

**PROFESSIONAL SERVICES AGREEMENT BETWEEN
ED CARPENTER
AND THE CITY OF ANN ARBOR FOR
DESIGN, FABRICATION, AND INSTALLATION
OF PUBLIC ART AT
THE ANN ARBOR JUSTICE CENTER LOBBY**

The City of Ann Arbor, a Michigan municipal corporation, having its offices at 301 E. Huron Street, Ann Arbor, Michigan 48107 (“City”) and Ed Carpenter, an individual, whose address 1812 NW 24th Avenue, Portland, Oregon 97210 (“Artist”), agree as follows this ___ day of _____, 2012.

The Artist agrees to provide services to the City under the following terms and conditions:

I. DEFINITIONS

Administering Service Area/Unit means Public Services Area.

Contract Administrator means Public Services Area Administrator or whomever the Contract Administrator may from time to time designate.

II. DURATION

This agreement shall become effective on _____, 2012, and shall remain in effect until satisfactory performance of all services, unless terminated for breach or as provided in this agreement.

III. SERVICES

A. General Scope: The Artist agrees to provide design, fabrication, and installation services for an installation as specified in Exhibit A.

B. Quality of Services: The Artist’s standard of service under this agreement shall be of the level of quality performed by professionals regularly rendering this type of service. Determination of acceptable quality shall be made solely by the Contract Administrator.

C. City Review of Services: The services shall, at all times, be subject to the City’s general review and approval. The Artist shall confer with the City periodically during the progress of the services, and shall prepare and present such information and materials as may be pertinent, necessary or requested by the City to determine the adequacy of the services or the Artist’s progress. Upon reasonable prior notice to the Artist, the City and its elected officials, officers, employees and agents shall have the right to

make reasonable inspections and reviews of the Artist's progress with respect to the services.

- D. Compliance with Applicable Law: The Artist shall perform his services under this agreement in compliance with all applicable laws, ordinances and regulations.
- E. Additional Work: The City may desire to have the Artist perform work or render services in connection with this project other than that expressly provided for in the "Scope of Services" section of Exhibit A. This will be considered extra work, supplemental to this agreement and shall not proceed unless authorized by a written amendment signed by both parties. Any costs incurred due to the performance of extra work prior to execution of an amendment will not be reimbursed under this agreement or an amendment.

IV. COMPENSATION OF ARTIST

- A. The Artist shall be paid as specified in Exhibit B. The total fee to be paid the Artist for the Services, including all design, installation, administrative and any other costs incurred, will be One Hundred Fifty Thousand and No/100 U.S. Dollars (\$150,000), provided all of the Services performed are accepted as specified in Exhibit A. Payment shall be made under payment terms specified in Exhibit B, following the receipt of invoices submitted by the Artist, and approved by the Contract Administrator.
- B. Payment shall be made upon satisfactory completion and delivery of the Services as provided in Exhibit A. It is understood and agreed between the parties that the compensation stated above is inclusive of any and all remuneration to which the Artist may be entitled.

V. WARRANTY OF SKILL BY ARTIST

- A. The Artist warrants that the quality of his/her services under this agreement shall conform to the level of quality performed by experts regularly rendering this type of service.
- B. The Artist warrants that he/she has all the skills and experience necessary to perform the services he/she is to provide pursuant to this agreement. The Artist may rely upon the accuracy of reports and surveys provided to him/her by the City except when defects should have been apparent to a reasonably competent Artist or when he/she has actual notice of any defects in the reports and surveys.

VI. RELATIONSHIP OF PARTIES

- A. The parties to this agreement agree that it is not a contract of employment but is a contract to accomplish a specific result. Artist is an independent contractor performing services for the City. Nothing contained in this agreement shall be deemed to constitute any other relationship between the City and the Artist.
- B. The Artist certifies that he/she has no personal or financial interest in the project other than the fee he is to receive under this agreement. The Artist further certifies that he/she shall not acquire any such interest, direct or indirect, which would conflict in any manner with the performance of services under this agreement. Further Artist agrees and certifies that he/she does not and will not employ or engage any person with a personal or financial interest in this agreement.
- C. Artist does not have any authority to execute any contract or agreement on behalf of the City, and is not granted any authority to assume or create any obligation or liability on the City's behalf, or to bind the City in any way.
- D. Artist certifies that he/she is not, and shall not become, overdue or in default to the City for any contract, debt, or any other obligation to the City including real or personal property taxes. City shall have the right to set off any such debt against compensation awarded for services under this agreement.

VII. ARTIST'S ACKNOWLEDGMENT OF RISKS AND WAIVER OF RIGHTS

The Artist understands that the City's willingness to enter into this contract is conditioned upon the Artist's agreement to the following provisions.

1. Acknowledgment of Risks of Damage. Artist acknowledges, for the benefit of the City, that installation of the work of art into the building, structure, landscape or other City facility for which it has been designed may subject such work of art to destruction, distortion, mutilation or other modification by reason of the removal of such work of art from such building, structure, landscape or other City facility.

