

# THE CITY OF MANHATTAN BEACH

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## ART AGREEMENT [City Hall Public Art Project]

This Agreement, is made and entered into as of this 15<sup>th</sup> of October, 2020, by and between the City of Manhattan Beach, a municipal corporation (the “City”) and Hou de Sousa (the “Artist”) (collectively referred to herein as the “Parties”).

### RECITALS

- A. The City issued a Request for Qualifications for the City Hall Public Art Project on November 6<sup>th</sup>, 2018 (the “RFQ”).
- B. Pursuant to the RFQ, City has selected a number of artists to develop proposals for the design of a site-related art piece at Manhattan Beach City Hall.
- C. The Artist represents that he/she has the appropriate background, training, and experience to create and implement a work of public art for the City.

NOW, THEREFORE, in consideration of the mutual obligations, covenants, and conditions hereinafter set forth, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

### I. SCOPE OF WORK

- A. In accordance with the terms of this Agreement and with the more detailed Scope of Work set forth in Exhibit A and hereby incorporated, the Artist shall execute an art installation (the “Artwork”) in the City Hall Lobby (the “Site”). All work under this Agreement shall be conducted during normal City Hall business hours.
- B. The Artwork shall be certified by the Artist as unique and shall not be duplicated at any other location.
- C. The Artist shall guarantee the structural integrity of the Artwork for two years and shall complete any repairs related to the original creation of the Artwork in that time period at the Artist’s expense.
- D. The Artist shall perform all services required under this Agreement to the highest professional standards and in a manner reasonably satisfactory to the City. The Artist shall comply with all applicable federal, state, and local laws, ordinances, codes, and regulations.

### II. AMOUNT AND MANNER OF PAYMENT

- A. In consideration of the Artist's execution of the Artwork, the City shall pay the Artist a fixed sum of \$342,657, which includes the Artist's design and project management costs. The City shall pay \$171,328.5 to the Artist upon execution of this Agreement, and shall pay the remaining \$171,328.5 to the Artist upon satisfactory completion of the Artwork.
- B. The Artist shall be responsible for (i) all subcontractor and consultant costs, including engineers, electricians, materials, fabricators, studio, and overhead costs; (ii) all costs related to fabrication, transportation, delivery, storage, security, and installation of all components of the Artwork; (iii) all costs related to preparation and clean-up of the Site, which is presented "as is" to the Artist; (iv) all costs related to General and Automobile Liability, Professional Liability insurance, and automotive insurance as required; (v) all travels costs, including room and board; and (vi) any other costs associated with the completion of the Artwork, including all costs required for permits and licenses.
- C. After completing the Artwork and receiving final approval from the Parks and Recreation Director or designee, the Artist shall submit an invoice to the City for the final payment. The City shall pay all undisputed amounts within thirty days of the City's approval of the invoice.
- D. All invoices shall be directed to the attention of the Parks and Recreation Director.

### III. RIGHT AND TITLE TO, AND INTEREST IN, THE ARTWORK

- A. The Artist shall not retain ownership of or any right, title or interest in the Artwork. The Parties agree that the Artwork and all such rights, title and interest in or to the Artwork belong to and are being sold and assigned in their entirety to the City for whatever use it desires, and that the City does and shall at all times own, solely and exclusively, complete and unencumbered, all rights, title and interest in and to all of the Artwork worldwide, any modifications thereto and any derivative works based thereon. Nothing contained herein shall be deemed to constitute a mere license or franchise in City. The Parties further agree that the City, and its successors and assigns, will be free to use, modify, distribute, sell, license or otherwise exploit the Artwork and any modifications to or derivative works based thereon without any restrictions or limitations or any obligations or payments to the Artist.
- B. The City hereby authorizes the Artist to make, and to authorize the making of, limited photograph and video reproductions of the Artwork for educational and self-promotional purposes. For purposes of this Agreement, the following are deemed to be photograph and video reproductions for educational and self-promotional purposes: slides, film strips, and video episodes not intended for a mass audience and used solely for educational programs that are hosted by the Artist in print media, on the Artist's website and social media sites, and on the Artist's computers and on any other electronic media, as long as such

reproduction is provided to others at no cost. In addition, all reproductions shall contain the following credit line unless otherwise requested to the contrary in writing by the City: "Commissioned by the City of Manhattan Beach." Under no circumstances shall the Artist use or make any photograph or video reproductions of the Artwork for commercial purposes and any photograph or video reproductions used or made by the Artist shall not compete with any City endeavor to sell or promote reproductions of the Artwork. The City has sole discretion to determine whether a photograph or video reproduction is utilized for educational and self-promotional purposes or whether the reproduction competes with the City's endeavors to sell or promote its reproductions in the City. If the City determines that the photograph or video reproduction does not meet the terms of this section, the City shall provide written notice to the Artist and the Artist shall immediately cease and desist the use of the reproduction.

