 3351-3351.1, Fabricator need not provide to the City proof of Workers Compensation insurance.

(2) **Professional Liability Insurance** for all design professionals (such as architects, landscape architects or engineers), applicable to any of the Fabricator's subcontractors who is a licensed engineer or architect. Such insurance shall have limits

not less than \$1,000,000 each claim with respect to negligent acts, errors and omissions. Any design professional required to obtain professional liability insurance shall maintain such insurance, and proof thereof, for the term of this Agreement.

(3) **Commercial 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. Fabricator shall obtain such insurance prior to commencing the fabrication of the artwork and shall maintain through the transportation and installation of the Work at the Site.

(4) **Automobile Liability Insurance**: If Fabricator is an *individual*, Personal Automobile Liability Insurance with limits not less than \$100,000/\$300,000 each occurrence. If Fabricator is a corporation or other legal entity, Commercial 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. Fabricator shall obtain such insurance prior to certification of this Agreement.

(5) **Risk of Loss Insurance** or other insurance against loss in an amount equal to the total payment specified under Section 5 (Compensation) of the contract. Fabricator shall obtain such insurance prior to commencing fabrication of the Artwork through fabrication and transportation of artwork to City and until receipt and acceptance of artwork by City.

(6) **Transportation and/or Installation Coverage**, as required by the Commission.

b. Required Policy Language.

(1) Commercial General Liability and Commercial Automobile Liability Insurance shall be endorsed to provide:

(a) Endorse the policy to name as Additional Insured the City and County of San Francisco, its Officers, Agents, and Employees;

(b) Professional Liability policies shall name the specific project as a covered project; and

(c) State that such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought, but the inclusion of more than one insured shall not operate to increase the insurer's limits.

(d) Regarding Workers' Compensation, Fabricator's insurer shall waive subrogation against the City and shall not otherwise seek reimbursement of any costs Fabricator or payments arising from any loss. Fabricator agrees to obtain

any endorsement that may be necessary to affect this waiver of subrogation. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the City for all work performed by the Fabricator, its employees, agents and subcontractors.

(2) All policies shall provide thirty days' advance written notice to the City of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notices shall be sent to the following address:

Jennifer Lovvorn, Project Manager
San Francisco Arts Commission
401 Van Ness Avenue, Suite 325
San Francisco, CA 94102

and to

Shahnam Farhangi, Contracts Manager
SFMTA Capital Projects and Construction Division
1 South Van Ness, 3rd floor
San Francisco, CA 94103

c. Miscellaneous Insurance Requirements.

(1) All insurance policies required under this Agreement shall be issued by insurance companies reasonably acceptable to City and authorized to do business in the State of California. Before commencing any operations under this Agreement, Fabricator shall do the following: (a) furnish to City certificates of insurance, and additional insured policy endorsements with insurers with ratings comparable to A-, VIII or higher, and that are satisfactory to City, in form evidencing all coverages set forth above, and (b) furnish complete copies of policies promptly upon City request.

(2) Should any of the required insurance be provided under a claims-made form, Fabricator shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of four years beyond the expiration of this Agreement, to the effect that, should occurrences during the contract term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies. This tail coverage requirement may be waived by the City's Risk Manager in writing where appropriate.

(3) Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence or claims limits specified above.

(4) Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until City receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, City may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

(5) Approval of the insurance by City shall not relieve or decrease the liability of Fabricator hereunder.

(6) In the event of loss or damage and where any insurance proceeds are paid to City, the Commission shall make a determination, in its sole discretion, as to whether the Work shall be restored, reconstructed or abandoned. If the Commission determines that Fabricator shall restore or reconstruct the Work, all insurance proceeds received by City shall be paid to Fabricator to the extent the proceeds are used for such restoration or reconstruction.

(7) If a subcontractor will be used to complete any portion of this agreement, the Fabricator shall ensure that the subcontractor shall provide all necessary insurance and shall name the City and County of San Francisco, its officers, agents and employees and the Fabricator listed as additional insureds.

16. Indemnification.

a. Fabricator shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Fabricator or loss of or damage to property, arising directly or indirectly from Fabricator's performance of this Agreement, including, but not limited to, Fabricator's use of facilities or equipment provided by City or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of City and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Fabricator, its subcontractors or either's agent or employee. 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.

b. In addition to Fabricator's obligation to indemnify City, Fabricator specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Fabricator by City and continues at all times thereafter.

c. Fabricator 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 the use by City, or any of its officers or agents, of articles or services to be supplied in the performance of this Agreement.

17. Incidental and Consequential Damages.

Fabricator shall be responsible for incidental and consequential damages resulting in whole or in part from Fabricator's acts or omissions. Nothing in this Agreement shall

constitute a waiver or limitation of any rights, which City may have under applicable law.

18. Liability of City.

City's payment obligations under this agreement shall be limited to the payment of the compensation provided for in this Agreement. Notwithstanding any other provision of this Agreement, in no event shall City be liable to Fabricator (regardless of whether any claim is based on contract or tort) for any special, consequential, indirect or incidental damages (including, but not limited to, lost profits) arising out of or in connection with this Agreement or the Work performed in connection with this Agreement.

19. Timely Provision of Services; Damages for Delayed Performance

a. Time. Time is of the essence in the Fabricator's performance of the Work. Fabricator agrees to provide all deliverables in accordance with the timelines contained herein unless changes to those timelines are approved in writing by the Commission. All changes to schedule must be approved by the Commission in writing.

b. Damages for Delayed Performance.

(1) Generally. Fabricator shall be liable for all incidental and consequential damages resulting, directly or indirectly, from delays in performance caused by Fabricator's acts or omissions. Fabricator shall not be liable to City for damages resulting from delays caused by Force Majeure or by acts or omissions of City, Architect or the Construction Contractor, except to the extent Fabricator failed to act reasonably to mitigate such damages.

(2) Illness, Injury, Death or Incapacity. Should Fabricator die, become ill, injured or otherwise incapacitated (collectively, "incapacitated") such that Fabricator is unable to work for any period exceeding 30 days (whether consecutive or non-consecutive), any delay arising out of such incapacity will be allowed by City whenever it is practicable to do so, considering the facts and circumstances of the Work, the Project, the Architect, the Construction Contractor and the SFMTA. City may require Fabricator to provide medical certification of any claimed incapacity. In the event Fabricator is incapacitated such that Fabricator is unable to work for a period exceeding a total of 30 days (whether consecutive or non-consecutive), City may, at its option, undertake to complete and install the Work in Fabricator's absence. If City exercises its option to implement the Artwork in Fabricator's absence, any compensation paid or payable to Fabricator shall be reduced by the costs and expenditures of City in completion of the Work.

c. Delivery of Artwork. Following final approval of the fabricated Artwork by the Arts Commission, the Fabricator shall deliver the Artwork to a designated City storage site no later than August 31, 2018. Following inspection and approval by the Arts Commission of the delivered Artwork at the City's storage site, the Arts Commission will store the Artwork at no cost to the Fabricator. The Fabricator shall be responsible for the storage and safekeeping of the Artwork prior to the delivery of the Artwork to the City's storage site.

d. Delay. In case of delay in Fabricator’s services through no fault of Fabricator, including construction delay, Fabricator shall store the Work at no additional cost to City for up to 6 months. If Fabricator’s work is delayed due to construction delays at the Site or other delays caused by City or its contractors, so that Fabricator suffers documented direct cost impacts in the form of increased costs of materials and/or labor, Fabricator may apply to the City for reimbursement of those expenses, which City may award in its sole discretion.

20. Fabricator's Default; Remedies.

a. Events of Default. Each of the following shall constitute an event of default (“Event of Default”) under this Agreement:

(1) Fabricator fails or refuses to perform or observe any term, covenant or condition contained in any of the following Sections of this Agreement:

8. Submitting False Claims; Monetary Penalties	29. Subcontracting
10. Taxes	29A .Prevailing Wages
11A. Bonds	30. Assignment or Transfer
11B. Licensed Contractor Requirements	37. Drug-Free Workplace Policy
15. Insurance	53. Compliance with Laws
22A. Warranties	57. Protection of Private Information
24. Proprietary or Confidential Information of City	58. Graffiti Removal

(2) Fabricator’s failure or refusal to perform or do any act required of Fabricator in this Agreement, including unexcused failure to meet the delivery deadlines or to conform the Work to the Contract Documents approved by the Commission;

(3) Fabricator (a) is generally not paying its debts as they become due, (b) files, or consents by answer or otherwise to the filing against it of a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors’ relief law of any jurisdiction, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of Fabricator or of any substantial part of Fabricator’s property or (e) takes action for the purpose of any of the foregoing;

(4) A court or government authority enters an order (a) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Fabricator or with respect to any substantial part of Fabricator’s property, (b) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors’ relief law of any jurisdiction or (c) ordering the dissolution, winding-up or liquidation of Fabricator;

b. Termination in the Case of Default. On or after any event of Fabricator default, City shall have the right to exercise its legal and equitable remedies. City’s remedies include the right to terminate this Agreement upon written notice to Fabricator (setting forth with specificity the basis for the Commission's termination), or to seek specific performance of all or any part of this Agreement. Upon termination by the Commission, this Agreement shall be of no further force or effect. The date of termination shall be five

calendar days from the Commission's dispatch of notice of termination, unless a later termination date is specified in the notice of termination. The Commission may rescind the notice of termination or extend the date for termination, but no rescission or extension is valid unless it is in writing and approved by resolution of the Commission.

c. Opportunity to Cure. In its sole discretion, the Commission may give Fabricator a grace period and opportunity to cure any default. Such grace period may be up to 35 calendar days after dispatch of written notice from the Commission setting forth the nature of the default and the requirements to cure.

d. No Obligation to Pay. Except as specifically provided in this Agreement, City shall have absolutely no payment or other obligations to Fabricator for any work or service completed, begun or contemplated by Fabricator subsequent to termination of this Agreement for any reason.

e. Remedies are Cumulative. These remedies are in addition to all other remedies available to either party under this Agreement or under applicable federal, state or local laws should the other party fail to comply with the terms of this Agreement.

21. Termination for Convenience.

a. City shall have the option, in its sole discretion, to terminate this Agreement, at any time during the term hereof, for convenience and without cause. City shall exercise this option by giving Fabricator written notice of termination. The notice shall specify the date on which termination shall become effective. As described below in subsection c., City shall pay Fabricator for services rendered prior to the date of termination.

b. Upon receipt of the notice, Fabricator shall commence and perform, with diligence, all actions necessary on the part of Fabricator to effect the termination of this Agreement on the date specified by City and to minimize the liability of Fabricator and City to third parties as a result of termination. All such actions shall be subject to the prior approval of City. Such actions shall include, without limitation:

(1) Halting the performance of all services and other work under this Agreement on the date(s) and in the manner specified by City.

