

## AGREEMENT FOR ARTIST SERVICES

THIS AGREEMENT is made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2017, by and between the City of Fresno, a municipal corporation (City) and Gordon Huether + Partners, Inc., (Artist). City and Artist may individually be referred to as "Party" and collectively as, the "Parties".

### RECITALS

A. The City requires the services of an artist that is experienced in public art works;

B. The Artist has the necessary professional skills and experience necessary to perform the services described in this Agreement;

C. The City desires to engage the Artist to provide these services by reason of its qualifications and experience in performing such services;

D. The Artist has submitted a proposal to the City and has affirmed its willingness and ability to perform such work on the terms and manner set forth in this Agreement.

NOW, THEREFORE, in consideration of these recitals and the mutual covenants contained herein, the Parties agree as follows:

#### 1. **Scope of Work.**

a. The City retains the Artist to perform, and the Artist agrees to render, those services (the Services) that are described in the attached **Exhibit A**, which is incorporated by this reference, pursuant to this Agreement's terms and conditions.

b. The Artist will be responsible for the professional quality, technical accuracy and coordination of the Services. The Artist will, without additional compensation, correct or revise any errors or deficiencies in the Services.

c. The Artist will keep the City informed on a regular basis that the Services are being performed in accordance with the requirement and intentions of this Agreement.

d. If applicable, the Artist has designated those persons listed in **Exhibit A** to provide the Services to the City. The Artist will not change or reassign those persons described in **Exhibit A** without prior written notice to the City, and will not replace those individuals with individuals to whom the City has a reasonable objection.

2. **Standard of Performance.** The Artist acknowledges that in entering into this Agreement the City is relying on the Artist's special skills and experience to do and perform the Services in accordance with best standards of professional practice. While performing the Services, the Artist will exercise the reasonable professional care and skill customarily exercised by reputable members of the Artist's profession practicing in the Central California area. The acceptance of the Services by the City does not release the Artist from these obligations.

The Artist will be responsible for employing or engaging all persons necessary to perform the Services. All of the Artist's staff will be qualified by training and experience to perform their assigned tasks. The Artist will give its personal attention to the fulfillment of the provisions of this Agreement by all of its employees and subcontractors, if any, and will keep the Services under its control. On demand of the City, if any employee or subcontractor of the Artist fails or refuses to carry out the provisions of this Agreement or appears to be incompetent or to act in a disorderly or improper manner, he or she will be discharged immediately from the Services.

**3. Term.** Unless earlier terminated, the term of this Agreement will commence upon the date first above written and will expire upon completion of the Services by the Artist.

**4. Schedule.** The Artist will generally adhere to the schedule that will be negotiated with the City, provided that the City will grant reasonable extensions of time for the performance of the Services occasioned by unusually lengthy governmental reviews of the Artist's work product or other unavoidable delays occasioned by unforeseen circumstances; provided, further, that such unavoidable delay will not include strikes, lockouts, work stoppages, or other labor disturbances conducted by, or on behalf of, the Artist's officers or employees. The Artist acknowledges the importance to the City of the City's project schedule and agrees to put forth its best professional efforts to perform the Services in a manner consistent with that schedule. The City understands, however, that the Artist's performance must be governed by sound practices. The Artist will work such overtime or engage such personnel and equipment as necessary to maintain the schedule, without additional compensation.

**5. Compensation.**

a. The total fee payable for the Services to be performed during the term of this Agreement will be a not to exceed amount of \$200,000.00. No other compensation for the Services will be allowed except for items covered by subsequent amendments to this Agreement. The City reserves the right to withhold a (10%) retention until the City has finally accepted the Services.

b. The first payment of \$25,000.00 is the design fee payable upon execution of this agreement by the City and the Artist, which shall cover the design phase further specified in the attached **Exhibit A**.

c. Subsequent payments will occur only after receipt by the City of invoices sufficiently detailed to include hours performed, hourly rates, and related activities and obligations incurred for approval by the City.

d. Within thirty (30) days after receipt of any applicable progress payment request, the City will verify the accuracy of the request, correct the charges where appropriate, and make payment to the Artist in an amount equal to the amount of such application, as verified or corrected by the City. No payment made prior to completion and acceptance of the Services will constitute acceptance of any part of the Services. The City reserves the right to withhold payment from the Artist on account of Services not performed satisfactorily, delays in the Artist's performance of Services, or other defaults hereunder.

**6. Status of the Artist.** The Artist shall perform the Services in the Artist's own way and pursuant to this Agreement as an independent contractor and in pursuit of the Artist's independent calling, and not as an employee of the City. The persons used by the Artist to provide the Services under this Agreement will not be considered employees of the City for any purposes.

The payment made to the Artist pursuant to the Agreement will be the full and complete compensation to which the Artist is entitled. The City will not make any federal or state tax withholdings on behalf of the Artist or its agents, employees, or subcontractors. The City will not pay any workers' compensation insurance, retirement contributions or unemployment contributions on behalf of the Artist or its employees or subcontractors. The Artist agrees to indemnify and pay the City within thirty (30) days for any tax, retirement contribution, social security, overtime payment, unemployment payment or workers' compensation payment which the City may be required to make on behalf of the Artist or any agent, employee, or contractor of the Artist for work done under this Agreement. At the City's election, the City may deduct the amounts paid pursuant to this Section, from any balance owing to the Artist.

