



Agreement for Commission of Public Artwork between Artist and Non-Agency - Private Entity

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prepared by the Public Art Network Council
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[LONG FORM]
AGREEMENT FOR COMMISSION OF PUBLIC ART WORK
[PRIVATE — NON-AGENCY]

THIS AGREEMENT, is entered into this ____ day of _____, 20____, by and between [name of commissioning private entity], [state of incorporation if corporate entity], (hereinafter the “Owner”) with offices at _____ and [artist’s name or artist’s name d.b.a. business name] (hereinafter, “Artist”) with offices at _____.

WHEREAS, the Owner requires the services of an artist to create a work of art (hereinafter the “Artwork” in a public space located at _____ (hereinafter the “Site”); and

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

WHEREAS, the Owner has selected the Artist based upon the Artist’s work and qualifications; and

WHEREAS, the Artist and the Owner wish to perform under the terms and conditions of this Agreement;

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

a. “Agency” shall mean (whichever department or city agency is mandating the requirement such as Los Angeles Redevelopment Agency, San Francisco Department of City Planning, etc.)

b. “Artist” shall mean: NAME. Where there is more than one Artist, all Artists shall be referred to collectively as “Artist.” If Artist is comprised of two or more individual persons or entities, each individual person or entity shall be jointly and severally responsible for satisfying Artist’s obligations under this Agreement, and each individual person or entity shall be liable for the acts and omissions of every other individual person or entity comprising Artist.

c. “Artwork” shall mean the work of art designed by Artist for the Site under the terms of this Agreement, as described and defined in Artist Proposal, to be attached as Appendix A upon completion of Phase I, Conceptual Design, of the Services to be Provided by Artist.

Article 1 Scope of Services

1.1 Artist’s Obligations

a. The Artist shall perform all services and furnish [all supplies, material and/or work equipment (specify if not all)] as necessary for the design, fabrication, transportation and installation of the Artwork. Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.

- b. The Artist shall determine the artistic expression, design, dimensions and materials of the Artwork, subject to review and acceptance by the Owner and any regulatory agencies with project oversight, as set forth in this Agreement. The Artist will do so in a manner that ensures that the Artwork as installed shall not interfere with the intended use of the Site, pedestrian and other traffic flow, parking, safety devices and procedures, and other needs and functions of the site as defined by Owner and/or ordinance prior to the development of a design by the Artist
- c. The Artist shall prepare the design concept described in Section 1.3 of this Agreement.
- d. The Artist shall complete the fabrication, transportation and installation of the Artwork by the scheduled dates as provided in Section 1.4(b)(i) of this Agreement.
- e. The Artist shall secure any and all required licenses, permits and similar legal authorizations at the Artist's expense as may be necessary for the installation of the Artwork at the Site.
- f. The Artist shall arrange for the transportation and installation of the Artwork in coordination with Owner. If the Artist does not install the Artwork himself, Artist shall supervise and approve the installation. Prior to the installation of the Artwork, Artist shall inspect site to ensure that it is ready to accept the artwork and compliant with the specifications provided by the Artist. Artist shall notify Owner of any perceived conflict, defect or non-compliance with specifications. All work shall be performed by qualified professionals and by licensed contractors as required by law.
- g. Artist shall provide required insurance in amounts and limits specified in Article 5 and Exhibit C.
- h. Artist shall provide a list of all subcontractors along with a copy of the agreement between the Artist and each subcontractor.
- i. Artist shall provide a maintenance manual with a description of all materials, processes and products utilized in the Artwork and the required care and upkeep involved, as well as recommended procedures in the event of necessary conservation.
- j. Artist shall provide a set of "as built" drawings if there is significant deviation from approved and permitted construction documents.
- k. Artist shall provide photographic documentation of the Artwork in a format acceptable to Artist and Owner.
- l. Artist shall be available with reasonable advance notice for a reasonable number of meetings required to coordinate design and project implementation, ceremonies and the like, as necessary.

1.2 Owner's Obligations

- a. The Owner shall perform all obligations in strict compliance with all terms and conditions in this Agreement.
- b. The Owner shall be responsible for providing the Artist, at no expense to the Artist, copies of existing designs, drawings, reports, list of required permits, and other existing relevant data, if any, which is needed by Artist in order to perform.
- c. The Owner shall be responsible for compliance with all applicable laws and regulations, including but not limited to zoning or environmental regulations, and prior to Artist's development of design, shall provide to the artist in writing an explanation of any specific limitations imposed by such laws and/or regulations that may impact the

Comment [j1]: We are just starting to do this in our agreements. It removes the language that says the artist must be contacted and have first crack at the conservation in all instances of conservation, because honestly, they aren't always the best person. If, for example, their maintenance and conservation manual is done in collaboration with a conservator, the course of action may be to call a painting conservator, or a technology conservator, or even a technician of some sort. Of course the artist should be notified that conservation is happening and the scope.

In my mind, particularly with private projects, the onus is on the artist to provide the developer/owner with an understanding of how best to care for the artwork, unlike a public program where the general assumption can be made that some entity with a basic knowledge and desire for maintenance and conservation is responsible for the artwork.

- Artwork including the policies, guidelines and approvals required by regulatory or oversight agencies such as a cultural affairs office.
- d. The Owner shall prepare the Site in accordance with the specifications detailed in the approved design concept in Section 1.3 of this Agreement. The Owner shall be responsible for [all expenses, labor and equipment (specify if not all)] to prepare the Site for the timely transportation and installation of the Artwork. The Owner shall complete the Site preparations by the scheduled installation date as provided in Section 1.4(b)(i) of this Agreement or shall contact the Artist in writing informing him or her of any delays.
 - e. The Owner shall provide and install a plaque on or near the Artwork containing a credit to the Artist and a copyright notice substantially in the following form: Copyright © [Artist’s name, date of publication]. If the plaque is to be placed on the Artwork or Artwork pedestal, it should be done in consultation with the Artist.
 - f. The Owner shall not permit any use of the Artist’s name or misuse of the Artwork which would reflect discredit on the Artist’s reputation as an artist or which would violate the spirit of the Artwork, should such use or misuse be within the Owner’s control.

Discussion

The roles of the Artist, Owner and any agents, (such as architects, structural engineers or general contractors) should be defined in detail. The traditional role of the Artist is that of a designer, fabricator, installer, and supervisor.

This Agreement assumes that the Artist will furnish the materials and will arrange the transportation and installation of the Artwork. The nature of a particular agreement may define different obligations. For example, the Parties may arrange that the general contractor for the project fabricate and install the Artwork under the Artist’s supervision.

For major construction projects, the Parties will likely require the services of architects, engineers, general contractors or landscape architects. This agreement should specify whether the Owner or the Artist engages such experts, and the obligations of such experts should be specified in a separate Agreement.

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

This Agreement assumes that the Artist will comply with the applicable laws and regulations, once advised by the Owner as to what is required and that the Artist will secure the required licenses, permits and similar legal authorizations. As the Owner is more likely to be familiar with such requirements, the Owner should advise the Artist regarding such matters and should verify with the permitting authority exactly what permits and or legal authorizations will be required. The artist may not have familiarity with the laws and regulations of the City and ultimately because it is private property, the Owner would be responsible. The Parties may instead arrange for a third party agent familiar with the process to research the laws and secure the required permits.