(2) Not placing any further orders or subcontracts for materials, services, equipment or other items.

(3) Terminating all existing orders and subcontracts.

(4) At City's direction, assigning to City any or all of Fabricator's right, title, and interest under the orders and subcontracts terminated. Upon such assignment, City shall have the right, in its sole discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.

(5) Subject to City's approval, settling all outstanding liabilities and all claims arising out of the termination of orders and subcontracts.

(6) Completing performance of any services or work that City designates to be completed prior to the date of termination specified by City.

(7) Taking such action as may be necessary, or as the City may direct, for the protection and preservation of any property related to this Agreement which is in the possession of Fabricator and in which City has or may acquire an interest.

c. Within 30 days after the specified termination date, Fabricator shall submit to City an invoice, which shall set forth each of the following as a separate line item:

(1) The reasonable cost to Fabricator, without profit, for all services and other work City directed Fabricator to perform prior to the specified termination date, for which services or work City has not already tendered payment. Reasonable costs may include a reasonable allowance for actual overhead, not to exceed a total of 10% of Fabricator's direct costs for services or other work. Any overhead allowance shall be separately itemized. Fabricator may also recover the reasonable cost of preparing the invoice.

(2) A reasonable allowance for profit on the cost of the services and other work described in the immediately preceding subsection (1), provided that Fabricator can establish, to the satisfaction of City, that Fabricator would have made a profit had all services and other work under this Agreement been completed, and provided further, that the profit allowed shall in no event exceed 5% of such cost.

(3) The reasonable cost to Fabricator of handling material or equipment returned to the vendor, delivered to the City or otherwise disposed of as directed by the City.

(4) A deduction for the cost of materials to be retained by Fabricator, amounts realized from the sale of materials and not otherwise recovered by or credited to City, and any other appropriate credits to City against the cost of the services or other work.

d. In no event shall City be liable for costs incurred by Fabricator or any of its subcontractors after the termination date specified by City, except for those costs specifically enumerated and described in the immediately preceding subsection (c). Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, post-termination overhead or unabsorbed overhead, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, prejudgment interest, or any other expense which is not reasonable or authorized under such subsection (c).

e. In arriving at the amount due to Fabricator under this Section, City may deduct: (1) all payments previously made by City for work or other services covered by Fabricator's final invoice; (2) any claim which City may have against Fabricator in connection with this Agreement; (3) any invoiced costs or expenses excluded pursuant to the immediately preceding subsection (d); and (4) in instances in which, in the opinion of the City, the cost of any service or other work performed under this Agreement is excessively high due to costs incurred to remedy or replace defective or rejected services or other work, the difference between the invoiced amount and City's estimate of the reasonable cost of

performing the invoiced services or other work in compliance with the requirements of this Agreement.

f. City’s payment obligation under this Section shall survive termination of this Agreement.

22. Rights and Duties Upon Termination or Expiration.

If the Commission terminates this Agreement for any reason, City shall be automatically vested with title to any Work produced under this Agreement up to the date of termination. Fabricator shall deliver any such Work to City in the manner, at the times, and to the extent directed by City. If termination is due to the default of Fabricator, City may, at its option, require Fabricator to refund to City any interim payments received under the Agreement; in such case, City may transfer title to the Work to Fabricator. This Section and the following sections shall survive termination or expiration of this Agreement:

8. Submitting False Claims; Monetary Penalties	24. Proprietary or Confidential Information of City
9. Disallowance , Disputed Amounts, and Debarment	26. Ownership of Results and Risk of Loss
10. Taxes	27. Works for Hire
11. Payment Does Not Imply Acceptance of Work; Approval and Final Acceptance	28. Audit and Inspection of Records; Reports
11A. Bonds	28A. City Access to Artwork/Work and Inspection; Status Reports; Fabricator's Availability
11B. Licensed Fabricator Requirements	
13. Responsibility for Equipment	48. Modification of Agreement
14. Independent Fabricator; Payment of Taxes and Other Expenses	49. Administrative Remedy for Agreement Interpretation
15. Insurance	50. Agreement Made in California; Venue
16. Indemnification	51. Construction
17. Incidental and Consequential Damages	52. Entire Agreement
18. Liability of City	56. Severability
22A. Warranties	57. Protection of private information
	58. Graffiti Removal

Subject to the immediately preceding sentence, upon termination of this Agreement prior to expiration of the term specified in Section 2, this Agreement shall terminate and be of no further force or effect. Fabricator shall transfer title to City, and deliver in the manner, at the times, and to the extent, if any, directed by City, any work in progress, completed work, supplies, equipment, and other materials produced as a part of, or acquired in connection with the performance of this Agreement, and any completed or partially completed work which, if this Agreement had been completed, would have been required to be furnished to City. This subsection shall survive termination of this Agreement.

22A. Warranties.

a. Warranty of Workmanship. If the Fabricator fabricates the Artwork or subcontracts for fabrication of the Artwork, then Fabricator represents and warrants that, for a period of three years after final acceptance, the **Artwork** will be free of defects in workmanship or materials, including Inherent Defects (as defined below), and that the Work will be executed in permanent, non-fugitive materials that will not tend to degrade or fade over long-term installation at the Site. “Inherent Defect” refers to a quality within the material or materials, which comprise the Work which, either alone or in combination, results in the tendency of the Work to destroy itself. “Inherent Defect” does not include any tendency to deteriorate that is specifically identified in the Contract Documents approved by the Commission. Fabricator shall, at Fabricator’s sole cost and expense, remedy any defects in workmanship or materials that appear within a period of three years from the date of final acceptance of the Artwork by City.

b. Warranty of Public Safety. Fabricator represents and warrants that the Work will not pose a danger to public health or safety in view of the possibility of misuse, if such misuse is in a manner that was reasonably foreseeable at any time during the term of this Agreement.

c. Warranty of Acceptable Standard of Display and Operation. Fabricator represents and warrants that:

(1) The Artwork will conform to design specifications and, where Artwork involves electronic, digital, video, mechanical, living, variable, moving or other dynamic components, the Artwork will also operate, function or perform in accordance with Fabricator’s representations to the City without any costs beyond the final Budget for the Artwork or any additional staff assistance.

(2) Occasional or minimal cleaning and repair of the Artwork and any associated working parts and/or equipment will maintain the Work within an acceptable standard of public display;

(3) Foreseeable exposure to the elements and general wear and tear will cause the Work to experience only minor repairable damages and will not cause the Work to fall below an acceptable standard of public display; and

(4) With general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the Work 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.

d. Manufacturer’s Warranties. To the extent the Work incorporates products covered by a manufacturer’s warranty, Fabricator shall provide copies of such warranties to City.

23. Conflict of Interest.

Through its execution of this Agreement, Fabricator acknowledges that it is familiar with the provision of Section 15.103 of the City's Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090

et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitutes a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the term of this Agreement.

24. Proprietary or Confidential Information of City.

Fabricator understands and agrees that, in the performance of the work or services under this Agreement or in contemplation thereof, Fabricator may have access to private or confidential information which may be owned or controlled by City and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to City. Fabricator agrees that all information disclosed by City to Fabricator shall be held in confidence and used only in performance of the Agreement. Fabricator shall exercise the same standard of care to protect such information as a reasonably prudent Fabricator would use to protect its own proprietary data.

25. Notices to the Parties; Department Liaison.

a. Notices. Unless otherwise indicated elsewhere in this Agreement, all written communications sent by the parties may be by U.S. mail or by fax, and shall be addressed as follows:

To Commission:

San Francisco Arts Commission
401 Van Ness Avenue, Suite 325
San Francisco, CA 94102
Attn: Jennifer Lovvorn
Phone: (415) 252-2225
Fax: (415) 934-1022
Email: jennifer.lovvorn@sfgov.org

To Fabricator:

Demiurge LLC
5485 Marion Street, Suite A
Denver CO 80216
p: 303:292:1011
joe.riche@demiurgedesign.com

Any notice of default shall be sent by registered mail.

Any change in the designation of the person or address to which submittals, requests, notices and reports shall be delivered is effective when the other party has received written notice of the change.

b. Department Liaison. In performing the services provided for in this Agreement, Fabricator's liaison with the Arts Commission will be the designated Public Art Project Manager for the Central Subway Project.

26. Ownership of Results and Risk of Loss.

Any interest of Fabricator or its Subcontractors, in drawings, plans, specifications, blueprints, studies, reports, memoranda, computation sheets, computer files and media or other documents prepared by Fabricator or its subcontractors in connection with services to be performed under this Agreement, shall become the property of and will be transmitted to City. However, Fabricator may retain and use copies for reference and as documentation of its experience and capabilities.

27. Works for Hire.

Copyright for the Artwork is owned by JIM CAMPBELL AND WERNER KLOTZ . If, in connection with services performed under this Agreement, Fabricator or its subcontractors create artwork, copy, posters, billboards, photographs, videotapes, audiotapes, systems designs, software, reports, diagrams, surveys, blueprints, source codes or any other original works of authorship, such works of authorship shall be works for hire as defined under Title 17 of the United States Code, and all copyrights in such works, if they are not part of the artwork and therefore included in Artist's copyright, are the property of the City. If it is ever determined that any works created by Fabricator or its subcontractors under this Agreement are not works for hire under U.S. law, Fabricator hereby assigns all copyrights to such works to the City, and agrees to provide any material and execute any documents necessary to effectuate such assignment. With the approval of the City, Fabricator may retain and use copies of such works for reference and as documentation of its experience and capabilities.

28. Audit and Inspection of Records; Reports.

a. Audit and Inspection of Records. Fabricator agrees to maintain and make available to City, during regular business hours, accurate books and accounting records relating to its work under this Agreement. Fabricator will permit City to audit, examine and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. Fabricator shall maintain such data and records in an accessible location and condition for a period of not less than five years after final payment under this Agreement or until after final audit has been resolved, whichever is later. The State of California or any federal agency having an interest in the subject matter of this Agreement shall have the same rights conferred upon City by this Section.

b. Records. Fabricator shall submit written reports as requested by the Commission. The Commission shall determine the format for the content of such reports. The timely submission of all reports is a necessary and material term and condition of this Agreement. The reports, including any copies, shall be submitted on recycled paper and printed on double-sided pages to the maximum extent possible.