2. Waiver of Rights Under Visual Artists Rights Act of 1990. The Artist understands and agrees that, as to his rights in the work of art, the provisions of this agreement shall supersede the provisions of the Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. § 101 et. seq., as amended, including but not limited to § 106A(a) and § 113(d), as to the work of art, and that execution of this Agreement by the Artist shall constitute a waiver by the Artist, as permitted in 17 U.S.C. § 106A(e), as amended, of any and all rights or protections in the work of art, and any

uses of the work of art whatsoever, set out in or otherwise granted by 17 U.S.C. § 101, et. seq., as amended, including but not limited to § 106A(a) or § 113(d), or otherwise in the nature of “Droit Moral” under which artists claim an interest in their work. The Artist understands that, despite the City’s commitment not to intentionally damage, alter or modify the work of art without the prior written approval of the Artist, alterations to the site and/or removal of the work of art from the site may subject the work of art to destruction, distortion, mutilation or other modification, by reason of such site alterations or its removal.

3. Maintenance, Repairs or Restorations. The City shall have the right to determine, in its sole discretion, after consultation with a knowledgeable professional selected by the City, when and if maintenance, repairs and restorations to the work of art will be made.

4. Damage. Subject to Paragraph 6 below, the City agrees that it will not intentionally damage, alter, or modify the work of art without the prior written approval of the Artist.

5. Notification to Artist. The City shall endeavor to notify the Artist, during the Artist’s lifetime, of any proposed alteration of the site that would affect the intended character of the work of art and shall endeavor to consult with the Artist in the planning and execution of any such alteration and shall make a reasonable effort to maintain the integrity of the work of art.

6. Removal, Relocation, Sale, Donation or Destruction. Nothing in this Agreement shall preclude any right of the City, in its sole discretion, to destroy the work of art.

**VIII. OWNERSHIP OF DOCUMENTS AND WORKS OF ART;
INTELLECTUAL PROPERTY RIGHTS; NON-INFRINGEMENT**

- A. All intellectual property rights, including without limitation any material produced in the pursuance of the agreed professional services, shall vest in and at all times remain vested in the originator of the material produced. will identify and clearly mark all materials produced and given to the City that constitute intellectual property, the rights to which are vested in and retained by or vested in and retained by any other originator, including identification of such other originator.
- B. The design recognition of the input and intellectual property rights of shall be honored, including when there is no further involvement in the project. This includes recognition of basic concepts which through developments and evolutions persist though to the final constructed design object.

- C. When displayed or reproduced in any manner, all intellectual copyright materials belonging to the artist, including sketches drawn by the artist, that have been identified and marked in accordance with Paragraph A, above, must be acknowledged in writing with “©,” as appropriate, in immediate adjacency to the image, and recognized orally as appropriate.
- D. Will accept no liability for the further interpretation, design or implementation by others of ideas, concepts and intellectual copyright materials generated in the pursuance of this agreement.
- E. The City shall own the physical embodiment of the works of art, including but not limited to, the art work proposals and all preliminary studies, models, samples and maquettes thereof.
- F. The Artist represents and warrants that the art work designs do not infringe or violate any copyright, trade secret, trademark, patent or other proprietary or personal right held by any third party.

If any of the art work designs is in any action held to constitute an infringement of any third party's rights and its use is enjoined, the Artist shall immediately and at his/her expense (a) procure for the City the right to continue its use of the art work design in accordance with this agreement, (b) alter the art work design to eliminate infringing portions, subject to the City's approval, or (c) replace the art work design with a design acceptable to the City that is non-infringing.

- G. The warranties made and the rights granted by this section VIII of the agreement shall survive the expiration or earlier termination of this agreement.

IX. RISK OF LOSS; INSURANCE; INDEMNIFICATION

- A. The Artist shall take such measures as are reasonably necessary to protect the work from loss or damage until the Artist has completed delivery to the City of all materials specified herein and ownership is transferred to the City, which shall occur when delivery is complete.
- B. The Artist is responsible for procuring and maintaining at his own expense whatever insurance he/she requires during the life of this agreement to protect himself from claims for bodily injuries, death or property damage which may arise under this agreement and to cover bodily injuries, death, property damage or other losses he/she may suffer while performing the work under this agreement, including damage to or loss of the work while in his possession and control.

- C. To the fullest extent permitted by law, the Artist shall indemnify, defend and hold the City, its officers, employees and agents harmless from all suits, claims, judgments and expenses including attorney's fees resulting or alleged to result, to its proportionate extent, from any negligent, grossly negligent, reckless and/or intentional wrongful or tortious acts or omissions by the Artist or his agents occurring in the performance of this agreement.

X. TERMINATION OF AGREEMENT; RIGHTS ON TERMINATION

- A. This agreement may be terminated by either party in the case of a breach of this agreement by the other party, if the breaching party has not corrected the breach within 15 days after notice of termination is given in conformance with the terms of this agreement.
- B. The City shall have the privilege, with or without cause, to cancel and annul this agreement at any time on 30 days written notice to the Artist in accordance with the notice provisions contained in this agreement.