- 1.3 Design**
 - a. Concept/Schematic

Comment [j2]: Do you want to insert a comment regarding labor? Many cities require prevailing wage. Also, some jobsites have exclusive agreements with unions that may impact the art budget. Onsite (and occasionally offsite) labor payment standards might be worth a paragraph in the discussion.

- i. The Artist submitted a design concept/schematic (the “Design”) which was selected and approved by the Owner. The Design shall be attached to this Agreement as Exhibit A.
- b. Approval
 - i. Within ___ days after the execution of this agreement, the Owner shall notify the Artist if Owner requires any revisions to the Design in order to comply with any applicable laws, ordinances and/or regulations or for other reasons including, but not limited to, ensuring the physical integrity of the Artwork or its installation at the Site. If agreed upon by both parties, such revisions will become a part of the Design.
- c. Final Design

Upon approval of the schematic design by Owner, Artist is authorized to proceed with Final Design which shall include the following: presentation quality materials, which shall include colored drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the Artwork and how it will be installed at the Site, mock-ups, final color and materials samples, proposed fabrication methods, feasibility studies and final cost estimates at design completion. When used in reference to the proposed Artwork, Final Design Documents shall fix and describe the size and character of the Artwork with respect to its relationship to the Site, including architectural, structural, mechanical and electrical systems, materials and other elements as may be appropriate.

d. Final/Construction Documents

Artist shall submit Construction Documents for construction and/or installation of the proposed Artwork as approved, which must be signed and stamped by design professionals licensed in the State of California, as required by the California Uniform Building Code and any local government amendments to the Building Code.

- i. Artist shall deliver Maquette (computer model or otherwise as agreed to by both parties) and color and material samples.
- ii. Artist shall review Architect’s Design Development and/or Construction Documents for accuracy of the integration of Artist’s Proposal within the Site and provide the Owner with written comments and/or corrections.
- iii. Artist shall provide a detailed description of future maintenance requirements for the Artwork. The Artist shall present the Design to a qualified conservator, who will make recommendations on the maintenance of the Artwork, and the Artist shall provide a written copy of the conservator’s recommendations to the Owner. The conservator’s report will indicate future maintenance and conservation needs and anticipated costs and may reflect issues such as the longevity of the materials used and the life span of the project.

(see below)e. Artist shall deliver a schedule describing Artist’s specific timelines for completing the Artwork.
OR

a. **Concept/Schematic**

- i. The Artist shall visit, examine, research and consider the Site and surrounding area. If applicable, the Artist shall also consult with representatives of the community and collaborate with the project design team to consider their input and concerns.

Comment [j3]: Very few artists think presenting their designs to a conservator is “appropriate”, especially if it has to come from their budget. In most instances they trust their fabricators to provide the scope of information they think necessary for fabrication & longevity. Often because there’s not widespread knowledge regarding conservators who have knowledge of construction materials and methods – and indeed, there aren’t a lot of them, but the field is growing. I think you need a different trigger than “when appropriate”, e.g., tie to a required maintenance estimate, which should be part of the schematic or final design and budget.

- ii Within ____ days of the execution of this Agreement the Artist shall submit to the Owner the design concept (the “Design”) in the form of [detailed color drawings, models, and/or other documents] as are required to present a meaningful representation of the Artwork.
- iii The Conceptual Design: The Proposal at Conceptual Design 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 Artwork relative to the site and a written description of the Artwork in sufficient detail that Artist’s design intent is clearly expressed.
 - ii) Budget for the cost of design, fabrication, insurance, transportation and installation of the Artwork with documentation of the sources and/or assumptions upon which the Budget figures are based regardless of whether these services are provided by Artist, Artist’s subcontractors or by third parties under a separate agreement. Budget shall also reflect the costs associated with any onsite project manager or staff to ensure that Artwork operates properly as installed at the Site.
- b. **Owner Approval**
 - i. Within [____] days after the Artist submits the Design, the Owner shall notify the Artist whether it approves or disapproves of the Design. The Owner shall have discretion in approving outright or with conditions, or rejecting the Design. The Owner shall notify the Artist of any revisions to the Design as are necessary for the Artwork to comply with any applicable laws, ordinances and/or regulations and other reasons including, but not limited to, ensuring the physical integrity of the Artwork or its installation at the Site. If agreed upon by both parties, such revisions will become a part of the accepted Design.
 - ii. If the Owner disapproves of the Design, the Owner will submit to the Artist in writing the reasons for such disapproval. In such event, the Artist will submit a Revised Design within [____] days after the Owner has notified the Artist of its disapproval. The Artist [will] [will not] be paid an additional fee for the Revised Design.
 - iii. The Revised Design will reflect changes made to address the Owner’s stated reasons for disapproval, as well as any adjustments in the budget or schedule that may be necessary. The Owner shall notify the Artist in writing whether it approves or disapproves of the revised Design within [____] days after the Artist submits the revised design.
 - iv. If the Artist refuses to revise the Design pursuant to Section 1.3(b)(ii), or if the Artist fails to adequately revise the Design in the judgment of the Owner, this Agreement shall terminate and the parties shall be under no further obligation to each other as of the date of such termination. The effective date of termination shall be the date the Owner submits its written disapproval of the Revised Design to the Artist. The Owner shall submit to the Artist a written termination notice with the disapproval. The termination notice shall advise the Artist that this Agreement has been terminated pursuant to this Article. The termination notice shall notify the Artist that the Artist is entitled to retain the compensation paid prior to the termination date, and that the Parties are under no further obligation to each other. The termination notice shall confirm that the Artist shall retain ownership of all Designs, Revised Designs and renderings thereof submitted hereunder.
- c. **Design Revision or Modification**
 - i. Prior to the execution of any change in the approved design, Artist shall present proposed changes in writing to the Owner for further review and approval. The Artist must provide a detailed description of any significant changes in the artistic expression, design, dimensions and materials of the Artwork that is not permitted by nor in substantial

conformity with the already approved design. Such notice will also include a detailed description of any additional costs that may be incurred or changes in the budget. A significant change is any change which materially affects installation, scheduling, site preparation or maintenance of the Artwork or the concept of the Artwork as represented in the Design.

- ii. If the Owner approves the changes, the Owner shall promptly (timeframe?) notify the Artist in writing.
- iii. If the Owner disapproves of the changes, the Owner shall promptly notify the Artist in writing and the Artist shall continue to fabricate the Artwork in substantial conformity with the Design.
- iv. The Artist's fee shall be equitably adjusted for any increase or decrease in the Artist's cost of, or time required for, performance of any services under this Agreement as a result of revisions made to the Design under Section 1.6(a). Any claim of the Artist for adjustment under this paragraph must be asserted in writing within ___ days after the date of the revision by the Artist. These additional costs should be indicated at time proposed changes are submitted

Discussion

Paragraph c (i) acknowledges that the artwork may evolve as the design progresses or may need to be modified in response to changes to the site or architectural design.

Any change to the accepted proposal must be documented in writing and submitted to the Owner for review and approval.