- C. The Artist hereby transfers to the City all rights of reproduction, as that term is defined in California Civil Code Section 982, in the Artwork, including, but not limited to, the right to reproduce the Artwork in any manner whatsoever for commercial and non-commercial purposes. Hereinafter, the Artist shall not acquire or claim any rights in or to the Artwork, any uses, reproductions or derivatives thereof or any proceeds therefrom.
- D. The Artist hereby waives, releases and disclaims any rights, demands or claims as may arise at any time and under any circumstances against the City, its elected officials, officers, agents, employees, attorneys, servants, volunteers, 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, California Civil Code § 987 *et seq.*, or any other type of moral right protecting the integrity of works of art. The Artist acknowledges and agrees that the City, in its sole and exclusive discretion, may, among other acts, temporarily or permanently alter or destroy the Artwork.
- E. The Artist represents and warrants that (i) the Artwork is and will be original; (ii) until the time of transfer hereunder, the Artist is the sole owner of the Artwork and of all rights therein including copyright, trademark and other proprietary rights therein; (iii) the Artist is and will be the sole creator of the Artwork; (iv) the Artist has and will have full and sufficient right to assign all rights granted herein and to waive all rights relinquished herein; (v) the Artist is not under any obligation to transfer or sell any of the Artwork to any third party; (vi) the Artwork has not been and will not be published under circumstances which have or will cause a loss of any copyright, trademark or other proprietary rights therein; and (vii) the Artwork does not and will not infringe any patent, copyright, trademark or other proprietary rights, privacy rights or other rights of any third party, nor has any claim (whether or not embodied in a legal action, past or present) of such infringement been threatened or asserted, nor is such a claim

pending, against the Artist (or, insofar as the Artist is aware, against any entity from which the Artist has obtained any rights).

- F. The Artist shall defend any action or proceeding brought against the City based on any claim that the Artwork, or any portion thereof, or the use of the Artwork, or any part thereof, constitutes infringement on any United States patent, copyright or trademark, now or hereafter issued. The City shall give prompt written notice to the Artist of any such claim or proceeding and will reasonably provide authority, information and assistance in the defense of the same. The Artist shall indemnify and hold harmless the City from and against all liabilities in any such action or proceeding. The Artist shall keep the City informed of all new developments in the defense of such actions or proceedings.

#### IV. INDEMNIFICATION

The Artist shall defend, indemnify, and hold harmless the City, its elected and appointed officials, officers, agents, and employees from any and all claims, demands, damages, costs, expenses (including attorney's fees), judgments, or liabilities arising out of this Agreement or occasioned by the performance or attempted performance of the provisions hereof; including, but not limited to, any act or omission to act on the part of the Artist or his or her agents or employees or other independent contractors directly responsible to him, except those claims, demands, damages, costs, expenses (including attorneys' fees), judgments or liabilities resulting from the sole negligence or willful misconduct of the City.

#### V. INSURANCE

- A. The Artist shall at all times during the term of this Agreement carry, maintain, and keep in full force and effect, insurance as follows:
1. A policy or policies of Comprehensive General Liability Insurance, with minimum limits of \$1,000,000 for each occurrence, combined single limit, against any personal injury, death, loss, or damage resulting from wrongful or negligent acts by the Artist.
  2. A policy or policies of Comprehensive Vehicle Liability Insurance covering personal injury and property damage, with minimum limits of \$1,000,000 per occurrence combined single limit, covering any vehicle utilized by the Artist in performing the work required by this Agreement.
  3. Workers' compensation insurance as required by the State of California.
- B. The Artist shall require each of its sub-contractors (if any) to maintain insurance coverage that meets all of the requirements of this Agreement.
- C. The City's Risk Manager may, in writing, amend and/or waive the insurance provisions set forth in paragraph A. of this section. In such case, the Artist shall comply with the insurance provisions required by the City's Risk Manager.