**7. Subcontracting.** The Artist's services are unique and personal. Except as may be specified in **Exhibit A**, the Artist will not subcontract any portion of the Services without prior written approval of the City Manager or designee. If the Artist subcontracts any of the Services, the Artist will be fully responsible to the City for the acts, errors and omissions of the Artist's subcontractor and of the persons either directly or indirectly employed by the Subcontractor, as the Artist is for the acts and omissions of persons directly employed by the Artist. Nothing contained in this Agreement will create any contractual relationship between any subcontractor or the Artist and the City. The Artist will be responsible for payment of subcontractors. The Artist will bind subcontractor and every subcontractor of a subcontractor by the terms of this Agreement applicable to the Artist's work unless specifically noted to the contrary in the subcontract and approved in writing by the City.

**8. Other Artists.** The City reserves the right to employ other Artists in connection with the Services.

**9. Indemnification.** To the furthest extent allowed by law, Artist shall indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time and property damage) incurred by City, Artist or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Agreement. Artist's obligations under the preceding sentence shall apply regardless of whether City or any of its officers, officials, employees, agents or volunteers are negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused solely by the gross negligence, or caused by the willful misconduct, of City or any of its officers, officials, employees, agents or volunteers.

If Artist should subcontract all or any portion of the work to be performed under this Agreement, Artist shall require each subcontractor to indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the preceding paragraph.

This section shall survive termination or expiration of this Agreement.

#### **10. Insurance.**

a. Throughout the life of this Agreement, the Artist shall pay for and maintain in full force and effect all insurance as required in **Exhibit B**, which is incorporated into and part of this Agreement, with an insurance company(ies) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated no less than "A-VII" in the Best's Insurance Rating Guide, or (ii) as may be authorized in writing by City's Risk Manager or designee at any time and in his/her sole discretion. The required policies of insurance as stated in Exhibit B shall maintain limits of liability of not less than those amounts stated therein. However, the insurance limits available to City, its officers, officials, employees, agents and volunteers as additional insureds, shall be the greater of the minimum limits specified therein or the full limit of any insurance proceeds to the named insured.

b. If at any time during the life of the Agreement or any extension, the Artist or any of its subcontractors/sub-consultants fail to maintain any required insurance in full force and effect, all services and work under this Agreement shall be discontinued immediately, and all payments due or that become due to the Artist shall be withheld until notice is received by City that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to City. Any failure to maintain the required insurance shall be sufficient cause for City to terminate this Agreement. No action taken by City pursuant to this section shall in any way relieve the Artist of its responsibilities under this Agreement. The phrase "fail to maintain any required insurance" shall include, without limitation, notification received by City that an insurer has commenced proceedings, or has had proceedings commenced against it, indicating that the insurer is insolvent.

c. The fact that insurance is obtained by the Artist shall not be deemed to release or diminish the liability of the Artist, including, without limitation, liability under the indemnity provisions of this Agreement. The duty to indemnify City shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by the Artist. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of the Artist, its principals, officers, agents, employees, persons under the supervision of the Artist, vendors, suppliers, invitees, consultants, sub-consultants, subcontractors, or anyone employed directly or indirectly by any of them.

d. If the Artist should subcontract all or any portion of the services to be performed under this Agreement, the Artist shall require each subcontractor/sub-consultant to provide insurance protection, as an additional insured, to the City and each of its officers, officials, employees, agents and volunteers in accordance with the terms of this section, except that any required certificates and applicable endorsements shall be on file with the Artist and the City prior to the commencement of any services by the subcontractor. The Artist and any subcontractor/sub-consultant shall establish additional insured status for City, its officers, officials, employees, agents and volunteers by using Insurance Service Office (ISO) form CG 20 10 11 85 or both CG 20 10 10 01 and CG 20 37 10 01 or by an executed manuscript company endorsement providing additional insured status as broad as that contained in ISO Form CG 20 10 11 85.

**11. Business License/Tax Certificate.** The Artist will obtain and maintain a City of Fresno License for the term of the Agreement, as it may be amended from time-to-time.

**12. Maintenance of Records.** The Artist will maintain complete and accurate records with respect to costs incurred under this Agreement. All records will be clearly identifiable. The Artist will allow a representative of the City during normal business hours to examine, audit, and make transcripts or copies of records and any other documents created pursuant to this Agreement. The Artist will allow inspection of all work, data, documents, proceedings, and activities related to the Agreement for a period of three years from the date of final payment under this Agreement.