If services are terminated for reasons other than the breach of the agreement by the Artist, the Artist shall be compensated for reasonable time spent and reasonable quantities of materials used prior to notification of termination. As a condition of receiving the payment from the City, the Artist agrees to transfer title to all partially completed work, plans, notes, drawings, etc., to the City.

XI. OBLIGATIONS OF THE CITY

- A. The City agrees to give the Artist access to staff and City owned properties as required to perform the necessary services under the agreement.
- B. The City shall notify the Artist of any defects in the services of which the City has actual notice.
- C. In the event that actual built conditions of structural, mechanical or electrical members of the Justice Center ceiling do not substantially match plans provided to the Artist, the City will be responsible for the cost of modifications to accommodate the public art installation.

XII. ASSIGNMENT

- A. The Artist shall not subcontract or assign any portion of the services without prior written consent from the City. The Artist's successors and assigns shall be bound by the terms of the agreement.

- B. The Artist shall retain the right to pledge payment(s) due and payable under the agreement to third parties.

XIII. NOTICES

All notices, forms, reports, maintenance suggestions, and other textual materials required by this agreement shall be in writing, and all such material, together with any other material to be delivered hereunder, shall be delivered or mailed to the respective addresses of the parties hereto. The Artist's failure to keep the City reasonably informed regarding the Artist's current address shall be deemed a waiver of the Artist's rights and opportunities under this agreement.

All notices, requests, demands or other communications that are required or permitted to be given under this agreement shall be in writing and shall be deemed to have been duly given upon receipt when addressed as follows:

If to the City, to: Craig Hupy
Interim Public Services Administrator
City of Ann Arbor
P.O. Box 8647
Ann Arbor, MI 48107-8647

If to the Artist, to: Ed Carpenter
1812 NW 24th Avenue
Portland, Oregon 97210

or to such other address as may be specified hereafter by either party for itself, by written notice to the other party.

XIV. EXTENT OF AGREEMENT

This agreement represents the entire understanding between the City and the Artist and it supersedes all prior representations or agreements whether written or oral. Neither party has relied on any prior representations in entering into this agreement.

This agreement may be altered, amended or modified only by written amendment signed by the Artist and the City.

XV. SEVERABILITY OF PROVISIONS

Whenever possible, each provision of this agreement will be interpreted in a manner as to be effective and valid under applicable law. However, if any provision of this agreement or the application of any provision to any party or circumstance will be prohibited by or invalid under applicable law, that provision will be ineffective to the extent of the prohibition or invalidity without invalidating the remainder of the provisions of this agreement or the application of the provision to other parties or other circumstances.

XVI. CHOICE OF LAW

This agreement shall be construed, governed, and enforced in accordance with the laws of the State of Michigan. By executing this agreement, the Artist and the City agree to venue in a court of appropriate jurisdiction sitting within Washtenaw County for purposes of any action arising under this agreement.

XVII. SIGNATURES

FOR ARTIST

By: _____
Ed Carpenter

FOR THE CITY OF ANN ARBOR

By: _____
John Hieftje, Mayor

By: _____
Jacqueline Beaudry, City Clerk

Approved as to substance

Steven D. Powers, City Administrator

Craig Hupy, Interim Public
Services Area Administrator

Approved as to form and content

Stephen K. Postema, City Attorney

EXHIBIT A

Scope of Service

If a provision in the attached Proposal conflicts with a provision in the Agreement, the terms of the Agreement prevail.

Justice Center Public Art

Design

1. Completion of a final design for the artwork
2. Consult with structural engineer for structural support design; Structural engineer approval required
3. Consult with electrician for lighting feed and controls plan
4. Design allowance for servicing of light bulbs and fire protection
5. Fire Protection Mechanical Engineering Specialist approval of sprinkler flow required

Fabrication

1. Complete fabrication of entire artwork
2. Fabrication of any necessary support structure
3. Artwork packing and shipping to Justice Center

Site Preparation

1. Obtain all applicable permits for artwork installation
2. Installation of support system and modification to ceiling to specifications of approved structural support of artwork
3. New installation and/or modification of electrical feed and control for artwork lights, applicable to city and building electrical codes

Installation

1. Complete installation of artwork
2. Establish a timeline and plan for a safe installation of artwork; Plan necessary access to the building during off-hours and comply with security requirements

Project Completion

1. Artist will restore all disturbed areas to prior condition
2. Replace drywall ceiling above artwork to prior condition, or better
3. Maintenance plan for future use by city staff; instructions for service of light bulbs and fire protection

EXHIBIT B

Schedule of Compensation

Three payments will be made in the following amounts. The second and third payment will be paid upon completion of the identified elements in the Scope of Services as set out in Exhibit A and upon receipt of invoice and evidence of completion. Payment is expected within 30 days of receipt.

First Payment

Upon signing of contract

\$50,000

**Second Payment Upon Completion of Design, Fabrication and
Site Preparation up to the Point of Shipment**

\$75,000

Third Payment

**Upon Completion of Final Site Preparation, Installation
and Project Completion**

\$25,000