- D. The policy or policies required by this Agreement shall be issued by an insurer admitted in the State of California and with a rating of at least A-;VII in the latest edition of Best's Insurance Guide.
- E. The Artist agrees that if it does not keep the aforesaid insurance in full force and effect, the City may either immediately terminate this Agreement or, if insurance is available at a reasonable cost, the City may take out the necessary insurance and pay, at the Artist's expense, the premium thereon.
- F. At all times during the term of this Agreement, the Artist shall maintain on file with the City Clerk a certificate or certificates of insurance on the form approved by the City's Risk Manager, showing that the aforesaid policies are in effect in the required amounts. The Artist shall, prior to commencement of work under this Agreement, file with the City Clerk such certificate or certificates. The general liability insurance and vehicle insurance shall contain an endorsement naming the City as an additional insured. All of the policies required under this Agreement shall contain an endorsement providing that the policies cannot be canceled or reduced except on thirty days' prior written notice to the City, and specifically stating that the coverage contained in the policies affords insurance pursuant to the terms and conditions as set forth in this Agreement.
- G. The insurance provided by the Artist shall be primary to any coverage available to the City. The policies of insurance required by this Agreement shall include provisions for waiver of subrogation.
- H. Any deductibles or self-insured retentions must be declared to and approved by the City. At the option of the City, the Artist shall either reduce or eliminate the deductibles or self-insured retentions with respect to the City, or the Artist shall procure a bond guaranteeing payment of losses and expenses.

## VI. INDEPENDENT CONTRACTOR

The Parties agree, understand, and acknowledge that the Artist is not an employee of the City, but is solely an independent contractor. The Artist expressly acknowledges and agrees that the City has no obligation to pay or withhold state or federal taxes or to provide workers' compensation or unemployment insurance or other employee benefits and that any person employed by the Artist shall not be in any way an employee of the City. As such, the Artist shall have the sole legal responsibility to remit all federal and state income and social security taxes and to provide for his/her own workers compensation and unemployment insurance and that of his/her employees or subcontractors. Neither the City nor any of its agents shall have control over the conduct of the Artist or any of the Artist's employees. The Artist shall not, at any time, or in any manner, represent that it or any of its agents or employees are in any manner agents or employees of the City. The Artist shall indemnify and hold harmless the City and its elected officials, officers and employees, servants, designated volunteers, and agents serving as independent contractors in the role of City officials, from any and all liability, damages, claims, costs and expenses of any nature to the extent arising from the Artist's

personnel practices. The City shall have the right to offset against the amount of any fees due to the Artist under this Agreement any amount due to the City from the Artist as a result of the Artist's failure to promptly pay to the City any reimbursement or indemnification arising under this section.

#### VII. TERMINATION OF CONTRACT

- A. The City retains the right and privilege of canceling, suspending, or abandoning the execution of any work in connection with this Agreement.
- B. The City shall have the right to terminate this Agreement for any reason, or for no reason, upon seven calendar days' written notice to the Artist. The Artist agrees to cease all work under this Agreement on or before the effective date of such notice.
- C. In the event of termination or cancellation of this Agreement by the City, due to no fault or failure of performance by the Artist, the Artist shall be paid based on the percentage of work satisfactorily performed at the time of termination. In no event shall the Artist be entitled to receive more than the amount that would be paid to the Artist for the full performance of the services required by this Agreement. The Artist shall have no other claim against the City by reason of such termination, including any claim for compensation.

#### VIII. FAILURE TO OBJECT NOT A WAIVER

No waiver of full performance by either Party shall be construed or operate as a waiver of any subsequent default or any of the terms, covenants, and conditions of this Agreement. The payment or acceptance of fees for any period after a default shall not be deemed a waiver of any right or acceptance of defective performance.

#### IX. LIMITATION ON ASSIGNMENT

- A. The personal skill, judgment, and creativity of the Artist are an essential element of this Agreement. Therefore, although the Parties recognize that the Artist may employ qualified personnel to work under the Artist's supervision, the Artist shall not assign, transfer or subcontract the creative and artistic portions of the Artwork to another party without the prior written consent of the City.
- B. Any such purported assignment without the City's prior written consent shall be null and void, and the Artist shall hold harmless, defend, and indemnify the City and its officers, officials, employees, agents and representatives with respect to any claim, demand or action arising from any unauthorized assignment.