28A. City Access to Artwork/Work and Inspection; Status Reports; Fabricator's Availability.

a. City Access to Artwork; Inspection of Work and Artwork. City shall have the right to inspect the Work, including the Artwork, at the Site **at which the Artwork is located** during any phase of the project at any time. In the event that all or part of the Work is created in a location other than the Site, the City shall have the right to inspect the Work, including the Artwork, at any phase of the project following **ten working days** written notice from the City to the Fabricator. The Fabricator shall be responsible for facilitating City's prompt access to Fabricator's property or the property of the Fabricator's subcontractors where the Work or portions of the Work are being fabricated or installed.

b. Status Reports. Fabricator shall submit written reports regarding the status of the Work, including the Artwork, as requested by the Commission. The Commission shall determine the format for the content of such reports. The timely submission of all reports is a necessary and material term and condition of this Agreement. The reports, including any copies, shall be submitted on recycled paper and printed on double-sided pages to the maximum extent possible.

29. Subcontracting.

a. Approval Required. Fabricator is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by the Commission in writing. Neither party shall, on the basis of this Agreement, contract on behalf of or in the name of the other party. An agreement made in violation of this provision shall confer no rights on any party and shall be null and void. Any approved subcontracts shall be itemized in Appendix B (or amendment thereto), and Fabricator shall provide a copy of each approved subcontract to the City with copies of the insurance documents required herein.

b. Documentation of Subcontracts. Fabricator shall provide a description of the Work to be performed under any subcontract and the amount of the subcontract, and shall provide the Commission with written copies of Fabricator's agreements with each subcontractor. Fabricator shall include by reference, and include in each and every contract, the requirements of this Agreement relating to the following: submitting false claims; inspection and audit of records; Administrative Code Chapters 12B (non-discrimination), SBE participation requirements, 12P (minimum compensation of employees), 12Q (Health Care Accountability Ordinance); indemnity provisions; bond and insurance requirements; earned income credit form provisions; provisions regarding City Access to Artwork/Inspection of Work and Artwork; required deliverables and City's right to use and implement the Work. Fabricator shall include a statement in the subcontract requiring that the subcontractor shall comply with all Agreement requirements applicable to the Fabricator, including compliance with applicable Federal, State and local laws, including any City contracting requirements applicable to the Fabricator.

c. Subcontract Requirements. If the Fabricator subcontracts any portion of the Work under this Agreement (including but not limited to engineering, architecture and/or fabrication of the Artwork), the City must grant prior approval of such subcontractors and the Fabricator shall require such subcontractors to:

(1) Name the City and County of San Francisco as a third-party beneficiary to the subcontract by expressly stating that "the parties agree that the City and County of

San Francisco shall be a third-party beneficiary to this agreement” and Fabricator shall provide the City with a copy of each such subcontract.

(2) Name the City and County of San Francisco as an additional insured on the subcontractor's general liability insurance policy.

(3) The Subcontractor shall agree to indemnify and hold harmless the City and County of San Francisco (consistent with the “Indemnification and General Liability” provisions contained herein as Section 16.)

(4) The subcontractor shall also be responsible for providing any performance and payment (labor and materials) bonds required under this Agreement on the City's form and shall name the City and Fabricator as dual obligees of such bonds. In the event of Fabricator or any of Fabricator’s subcontractors’ failure to perform, Fabricator shall assign all rights under any such bonds in favor of the City.

(5) Subcontractor shall certify that he or she has all applicable licenses required by the State for subcontractor to perform any required engineering and/or fabrication specified in the subcontract and that subcontractor warrants that such licenses are valid for the full term of this Agreement and during the period in which the subcontractor performed work under this Agreement.

(6) If Fabricator does not have an appropriate license issued by the State of California, any subcontract between Fabricator and any firm engaged to perform a Public Work under this Agreement is void and the City shall have no liability whatsoever for any costs incurred under said subcontract.

d. Responsibility. The Fabricator shall be responsible for the professional standards, performance, and actions of all persons and firms performing subcontract work under this Agreement at any and all tiers.

e. Substitutions of Subcontractors. Fabricator may substitute any Approved Subcontractor listed in Appendix B for: (a) failure to perform to a reasonable level of professional competence; (b) inability to provide sufficient resources to the Project; or (c) unwillingness to negotiate reasonable contract terms or compensation. Fabricator may only substitute subcontractors with the prior written approval of the SFMTA and the Commission.

f. Prompt Payment of Subcontractors. In accordance with SFMTA's SBE Program, no later than three (3) working days from the date of Fabricator's any payments by the City for the Work or any portion thereof, the Fabricator shall pay any subcontractors for work that has been satisfactorily performed by said subcontractors, unless the Fabricator notifies the CCO in writing within (10) working days prior to receiving payment from the City that there is a bona fide dispute between the Fabricator and the subcontractor. Within ten (10) working days following receipt of payment from the City, Fabricator shall provide City with a declaration under penalty of perjury that it has promptly paid such subcontractors for the work they have performed and stating the amounts paid. Failure to provide such evidence shall be cause for City to suspend future progress

payments to Consultants.

g. Interest on Unpaid Amounts. If the Fabricator does not pay its subcontractor as required under the above paragraphs, it shall pay interest to the subcontractor at the legal rate set forth in subdivision (a) of Section 685.010 of the California Code of Civil Procedure. This Section shall not impair or limit any remedies otherwise available to the Fabricator or a subcontractor in the event of a dispute involving late payment or nonpayment by the Fabricator or deficient subcontractor performance or nonperformance by the Fabricator.

h. Retention. Fabricator may withhold retention from subcontractors if City withholds retention from the Fabricator. Should retention be withheld from Fabricator, within thirty (30) days of City's payment of retention to Fabricator for satisfactory completion of all work required of a subcontractor, Fabricator shall release any retention withheld to the subcontractor. Satisfactory completion means when all the tasks called for in the subcontract with subcontractor have been accomplished and documented as required by City. Within forty (40) days of satisfactory completion of all Work required of the subcontractor, Fabricator should release any retention withheld to the subcontractor.

i. Substitutions of SBE Firms. If Fabricator wishes to substitute a subcontractor that is a SBE, the Fabricator must make good faith efforts to use another SBE as a substitute. The Fabricator shall notify Commission in writing of any request to substitute a SBE subcontractor or supplier and provide the Commission with any documentation requested to support the substitution. The Commission and the SFMTA's CCO must approve the request in writing for the substitution to be valid.

j. Addition of Subcontractors. The City reserves the right to require the Fabricator to retain a subcontractor that possess specific expertise to provide services under this Agreement, if the City determines that the Fabricator does not have specific expertise necessary for the timely and successful completion of the Artwork.

k. Flowdown Requirements. Fabricator shall fully inform all subcontractors, and shall require each of its subcontractors to warrant that it has fully informed each of its respective lower tier subcontractors (if any), of the terms and conditions of this Agreement. Fabricator shall ensure that all services performed and material furnished and the manner by which those services and materials are provided shall conform to the requirements of this Agreement. The terms and conditions of the Fabricator's subcontracts shall conform to the requirements of this Agreement. Each subcontract and a cost summary of each of those agreements shall be subject to review by the Commission and the SFMTA prior to the subcontractor proceeding with the Work. Fabricator shall provide the City copies of any written agreements between a first tier subcontractor and any lower tier subcontractor prior to proceeding with the Work.

l. Privity. Fabricator shall include in every subcontract for architecture and/or engineering services a requirement that to the maximum extent provided by California law, the City may rely upon and bring action for errors and omissions in the designs, calculations and other work performed for the Fabricator under this Contract as if the City had directly contracted with the architect or engineer. Notwithstanding the

preceding provision, the Fabricator shall be fully responsible for the errors and omissions of its engineers and architects and other subcontractors under this Agreement.

m. Availability. Fabricator's subcontracted engineer(s) and architect(s) must be available to provide Construction Support through the completion of the installation of the Artwork.

30. Assignment or Transfer.

a. Fabricator guarantees that Fabricator will consistently give personal attention to the faithful execution of this Agreement, including any work performed by employees, agents or subcontractors. Fabricator shall keep the Work under Fabricator's control and shall not assign or subcontract the Work, in whole or in part, except as provided in this Agreement and authorized by the Commission. All transactions with subcontractors shall be made through Fabricator, and no subcontract, assignment or other transfer by Fabricator Team shall relieve Fabricator of any of Fabricator's liability or obligations under this Agreement.

b. City may assign this Agreement to the Construction Contractor on such terms and conditions as are acceptable to City.

31. Non-waiver of Rights.

The omission by either party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants, or provisions thereof by the other party at the time designated, shall not be a waiver of any such default or right to which the party is entitled, nor shall it in any way affect the right of the party to enforce such provisions thereafter.

32. Consideration of Criminal History in Hiring and Employment Decisions.

a. Fabricator agrees to comply fully with and be bound by all of the provisions of Chapter 12T "City Fabricator/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions," of the San Francisco Administrative Code (Chapter 12T), including the remedies provided, and implementing regulations, as may be amended from time to time. The provisions of Chapter 12T are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the Chapter 12T is available on the web at www.sfgov.org/olse/fco. A partial listing of some of Fabricator's obligations under Chapter 12T is set forth in this Section. Fabricator is required to comply with all of the applicable provisions of 12T, irrespective of the listing of obligations in this Section. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12T.

b. The requirements of Chapter 12T shall only apply to a Fabricator's or Subcontractor's operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, shall apply only when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City of San Francisco, and shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

c. Fabricator shall incorporate by reference in all subcontracts the provisions of Chapter 12T, and shall require all subcontractors to comply with such provisions. Fabricator's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

d. Fabricator or Subcontractor shall not inquire about, require disclosure of, or if such information is received, base an Adverse Action on an applicant's or potential applicant for employment's, or employee's: (1) Arrest not leading to a Conviction, unless the Arrest is undergoing an active pending criminal investigation or trial that has not yet been resolved; (2) participation in or completion of a diversion or a deferral of judgment program; (3) a Conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; (4) a Conviction or any other adjudication in the juvenile justice system; (5) a Conviction that is more than seven years old, from the date of sentencing; or (6) information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

e. Fabricator or Subcontractor shall not inquire about or require applicants, potential applicants for employment, or employees to disclose on any employment application the facts or details of any conviction history, unresolved arrest, or any matter identified in subsection 32(d), above. Fabricator or Subcontractor shall not require such disclosure or make such inquiry until either after the first live interview with the person, or after a conditional offer of employment.

f. Fabricator or Subcontractor shall state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment to be performed under this Agreement, that the Fabricator or Subcontractor will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of Chapter 12T.

g. Fabricator and Subcontractors shall post the notice prepared by the Office of Labor Standards Enforcement (OLSE), available on OLSE's website, in a conspicuous place at every workplace, job site, or other location under the Fabricator or Subcontractor's control at which work is being done or will be done in furtherance of the performance of this Agreement. The notice shall be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace, job site, or other location at which it is posted.

h. Fabricator understands and agrees that if it fails to comply with the requirements of Chapter 12T, the City shall have the right to pursue any rights or remedies available under Chapter 12T, including but not limited to, a penalty of \$50 for a second violation and \$100 for a subsequent violation for each employee, applicant or other person as to whom a violation occurred or continued, termination or suspension in whole or in part of this Agreement.