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

d. Design Development Documents

Design Development

- i) Design Development Materials and Documents shall incorporate the further development and refinement of the Proposal. Budget and Maintenance Report developed under Conceptual Design.
- ii) Design Development shall include presentation quality materials, which shall include colored drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the Artwork and how it will be installed at the Site, mock-ups, final color and materials samples, proposed fabrication methods, feasibility studies and final written cost estimates from fabricators, suppliers and other sub-contractors at design completion. When used in reference to the proposed Artwork, Design Development Documents shall fix and describe the size and character of the Artwork with respect to its relationship to the Site, including architectural, structural, mechanical and electrical systems, materials and other elements as may be appropriate. The Design must provide sufficient detail to permit the Owner to ensure compliance with applicable local, state or federal laws, ordinances and/or regulations
- iii) Artist and Artist's structural engineer and fabricator shall review all Design Development drawings, materials and documents for consistency and constructability, and report any engineering, structural concerns, or constructability concerns to the Owner. Modifications to the design necessitated by this review shall be submitted and approved

by the Owner prior to beginning the production of Construction Documents and incorporated therein

- iv) Maintenance Plan. At the time Artist submits Artist's design for review by the Owner and as part of the Design Development Documents, Artist shall provide the Owner 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. Artist shall also provide Owner 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 may be an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. 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 design, fabrication and/or installation of the Artwork.

e. Final/Construction Documents:

- i. Construction Documents for construction and/or installation of the proposed Artwork as approved, which must be signed and stamped by design professionals licensed in the State of _____. These drawings and supplementary documents shall indicate any issues or coordination involved in the construction, integration and operation of the artwork as well as any third party subcontractors needed to work on the project. If the design contains lighting, media and/or or purchased forms of hardware, computers or software programs that are an intrinsic aspect of the artwork, each must be identified
 - ii Artist shall deliver Mock-ups and Samples, as required by Owner
 - iii) Artist shall review Architect's Design Development and/or Construction Documents for accuracy of the integration of Artist's Proposal within the Site and provide the Owner and Architect with written comments and/or corrections.
- iv. Where appropriate, the Artist shall present the Design to a qualified conservator, who will make recommendations on the maintenance of the Artwork and the Artist shall provide a written copy of the conservator's recommendations to the Owner. The conservator's report will indicate future maintenance and conservation needs and anticipated costs and may reflect issues such as the longevity of the materials used
- v. Artist shall deliver a schedule describing Artist's specific timelines for completing the Artwork.

Discussion

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

The Owner will require that any structural drawings be certified by a qualified engineer, licensed by the state and paid by the Artist as part of the design cost, stating that the Artwork will be of adequate structural integrity (including foundation loads, wind loads, and potential live loads). Such drawings will conform to all applicable federal, state and local laws and regulations. Drawings must comply with standards as defined by permitting authorities as required or be redesigned and resubmitted at no additional cost to the Owner,

1.4 Budget, Payment and Deliverables Schedule

a. Budget

i. The Artist shall prepare a budget, which shall include all goods, services and materials with such costs itemized. The Budget shall be attached to this Agreement as Exhibit B.

ii. Budget shall mean a specific and detailed document identifying the cost of completion of all work under this Agreement, including all modifications. The Budget shall include the costs for all design fees and costs; preliminary and final engineering requirements; materials and labor for fabrication, including Artist and subcontractors' costs; consultants, including engineers and specifications writers; transportation of Artwork; installation of Artwork, including any necessary permits; permits and licenses; required insurance; any sales tax; and a 5% to 10% contingency allowance. Calculation of the budget will take into consideration the possible inflation of service and material costs between the date of execution of this Agreement and the anticipated completion date.

iii. If the Artist incurs costs in excess of the amount listed in the budget, the Artist shall pay such excess from the Artist's own funds unless the Artist obtains approval in writing for such additional costs from the Owner (or such costs were the result of actions or inaction of the Owner).

b. Payment Schedule

Artist's completion milestones and payment schedule is as set forth in Exhibit C, Payment Schedule, which is incorporated herein by reference

Discussion

The budget includes itemized costs for the artist's creative resources and specific design(s), materials, the applicable sales tax for such materials; off-site fabrication costs; the Artist's time for coordination, fabrication, supervision of the installation; fees for required licenses, permits, and similar legal authorizations; fees for the labor of assistants; itemized general contractor and subcontractor fees if applicable; consultants' or experts' fees (such as engineers, architects or others) if applicable; insurance; Artist's travel; transportation of the Artwork to Site; itemized installation costs; any applicable local, state or federal taxes; and a [x]% contingency to cover unforeseen costs that may arise. The contract should identify a formula for dispersing sums in the event that there are unused monies from the contingency allocation. Also there should be consideration for money for coordination with general contractor if the project is being incorporated into new construction. Who will pay for such? Usually this comes out of the art budget if the Owner has not explicitly agreed to cover these costs. The cost of Contractor coordination should be included as a line item

This is not an exhaustive list of expenses to be included in the budget. There may be other costs depending on the nature of the project. The artist should obtain written cost estimates for

Comment [j4]: COST SAVINGS. In the event that the Developer and Artist jointly agree upon a modification of the Final Proposal or the Construction Documents that results in cost savings such as, but not limited to, the deletion of an element of the Artwork, the substitution of lesser quality materials with no offsetting upgrade of other materials, or the reduction in the Artwork's size, the cost savings attributable to the modification will revert to the Developer.

all of the components of the project in order to develop a comprehensive and realistic budget and to ascertain that the project is feasible within the confines of the budget. It is likely that the project architect and contractor may not want to have any liability for incorrectly advising the artist about potential costs. In addition, the artist should include a 10% contingency in the event of problems, changes or other unanticipated costs.. The project architect/contractor, if there is one, should advise the Artist on the possible range of some of the costs as well as vendor sources and costs for displaying the Artwork such as framing, lighting, footing, pedestals, seismic retrofitting, extended warranties on media components or mechanical devices. Although the budget is usually a fixed amount, it is necessary to itemize the expenses so that both the Owner and any pertinent regulatory agencies can be assured the money is being appropriately and responsibly spent and that all required costs can be covered within the limitations of the art project budget.

The Artist may be tempted to reflect conservative cost estimates in the budget, but cost overruns may be incurred by the Artist, leaving the Artist with little to no profit, or even worse debt. Written cost estimates from fabricators and suppliers are essential to avoid this situation.

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

1.5 Schedule and Progress Reports

- i. The Artist shall notify the Owner of the anticipated schedule for the fabrication, transportation and installation of the Artwork, including a schedule for the submission of progress reports and inspections if any required by Owner or permitting agency . The Schedule may be amended by written agreement. The Schedule of Deliverables must identify a specific date or timeframe for the completion of the Artwork. This Schedule of Deliverables is included as Appendix C.
- ii. The Artist shall inform the client of the progress of each phase of work completed under the Agreement.

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

Other parties involved in the project (such as general contractor or an architect), if any, should also receive copies of the schedule. As construction of the Site progresses, periodic coordination meetings should take place among contractor, Artist and Owner. The Parties should be required to provide a minimum of 30 days written notice of any changes to the schedule.

1.6 Fabrication Stage

Comment [J5]: What do you mean by this? Negotiating with whom? Seems to me if an Owner is commissioning artwork in response to a percent for art requirement, then any budget increase OR DECREASE should be part of an agreement between Owner and agency requiring artwork. Very few would voluntarily seek to increase a budget. SJ negotiates agreements as part of DDA. We have an adjustment clause at 15% increase between budget submitted as part of pro forma when agreement negotiated, and when submitted for building permit. We rarely exercise the option though because the artwork is significantly designed by that point and adding more budget would be hard to incorporate into the artwork.