X. APPROVAL

Whenever approval, consent, information, or data is herein required of any or all parties, the same shall not be unreasonably or arbitrarily delayed or withheld.

XI. NOTICES

Any notices, bills, invoices, etc. required by this Agreement shall be deemed received on (i) the day of delivery if delivered by hand during the receiving party's regular business hours or by facsimile before or during the receiving party's regular business hours; or (ii) on the second business day following deposit in the United States mail, postage prepaid, to the addresses set forth below, or to such other addresses as the Parties may, from time to time, designate in writing pursuant to this section:

If to the Artist:


If to the City:

City of Manhattan Beach  
1400 Highland Avenue  
Manhattan Beach, CA 90266  
ATTN: Erik Brinkman

XII. AMENDMENTS

No modification or amendment of the terms hereof shall be effective unless written and signed by authorized representatives of the Parties. The Parties expressly reserve the right to modify this Agreement from time to time by mutual written agreement.

XIII. LAW AND VENUE

The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the State of California, excluding California's choice of law rules. Venue for any such action relating to this Agreement shall be in the Los Angeles County Superior Court.

XIV. ATTORNEYS' FEES

If any legal action or other proceeding, including action for declaratory relief, is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default or misrepresentation in connection with this Agreement, the prevailing Party shall be entitled to recover all attorneys' fees, experts' fees, and other costs, in addition to any other relief to which the Party may be entitled.

XV. ENTIRE AGREEMENT

This Agreement constitutes the entire understanding between the Parties with respect to the subject matter hereof and supersedes any and all prior understandings or agreements in regard thereto.

XVI. SEVERABILITY

If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

*[Remainder of this page intentionally left blank]*

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the first date above written.

CITY OF MANHATTAN BEACH  
A Municipal Corporation

[NAME OF ARTIST]

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BRUCE MOE  
City Manager

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Artist Signature

ATTEST:

APPROVED AS TO CONTENT:

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LIZA TAMURA  
City Clerk

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MARK LEYMAN  
Parks & Recreation Director

APPROVED AS TO FORM:

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QUINN M. BARROW  
City Attorney

## **EXHIBIT A**

### **SCOPE OF WORK**

In accordance with the requirements for the site-specific art project as stated in the RFQ and the design approved by the City Council, the Artist shall execute the artwork on the following location:

Artwork (*Chromatic*) – City Hall Lobby, upstairs and downstairs

Artwork shall include:

- i. *Chromatic* Mural located behind the stairwell on the North-facing wall of the City Hall Lobby and spanning two stories
- ii. Seating/benches for both lobbies
- iii. Wood paneling to reface front desk, include a cut out or remounting of existing lighted City Seal
- iv. Repainting of stairwell
- v. Installation of new wood paneled ceiling in place of existing hung ceiling

## **Overview**

### **Roles and Responsibilities**

The Artist shall be responsible for:

- i. All subcontractor and consultant costs and coordination, including engineers, electricians, materials, fabricators, studio, and overhead costs
- ii. All costs and coordination related to fabrication, transportation, delivery, storage, security, and installation of all components of the Artwork
- iii. All costs and coordination related to preparation and clean-up of the Site, which is presented “as is” to the Artist (with the exception of removal and replacement of landscaping in front of Mural 1 outlined below)
- iv. All costs and coordination related to General and Automobile Liability, Professional Liability insurance, and automotive insurance as required
- v. All travels costs, including room and board
- vi. Any other costs and coordination associated with the completion of the Artwork, including all costs required for permits and licenses

The City will:

- i. Present the site for the Artwork in “as is” condition with the exception of:
  - a. Removing the hung ceiling in the upstairs and downstairs lobbies up to the ‘horseshoe’
  - b. Repainting the walls (except the wall of stairwell and mural wall)
  - c. Refinishing the wood of the handrail banister

### **Budget**

The artist fee for the delivery of the project is \$342,657.00

### **Timeline**

<b>Contract Executed by:</b>	December 31, 2020
<b>Ceiling Removed and walls painted by:</b>	March 30, 2021
<b>Artwork installed by:</b>	May 31, 2021