33. Small Business Enterprise Program.

The City is committed to a Small Business Enterprise Program ("SBE Program") for the participation of SBEs in contracting opportunities. In addition, the Fabricator must comply with all applicable federal regulations regarding Disadvantaged Business Enterprise (DBE) participation, as set out in Title 49, Part 26 of the Code of Federal Regulations (49 C.F.R. Part 26), with respect to DBEs performing work under this Agreement. More information on federal DBE requirements can be found on the internet at: <http://www.fta.dot.gov/library/admin/BPPM/ch7.html>.

34. Nondiscrimination; Penalties.

a. Fabricator Shall Not Discriminate. In the performance of this Agreement, Fabricator agrees not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status) against any employee of, any City employee working with, or applicant for employment with Fabricator, in any of Fabricator's operations within the United States, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by Fabricator.

b. Subcontracts. Fabricator shall incorporate by reference in all subcontracts the provisions of §12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all subcontractors to comply with such provisions. Fabricator's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

c. Nondiscrimination in Benefits. Fabricator does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for City elsewhere in the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in §12B.2(b) of the San Francisco Administrative Code.

d. Condition to Contract. As a condition to this Agreement, Fabricator shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the HRC.

e. Incorporation of Administrative Code Provisions by Reference. The provisions of Chapters 12B and 12C of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Fabricator shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, Fabricator understands that pursuant to §§12B.2(h) and 12C.3(g) of the Administrative Code, a penalty of \$50 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against Fabricator and/or deducted from any payments due Fabricator.

35. MacBride Principles—Northern Ireland.

Pursuant to San Francisco Administrative Code §12.F.5, City urges companies doing business in Northern Ireland to move towards resolving employment inequities, and

encourages such companies to abide by the MacBride Principles. City urges San Francisco companies to do business with corporations that abide by the MacBride Principles. By signing below, Fabricator acknowledges and agrees that Fabricator Team has read and understood this section.

36. Tropical Hardwood and Virgin Redwood Ban.

Fabricator shall not import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product in the performance of this Agreement.

37. Drug-Free Workplace Policy.

Fabricator acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City premises. Fabricator agrees that any violation of this prohibition by Fabricator, its employees, agents or assigns will be deemed a material breach of this Agreement.

38. Resource Conservation.

Chapter 5 of the San Francisco Environment Code (“Resource Conservation”) is incorporated herein by reference. Failure by Fabricator to comply with any of the applicable requirements of Chapter 5 will be deemed a material breach of contract.

39. Compliance with Americans with Disabilities Act.

Fabricator acknowledges that, pursuant to the ADA, programs, services and other activities provided by a public entity to the public, whether directly or through Fabricator, shall be accessible to the disabled public. Fabricator shall provide the services specified in this Agreement in a manner that complies with the ADA. Fabricator shall not discriminate against disabled persons in the provision of services, benefits or activities provided under this Agreement and further agrees that any violation of this prohibition on the part of Fabricator, its employees, agents or assigns will constitute a material breach of this Agreement.

Fabricator shall cooperate with City and allow City to take reasonable steps to ensure that the Artwork is accessible to the disabled, with respect to the elimination of both architectural and programmatic barriers. Such cooperation shall include assisting with modifications to the Artwork, or preparing or authorizing tactile models, reproductions, or other materials necessary to provide access to the Artwork. If requested by City, Fabricator shall engage a consultant, as part of the project Budget, to review the Artwork for compliance with the ADA.

40. Sunshine Ordinance.

Pursuant to San Francisco Administrative Code §67.24(e), contracts, Fabricator’s bids, responses to solicitations and all other records of communications between City and

persons or firms seeking contracts, shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this paragraph will be made available by City to the public upon request.

41. Public Access to Meetings and Records.

If the Fabricator receives a cumulative total per year of at least \$250,000 in City funds or City-administered funds and is a non-profit organization as defined in Chapter 12L of the San Francisco Administrative Code, Fabricator shall comply with and be bound by all the applicable provisions of that Chapter. By executing this Agreement, the Fabricator agrees to open its meetings and records to the public in the manner set forth in §§12L.4 and 12L.5 of the Administrative Code. Fabricator further agrees to make-good faith efforts to promote community membership on its Board of Directors in the manner set forth in §12L.6 of the Administrative Code. The Fabricator acknowledges that its material failure to comply with any of the provisions of this paragraph shall constitute a material breach of this Agreement. The Fabricator further acknowledges that such material breach of the Agreement shall be grounds for the City to terminate and/or not renew the Agreement, partially or in its entirety.

42. Limitations on Contributions.

Through execution of this Agreement, Fabricator acknowledges that it is familiar with section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, or for a grant, loan or loan guarantee, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or the board of a state agency on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Fabricator acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Fabricator further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Fabricator's board of directors; Fabricator's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Fabricator; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Fabricator. Additionally, Fabricator acknowledges that Fabricator must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. Fabricator further agrees to provide to City the names of each person, entity or committee described above.

43. Requiring Minimum Compensation for Employees.

a. Fabricator agrees to comply fully with and be bound by all of the provisions of the Minimum Compensation Ordinance (MCO), as set forth in San Francisco Administrative Code Chapter 12P (Chapter 12P), including the remedies provided, and implementing guidelines and rules. The provisions of Sections 12P.5 and 12P.5.1 of Chapter 12P are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the MCO is available on the web at www.sfgov.org/olse/mco. A partial listing of some of Fabricator's obligations under the MCO is set forth in this Section. Fabricator is required to comply with all the provisions of the MCO, irrespective of the listing of obligations in this Section.

b. The MCO requires Fabricator to pay Fabricator's employees a minimum hourly gross compensation wage rate and to provide minimum compensated and uncompensated time off. The minimum wage rate may change from year to year and Fabricator is obligated to keep informed of the then-current requirements. Any subcontract entered into by Fabricator shall require the subcontractor to comply with the requirements of the MCO and shall contain contractual obligations substantially the same as those set forth in this Section. It is Fabricator's obligation to ensure that any subcontractors of any tier under this Agreement comply with the requirements of the MCO. If any subcontractor under this Agreement fails to comply, City may pursue any of the remedies set forth in this Section against Fabricator.

c. Fabricator shall not take adverse action or otherwise discriminate against an employee or other person for the exercise or attempted exercise of rights under the MCO. Such actions, if taken within 90 days of the exercise or attempted exercise of such rights, will be rebuttably presumed to be retaliation prohibited by the MCO.

d. Fabricator shall maintain employee and payroll records as required by the MCO. If Fabricator fails to do so, it shall be presumed that the Fabricator paid no more than the minimum wage required under State law.

e. The City is authorized to inspect Fabricator's job sites and conduct interviews with employees and conduct audits of Fabricator

f. Fabricator's commitment to provide the Minimum Compensation is a material element of the City's consideration for this Agreement. The City in its sole discretion shall determine whether such a breach has occurred. The City and the public will suffer actual damage that will be impractical or extremely difficult to determine if the Fabricator fails to comply with these requirements. Fabricator agrees that the sums set forth in Section 12P.6.1 of the MCO as liquidated damages are not a penalty, but are reasonable estimates of the loss that the City and the public will incur for Fabricator's noncompliance. The procedures governing the assessment of liquidated damages shall be those set forth in Section 12P.6.2 of Chapter 12P.

g. Fabricator understands and agrees that if it fails to comply with the requirements of the MCO, the City shall have the right to pursue any rights or remedies available under Chapter 12P (including liquidated damages), under the terms of the contract, and under applicable law. If, within 30 days after receiving written notice of a breach of this Agreement for violating the MCO, Fabricator fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Fabricator fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the City shall have the right to pursue any rights or remedies available under

applicable law, including those set forth in Section 12P.6(c) of Chapter 12P. Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the City.

h. Fabricator represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the MCO.

i. If Fabricator is exempt from the MCO when this Agreement is executed because the cumulative amount of agreements with this department for the fiscal year is less than \$25,000, but Fabricator later enters into an agreement or agreements that cause Fabricator to exceed that amount in a fiscal year, Fabricator shall thereafter be required to comply with the MCO under this Agreement. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Fabricator and this department to exceed \$25,000 in the fiscal year.

44. Requiring Health Benefits for Covered Employees.

Unless exempt, Fabricator agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q, including the remedies provided, and implementing regulations, as the same may be amended from time to time. The provisions of section 12Q.5.1 of Chapter 12Q are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the HCAO is available on the web at www.sfgov.org/olse. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12Q.

a. For each Covered Employee, Fabricator shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If Fabricator chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Commission.

b. Notwithstanding the above, if the Fabricator is a small business as defined in Section 12Q.3(e) of the HCAO, it shall have no obligation to comply with part (a) above.

c. Fabricator's failure to comply with the HCAO shall constitute a material breach of this agreement. City shall notify Fabricator if such a breach has occurred. If, within 30 days after receiving City's written notice of a breach of this Agreement for violating the HCAO, Fabricator fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Fabricator fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, City shall have the right to pursue the remedies set forth in 12Q.5.1 and 12Q.5(f)(1-6). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to City.

d. Any Subcontract entered into by Fabricator shall require the Subcontractor to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. Fabricator shall notify City's Office of Contract Administration when it enters into such a Subcontract and shall certify to the Office of Contract Administration that it has notified the Subcontractor of the obligations under the HCAO and has imposed the requirements of the HCAO on Subcontractor through the Subcontract. Each Fabricator shall be responsible for its Subcontractors' compliance with this Chapter. If a Subcontractor fails to comply, the City may pursue the remedies set forth in this Section against Fabricator based on the

Subcontractor's failure to comply, provided that City has first provided Fabricator with notice and an opportunity to obtain a cure of the violation.

e. Fabricator shall not discharge, reduce in compensation, or otherwise discriminate against any employee for notifying City with regard to Fabricator's noncompliance or anticipated noncompliance with the requirements of the HCAO, for opposing any practice proscribed by the HCAO, for participating in proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

f. Fabricator represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the HCAO.

g. Fabricator shall maintain employee and payroll records in compliance with the California Labor Code and Industrial Welfare Commission orders, including the number of hours each employee has worked on the City Contract.

h. Fabricator shall keep itself informed of the current requirements of the HCAO.

i. Fabricator shall provide reports to the City in accordance with any reporting standards promulgated by the City under the HCAO, including reports on Subcontractors and Subtenants, as applicable.

j. Fabricator shall provide City with access to records pertaining to compliance with HCAO after receiving a written request from City to do so and being provided at least ten business days to respond.

k. Fabricator shall allow City to inspect Fabricator's job sites and have access to Fabricator's employees in order to monitor and determine compliance with HCAO.

l. City may conduct random audits of Fabricator to ascertain its compliance with HCAO. Fabricator agrees to cooperate with City when it conducts such audits.

m. If Fabricator is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but Fabricator later enters into an agreement or agreements that cause Fabricator's aggregate amount of all agreements with City to reach \$75,000, all the agreements shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between Fabricator and the City to be equal to or greater than \$75,000 in the fiscal year.