- a. The Artist shall fabricate [and install] the Artwork in substantial conformity with the Design. The Artist may not deviate from the approved design without written approval of the Owner.
- b. If the Artwork is being constructed on site, the Artist shall avoid creating nuisance conditions arising out of the Artist's operations.
- c. The Owner shall have the right to review the Artwork at reasonable times during the fabrication thereof upon reasonable notice.
- d. If the Owner, upon review of the Artwork, determines that the Artwork does not conform to the approved Final Design, the Owner reserves the right to notify the Artist in writing of the deficiencies and that the Owner intends to withhold the next budget installment within [___] days of the determination as in paragraph (g) below.
- e. The Artist will have thirty days to cure the Owner's objections and will notify the Owner in writing of completion of the cure. The Owner shall promptly review the Artwork, and upon approval shall release the next budget installment. If the Artist disputes the Owner's determination that the Artwork does not conform, the Artist shall promptly submit reasons in writing to the Owner within [___] days of the Owner's prior notification to the contrary. The Owner shall make reasonable efforts to resolve the dispute with the Artist in good faith. However, final determination as to whether the Artist has complied with the terms of this Agreement shall remain with the Owner.
- f. The Artist shall notify the Owner in writing when fabrication of the Artwork has been completed, and that the Artwork is ready for delivery and installation at the Site if the Artwork was fabricated off-site.
- g. Prior to the transportation and installation of the Artwork, the Owner shall inspect the Artwork within [___] days after receiving notification pursuant to paragraph (f) to determine that the Artwork conforms with the Final Design: give final approval of the fabricated Artwork and; authorize the installation of the Artwork at the site. The Owner shall not unreasonably withhold final approval of the fabricated Artwork. In the event that the Owner does withhold final approval, the Owner shall submit the reasons for such disapproval in writing within [___] days of examining the fabricated Artwork. The Artist shall then have [___] days from the date of the Owner's notice of the disapproval to make the necessary adjustments to the fabricated Artwork in accordance with such writing. The Artist shall not be penalized for any delay in the delivery and installation of the Artwork to the Site unless the Artist has willfully and substantially deviated from the Design without the prior approval of the Owner. The Artist shall then be held responsible for any expenses incurred in correcting such deviation.
- h. The Owner shall promptly notify the Artist of any delays impacting installation of the Artwork. Any additional storage and insurance costs incurred by the Artist shall be borne by the Owner in the event that the delay is the caused by the Owner.
- i. The Artist shall be required to inspect the Site prior to the transportation and installation of the Artwork and shall notify the Owner of any adverse Site conditions that will impact the installation of the Artwork and which are in need of correction. Failure to do so by the Artist shall be deemed as an acceptance of the Site conditions.
- j. The Artist shall take reasonable measures to protect or preserve the integrity of the Artwork with the application of a protective sealant, patina or anti-graffiti coating, if applicable, unless the Owner specifically disapproves of such.

Discussion

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

1.7 Installation

- a. Upon the Owner's final approval of the fabricated Artwork as being in conformity with the Design, the Artist shall deliver [and install] the completed Artwork to the Site in accordance with the schedule provided for in Section 1.4(b).
- b. The Artist will coordinate closely with the Owner to ascertain that the Site is prepared to receive the Artwork. Artist must notify Owner of any adverse conditions at the Site that would effect or impede the installation of the Artwork.
- c. The Artist is responsible for timely installation of the Artwork. Artist may not install the Artwork until authorized to do so by the Owner.
- d. The Artist shall be present to supervise the installation of the Artwork.
- e. Upon installation, the Artwork shall be deemed to be in the custody of the Owner for purposes of Article 3 and Article 5 of this Agreement; the Owner assumes liability for any damage to the Artwork or injury to persons or property caused by the Artwork or any activity related to the Artwork.]
- f. Upon completion of the installation of the Artwork, the Artist shall provide the Owner with written instructions for the future maintenance and preservation of the Artwork. The Owner is responsible for the proper care and maintenance of the Artwork.

Comment [j6]: Already stated language

Discussion

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

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

The period of maintenance under Section 1.7(f) is assumed to be the life of the Artwork. However, the anticipated longevity of the Artwork may be negotiated by the Parties. For example, the Owner may require a specific lifespan or duration for the art project. The Parties may agree that the period of maintenance for the Artwork be the same as that of the project. As artists begin to use more innovative materials and techniques which have not yet been tested by time, the Parties may wish to negotiate a specified period of time for maintenance of the Artwork, such as the life of the building project, after which the Owner has the right to relocate, transfer, or destroy the Artwork, what about VARA and CAPA?

Comment [j7]: In California, for example, there is a 10 year cliff in which a HOA can sue a developer. It is good for projects to take into consideration such things when discussing longevity of an artwork. Might be worth mentioning.

1.8 Approval and Acceptance

- a. The Artist shall notify the Owner in writing when all services as required of both Parties by this Agreement prior to this paragraph have been completed in substantial conformity with the Design and contract documents.
- b. The Owner shall promptly notify the Artist in writing of its final acceptance of the Artwork within ____ days after the Artist submitted written notice pursuant to paragraph (a) above. The effective date of final acceptance shall be the date the Owner submits written notice to the Artist of its final acceptance of the Artwork. The final acceptance shall be understood to mean that the Owner acknowledges completion of the Artwork in substantial conformity with the Design, and that the Owner confirms that all services as required of both Parties by this Agreement prior to paragraph (c) of this section have been completed. Title to the Artwork to the Owner passes upon final acceptance of the Artwork and final payment by Owner to Artist. If a regulatory agency must approve the completed artwork, the Owner should move promptly to gain such approval as it will be a precondition to the Owner's ability to accept and approve the finished artwork from the Artist.
- c. If the Owner disputes that all the services have been performed, the Owner shall notify the Artist in writing of those services the Artist has failed to perform within ____ days after the Artist submitted written notice pursuant to paragraph (a) above. The Artist shall promptly perform those services indicated by the Owner.
- d. If the Artist disputes the Owner's determination that not all services have been performed, the Artist shall submit reasons in writing to the Owner within ____ days of the Owner's prior notification to the contrary. The Owner shall make reasonable efforts to resolve the dispute with the Artist in good faith. However, final determination as to whether all services have been performed shall remain with the Owner.
- e. Upon the resolution of any disputes that arise under paragraphs (c) and (d) of this Section, the Owner shall notify the Artist of its final acceptance of the Artwork pursuant to paragraph (b).

Discussion

The services to be completed prior to final acceptance are the Article 1 Obligations. It is important to resolve all disputes prior to the transfer of ownership of the Artwork from the Artist to the Owner upon Owner's final acceptance of the installed artwork. Upon transfer of ownership, Owner assumes responsibility for the insurance and maintenance of the Artwork and will be obligated to maintain the Artwork in accordance with the Artist's specifications and the applicable conservation standards as described in Section 5.2 of this Agreement. It should be noted that while the Artwork may be in custody of the Owner, title to the Artwork does not transfer to the Owner until the Owner has given final approval pursuant to Section 1.8 and made final payment to Artist pursuant to Exhibit B

Article 2 Terms of Agreement

- a. **Duration**
This Agreement shall be effective on the date that this contract has been signed by both parties, and, unless terminated earlier pursuant to such provisions in the Agreement, shall extend until final acceptance by the Owner under Section 1.8(b), or submission of final payment to the Artist by the Owner under Exhibit B, whichever is later. Extension of time of performance hereunder may be granted upon the request of one party and the consent of the other thereto, which consent shall not be unreasonably withheld. Such

Comment [j8]: What extension would there be if the contract extends until final acceptance?

extension shall be in writing, signed by both parties, and attached to the schedule described in Section 1.4(b)(i).

b. Force Majeure

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

Discussion

The Parties may negotiate for an extension of the term of the Agreement upon mutual consent. The Agreement acknowledges that Force Majeure refers to conditions beyond the reasonable control of the Artist are natural disasters, labor strikes and war. These examples are merely suggestive, and not to be deemed exclusive.