**13. Ownership Rights.**

a. Copyrights.

i. The Artist shall retain all copyrights in and to any work(s) created under this Agreement, provided that the Artist hereby grant to the City an irrevocable license to graphically depict the work for any non-commercial purpose whatsoever. For the purposes of this limitation, the graphic depiction of the work(s) on materials designed to promote the City shall be deemed to be a non-commercial use. The City shall not be responsible for any third party infringement of the Artist's copyright.

ii. If, for any reason, the approved design is not implemented, all rights to the proposed work shall be retained by the Artist.

iii. The Artist agrees that all work performed under this Agreement shall comply with all applicable patent, trademark and copyright laws, rules, regulations and codes of the State of California and the United States. The Artist hereby represents and warrants that the work does not, and the Artist has not and will not, utilize any protected patent, trademark or copyright in performance under this Agreement unless and until the Artist has obtained proper permission and all releases and other necessary documents. If the Artist specifies any material, equipment, process or procedure which is protected, the Artist shall disclose such

patents, trademarks and copyrights in the construction drawings and technical specifications, such listing to be appended to this Agreement and shall be incorporated by this reference.

iv. The Artist agrees to release, indemnify, defend and save harmless the City, its officers and employees from any and all claims, damages, suits, costs, expenses, liabilities, actions or proceedings of any kind resulting from the performance under this Agreement which infringes upon any patent, trademark or copyright or other right protected by law.

b. The Artist's Moral Rights; the City's Ownership Rights.

i. The City intends to make its best efforts to display the work at the project site as originally created by the Artist and to maintain the work in good condition. However, the City must preserve complete flexibility to operate and manage City properties. Therefore, subject to its obligation to make good-faith efforts to consult with the Artist as set forth in subparagraph iii below. The City retains the absolute right to alter, repair, modify, remove, relocate, sell, or dispose of, (collectively, Modify) the work in its sole judgment. For example, the City may modify the work to eliminate hazards, to comply with the ADA, to otherwise aid in the management of its property and affairs, or through neglect or accident. If, during or after the term of this Agreement, the City finds the project site to be inappropriate, the City has the right to install the work at an alternate location that it chooses in its sole reasonable discretion.

ii. With respect to the work produced under this Agreement, except as otherwise set forth herein, the Artist waives any and all claims arising at any time and under any circumstances, against the City its officers, agents, employees, successors and assigns, arising under the Federal Visual Artists Rights Act (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 et seq.), and any other local, state, federal or international laws that convey rights of the same nature as those conveyed under 17 U.S.C. §106A, Cal. Civil Code §§987 et seq., or any other type of moral right protecting the integrity of works of art. If the work is incorporated into a building such that the work cannot be removed from the building without physical defacement, mutilation, alteration, distortion, destruction or other modification (collectively, Modification) of the work, the Artist waives any and all such claims against any future owners of the Site, and its agents, officers, and employees for Modification of the work.

iii. Where time permits, prior to Modifying the work, the City shall make reasonable good faith efforts to notify and consult with the Artist, at the last phone number or address provided by the Artist to the City, and to come to a mutually agreeable plan for disposition of the work. Such consultation shall be without charge by the Artist unless otherwise specifically agreed in writing. If the work is modified and the City intends to maintain the work on display, the City shall make a

reasonable good-faith effort to engage the Artist in the restoration of the work and to compensate the Artist for the Artist's time and efforts at fair market value, which may be the subject of a future Agreement between the Artist and the City. However, the City has no obligation under this Agreement to restore the work or to compensate the Artist for any restoration work. If the City Modifies the work without the Artist's consent in a manner that is prejudicial to the Artist's reputation, the Artist retains the right to disclaim authorship of the work In accordance with California Civil Code §987(d) and 17 U.S.C. §106A(a)(2).

iv. Except as provided in this Agreement, with respect to third parties who are not officers, employees, agents, successors or assigns of the City, the Artist retains the Artist's moral rights in the work, as established in the Visual Artists Rights Act (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 and 989) or any other local, state, federal or international moral rights laws that protect the integrity of works of art. Accordingly, nothing herein shall prevent the Artist from pursuing a claim against a third party who is not an officer, employee, agent, successor or assign of the City for Modification of the work. The City has no obligation to pursue claims against third parties to remedy or prevent Modification of the work. However, as owner of the work, the City may pursue claims against third parties for damages or to restore the work if the work has been modified without the City's authorization.

**14. Confidentiality.** All documents, reports, information, data, and exhibits prepared or assembled by the Artist in connection with the performance of the services pursuant are confidential until released by the City to the public, and the Artist will not make any of these documents or information available to any individual or organization not employed by the Artist or the City without the written consent of the City before any such release.

**15. Notices.** Any notices relating to this Agreement shall be given in writing and shall be deemed sufficiently given and served for all purposes when delivered personally, by facsimile or by generally recognized overnight courier service, or five (5) days after deposit in the United States mail, certified or registered, return receipt requested, with postage prepaid, addressed as follows:

For City:  
City of Fresno  
Attention: Bruce Rudd, City  
Manager  
2600 Fresno Street  
Fresno CA 93721  
Phone: (559) 621-7784

For Artist:  
Gordon Huether + Partners, Inc.  
Attention: Gordon A. Huether, Chief  
Executive Officer  
1821 Monticello Rd  
Napa, CA 94558  
Phone: (707) 255-5954

Either Party may change its address for purposes of this section by giving the other Party written notice of the new address in the manner set forth above.