45. First Source Hiring Program.

Intentionally left blank by Agreement of Parties.

46. Prohibition on Political Activity with City Funds.

In accordance with San Francisco Administrative Code Chapter 12.G, Fabricator may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure (collectively, "Political Activity") in the performance of the services provided under this Agreement. Fabricator agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the City's Controller. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event Fabricator violates the provisions of this section, the City may, in addition to any other rights or remedies available hereunder, (i) terminate this Agreement, and (ii) prohibit Fabricator from bidding on or receiving

any new City contract for a period of two (2) years. The Controller will not consider Fabricator's use of profit as a violation of this section.

47. Preservative-treated Wood Containing Arsenic.

Fabricator may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of Environment under Section 1304 of the Code. The term "preservative-treated wood containing arsenic" means wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Fabricator may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude Fabricator from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" means a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

48. Modification of Agreement.

- a. Except as provided herein, this Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved in the same manner as this Agreement.
- b. Fabricator shall cooperate with the Arts Commission and the SFMTA's Office of Contract Compliance to submit to the OCC any amendment, modification, supplement or change order that would result in a cumulative increase of the original amount of this Agreement by more than 20%.
- c. The Commission and Fabricator, by written agreement signed by both parties, may clarify provisions of Appendix A ("Fabricators Proposal") and/or Appendix B ("Services to be Provided by Fabricator), by further outlining, correcting, clarifying and refining the substance of each of the Phases of the Work as to the date(s) of deliverables (including modifying or changing the order of the due date(s) for deliverables), the costs associated with each Phase and the Performance and Payment Schedule. Such changes shall be kept on file at the Commission. Such clarifications shall not alter the total maximum term or maximum compensation allowed in Section 2 (Term of the Agreement) and section 5 (Compensation), respectively.

49. Administrative Remedy for Agreement Interpretation.

Should any question arise as to the meaning and intent of this Agreement, the question shall, prior to any other action or resort to any other legal remedy, be referred to Purchasing who shall decide the true meaning and intent of the Agreement.

50. Agreement Made in California; Venue.

The formation, interpretation and performance of this Agreement shall be governed by

the laws of the State of California. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

51. Construction.

All paragraph captions are for reference only and shall not be considered in construing this Agreement.

52. Entire Agreement.

This Contract and the documents incorporated by reference herein sets forth and memorializes the entire agreement between the Parties, and supersedes all other oral or written understandings or provisions. This contract may be modified only as provided in Section 48 (Modification of Agreement).

53. Compliance with Laws.

Fabricator shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and shall at all times comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time.

54. Services Provided by Attorneys.

Any services to the Project to be provided by a law firm or attorney (engaged by the Fabricator) must be reviewed and approved in writing by the City Attorney in advance of the Fabricator's engagement of the attorney. No invoices for services to the Fabricator provided by law firms or attorneys to the Fabricator, including, without limitation, as subcontractors of Fabricator, will be reimbursed by the City unless the provider received advance written approval from the City Attorney and such amount is within the Fabricator's approved Budget. The City Attorney will not review or approve an attorney who only provides confidential advice to the Fabricator, but the City will not reimburse the Fabricator for those expenses.

55. Priority of Documents.

The services and Work that Fabricator shall provide and perform for the Project are described in this Agreement, the RFP, and the Proposal. All requirements of the RFP and the representations made in the Fabricator's Proposal that are not in conflict with provisions of this Contract are hereby incorporated by reference and made an integral part of the contract as though fully set forth herein. With respect to any conflict or ambiguity between this Agreement and the RFP or the Proposal, this Agreement shall control except where the RFP or the Proposal refers to services not otherwise mentioned in this Agreement, in which case and to such extent the RFP shall control. The Proposal shall control only where an issue or subject is not addressed in either the RFP or this Agreement. A modification to the Agreement shall control over all other documents. In case of conflict among modifications to the Agreement, the latest modification shall have precedence over any earlier modification.

56. Severability.

Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

57. Protection of Private Information.

Fabricator has read and agrees to the terms set forth in San Francisco Administrative Code Sections 12M.2, "Nondisclosure of Private Information," and 12M.3, "Enforcement" of Administrative Code Chapter 12M, "Protection of Private Information," which are incorporated herein as if fully set forth. Fabricator agrees that any failure of Contactor to comply with the requirements of Section 12M.2 of this Chapter shall be a material breach of the Contract. In such an event, in addition to any other remedies available to it under equity or law, the City may terminate the Contract, bring a false claim action against the Fabricator pursuant to Chapter 6 or Chapter 21 of the Administrative Code, or debar the Fabricator.

58. Graffiti Removal.

Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti shall be abated as quickly as possible to avoid detrimental impacts on the City and County and its residents, and to prevent the further spread of graffiti.

Fabricator shall remove all graffiti from any real property owned or leased by Fabricator in the City and County of San Francisco within forty eight (48) hours of the earlier of Fabricator's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works. This section is not intended to require a Fabricator to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17

U.S.C. §§ 101 et seq.). Any failure of Fabricator to comply with this section of this Agreement shall constitute an Event of Default of this Agreement.

59. Food Service Waste Reduction Requirements.

Fabricator agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in San Francisco Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this Agreement as though fully set forth. This provision is a material term of this Agreement. By entering into this Agreement, Fabricator agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Fabricator agrees that the sum of one hundred dollars (\$100) liquidated damages for the first breach, two hundred dollars (\$200) liquidated damages for the second breach in the same year, and five hundred dollars (\$500) liquidated damages for subsequent breaches in the same year is reasonable estimate of the damage that City will incur based on the violation, established in light of the circumstances existing at the time this Agreement was made. Such amount shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Fabricator's failure to comply with this provision.

60. Cooperative Drafting.

This Agreement is the product of negotiations between the City and the Fabricator, each of which has opportunity to consult with legal counsel of its choosing as to the terms and conditions set out herein. No statute or rule of construction or interpretation that would require that an ambiguity in this Agreement be construed against the drafter shall apply to this Agreement, but the Agreement shall be construed to implement the intent of the parties.

61. Dispute Resolution Procedure.

If agreed to by both Parties, disputes may be resolved by a mutually agreed to alternative dispute resolution process.

62. Federal Requirements.

a. Federal Contract Requirements and Applicable Law. The provisions set out this Section 62 are required by federal law. If there is any conflict between said provisions or any federal law, regulation or requirement, including such limitations and requirements as the FTA may impose, such federal requirements, terms and conditions shall take precedence over any terms and conditions set out in this Agreement. The City and County of San Francisco is a chartered City and County with home rule powers under the Constitution of the State of California. The terms of this Agreement are governed by California Law and the ordinances and Charter of the City and County of San Francisco. Except as expressly provided for in this Agreement, the Federal Acquisition Regulations (FAR) shall not apply to this Agreement, except as to provide guidance as to accounting and auditing standards, including but not limited to calculation of compensable costs and overhead.

b. Incorporation of Federal Transit Administration (FTA) Terms.

- (1) All contractual provisions required by DOT, as set forth in FTA Circular

4220.1F, (http://www.fta.dot.gov/laws/circulars/leg_reg_8641.html), as amended and the Master Grant Agreement (<http://www.fta.dot.gov/documents/15-Master.pdf>), are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Fabricator shall not perform any act, fail to perform any act, or refuse to comply with any City request that would cause the City to be in violation of the FTA terms and conditions.

(2) The FTA Master Agreement obligates SFMTA to incorporate certain provisions into this Agreement and any lower tier subcontracts at any level and to take appropriate measures to ensure that Fabricator and its lower tier subcontractors at any level comply with certain applicable requirements set forth in the Master Agreement. The FTA Master Agreement is hereby incorporated by reference into this Agreement, and Fabricator shall comply with all such requirements.

(3) Copies of the FTA Master Agreement are available from the Commission.

c. Applicability of Federal Grant Contract.

(1) This procurement may be subject to one or more financial assistance contracts between SFMTA and the U.S. Department of Transportation, which incorporate the current FTA Master Agreement and Circular 4220.1F as amended. U.S. Department of Transportation's level of financial assistance may be between zero and eighty percent (0-80%). The Fabricator is required to comply with all terms and conditions prescribed for third party contracts in these documents.

(2) Federal laws, regulations, policies and administrative practices may be modified or codified after the date this Agreement is established and may apply to this Agreement. To assure compliance with changing federal requirements, Contract Award indicates that the Fabricator agrees to accept all changed requirements that apply to this Agreement.

d. Federal Funding Limitation. Fabricator understands that funds to pay for Fabricator's performance under this Agreement are anticipated to be made available from the United States Department of Transportation through the Federal Transit Administration (FTA). All funds must be approved and administered by FTA. The City's obligation hereunder is payable from funds that are appropriated and allocated by FTA for the performance of this Agreement. If funds are not allocated, or ultimately are disapproved by FTA, the City may terminate or suspend Fabricator's services without penalty. The Commission shall notify Fabricator promptly in writing of the non-allocation, delay, or disapproval of funding.

e. No Federal Government Obligation to Third Parties. Fabricator agrees that, absent the Federal Government's express written consent, the Federal Government shall not be subject to any obligations or liabilities to any subrecipient, any third party Fabricator, or any other person not a party to the Grant Agreement in connection with this Project. Notwithstanding any concurrence provided by the Federal Government in or approval of any solicitation, subagreement, or third party contract, the Federal Government continues to have no obligations or liabilities to any party, including a

subrecipient or third party contractor.

f. Federal Lobbying Restrictions.