Article 3. Risk of Loss

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

Discussion

It is customary for the Artist to bear the risk of loss as any services performed on or in relation to the Artwork are performed by the Artist or under the Artist's supervision. This means that the Artist is responsible for damage to the artwork, loss of artwork due to theft or accident or any other damage or loss that may occur prior to the transportation and installation of the artwork at the site. To protect against Risk of Loss, the artist may be required to obtain either Fine Arts Insurance or Risk of Loss Insurance in an amount equal to the value of the artwork. The Artist may also self insure by proving that he or she has the assets to assume full financial liability for the replacement and or re-creation of the artwork in the event of loss or damage. The Parties may agree that the Owner bear the risk of loss or damage to the Artwork prior to final acceptance if the partially or wholly completed Artwork is in the custody, control or supervision of the Owner or its agent(s) for the purposes of storing, installing on-Site or performing other services to the Artwork.

Article 4 Artist's Representations and Warranties

4.1 Warranties of Title

The Artist represents and warrants that:

- a. the Artwork is solely the result of the artistic effort of the Artist;
- b. except as otherwise disclosed in writing to the Owner, the Artwork is unique and original and does not infringe upon any copyright or the rights of any person;

- c. the Artwork (or duplicate thereof) has not been accepted for sale elsewhere;
- d. the Artist has not sold, assigned, transferred, licensed, granted, encumbered or utilized the Artwork or any element thereof or any copyright related thereto which may affect or impair the rights granted pursuant to this Agreement;
- e. the Artwork is free and clear of any liens from any source whatsoever.
- f. all Artwork created by the Artist under this Agreement, whether created by the Artist alone or in collaboration with others shall be wholly original with the Artist and shall not infringe upon or violate the rights of any third party.
- g. the Artist has the full power to enter into and perform this Agreement and to make the grant of rights contained in this Agreement.
- h. all services performed hereunder shall be performed in accordance with all applicable laws, regulations, ordinances, etc. and with all necessary care, skill, and diligence.
- i. these representations and warranties shall survive the termination or other extinction of this Agreement.

4.1 Warranties of Quality and Condition

- a. The Artist represents and warrants that all work will be performed in accordance with professional “workmanlike” standards and free from defective or inferior materials and workmanship (including any defects consisting of “inherent vice,” or qualities that cause or accelerate deterioration of the Artwork) for year after the date of final acceptance by the Owner under Section 1.8(b).
- b. The Artist represents and warrants that the Artwork and the materials used are not currently known to be harmful to public health and safety.
- c. The Artist represents and warrants that reasonable maintenance of the Artwork will not require procedures substantially in excess of those described in the maintenance and preservation recommendations submitted by the Artist pursuant to Section 1.7(f).
- d. If within [one] year the Owner observes any breach of warranty described in this Section 4.2, the Artist shall cure the breach promptly, satisfactorily and consistent with professional conservation standards, at no expense to the Owner. The Owner shall give notice to the Artist of such breach with reasonable promptness. However, if Artist did not disclose this risk of breach in the Proposal and Maintenance and Conservation manual, and if breach is not curable by Artist, the Artist is responsible for reimbursing the Owner for damages, expense and loss incurred by the Owner as a result of the breach of warranty. However, if the Artist disclosed the risk of this breach in the Proposal and maintenance and conservation manual and the Owner accepted that it may occur, as indicated by the written final acceptance of the artwork, it shall not be deemed a breach for purposes of this Section 4.2 of this Agreement..
- e. If after [one] year the Owner observes any breach of warranty described in this Section 4.2 that is curable by the Artist, the Owner shall contact the Artist to make or supervise repairs or restorations at a reasonable fee during the Artist’s lifetime. The Artist shall have the right of first refusal to make or supervise repairs or restorations. Should the Artist be unavailable or unwilling to accept reasonable compensation under the industry standard, the Owner may seek the services of a qualified restorative conservator and maintenance expert.
- f. The foregoing warranties are conditional, and shall be voided by the failure of the Owner to maintain the Artwork in accordance with the Artist’s specifications and the applicable

Comment [j9]: Here’s where Artwork term starts getting used.

Comment [j10]: What is the legal repercussion of “warrant” here? If the maintenance is in excess of the recommendations could they be financially responsible? For how long – the one year as stated in 4.2d? Otherwise might say something more along the lines of “Artist, to the best of his/her knowledge represents...” or some such

Comment [j11]: Does reasonable promptness have to be before the year has expired? If so, this should be clearly stated.

Comment [j12]: Is it a breach of warranty after one year? Otherwise, I would think that this paragraph should be struck and the assumption would be that the owner would follow the procedures for restoration as outlined in the maintenance & conservation/preservation manual. I don’t think the artist should de facto have right of first refusal. But there should be a clause that says the owner will employ highest possible standards for professional conservation or similar and reference the maintenance manual.

conservation standards. If the Owner fails to maintain the Artwork in good condition, the Artist, in addition to other rights or remedies the Artist may have in equity or at law, shall have the right to disown the Artwork as the Artist's creation and request that all credits be removed from the Artwork and reproductions thereof until the Artwork's condition is satisfactorily repaired.

Comment [j13]: Are we implying here that the owner is responsible for knowing conservation standards and if not, then if they are overlooked the owner is voiding warranty? It seems that it's the artist's job to educate the owner regarding maintenance, and if the artist omits including in their manual of maintenance/conservation good practices of maintenance, the owner should not be held responsible and therefore void their warranty.

Comment [j14]: Is this necessary here since it's part of VARA which is protected as part of this contract?

Discussion

Although a one year warranty is still the accepted standard in the field, many government agencies are starting to require a longer period of warranty. The length of the warranty should take into account the nature of the Artwork, the type of materials and methods used with respect to the Artwork, the conservation record of similar Artworks in similar environments, the period of time during which defects are likely to manifest themselves, the cost of the Artwork and the potential liability involved. Artists will require fabricators to assume warranty responsibility for their work this will impact the artist's ability to offer a specific length of warranty to the Owner. New and experimental materials and technologies present special challenges as there may not be a history of performance of many years. Owners commissioning work that involves new and experimental materials and technologies may wish to consider establishing a long-term maintenance budget using a portion of the project budget as an endowment.

The Artist's aesthetic choices and goals might be at odds with the Owner's concerns over maintenance and conservation of the Artwork. For example, the materials or equipment that the Artist chooses may be untested or unproven, or might not age in a traditional way. Thus, the Artist should provide a written disclosure of factors that may be at odds with the conservation goals in the Proposal, so that the Owner can make an informed evaluation of the impact of the Artist's choices on the standard warranties. The Owner may also wish to consult with an independent expert to evaluate the materials and techniques used in the Artwork prior to acceptance. It is particularly important for the Owner to do this in light of varying environmental conditions which may affect materials differently and possibly more adversely under some conditions than others.