**16. Conflicts of Interest.**

a. Prior to the City's execution of this Agreement, the Artist shall complete a City of Fresno conflict of interest disclosure statement in the form as set forth in **Exhibit C**. During the term of this Agreement, the Artist shall have the obligation and duty to immediately notify the City in writing of any change to the information provided by the Artist in such statement.

b. The Artist shall comply, and require its subcontractors to comply, with all applicable (i) professional canons and requirements governing avoidance of impermissible client conflicts; and (ii) federal, state and local conflict of interest laws and regulations including, without limitation, California Government Code Section 1090 et. seq., the California Political Reform Act (California Government Code Section 87100 et. seq.) and the regulations of the Fair Political Practices Commission concerning disclosure and disqualification (2 California Code of Regulations Section 18700 et. seq.). At any time, upon written request of the City, the Artist shall provide a written opinion of its legal counsel and that of any subcontractor that, after a due diligent inquiry, the Artist and the respective subcontractor(s) are in full compliance with all laws and regulations. The Artist shall take, and require its subcontractors to take, reasonable steps to avoid any appearance of a conflict of interest. Upon discovery of any facts giving rise to the appearance of a conflict of interest, the Artist shall immediately notify the City of these facts in writing.

c. In performing the work or services to be provided hereunder, the Artist shall not employ or retain the services of any person while such person either is employed by the City or is a member of any City council, commission, board, committee, or similar City body. This requirement may be waived in writing by the City Manager, if no actual or potential conflict is involved.

d. The Artist represents and warrants that it has not paid or agreed to pay any compensation, contingent or otherwise, direct or indirect, to solicit or procure this Agreement or any rights/benefits hereunder.

e. Neither the Artist, nor any of the Artist's subcontractors performing any services on this Project, shall bid for, assist anyone in the preparation of a bid for, or perform any services pursuant to, any other contract in connection with this Project unless fully disclosed to and approved by the City Manager, in advance and in writing. The Artist and any of its subcontractors shall have no interest, direct or indirect, in any other contract with a third party in connection with this Project unless such interest is in accordance with all applicable law and fully disclosed to and approved by the City Manager, in advance and in writing. Notwithstanding any approval given by the City Manager under this provision, the Artist shall remain responsible for complying with Section 9(b), above.

f. If the Artist should subcontract all or any portion of the work to be performed or services to be provided under this Agreement, the Artist shall



include the provisions of this Section 9 in each subcontract and require its subcontractors to comply therewith.

g. This Section shall survive expiration or termination of this Agreement.

**17. General Compliance with Laws.** The Artist will keep fully informed of federal, state and local laws and ordinances and regulations which in any manner affect those employed by the Artist, or in any way affect the performance of the Services by the Artist. The Artist will at all times observe and comply with these laws, ordinances, and regulations and will be responsible for the compliance of the Services with all applicable laws, ordinances and regulations.

**18. Discrimination and Harassment Prohibited.** To the extent required by controlling federal, state and local law, the Artist shall not employ discriminatory practices in the provision of services, employment of personnel, or in any other respect on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era. Subject to the foregoing and during the performance of this Agreement, the Artist agrees as follows:

a. The Artist will comply with all applicable laws and regulations providing that no person shall, on the grounds of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran or veteran of the Vietnam era be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity made possible by or resulting from this Agreement.

b. The Artist will not discriminate against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran, or veteran of the Vietnam era. The Artist shall ensure that applicants are employed, and the employees are treated during employment, without regard to their race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran, or veteran of the Vietnam era. Such requirement shall apply to the Artist's employment practices including, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Artist agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provision of this nondiscrimination clause.

c. The Artist's will, in all solicitations or advertisements for employees placed by or on behalf of the Artist in pursuit hereof, state that all qualified applicants will receive consideration for employment without regard to race, religious creed, color, national origin, ancestry, physical disability, mental

disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, status as a disabled veteran, or veteran of the Vietnam era.

d. The Artist will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice advising such labor union or workers' representatives of the Artist's commitment under this section and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

e. If the Artist should subcontract all or any portion of the services to be performed under this Agreement, the Artist shall cause each subcontractor to also comply with the requirements of this Section.

## **19. Termination.**

a. In the event of the Artist's failure to prosecute, deliver, or perform the Services, the City may terminate this Agreement for nonperformance by notifying the Artist in writing pursuant to the notice provisions of this Agreement. The Artist has five (5) business days to deliver any documents owned by the City and all work in progress to the City address contained in this Agreement. The City will make a determination of fact based upon the work product delivered to the City and of the percentage of work that the Artist has performed which is usable and of worth to the City in having the Agreement completed. Based upon that finding the City will determine the final payment of the Agreement. In the event the City elects to terminate, the City will have the right to immediate possession of all Work Product and work in progress prepared by the Artist, whether located at the project site, at the Artist's place of business, or at the offices of a subcontractor.

b. Either Party, upon tendering thirty (30) calendar days written notice to the other Party, may terminate this Agreement for convenience. In this event and upon request of the City, the Artist will assemble the work product without charge and put it in order for proper filing and closing and deliver it to the City. The Artist will be paid for work performed to the termination date; however, the total will not exceed the lump sum fee payable under this Agreement. The City will make the final determination as to the portions of tasks completed and the compensation to be made.

c. The City may terminate this Agreement for non-appropriation of funds sufficient to meet its obligations during any City fiscal year of this Agreement, or insufficient funding for the Services. The Artist shall be paid for the work performed pursuant to Section 19(b).

**20. Covenants Against Contingent Fees.** The Artist warrants that the Artist has not employed or retained any company or person, other than a bona fide employee working for the Artist, to solicit or secure this Agreement, and that the Artist has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration contingent upon, or resulting from, the award or making of this Agreement. For breach or violation of this warranty, the City will have the right to terminate this Agreement for

nonperformance, or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of the fee, commission, percentage, brokerage fees, gift, or contingent fee.