(1) This Agreement is subject to Section 319, Public Law 101-121 (31 U.S.C. §1352) and U.S. DOT regulations "New Restrictions on Lobbying," 49 C.F.R. Part 20, which prohibits Federal funds from being expended to influence or to attempt to influence an officer or employee of any agency, members of Congress, an office or employee of Congress or an employee of any Member of Congress in connection with the awarding of any federally funded contract, the making of any Federal grant or loan, or entering into any cooperative agreement and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. Consultants and Subcontractors at any time who apply or bid for an award of \$100,000 or more shall file the certification required by 49 C.F.R. Part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or any employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures are forwarded from tier to tier, up to the recipient. The Fabricator shall submit the "Certification Regarding Lobbying" included in this document. The Fabricator's signature on this certification shall certify that: a) it has not engaged in the prohibited activity and b) the language of the certification shall be included in all lower tier subcontracts, which exceed \$100,000, and that all such subcontractors shall certify and disclose accordingly. SFMTA is responsible for keeping the certification form of the Fabricator, who is in turn responsible for keeping the certification forms of subcontractors. Further, by executing the Agreement, the Fabricator agrees to comply with these laws and regulations.

(2) If the Fabricator has engaged in any lobbying activities to influence or attempt to influence the awarding of this Agreement, the Fabricator must disclose these activities. In such a case, the Fabricator shall complete Standard Form SF-LLL, "Disclosure of Lobbying Activities". SFMTA must also receive all disclosure forms.

(3) The Fabricator and any subcontractors shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of a previously filed disclosure form. An event that materially affects the accuracy of the information reported includes:

(a) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence this federally funded Agreement; or

(b) A change in the person(s) influencing or attempting to influence this federally funded Agreement; or

(c) A change in the officer(s), employee(s) or member contracted to influence or attempt to influence this federally funded Agreement.

g. Lobbying Certification and Disclosure. Pursuant to 49 C.F.R. Part 20 (which is by this reference incorporated herein), the Fabricator shall execute and return the Certification Regarding Lobbying by Fabricator form set forth in Attachment G with the execution of this agreement.

h. Certification Regarding Debarment, Suspension And Other Responsibility Matters.

(1) Pursuant to Executive Order 12549 and 12689, "Debarment and Suspension," 31 USC § 6101 and federal regulations in 49 C.F.R. 29, entities and individuals who are debarred or suspended by the federal government are excluded from obtaining federal assistance funds under this Contract. To assure that such entities and individuals are not involved as participants on this FTA-financed contract, if the contract exceeds \$25,000 each Fabricator shall complete and submit, as part of its Proposal, the certification form, contained in these documents. The inability of an Fabricator to provide a certification will not necessarily result in denial of consideration for contract award. A Fabricator that is unable to provide a certification must submit a complete explanation attached to the certification form. Failure to submit a certification or explanation may disqualify the Fabricator from participation under this Contract. SFMTA, in conjunction with FTA, will consider the certification or explanation in determining contract award. No contract will be awarded to a potential third-party Fabricator submitting a conditioned debarment or suspension certification, unless approved by the FTA.

(2) The certification is a material representation of fact upon which reliance is placed in determination of award of contract. If at any time the Fabricator learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances, it shall immediately provide written notice to SFMTA. If it is later determined that the Fabricator knowingly rendered an erroneous certification, or failed to notify SFMTA immediately of circumstances which made the original certification no longer valid, SFMTA may disqualify the Fabricator. If it is later determined that the Fabricator knowingly rendered an erroneous certification, or failed to notify SFMTA immediately of circumstances which made the original certification no longer valid, SFMTA may terminate the contract, in addition to other remedies available including FTA suspension and/or debarment.

(3) Further, the Fabricator shall not knowingly enter into any subcontract with an entity or person who is proposed for debarment under 48 C.F.R. Part 9, Subpart 9.4, debarred, suspended, or who has been declared ineligible from obtaining federal assistance funds. As such, the Fabricator shall require all subcontractors seeking subcontracts to complete and submit the same certification form contained in these documents before entering into any agreement with said subcontractor.

i. Exclusionary Or Discriminatory Specifications. Apart from inconsistent requirements imposed by Federal statute or regulations, the Fabricator agrees that it will

comply with the requirement of 49 U.S.C. § 5323(h)(2) by refraining from using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.

j. Energy Conservation. The Fabricator shall recognize mandatory standards and policies relating to energy efficiency that are contained in the State Energy Action plan issued in compliance with the Energy Policy and Conservation Act (42 USC Section 6321 et seq.).

k. Clean Water. The Fabricator agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq. The Fabricator agrees to report each violation to the City and understands and agrees that the City will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. The Fabricator also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

l. Clean Air. The Fabricator agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. The Fabricator agrees to report each violation to the City and understands and agrees that the Purchaser will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. The Fabricator also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

m. Fly America. International air transportation of any persons involved in or property acquired for the Project must be provided by U.S. flag air carriers to the extent service by these carriers is available, as required by the International Air Transportation Fair Competitive Practices Act of 1974, as amended, 49 U.S.C. 40118, in accordance with U.S. GAO regulations, “Uniform Standards and Procedures for Transportation Transactions,” 4 C.F.R. Part 52, and U.S. GAO Guidelines for Implementation of the “Fly America Act” B-138942, 1981 U.S. Comp. Gen. LEXIS 2166. March 31, 1981.

n. Texting While Driving; Distracted Driving. Consistent with Executive Order 13513 “Federal Leadership on Reducing Text Messaging While Driving”, Oct. 1, 2009 (available at <http://edocket.access.gpo.gov/2009/E9-24203.htm>) and DOT Order 3902.10 “Text Messaging While Driving”, Dec. 30, 2009, SFMTA encourages Fabricator to promote policies and initiatives for employees and other personnel that adopt and promote safety policies to decrease crashes by distracted drivers, including policies to ban text messaging while driving, and to include this provision in each third party subcontract involving the project.

o. Seat Belt Use. In compliance with Executive Order 13043 “Increasing Seat Belt Use in the United States”, April 16, 1997 23 U.S.C. Section 402 note, the SFMTA encourages Fabricator to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated vehicles, and to include this provision in each third party subcontract involving the project.

Fabricator

p. Electronic and Information Technology. When providing reports or other information to the SFMTA, or to the Federal Transit Administration (FTA), among others, on behalf of the SFMTA, the Fabricator agrees to prepare such reports or information using electronic or information technology capable of assuring that the reports or information delivered will meet the applicable accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d, and U.S. ATBCB regulations, "Electronic and Information Technology Accessibility Standards," 36 C.F.R. Part 1194.

q. Civil Rights and Nondiscrimination. In addition to the provisions prohibiting discrimination set out in Section 34, above, the Fabricator shall ensure compliance by it and its subcontractors with all requirements imposed by Title VI of the Civil Rights Act of 1964 (42 USC 2000d), federal Executive Order No. 11246, regulations of the U. S. Department of Labor issued thereunder, the regulations of the federal Department of Transportation issued thereunder, and the Americans with Disabilities Act, as they may be amended from time to time. Accordingly, during the performance of this Agreement, the Fabricator, for itself, its assignees, and successors in interest (hereinafter referred to as the "Fabricator"), agrees as follows:

(1) The Fabricator shall comply with the Regulations relative to nondiscrimination in federally-assisted programs of the Department of Transportation (hereinafter "DOT"), Title 49, Code of Federal Regulations, Part 21 ("Nondiscrimination in Federally-Assisted Programs of the Dept. of Transportation"), as they may be amended from time to time (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this Agreement.

(2) In all solicitations either by competitive bidding or negotiation made by the Fabricator for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Fabricator of the Fabricator's obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, religion, creed, sex, sexual orientation, disability, age, or nationality.

(3) The Fabricator shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by SFMTA or FTA to be pertinent to ascertain compliance with such regulations, orders, and instructions. Where any information is required of a contractor or subcontractor that is in the exclusive possession of another who fails or refuses to furnish this information, the Fabricator shall so certify to SFMTA, or FTA, as appropriate, and shall set forth what efforts it has made to obtain the information.

(4) In the event of the Fabricator's noncompliance with the nondiscrimination provisions of this Agreement, SFMTA shall impose such contract sanctions as it or FTA may determine to be appropriate, including, but not limited to:

(a) Requiring the Fabricator to take remedial action to bring the Fabricator into compliance; and/or

(b) Withholding of payments to the Fabricator under the Agreement until the Fabricator complies; and/or

(c) Cancellation, termination, or suspension of the Agreement, in whole or in part.

(5) The Fabricator shall include the provisions of these Subsections r(1) to r(4) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto. The Fabricator shall take such action with respect to any subcontract or procurement as SFMTA or FTA may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that, in the event the Fabricator becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Fabricator may request SFMTA to enter into such litigation to protect the interests of SFMTA and, in addition, the Fabricator may request the United States to enter into such litigation to protect the interest of the United States.

r. Title VI Compliance. During the performance of this Agreement, Fabricator, for itself, its assignees, and its successors in interest agrees as follows:

(1) Compliance with Regulations: Fabricator shall comply with the Regulations relative to nondiscrimination in federally-assisted programs of the Department of Transportation (hereinafter, "DOT") Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time (hereinafter referred to as the Regulations), which are herein incorporated by reference and made part of this Agreement.

(2) Nondiscrimination: Fabricator, with regard to the work performed by it during the Agreement, shall not discriminate on the grounds of race, religion, color, sex, age, or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment. Fabricator shall not participate either directly or indirectly in the discrimination prohibited by 21.5 of the Regulations, including employment practices when the Agreement covers a program set forth in Appendix B of the Regulations.

(3) Solicitations for Subcontracts, Including Procurements of Materials and Equipment: In all solicitations either by competitive bidding or negotiation made by Fabricator for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by Fabricator of Fabricator's obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, religion, color, sex, age, or national origin.

(4) Information and Reports: Fabricator shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit

access to its books, records, accounts, other sources of information, and its facilities as may be determined by SFMTA or the FTA to be pertinent to ascertain compliance with such Regulations, orders, and instructions. Where any information required of Fabricator is in the exclusive possession of another who fails or refuses to furnish this information, Fabricator shall so certify to SFMTA, or the FTA as appropriate, and shall set forth what efforts it has made to obtain the information.

(5) **Sanctions for Noncompliance:** In the event of Fabricator's noncompliance with the nondiscrimination provisions of this Agreement, SFMTA shall impose such contract sanctions as it or the FTA may determine to be appropriate, including, but not limited to:

(a) Withholding of payments to Fabricator under the Agreement until Fabricator complies, and/or,

(b) Cancellation, termination or suspension of the Agreement, in whole or in part.