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

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

Article 5 Insurance

5.1 General

- a. The Artist acknowledges that until installation of the Artwork under Section 1.7(e), any injury to property or persons caused by the Artist's Artwork or any damage to, theft of, vandalism to, or acts of God affecting the Artist's Artwork are the sole responsibility of the Artist, including, but not limited to, any loss occurring during the creation, storage, transportation or delivery of the Artist's Artwork, regardless of where such loss occurs.
- b. Terms for the procurement and duration of insurance are provided in Exhibit C.
- c. Required insurance policies are described in Exhibit C.

Comment [j15]: Again, this brings up the issue of the time delta between completion and final acceptance and the lack of clarity of responsibility for the artwork during this time. What is the standard for other subcontract work on a job site?

5.2 Indemnity

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

Discussion

Please note that the Parties under this Agreement have a mutual duty of indemnification. A Suitable compromise, if the Owner insists on broad indemnification, may be for the Artist to agree to indemnify the Owner only in the instance of an adverse judgment and/or for the Artist's liability to not exceed the limits of the liability of the insurance policies required to be maintained by the Artist under this Agreement.

Article 6 Ownership and Intellectual Property Rights

6.1 Title

Title to the Artwork shall pass to the Owner upon the Owner's written final acceptance and payment for the Artwork pursuant to Section 1.8(b) and Exhibit B.

Discussion

Should the artwork be commissioned under a mandatory obligation to a public agency, the Owner may withhold final acceptance and payment until the Agency give its approval.

6.2 Ownership of Documents

One set of presentation materials prepared by Artist and submitted to Owner under this Agreement shall be retained by Owner.

6.3 Copyright Ownership

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

Discussion

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

6.4 Reproduction Rights

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

Comment [j16]: What is exact? What about a 95% scale. I don't know if the three-dimensional indication needs to be there. Would it be better to say something like "substantially similar"?

Also isn't "additional duplicate" redundant?

Comment [j17]: Should probably indicate electronic media rights these days. Also, from San Jose agreement, we give the owner the right to use the artwork in marketing materials for the project, in fact we encourage it, particularly for residential construction in an effort to have new owners buy into having art as a valued part of their residence, here's our language:

18.1 **REPRODUCTIONS - DEVELOPER.** Artist authorizes Developer and City to make, and to authorize the making of photographs and other two-dimensional reproductions of the Artwork for educational, public relations, promotional and other Project-related purposes. For the purposes of this Agreement, the following are deemed to be reproductions for noncommercial purposes, examples include but are not limited to: reproduction in exhibition catalogues, slides, photographs, postcards posters, and calendars; in art magazines, art books and art and news sections of print and electronic newspapers and websites; in general books and magazines not primarily devoted to art but of an educational, architectural, historical or critical nature; slides, video and film strips not intended for a mass audience; and television from stations operated for educational purposes, or on programs for educational purposes from all stations. Artist also grants Developer the right to use images of the artwork in materials exclusively promotional for the Project. On any and all such reproductions, Developer shall place a copyright notice, naming the Artist in the form and manner required to protect the copyrights in the works under the United States copyright law.

18.2. In the event Developer wishes to use the Artwork, or reproductions thereof, for commercial purposes not authorized in Section 18.2 of this Agreement, Developer shall contact Artist so that a separate agreement may be negotiated at a commercially reasonable rate.

Comment [j18]: This is no longer required legally, why are we requiring here. I would think this would be at the artist's option.

Discussion

Section 6.4 protects the Owner's legitimate interest in acquiring a unique work by the Artist. It prevents the artist reproducing identical artworks for others and permits the Owner to reproduce images of the Artwork for noncommercial purposes. At the same time, the artist has the right to create future artworks that include the style, form, "feel," and themes embodied in the Artwork.

Copyright is a property right that can be negotiated between the Parties. If the Owner expects to own the copyright, this should be subject to reasonable compensation for any assignment of right(s). The Artist should, at minimum, retain an irrevocable license to reproduce and display the Artwork in two-dimensional mediums and for incorporation into his portfolio or for exhibitions, [and perhaps also a license to create derivative artworks.]

Additional examples of non-commercial two-dimensional reproductions are reproductions in art, architecture and trade association publications.

Should the state in which the Artwork is located have a resale royalty provision in state law (as in California for instance) the Owner is obligated to determine the appropriate royalty, if any in accordance with state law. If Owner sells the Artwork as a fixture to real property, and if the resale value of the Artwork is not itemized separately from the value of the real property, the parties agree that the resale price of the Artwork shall be presumed to be less than the purchase price paid by Owner. Thus, Owner has no obligation to pay resale royalties pursuant to California Civil Code §986 or any other law requiring the payment of resale royalties. If Owner sells the Artwork as an individual piece, separate from or itemized as part of a real property

transaction, Owner shall pay to Artist a resale royalty to the extent required by California Civil Code §986, based upon the sale price of the Artwork.

Article 7 Artist's Rights

7.1 General

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

Comment [J19]: I don't think the permission of the artist needs to be obtained, I think the law is that the artist needs to be notified isn't it? I think, especially with building integrated projects, we are better off recommending that if the work is to be destroyed, then the artist has the right of first refusal to save the work. Also, the Owner should have the right to remove and sell the work if ordinance does not otherwise disallow.

Discussion

The protections afforded by the Visual Artists' Rights Act apply to discrete art objects. The applicability of the Visual Artists' Rights Act to object that are integrated into the Site is determined of a case-by-case basis.

The Visual Artists' Rights Act states:

"The author of an Artwork of visual art shall have the right:

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

Individual States may have also passed legislation independent of the Visual Artists' Rights Act to protect the rights of visual artists. For example:

The New York Authorship Rights Act states:

"No person other than the artist or a person acting with the artist's consent shall knowingly display in a place accessible to the public or publish a work of fine art or

limited edition multiple of not more than 300 copies by that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published, or reproduced as being the work of the artist, or under circumstances which would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom."

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

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

7.2 Alteration of Site or Removal of Artwork

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

Comment [j20]: Again, notification v. permission.

Comment [j21]: Why should this be the responsibility of the artist. I think the recommendation should be that the owner should, when possible, consult the artist for recommendations. Written instructions or the like should be compensated.

OR

- a. The Owner shall notify the Artist in writing upon [adoption of a plan of construction or alteration of the Site] which would entail removal or relocation of the Artwork which might result in the Artwork being destroyed, distorted or modified. The Artist shall be granted the right of consultation regarding the removal or relocation of the Artwork. If the Artwork cannot be successfully removed or relocated as determined by the Owner, the Artist may disavow the Artwork or have the Artwork returned to him at his expense.
- b. The Artwork may be removed or relocated or destroyed by the Owner should the Artist and the Owner not reach mutual agreement on the removal or relocation of the Artwork after a period not to exceed [90] days after written notice to the Artist. During the [90] day period, the parties shall engage in good faith negotiations concerning the Artwork's removal or relocation.
- c. In the event of changes in building codes or zoning laws or regulations that cause the Artwork to be in conflict with such codes, laws or regulations, the Owner may authorize the removal or relocation of the Artwork without the Artist's prior permission. In the alternative, the Owner may commission the Artist by a separate agreement to make any

necessary changes to the Artwork to render it in conformity with such codes, laws or regulations.