**21. Claims and Lawsuits.** By signing this Agreement, the Artist agrees that any claim submitted to the City must be asserted as part of the process as set forth in this Agreement and not in anticipation of litigation or in conjunction with litigation. The Artist acknowledges that if a false claim is submitted to the City by the Artist, it may be considered fraud and the Artist may be subject to criminal prosecution. The Artist acknowledges that California Government Code sections 12650 et seq., the False Claims Act, applies to this Agreement and, provides for civil penalties where a person knowingly submits a false claim to a public entity. These provisions include false claims made with deliberate ignorance of the false information or in reckless disregard of the truth or falsity of information. If the City seeks to recover penalties pursuant to the False Claims Act, it is entitled to recover its litigation costs, including attorney's fees. The Artist acknowledges that the filing of a false claim may subject the Artist to an administrative debarment proceeding as the result of which the Artist may be prevented to act as an Artist on any public work or improvement for a period of up to five (5) years. The Artist acknowledges debarment by another jurisdiction is grounds for the City to terminate this Agreement.

**22. Dispute Resolution.** Should any dispute arise out of this Agreement, either Party may request that it be submitted to mediation. The Parties will meet in mediation within thirty (30) days of a request. The cost of mediation will be borne equally by the Parties. Neither Party will be deemed the prevailing party. No Party will be permitted to file a legal action without first requesting mediation and making a good faith attempt to reach a mediated settlement. The mediation process, once commenced by a meeting with the mediator will last until an agreement is reached by the Parties but not more than sixty (60) days, unless the maximum time is extended by the parties.

**23. Jurisdiction, Venue and Governing Law.** Any action at law or in equity brought by either of the Parties for the purpose of enforcing a right or rights provided for by this Agreement will be tried in a court of competent jurisdiction in the County of Fresno, State of California, and the Parties waive all provisions of law providing for a change of venue in these proceedings to any other county. This Agreement will be governed by the laws of the State of California.

**24. Testimony.** The Artist will testify at the City's request if litigation is brought against the City in connection with the Artist's services under this agreement. Unless the action is brought by the Artist, or is based upon the Artist's actual or alleged negligence or other wrongdoing, the City, upon prior written agreement with the Artist will compensate the Artist for time spent in preparation for testimony, testimony, and travel at the Artist's standard hourly rates at the time of actual testimony.

**25. Successors and Assigns.** It is mutually understood and agreed that this Agreement will be binding upon the Parties and their respective successors. Neither this Agreement nor any part of it nor any monies due or to become due under it may be assigned by the Artist without the prior written consent of the City, which will not be unreasonably withheld.

**26. Section Headings.** Section headings as used in this Agreement are for convenience only and will not be deemed to be a part of such sections and will not be construed to change the meaning of the section.

**27. Waivers.** The waiver by either Party of any breach or violation of any term, covenant, or condition of this Agreement or of any applicable law will not be deemed to be a waiver of such term, covenant, condition or law or of any subsequent breach or violation of same or of any other term, covenant, condition, or law. The acceptance by either Party of any fee or other payment which may become due under this Agreement will not be deemed to be a waiver of any preceding breach or violation by the other Party of any term, covenant, or condition of this Agreement or any applicable law.

**28. Entire Agreement.** This Agreement, together with any other written document referred to or contemplated by it embody the entire Agreement and understanding between the parties relating to the subject matter of it. The City Manager is authorized, in consultation with the City Attorney, to agree to non-material amendments to this Agreement. Neither this Agreement nor any of its provisions may be amended, modified, waived, or discharged except in a writing executed by both Parties.

**29. Authority.** The individuals executing this Agreement and the instruments referenced in it on behalf of the Artist each represent and warrant that they have the legal power, right and actual authority to bind the Artist to the terms and conditions of this Agreement. Artist acknowledges that this Agreement is subject to approval by the City's Council.

**30. Severability.** If any term, provision, condition or covenant of this Agreement or its application to any party or circumstances shall be held, to any extent, invalid or unenforceable, the remainder of this Agreement, or the application of the term, provision, condition or covenant to persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be affected, and shall be valid and enforceable to the fullest extent permitted by law.

[Signatures follow on the next page.]

IN WITNESS WHEREOF, the parties have executed this Agreement at Fresno, California, on the day and year first above written.

CITY OF FRESNO,  
A California municipal corporation

ARTIST, GORDON HUETHER +  
PARTNERS, INC.

By: \_\_\_\_\_  
Bruce Rudd, City Manager

By: \_\_\_\_\_  
Gordon A. Huether  
Chief Executive Officer  
(If corporation or LLC, Board Chair,  
Pres. or Vice Pres.)

APPROVED AS TO FORM:  
DOUGLAS T. SLOAN  
City Attorney

By: \_\_\_\_\_  
Brandon M. Collet      Date  
Deputy City Attorney

By: \_\_\_\_\_  
Name: \_\_\_\_\_

ATTEST:  
YVONNE SPENCE, CMC  
City Clerk

Title: \_\_\_\_\_  
(If corporation or LLC, CFO, Treasurer,  
Secretary or Assistant Secretary)

By: \_\_\_\_\_  
Deputy

REVIEWED BY:  
\_\_\_\_\_  
\_\_\_\_\_

Attachment: Exhibit A - Scope of Work  
Exhibit B - Insurance Requirements  
Exhibit C - Conflict of Interest

## EXHIBIT A

### SERVICES TO BE PROVIDED BY ARTIST, GORDON HUETHER + PARTNERS, INC., FOR THE MARIPOSA PLAZA PROJECT.

The parties agree that the Artwork will be installed on the Mariposa Plaza, property owned by the City along Mariposa and Fulton Streets. The specific location(s) will be further determined through the design phase with approval of the Mariposa Plaza Art Committee (MPAC).