(6) **Incorporation of Provisions:** Fabricator shall include the provisions of Subsection 62.18.1 through 62.18.5 of this Section in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto. Fabricator shall take such action with respect to any subcontract or procurement as SFMTA or the FTA may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that, in the event Fabricator becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, Fabricator may request SFMTA to enter into such litigation to protect the interests of SFMTA, and, in addition, Fabricator may request the United States to enter into such litigation to protect the interests of the United States.

s. Requirements of Americans with Disabilities Act. The Fabricator is required to comply with all applicable requirements of the Americans with Disabilities Act of 1990 (ADA), 42 USC §§ 12101, et seq.; Section 504 of the Rehabilitation Act of 1973, as amended, 29 USC § 794; and 49 USC § 5301(d), and the following regulations and any amendments thereto:

(1) U.S. Department of Transportation regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37;

(2) U.S. Department of Transportation regulations, "Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. Part 27;

(3) U.S. Department of Justice (DOJ) regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 C.F.R. Part 35;

(4) DOJ regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. Part 36;

(5) U.S. General Services Administration regulations, "Accommodations for the Physically Handicapped," 41 C.F.R. Subpart 101-19;

(6) U.S. Equal Employment Opportunity Commission (EEOC) "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630;

(7) U.S. Federal Communications Commission regulations, "Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities," 47 C.F.R. Part 64, Subpart F; and

(8) FTA regulations, "Transportation for Elderly and Handicapped Persons," 49 C.F.R. Part 609.

62.19.9. Any implementing requirements that the FTA may issue.

t. Subcontractor Non-Discrimination Assurances. Pursuant to 49 C.F.R. Section 26.13, the Fabricator is required to make the following assurance in its agreement with SFMTA and to include this assurance in any agreements it makes with subcontractors in the performance of this contract: "The Fabricator or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Fabricator shall carry out applicable requirements of 49 C.F.R. Part 26 in the award and administration of DOT-assisted contracts. Failure by the Fabricator or subcontractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as SFMTA deems appropriate."

u. Recycled Products. To the extent practicable and economically feasible, the Fabricator agrees to provide a competitive preference for recycled products to be used in the Project pursuant to the U.S. Environmental Protection Agency Guidelines at 40 C.F.R. Parts 247, implementing Section 6002 of the Resource Conservation and Recovery Act, as amended, 42 USC § 6962. If possible, the Fabricator shall use both sides of paper sheets for copying and printing and shall use recycled/recyclable products wherever practical at the fulfillment of this Agreement.

v. False or Fraudulent Statements and Claims.

(1) The Fabricator recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 49 U.S.C. §§ 3801 et seq. and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to its actions pertaining to this Project. Accordingly, by signing this Agreement, the Fabricator certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the covered Grant Agreement, Cooperative agreement, Contract or Project. In addition to other penalties that may be applicable, the Fabricator acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Fabricator, to the extent the Federal Government deems appropriate.

(2) The Fabricator also acknowledges that it if makes a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government in connection with an urbanized area formula project financed with Federal assistance authorized by 49 U.S.C. § 5307, the Government reserves the right to impose on the Fabricator the penalties of 18 U.S.C. § 1001, 31 USC §§ 3801, et seq., and 49 U.S.C. § 5307(n)(1), to the extent the Federal Government deems appropriate.

(3) The Fabricator agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

w. Drug-Free Workplace Policy. Fabricator acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, 41 U.S.C. 702, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City premises. Fabricator agrees that any violation of this prohibition by Fabricator, its employees, agents or assigns will be deemed a material breach of this Agreement.

x. Buy America. If steel, iron, other manufactured products (“materials”) (as defined in 49 CFR Sections 661.3 and 661.5) are used in the fabrication of the Artwork, said materials must be manufactured in the United States in accordance with 49 CFR Sections 661.3 and 661.5 and other applicable federal regulations. Fabricator shall not use materials that do not comply with said requirements. Fabricator shall refund the City all funds received for the Work and shall be liable for all costs and damages arising from or related to the replacement or refabrication of the Artwork due to noncompliance with Buy America requirements.

y. Incorporation of FTA Terms.

(1) The preceding provisions include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1F, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Fabricator shall not perform any act, fail to perform any act, or refuse to comply with any SFMTA requests which would cause the SFMTA to be in violation of the FTA terms and conditions.

(2) For purposes of applying federal law to this Agreement, the following terms have the meanings provided below:

- i. Approved Project Budget means the most recent statement, approved by the FTA, of the costs of the Project, the maximum amount of Federal assistance for which the City is currently eligible, the specific tasks (including specified contingencies) covered, and the estimated cost of each task.

- ii. Contractor means the Fabricator that is the individual or entity awarded a third party contract financed in whole or in part with Federal assistance originally derived from FTA.
- iii. Cooperative Agreement means the instrument by which FTA awards Federal assistance to a specific Recipient to support a particular Project or Program, and in which FTA takes an active role or retains substantial control.
- iv. Federal Transit Administration (FTA) is an operating administration of the U.S. DOT.
- v. FTA Directive includes any FTA circular, notice, order or guidance providing information about FTA's programs, application processing procedures, and Project management guidelines. In addition to FTA directives, certain U.S. DOT directives also apply to the Project.
- vi. Grant Agreement means the instrument by which FTA awards Federal assistance to a specific Recipient to support a particular Project, and in which FTA does not take an active role or retain substantial control, in accordance with 31 U.S.C. § 6304.
- vii. Government means the United States of America and any executive department or agency thereof.
- viii. Project means the task or set of tasks listed in the Approved Project Budget, and any modifications stated in the Conditions to the Grant Agreement or Cooperative Agreement applicable to the Project. In the case of the formula assistance program for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. §§ 5307, 5310, and 5311, respectively, the term "Project" encompasses both "Program" and "each Project within the Program," as the context may require, to effectuate the requirements of the Grant Agreement or Cooperative Agreement.
- ix. Recipient means any entity that receives Federal assistance directly from FTA to accomplish the Project. The term "Recipient" includes each FTA "Grantee" as well as each FTA Recipient of a Cooperative Agreement. For the purposes of this Agreement, Recipient is the City.
- x. Secretary means the U.S. DOT Secretary, including his or her duly authorized designee.
- xi. Third Party Contract means a contract or purchase order, including this Fabrication Agreement, awarded by the Recipient to a vendor or contractor, financed in whole or in part with Federal assistance awarded by FTA.
- xii. Third Party Subcontract means a subcontract at any tier entered into by Contractor or third party subcontractor, financed in whole or in part with Federal assistance originally derived from FTA.
- xiii. U.S. DOT is the acronym for the U.S. Department of Transportation, including its operating administrations.

z. Federal Changes. Fabricator shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement between the City and FTA, as they may be amended or promulgated from time to time during the term of this contract. Fabricator's failure to so comply shall constitute a material breach of this contract.

aa. Access to Records.

- (1) The Fabricator agrees to provide the City and County of San Francisco, the FTA Administrator, the Comptroller General of the United States or any of their authorized representatives access to any books, documents, papers and records of the Fabricator which are directly pertinent to this Agreement for the purposes of making audits, examinations, excerpts and transcriptions.
- (2) The Fabricator agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- (3) The Fabricator agrees to maintain all books, records, accounts and reports required under this Agreement for a period of not less than three years after the date of termination or expiration of this Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case Fabricator agrees to maintain same until the City, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. 49 CFR 18.36(i)(11).

bb. No Federal Government Obligations to Fabricator.

- (1) The City and Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this contract and shall not be subject to any obligations or liabilities to the City, Contractor, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.
- (2) The Fabricator agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.
- (3)

63. Approval by Counterparts.

This Agreement may be executed in counterparts, each of which shall be an original, but together shall constitute one and the same instrument.

64. Included Appendices.

The Appendices listed below are incorporated to the Agreement by reference.

- A. Services to be Provided by Fabricator
- B. Fabricator's Approved Costs
- C. Payment Schedule
- D. Civic Art Collection Forms
- E. Lobbying Certification and Disclosure

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day first mentioned above.

CITY

APPROVED:

Tom DeCaigny
Director of Cultural Affairs
Arts Commission

APPROVED:

SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY

Edward Reiskin
Director of Transportation
Date: _____

SFMTA Board of Directors

Resolution No. _____
Dated: _____
Attest:

Roberta Boomer, Secretary
SFMTA Board of Directors

Approved as to Form:

Dennis J. Herrera
City Attorney

By _____
Robert K. Stone
Deputy City Attorney

FABRICATOR

By signing this Agreement, I certify that I comply with the requirements of the Minimum Compensation Ordinance, which entitle Covered Employees to certain minimum hourly wages and compensated and uncompensated time off

I have read and understood paragraph 35, the City's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles.

JOE RICHE,
DEMIURGE LLC
5485 Marion Street, Suite A
Denver CO 80216
City vendor number: **10256**

Appendix A
Services to be Provided by FABRICATOR

**Fabrication, Transportation and Consultation during Installation of
Artwork for
The Central Subway UNION SQUARE MARKET STREET STATION**

Authorization: The Commission must approve Fabricator’s work at each phase of development before the Fabricator proceeds to the next phase.

1) PHASE I – Final Artwork Specification and Fabrication of Artwork

1. Scope of Work.

- a) Fabricator shall identify subcontractors and provide the Arts Commission with copies of agreements prior to payment for fabrication of all or any Work pursuant to Paragraph 29, as well as documentation establishing that all employees, subcontractors and suppliers have been paid in a timely manner (collectively, “Subcontracts and Documentation”).
- b) Work with the Artist to further develop the specification by producing up to ten additional stamped, polished and assembled stainless steel disc samples in consultation with the Artist for approval by the Artist and Arts Commission staff. The design drawings and specifications attached as Appendix F have been approved by the Arts Commission and are binding unless or until changes are approved by resolution of the Commission.
- c) Shop Drawings. Fabricator shall deliver Shop Drawings for Artwork elements, armature and attachment hardware produced by Fabricator or Fabricator’s subcontractors. The Shop Drawings shall be signed and stamped by a structural engineer under the Artist’s Contract as required by the California Uniform Building Code and any San Francisco amendments to the Building Code.
- d) Meet with General Contractor’s art installer prior to beginning fabrication to review shop drawings, architectural drawings and installation procedure.
- e) Fabricator shall fabricate the Artwork in accordance with all Contract Documents approved by the Commission by Resolution.
- f). Fabricator’s proposal for the fabrication and transportation of the Artwork is outlined in Appendix B (Fabricator’s Costs).
- g) Inspection of Artwork:
 - i) Fabricator shall send photo documentation of Artwork fabrication at 50% completion and 100% completion. Documentation to be sent to Arts Commission Project Manager at each stage for review and approval prior to advancing with next phase of fabrication.

ii) Fabricator shall notify the Commission 30 days in advance of 100% completion of all the Artwork elements so that the Arts Commission can do a field inspection of the Artwork at the fabricator.

iii) Fabricator shall submit documentation from Fabricator's structural engineer confirming that fabrication has been completed in conformance with the approved Contract Documents, including any required welding inspection reports and/or any required materials submittals confirming steel sections and grades.

h) Transportation Plan. Fabricator shall deliver a written list of the workers, vehicles, and equipment that will be involved in the transportation of the Artwork to the Site. Evidence of insurance of the Artwork during transportation must be provided by the company or individual hired to transport the Artwork.

i) Final documentation, written proof of timely payment to subcontractors, maintenance manual, product specification data.