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

Comment [j22]: Why is this here? If imminent hazard, no matter the cause, then need right to remove. I understand the possibility of willful neglect, but that seems like the most difficult way to get rid of an artwork, and either way the work would need to come out if it's posing an imminent hazard. Maybe a clause that says "without possibility of stabilizing prior to repair"

Discussion

Section 7.2 takes into consideration that the Artwork is site-specific. Site-specific means that the Artist designed the Artwork specifically to be displayed at a particular Site and only that Site. The meaning of the Artwork is directly tied into the Site. A change in location of the Artwork may alter its meaning as imagined by the Artist or alter the Artist's statement as imbued in the Artwork or the work may be so integrally built as part of the site that to remove or alter the work is to destroy it.

The alternative paragraphs (a) and (b) of this section take into consideration that the Owner may insist on an unencumbered right to remove, relocate or destroy the Artwork to ensure that any current or future construction at the Site is not hindered.

Article 8 Artist as an Independent Contractor

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

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

Article 9 Assignment of Artwork

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

Comment [j23]: The artist should not have any rights relative to Owner's transfer of rights & obligations. The artist's choice is to continue with the agreement in the event there is such a transfer.

Article 10 Termination

- a. Either Party may terminate this Agreement without recourse by the other where performance is rendered impossible or impracticable for reasons beyond such Party's reasonable control such as, but not limited to, acts of nature; war or warlike operation; superior governmental regulation or control; public emergency; or strike or other labor disturbances. Notice of termination of this Agreement shall be given to the non-terminating party in writing not less than ____ days prior to the effective date of termination.

- b. The Owner may terminate this Agreement without cause upon [60] days written notice to the Artist. The Owner shall pay the Artist for services performed and commitments made prior to the date of the termination, consistent with the schedule of payments set forth in Exhibit B of this Agreement. The Artist shall have the right to an equitable adjustment in the fee for services performed and expenses incurred beyond those for which the Artist has been compensated to date under Exhibit B with allowance for documented lost opportunities, unless the parties come to a settlement otherwise. The Artist shall retain possession and title to the [studies, drawing, designs, maquettes, and models] already prepared and submitted or prepared for submission to the Owner by the Artist under this Agreement prior to the date of termination.
- c. If either party to this agreement shall willfully or negligently fail to fulfill in a timely and proper manner, or otherwise violate any of the covenants, agreements or stipulations material to this Agreement, the other party shall thereupon have the right to terminate this Agreement by giving written notice to the defaulting party of its intent to terminate specifying the grounds for termination. The defaulting party shall have ____ days after the effective date of the notice to cure the default. If it is not cured by that time, this Agreement shall terminate.
- d. If the Artist defaults [for cause other than death or incapacitation], the Artist shall return to the Owner all funds provided by the Owner in excess of the expenses already incurred. The Artist shall provide an accounting of these expenses. All finished and unfinished drawings, sketches, photographs and other work products prepared and submitted or prepared for submission by the Artist under this Agreement shall be retained by the Artist. [The Owner [shall] retain the right to have the Artwork fabricated or executed.] However, the Artist shall retain the copyright in the Artwork and all rights under Article 7 and Article 8.
- e. Upon notice of termination, the Artist and his subcontractors shall cease all services affected.

Comment [j24]: Why so long for termination after written notice? How does this benefit the artist since work should cease immediately upon receipt of the notice (and this maybe should be stated here).

Comment [j25]: Why is this parenthetical? If the project is of a nature that the submitted plans and drawings are complete and the work could be fabricated, then I'd think the owner should have the right – it's up to the artist if they'd want to claim authorship. On the other hand, if it were a mural, obviously that probably wouldn't be viable. I think it's a bit odd that if the artist defaults they get to keep all drawings, copyright, etc, and the owner is left holding the bag with no(?) recourse. I'm not sure what the remedy should be, but this just seems a bit unfair.

Comment [j26]: For a multiple artist agreement, we also include this clause:
 11.2BREACH BY ONE ARTIST. In the event that one Artist breaches this Agreement including, but not limited to the Artist's failure to perform under this Agreement, Developer has the right to terminate this Agreement as to the breaching Artist only and to proceed under the Agreement with the non-breaching Artist under the terms of this Agreement with all the same rights under this Agreement as if Developer had not exercised its termination rights. The notice provisions set forth in Section 25 shall apply to any Notice of Termination issued by Client to one breaching Artist.

Discussion

Failure of the Owner to an installment payment to Artist constitutes a violation of this Agreement in accordance with paragraph (e) of Article 10.

The Artist should keep accurate up to date records of track time spent and expenses incurred in performance of this Agreement in the event that a dispute arises as to the amount of compensation due to the Artist in the event of termination.

Article 11 Death or Incapacity

- a. If the Artist becomes unable to complete this Agreement due to death or incapacity, such death or incapacity will not be deemed a breach of this Agreement or a default on the part of the Artist for purposes of Article 10.
- b. In the event of incapacity, the Artist shall assign his obligations and services under this contract to another artist provided that the Owner approves of the new artist and so agrees in writing. If the Owner does not agree, the Owner may elect to terminate this Agreement. The Artist shall retain all rights under Article 6 and Article 7. The Artwork and any reproductions thereof shall contain a credit to the Artist and a copyright notice in substantially the following form: © [Artist's name, date of publication].
- c. In the event of death, this Agreement shall terminate effective the date of death. The Artist's heirs shall retain rights under Article 6 and Article 7. [The Artist's executor shall

deliver to the Owner the Artwork in whatever form or degree of completion it may be in at the time. Title to the Artwork shall then transfer to the Owner. However, the Artwork shall not be represented to be the completed work of the Artist unless the Owner is otherwise directed by the Artist's heirs.]

Article 12 Notices and Documents

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

For the Owner:

For the Artist:

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

Article 13 Waiver

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

Article 14 Conflict of Interest

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

Article 15 Arbitration

If, during the creation of the Artwork, its installation and subsequent existence, either Party breaches this Agreement, each Party agrees to submit to arbitration upon the request of the other Party provided that the breach is not cured within a reasonable time under paragraph (c) of Article 11.

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

[Notwithstanding any provision of this Agreement to the contrary, any damage award to a party on account of a Party's breach of this Agreement, with the exception of the Artist's duty under Article 6 to procure and maintain insurance, shall not exceed an amount equal to the sum of the payment in Exhibit B.]

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

Discussion

Arbitration is a type of alternative dispute resolution that may be undertaken in lieu of filing an action in court. An advantage may be that it is less time consuming than a lawsuit, however, there are drawbacks that must be considered. The fees associated with arbitration can potentially be more than the filing fee of a lawsuit. Arbitration decisions are often binding and final whereas a lawsuit judgment can be appealed.

There are also alternative dispute mechanisms, such as mediation, in which a third party aids in negotiating a settlement (as opposed to delivering a judgment as in arbitration or a lawsuit).