1. "Proposal" shall mean the proposed visual, aesthetic, and artistic intent and design of the Artwork approved by the MPAC. The most recent design approved the Committees is incorporated herein by reference, and is binding unless or until changes are approved by the Committees.

a. Attached is the Artist's Proposal at the time of the Agreement date. The Artist's Proposal was approved by the Committees on \_\_\_\_\_, 2017. The Artist's Proposal shall be automatically superseded by any Contract Documents that are later approved by the Committees.

#### Phase I: DESIGN

##### 1. Scope of Work.

###### a. General

i. The Artist shall deliver a Design Proposal for the Artwork (Proposal). The scope of work under this phase includes the development of the proposal through all phases of design.

ii. The Mariposa Plaza Art Committee (MPAC) must approve the proposal at each phase of development before the Artist proceeds to the next phase. If the MPAC does not accept the Proposal at any design phase, the Artist agrees to submit one alternate proposal or design alternative at no additional cost. The final proposal will be submitted to the Fresno Arts Council's Review Committee for their approval (FACRC).

iii. The Proposal shall reflect the requirements of the City as expressed in the original Request for Proposal and as further discussed in communications with the MPAC and the City.

iv. The Artist shall attend project meetings and make presentations to the City staff, MPAC, and other individuals and organizations, as needed.

v. The Artist shall meet with staff for the purposes of defining goals appropriate to the immediate general social and physical environment of the Artwork, and developing and refining imagery in the Artwork. The Artist shall also attend community outreach meetings and individual meetings with local experts or other interested parties as designated by the MPAC. The times and dates of these meetings shall be subject to the mutual agreement of the parties.

b. Design. The Proposal shall include:

i. Drawings (in plan and elevation) and/or 3-dimensional models, proposed materials and samples, colors, finishes, textures and patinas, the specific location and orientation of the work relative to the site and a written description of the Artwork in sufficient detail that the Artist's design intent is clearly expressed.

ii. Budget for costs related to the design, fabrication and installation of the Artwork, including, but not limited to: itemized costs for materials including applicable sales tax; off-site fabrication costs; costs for labor of assistants; the Artist's time for coordination, fabrication, supervision and installation; itemized estimates of General Contractor and sub-contractor costs; permits or other fees; insurance; studio and operation expense; consultants' fees; communications; the Artist's travel; transportation of the Artwork to Site; and itemized installation costs. The Artwork Budget shall also include a contingency to cover unforeseen costs that may arise during the course of the fabrication and installation.

iii. The Artist and/or the Artist's structural engineer and fabricator shall review all drawings, materials and documents for consistency and constructability, and report any engineering, structural concerns, or constructability concerns to the City. Modifications to the design necessitated by this review shall be submitted and approved by the City prior to beginning the production of Construction Documents and incorporated therein

iv. Maintenance Plan. At the time the Artist submits the Artist's proposal for review by the MAPC, the Artist shall provide the City with a General Maintenance Plan for the Artwork, with a detailed description of future anticipated maintenance requirements; a recommended maintenance schedule; anticipated and required care and/or replacement/upgrade of any part of the Artwork and associated moving parts or equipment including any staff time involved in displaying or operating artwork and the frequency of such staff involvement; and written instructions and manufacturer's specifications for reasonably foreseeable maintenance and preservation activities relating to the Artwork. The Artist shall also provide the City with a description of all equipment and or machinery needed to operate the project (if applicable) and any anticipated or required staffing, supervision or operational needs. The Artwork must be durable, taking into consideration that the site(s) is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. The Artist shall ensure that all maintenance requirements will be reasonable in terms of time and expense. The Artist shall be responsible for making any updates or clarifications to this Maintenance Plan if the maintenance requirements and estimates change over the course of the project.

v. Any plans, documents, or structural drawings must be certified by a qualified engineer, licensed by the State of California and must conform to all applicable federal, state and local laws and regulations.

vi. The Artist shall deliver a schedule describing the Artist's specific timelines for fabrication of the Artwork.

vii. The Artist shall be available to present the Design Proposal at one or more meetings of the MPAC, on dates mutually agreed upon by County and the Artist.

viii. The MPAC may recommend approval, approval with minor changes or disapproval. In the event that the MPAC recommends disapproval or approval with minor changes to the Proposal, the MPAC shall submit to the Artist in writing the reasons for such disapproval or minor changes. The Artist shall respond to the recommended changes in writing and submit a revised Proposal to the Committee for review. The Artist recognizes and agrees that the MPAC may review the design materials and/or documents as revised and make additional recommendations.

ix. Informational Presentation. At the conclusion of the design process, the Artists shall make an informational presentation to the City Council on the Design Proposal.