2. Schedule of Deliverables.

Deliverable	Due Dates
Final Artwork Design Specification	No later than September 29, 2017
Submit Shop Drawings	No later than October 15, 2017
Coordination Meeting with Art Installer and GC	No later than October 29, 2017
50% Fabrication	No later than March 1, 2018
Notify SFAC Project Manager of 100% Fabrication in order to schedule inspection	No later than June 2, 2018
100% Fabrication	No later than July 2, 2018
Final Inspection	No later than July 31, 2018

3. Compensation. Fabricator's total compensation for Phase I shall be in accordance with Appendix B, Fabricators Approved Costs, which is incorporated herein by reference. Such compensation shall cover all of Fabricator's costs and fees for Phase I.

4. Payment Schedule: Fabricator's payment schedule and milestones shall be in accordance with Appendix C, Fabricator's Payment Schedule, which is incorporated herein by reference.

5. Approved Subcontractors:
Charles Schillinger Company (Disk Stamping)
1329 Ford Road
Bensalem, PA 19020

Yetiweurks Engineering
5830 Downing St
Denver, CO 80216

Onsite Coatings
Thornton, CO 80229

Colorado Waterjet Company
5186 Longs Peak Rd F
Berthoud, CO 80513

Metal Rolling and Welding
5627 Kendall Ct. Unit L
Arvada, CO 80002

Lightning Mobile Inc.
260 E 54th Ave., Suite 106
Denver, CO 80216

6. Other Requirements
Left blank by agreement between the parties.

Phase II
TRANSPORTATION OF ARTWORK

1. Scope of Work.

A. Fabricator shall transport Artwork from Fabricator’s shop or other location where Artwork has been fabricated to the City’s designated storage site (exact location TBD. Storage site will be within 25-mile radius from San Francisco).

B. Transportation Plan: Fabricator shall deliver a written list of workers, vehicles, and equipment that will be involved in the transportation of the Artwork to the City. Evidence of insurance of the Artwork during transportation must be provided by the company or the individual hired to transport the Artwork.

C. Fabricator shall prepare, package, crate the Artwork for transportation in accordance with customary industry standards for the transportation of Artwork. Fabricator is responsible for protecting the Artwork during transportation until the Arts Commission inspects and accepts the delivered Artwork. The City shall inspect the Artwork upon arrival in San Francisco and prior to the release of the freight driver to prevent any discrepancy as to when any possible damage occurred.

D. Fabricator shall deliver subcontracts of all or any Work pursuant to Paragraph 29, as well as documentation establishing that all employees, subcontractors and suppliers have been paid in a timely manner (collectively, “Subcontracts and Documentation”).

E. Schedule of Deliverables.

Deliverable	Due Date
Delivery of Required Proof of Insurance	Prior to beginning work of this phase
Delivery of Artwork to Storage	No later than August 31, 2018
Installation Documentation	Prior to final payment
Maintenance Documents	Prior to final payment
Subcontracts and Documentation	Prior to each progress payment and final payment.

F. Compensation. Fabricator’s total compensation for Phase I shall be in accordance with Appendix B, Fabricators Approved Costs, which is incorporated herein by reference. Such compensation shall cover all of Fabricator’s costs and fees for Phase I.

G. Payment Schedule: Fabricator’s payment schedule and milestones shall be in accordance with Appendix C, Fabricator’s Payment Schedule, which is incorporated herein by reference.

H. Approved Subcontractors and corresponding insurance requirements. The Arts Commission shall approve the Fabricator’s subcontracts for the transportation of the Artwork and other consultants as necessary to provide project assistance. Subcontractors are subject to the same insurance requirements as stated in this Agreement unless waived by the City Risk Manager.

Fine Arts Insurance or other insurance against loss in an amount equal to the value of the contract. Fabricator shall obtain such insurance prior to commencing fabrication of the Artwork

I.

1. Reports

Fabricator shall submit written reports as requested by the San Francisco Arts Commission. Format for the content of such reports shall be determined by the San Francisco Arts Commission. The timely submission of all reports is a necessary and material term and condition of this Agreement. The reports, including any copies, shall be submitted on recycled paper and printed on double-sided pages to the maximum extent possible.

2. Department Liaison

In performing the services provided for in this Agreement, Fabricator's liaison with the San Francisco Arts Commission will be JENNIFER LOVVORN, Project Manager.

**PHASE III -
CONSULTATION DURING INSTALLATION OF ARTWORK**

1. Scope of Work.

a. Installation. The Artwork shall be installed at the Site by the Construction Contractor. The Fabricator shall review and provide written comments and recommendations concerning the Construction Contractor's plans for installation of the Artwork, and the Fabricator shall consult with the City and the Construction Contractor as to the means and methods of installing the Artwork. The preparation of the Site for installation of the Artwork shall be the responsibility of the Construction Contractor.

b. Maintenance Documents. Fabricator shall deliver all information necessary for the Commission to properly care for and maintain the Artwork, including information regarding the physical make-up of the Artwork, methods and materials, and information about Fabrication of the Artwork in the forms attached as Appendix D: Civic Art Collection Forms.

2. Schedule of Deliverables. See Appendix C Performance and Payment Schedule.

3. Compensation. Fabricator's total compensation for Phase III shall be as set forth in Appendix B, Project Budget, and Appendix C, Performance and Payment Schedule, which are both incorporated herein by reference. **Such compensation shall cover all of Fabricator's costs and fees for Phase III.**

4. Approved Subcontractors and corresponding insurance requirements. The Arts Commission shall approve the Fabricator's subcontracts for the transportation of the Artwork and other consultants as necessary to provide project assistance. Subcontractors are subject to the same insurance requirements as listed below unless waived by the City Risk Manager.

5. Reports

Fabricator shall submit written reports as requested by the San Francisco Arts Commission. Format for the content of such reports shall be determined by the San Francisco Arts Commission. The timely submission of all reports is a necessary and material term and condition of this Agreement. Fabricator may submit reports electronically unless the City requires printed copies, which if so requested shall be submitted on recycled paper and printed on double-sided pages to the maximum extent possible.

6. Department Liaison

In performing the services provided for in this Agreement, Fabricator's liaison with the San Francisco Arts Commission will be JENNIFER LOVVORN, Project Manager.

**Appendix B
APPROVED COSTS**

A. The City shall compensate Fabricator for its performance of the Work by completion of Milestones, as described in the Appendix C, for the approved costs stated below.

Demiurge Sculptural Fabrications

Description	Cost	Total
Design Optimization		
Labor: Production Design + Optimization	\$15,200.00	
Labor: R&D + Prototyping	\$6,840.00	
Materials: R&D + Prototyping	\$5,292.00	
Labor: Project Management	\$18,233.00	
Subtotal Design Optimization		\$45,565.00
Artwork Fabrication		
Labor: Project Management + Logistics + Meetings + Site Visits	\$29,640.00	
Labor: Shop Fabrication	\$307,135.00	
Materials: Shop Consumables	\$18,988.80	
Materials: All Production Materials per White Light & Arup Documents	\$355,924.49	
Materials: Paint Top Coat Materials and Consumables	\$5,670.00	
Materials: Media Blasting Consumables	\$1,890.00	
Trade Vendors: Media Blasting (Surface Prep for Top Coating)	\$7,206.00	
Lotus Leaf Coating	\$23,000.00	
Subtotal Artwork Fabrication		\$749,454.29
Crating and Delivery		
Labor: Crate/Transport Frame Production + Packing	\$7,600.00	
Materials: Fuel Surcharge	\$354.38	
Materials: Crate/Transport Frame Materials	\$5,430.00	
Materials: Packing Materials	\$3,543.33	
Trade Vendors: Dedicated Transport Truck	\$7,340.00	
Subtotal Crating and Delivery		\$24,267.71
Contract Total		\$819,287.00

B. The City shall compensate Fabricator on a time and materials basis for Additional Work performed outside the scope of the Work described in Milestones, in accordance with the schedule of hourly rates set out below.

Demiurge Hourly Rates for Consultation:

- \$95/hour for all regular services - overtime \$142.50/hour
- \$130/hour for Management or Ownership labor - no overtime.

Appendix C
MILESTONE PAYMENT SCHEDULE

MILESTONE 1	Upon Completion of review of Artist's Digital Model of Artwork	\$ 22,782.50
MILESTONE 2	Upon Completion of Design Optimization	\$ 187,831.32
MILESTONE 3	Upon Completion of 50% Fabrication	\$ 291,711.40
MILESTONE 4	Upon 100% Completion and Approval of Fabrication	\$ 291,711.40
MILESTONE 5	Upon Delivery of Artwork	\$ 19,322.38
MILESTONE 6	Upon Completion of Installation Consultation	\$ 5,928.00
Total		\$ 819,287.00

Fabricator shall not proceed to perform the next Phase or Milestone, as indicated above, without written permission from the Arts Commission.

APPENDIX D: MAINTENANCE DOCUMENTS

Full Name of Fabricator:
Title of Artwork:
Date of Execution:
Dimensions:
Artwork Material/s: (List type and brand name for all materials; attach Material Safety and Technical Data Sheets. Include contact names for each supplier and attach warranties when possible.)
Material Thickness:
Welding or Joint Material:
Welding Rod Alloy or Joint Material:
Casting Alloy, Wax Body, Glass or Fiber Type:
Framing Materials and Construction Method: (List type and brand name for all materials; attach Material Safety and Technical Data Sheets. Include contact names for each supplier and attach warranties when possible.)

Technique or Construction Method: (List all architects and fabricators. Attach any warranties or agreements.)

Finish: (all anti-graffiti coatings, fixative coatings, fire retardant sprays, etc., attach Material Safety and Technical Data sheets.)

Foundation/Installation Method:

Maintenance and Care of Artwork: (Suggested cleaning agent and procedure, attach Material Safety and Technical Data sheets.)

Placement of Artwork: (cautions regarding sunlight, heat, etc.)

Handling Instructions:

Attach any diagrams and disassembly instructions.