Article 16 Amendments

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

Article 17 Conflict with the Law

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

Discussion

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

Article 18 Choice of Law

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

Discussion

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

Conditions for choice of law include: where the agreement was made, where most of the performance of the agreement occurred, who had bargaining power, if there is a governing contract provision, etc

Article 19 Entire Agreement

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

For Owner:

Name

Title

Date

For Artist:

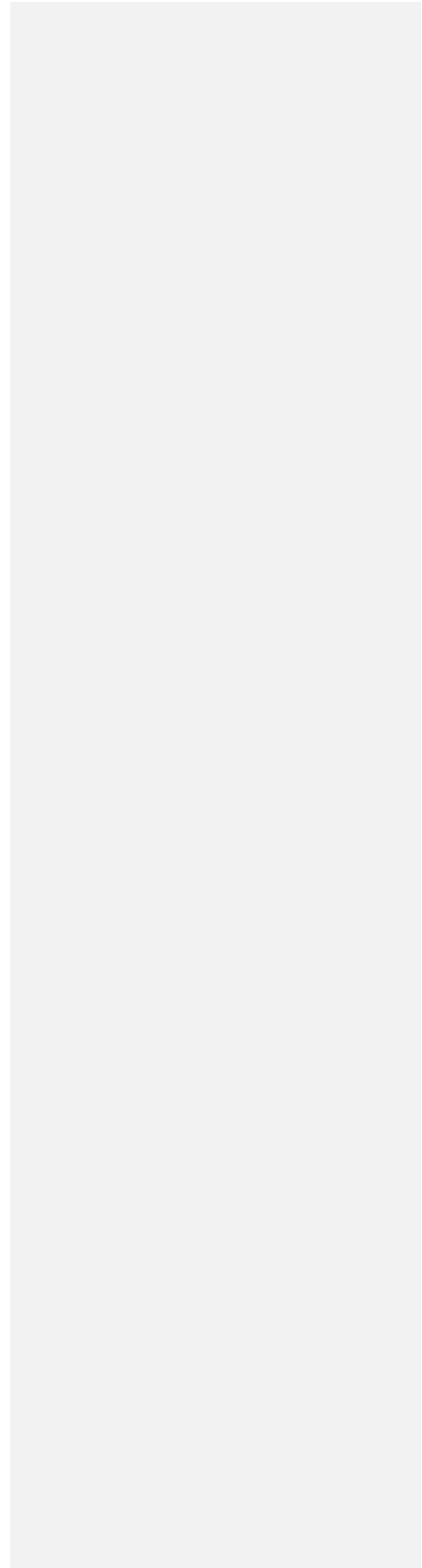
Name

Title

Date

Exhibit A
Description of Project

Exhibit B



Budget and Payment Schedule

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

- a. \$_____ upon the execution of this Agreement, [recognizing that the Artist will invest time and expense in preparing the Design as set forth under Section 1.3;
- b. \$_____ upon submission of the Design as set forth under Section 1.3
- c. \$_____ upon the Owner's notification to the Artist of its approval of the Design as set forth under Section 1.3]; alternately, upon permitting of construction documentation since there's not a required owner approval of final drawings in 1.3
- d. \$_____ upon commencement of fabrication
- e. \$_____ upon completion of 50% of the fabrication
- f. \$_____ upon completion of the fabrication and when the Artwork is ready for delivery and installation at the Site as set forth under Section 1.5(f);
- g. \$_____ upon delivery by Artist to the Owner of Maintenance Manual with written instructions for the maintenance and preservation of the Artwork under Section 1.7(e)
- h. \$_____ upon final acceptance of the Artwork by the Owner as set forth under Section 1.8(b) and approval by the regulatory agency.

Discussion

The installment payments can also be expressed as a percentage of the total contract amount. The Artist will submit an invoice for each milestone completed.

The Owner will make payment within 30 days upon receipt of invoice from Artist. This takes into consideration that the Owner may desire time to inspect and approve of goods and services; unless the bid specification, purchase order, or contract specifies otherwise. The imposition of an interest penalty may be desired to ensure that the Owner promptly conducts whatever inspection is desired and processes the payment. A sample interest provision is: "If payment of an installment has not been made to the Artist within ____ days of the stated date of payment for each respective installment without cause, a separate interest penalty of [.03333]% per day will be due and payable, in addition to the invoice amount, to the Artist. Interest penalties of less than \$1 will not be enforced."

Exhibit C

Insurance

General

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

Comment [j27]: Subcontractors as add'l insureds? Seems the requirement should be for subs to have equivalent insurance, specifically to cover the value of their part of the work.

Comment [j28]: Option for subs to have own coverage is here and should be similar in "a".

Insurance Policies

- a. Commercial General Liability insurance policy, written on an occurrence form, including all the usual coverage known as:
 1. premises/operations liability
 2. products/completed operations
 3. personal/advertising injury
 4. contractual liability
 5. [broad-form property damage]
 6. [independent contractor's liability]

Said policy must provide the following minimum coverage:

1. \$[1,000,000] combined single limit per occurrence for bodily injury, personal injury and property damage.
 2. \$[1,000,000] annual aggregate
- b. Automobile liability insurance policy, including coverage for owner, non-owner, leased or hired vehicles, providing the following minimum coverage:
 1. bodily injury liability of \$[50,000] for each person,
 2. \$[300,000] per occurrence,
 3. property damage liability of \$[25,000] for each occurrence.

The Artist agrees to keep in good standing a valid driver's license at all times during the term of this Agreement.

- c. [Transportation/Cartage insurance all risk. Coverage must include loading, transportation and unloading of the Artwork. If the Artwork is to be loaded, transported or unloaded by a person or entity other than the Artist, the insurance coverage must cover that person or entity. The minimum limit shall be the total amount of compensation paid to Artist through the date of loading under Exhibit B.]
- d. [All Risk Installation insurance which covers physical damage to or destruction of the Artwork. If the Artwork is to be installed by a person or entity other than the Artist, the insurance coverage must cover that person or entity. The minimum limit shall be the total amount of compensation paid to the Artist through the date of the beginning of the installation of the Artwork under Exhibit B.]
- e. [Worker's Compensation and Employers' Liability insurance in accordance with the statutory requirements of the State of _____ providing coverage for any and all employees of Artist. The Artist shall require all subcontractors to carry this coverage also. The minimum coverage for the Worker's Compensation and Employers' Liability insurance shall be \$[100,000].
- f. If, however, the Artist does not have any employees as defined by state statutes and regulations and does not wish to cover himself for Worker's Compensation, the Artist shall sign the following statement:

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

Comment [j29]: Again, is this a place were a subcontractor (transportation company) would carry their own? Should artist carry transportation all risk if not doing the transporting?

(Artist's signature)

(Print Artist's name)]

The requirement for Worker's Compensation and Employers' Liability insurance shall be waived in writing upon submission of this signed statement by the Artist to the Owner.

- g. Artist will be responsible for obtaining Professional Errors and Omissions coverage for services provided by licensed engineers and architects with a general aggregate limit of \$[1,000,000] and for assuring engineers and other experts have appropriate Professional Errors and Omissions coverage or name them as additional insureds to the policy of the Artist.

Comment [j30]: I don't believe artists can get E&O. We require that our artists who use an engineer to create their documents must produce a copy of their E&O.

Discussion

It is important to note that the above provisions would vary in different circumstances, depending on federal, state or local requirements, the scale of the project and other factors. The person responsible for obtaining and paying for insurance coverage does not necessarily have to be the Artist; it can also be the Owner or another person. Responsibility may vary depending on the nature of the activities of the persons involved in the project and the availability and cost of coverage to each such person. Although the Artist is usually responsible for obtaining the insurance policies at his own expense, the cost of insurance is generally incorporated into the budget under Section 1.4(a).

Whoever is responsible, each of the other parties (the Artist, the Owner, or other persons involved) should be named in the policy as an additional insured with respect to the coverage.

At a minimum, the Owner is likely to require that the Artist insure the Artwork against fire or theft at any stage of its fabrication and installation up until the final acceptance of the Artwork.