c. Fabrication and Installation of Artwork

1. The Artist shall fabricate the Artwork in accordance with the Design approved by the MPAC.

i. The Artist shall provide for the transportation of the Artwork. The Artist shall not transport the Artwork until access to the site has been approved and scheduled by the City in coordination with the Artist.

ii. The Artist shall install the Artwork in accordance with the approved Design Proposal. The Artist shall consult with the City and, if necessary, the Project Construction Management Team and General Contractor prior to and during the installation of the Artwork. The City and the Artist shall coordinate the Artist's activities on site with the General Contractor through the Construction Management Team and/or the City staff

iii. The Artist is responsible for all equipment needed for installation. The Artist shall supply all hardware and personnel necessary for installation. The Artist is responsible for repairing or paying for the repair of any damage to the site(s), the Artwork, or the work of other artists to the extent such damage is caused by the Artist, the Artist's agents, employees, subcontractors, or the Artists. At the completion of installation, the Artist shall clean and restore the site and the work area to the condition it was in at the beginning of installation.



**EXHIBIT B**  
**INSURANCE REQUIREMENTS**

**Agreement for Artist Services between the City of Fresno ("CITY")  
and Gordon Huether + Partners, Inc ("ARTIST ")**

Mariposa Plaza Project

**MINIMUM SCOPE OF INSURANCE**

Coverage shall be at least as broad as:

1. The most current version of Insurance Services Office (ISO) Commercial General Liability Coverage Form CG 00 01, providing liability coverage arising out of your business operations. The Commercial General Liability policy shall be written on an occurrence form and shall provide coverage for "bodily injury," "property damage" and "personal and advertising injury" with coverage for premises and operations (including the use of owned and non-owned equipment), products and completed operations, and contractual liability (including, without limitation, indemnity obligations under the Agreement) with limits of liability not less than those set forth under "Minimum Limits of Insurance."
2. The most current version of ISO \*Commercial Auto Coverage Form CA 00 01, providing liability coverage arising out of the ownership, maintenance or use of automobiles in the course of your business operations. The Automobile Policy shall be written on an occurrence form and shall provide coverage for all owned, hired, and non-owned automobiles or other licensed vehicles (Code 1- Any Auto). If personal automobile coverage is used, the CITY, its officers, officials, employees, agents, and volunteers are to be listed as additional insureds.
3. Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.
4. Professional Liability (Errors and Omissions) insurance appropriate to ARTIST's profession. Architect's and engineer's coverage is to be endorsed to include contractual liability.

**MINIMUM LIMITS OF INSURANCE**

ARTIST, or any party the ARTIST subcontracts with, shall maintain limits of liability of not less than those set forth below. However, insurance limits available to CITY, its officers, officials, employees, agents, and volunteers as additional insureds, shall be the greater of the minimum limits specified herein or the full limit of any insurance proceeds available to the named insured:

1. **COMMERCIAL GENERAL LIABILITY:**
  - (i) \$1,000,000 per occurrence for bodily injury and property damage;

- (ii) \$1,000,000 per occurrence for personal and advertising injury;
  - (iii) \$2,000,000 aggregate for products and completed operations; and,
  - (iv) \$2,000,000 general aggregate applying separately to the work performed under the Agreement.
- 2. **COMMERCIAL AUTOMOBILE LIABILITY:**  
\$1,000,000 per accident for bodily injury and property damage.
- 3. **WORKERS' COMPENSATION INSURANCE** as required by the State of California with statutory limits.
- 4. **EMPLOYER'S LIABILITY:**
  - (i) \$1,000,000 each accident for bodily injury;
  - (ii) \$1,000,000 disease each employee; and,
  - (iii) \$1,000,000 disease policy limit.
- 5. **PROFESSIONAL LIABILITY** (Errors and Omissions):
  - (i) \$1,000,000 per claim/occurrence; and,
  - (ii) \$2,000,000 policy aggregate.

#### **UMBRELLA OR EXCESS INSURANCE**

In the event ARTIST purchases an Umbrella or Excess insurance policy(ies) to meet the "Minimum Limits of Insurance," this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies). In addition, such Umbrella or Excess insurance policy(ies) shall also apply on a primary and non-contributory basis for the benefit of the CITY, its officers, officials, employees, agents, and volunteers.

#### **DEDUCTIBLES AND SELF-INSURED RETENTIONS**

ARTIST shall be responsible for payment of any deductibles contained in any insurance policy(ies) required herein and ARTIST shall also be responsible for payment of any self-insured retentions. Any deductibles or self-insured retentions must be declared to on the Certificate of Insurance, and approved by, the CITY's Risk Manager or designee. At the option of the CITY's Risk Manager or designee, either:

- (i) The insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officers, officials, employees, agents, and volunteers; or
- (ii) ARTIST shall provide a financial guarantee, satisfactory to CITY's Risk Manager or designee, guaranteeing payment of losses and related investigations, claim administration and defense expenses. At no time shall CITY be responsible for the payment of any deductibles or self-insured retentions.

#### **OTHER INSURANCE PROVISIONS/ENDORSEMENTS**

The General Liability and Automobile Liability insurance policies are to contain, or be endorsed to contain, the following provisions:

- 1. CITY, its officers, officials, employees, agents, and volunteers are to be covered as additional insureds. ARTIST shall establish additional insured

status for the City and for all ongoing and completed operations by use of ISO Form CG 20 10 11 85 or both CG 20 10 10 01 and CG 20 37 10 01 or by an executed manuscript insurance company endorsement providing additional insured status as broad as that contained in ISO Form CG 20 10 11 85.

2. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, officials, employees, agents, and volunteers. Any available insurance proceeds in excess of the specified minimum limits and coverage shall be available to the Additional Insured.
3. For any claims relating to this Agreement, ARTIST's insurance coverage shall be primary insurance with respect to the CITY, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the CITY, its officers, officials, employees, agents, and volunteers shall be excess of ARTIST's insurance and shall not contribute with it. ARTIST shall establish primary and non-contributory status by using ISO Form CG 20 01 04 13 or by an executed manuscript insurance company endorsement that provides primary and non-contributory status as broad as that contained in ISO Form CG 20 01 04 13.

The Workers' Compensation insurance policy is to contain, or be endorsed to contain, the following provision: ARTIST and its insurer shall waive any right of subrogation against CITY, its officers, officials, employees, agents, and volunteers.

If the Professional Liability (Errors and Omissions) insurance policy is written on a claims-made form:

1. The retroactive date must be shown, and must be before the effective date of the Agreement or the commencement of work by ARTIST.
2. Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of the Agreement work or termination of the Agreement, whichever occurs first, or, in the alternative, the policy shall be endorsed to provide not less than a five (5) year discovery period.
3. If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the effective date of the Agreement or the commencement of work by ARTIST, ARTIST must purchase "extended reporting" coverage for a minimum of five (5) years completion of the Agreement work or termination of the Agreement, whichever occurs first.
4. A copy of the claims reporting requirements must be submitted to CITY for review.
5. These requirements shall survive expiration or termination of the Agreement.

All policies of insurance required herein shall be endorsed to provide that the coverage shall not be cancelled, non-renewed, reduced in coverage or in limits except after thirty

(30) calendar days written notice by certified mail, return receipt requested, has been given to CITY. ARTIST is also responsible for providing written notice to the CITY under the same terms and conditions. Upon issuance by the insurer, broker, or agent of a notice of cancellation, non-renewal, or reduction in coverage or in limits, ARTIST shall furnish CITY with a new certificate and applicable endorsements for such policy(ies). In the event any policy is due to expire during the work to be performed for CITY, ARTIST shall provide a new certificate, and applicable endorsements, evidencing renewal of such policy not less than fifteen (15) calendar days prior to the expiration date of the expiring policy.

Should any of the required policies provide that the defense costs are paid within the Limits of Liability, thereby reducing the available limits by any defense costs, then the requirement for the Limits of Liability of these policies will be twice the above stated limits.

The fact that insurance is obtained by ARTIST shall not be deemed to release or diminish the liability of ARTIST, including, without limitation, liability under the indemnity provisions of this Agreement. The policy limits do not act as a limitation upon the amount of indemnification to be provided by ARTIST. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of ARTIST, its principals, officers, agents, employees, persons under the supervision of ARTIST, vendors, suppliers, invitees, consultants, sub-consultants, subcontractors, or anyone employed directly or indirectly by any of them.

**SUBCONTRACTORS** - If ARTIST subcontracts any or all of the services to be performed under this Agreement, ARTIST shall require, at the discretion of the CITY Risk Manager or designee, subcontractor(s) to enter into a separate side agreement with the City to provide required indemnification and insurance protection. Any required side agreement(s) and associated insurance documents for the subcontractor must be reviewed and preapproved by CITY Risk Manager or designee. If no side agreement is required, ARTIST shall require and verify that subcontractors maintain insurance meeting all the requirements stated herein and ARTIST shall ensure that CITY, its officers, officials, employees, agents, and volunteers are additional insureds. The subcontractors' certificates and endorsements shall be on file with ARTIST, and CITY, prior to commencement of any work by the subcontractor.

#### **VERIFICATION OF COVERAGE**

USER shall furnish CITY with all certificate(s) and **applicable endorsements** effecting coverage required hereunder. All certificates and **applicable endorsements** are to be received and approved by the CITY'S Risk Manager or his/her designee prior to CITY'S execution of the Agreement and before work commences. All non-ISO endorsements amending policy coverage shall be executed by a licensed and authorized agent or broker. Upon request of CITY, USER shall immediately furnish City with a complete copy of any insurance policy required under this Agreement, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive expiration or termination of this Agreement.

**EXHIBIT C**  
**DISCLOSURE OF CONFLICT OF INTEREST**  
**MARIPOSA PLAZA PROJECT**

		YES*	NO
1	Are you currently in litigation with the City of Fresno or any of its agents?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
2	Do you represent any firm, organization or person who is in litigation with the City of Fresno?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
3	Do you currently represent or perform work for any clients who do business with the City of Fresno?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
4	Are you or any of your principals, managers or professionals, owners or investors in a business which does business with the City of Fresno, or in a business which is in litigation with the City of Fresno?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
5	Are you or any of your principals, managers or professionals, related by blood or marriage to any City of Fresno employee who has any significant role in the subject matter of this service?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
6	Do you or any of your subcontractors have, or expect to have, any interest, direct or indirect, in any other contract in connection with this Project?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

\* If the answer to any question is yes, please explain in full below.

Explanation: \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_

(name)

(company)

(address)

(city state zip)

☐ Additional page(s) attached.