

**STAFF REPORT FOR CALENDAR ITEM NO: 8
FOR THE MEETING OF: March 10, 2011**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approve the design concept and budget for Tim Hawkinson, the fifth artist recommended by the Transbay Public Art Steering Committee to create a unique site specific work for the Transbay Transit Center in accordance with the TJPA Board directive to create a “landmark entry” sculpture to be located in the Northeast corner of Mission Square (near the intersection of Mission and Fremont Streets) on a dedicated foundation, structural slab, and base-isolator system, and authorize the Executive Director to enter into agreements with the artist Tim Hawkinson and Webcor/Obayashi (W/O) (by change order to the existing agreement between TJPA and W/O). The scope of work for the artist shall include consultation during design development, construction documents, production of a three-dimensional model, and consultation during assembly, fabrication and installation. The scope of work for W/O shall include the management, assembly, construction, and installation of the sculpture and its foundation. The TJPA Architect of Record, Pelli Clarke Pelli, Inc., and its subconsultant engineers, will prepare all plans and specifications for the sculpture and its foundation.

EXPLANATION:

Public Art Program

In May 2008, the TJPA approved the establishment of a public art program budget of \$4.75 million, and entered into an intergovernmental agreement with the San Francisco Arts Commission (SFAC) to manage and oversee the development of the public art program on TJPA’s behalf. The SFAC established a Steering Committee whose members were approved by the TJPA Executive Director. The five members of the Public Art Steering Committee are Maria Ayerdi-Kaplan, TJPA Executive Director; Luis R. Cancel, Director of Cultural Affairs of the SFAC; Fred Clarke, Pelli Clarke Pelli Architects; Commissioner JD Beltran, Member of the Visual Arts Committee of the SFAC/Artist and Professor at the San Francisco Art Institute; and Blake Summers, Director and Chief Curator, San Francisco International Airport Museums and Exhibition Program. The work ascribed to the Steering Committee in the intergovernmental agreement includes general oversight of the development of the Art Program such as recommending policies for and objectives of the Art Program; approving the selection of artists and reviewing and approving the artists’ proposals and corresponding budgets prior to requesting TJPA Board approval.

As previously presented to the TJPA Board, the goals and objectives established by the Steering Committee for the Transbay Transit Center Public Art Program are as follows:

- Artworks commissioned for the Transbay Transit Center must be of an appropriate scale and impact to respond to the monumentality and sculptural quality of the architectural design.
- The artist’s designs should be timeless and meaningful over the many future decades of the life of the building and should be complex and dynamic enough to maintain interest over time and repeated viewings.

- The artwork should reflect the prestige and civic importance of the building.
- The artwork should be bold, original, and unique to San Francisco.
- The artwork should be visually provocative and sophisticated in a way that reflects the San Francisco Bay Area's leadership as an urban center and cultural destination.
- The artwork should serve as a focal point or landmark within the architectural context of the location where it will be situated.
- The artwork should affect the visitor's experience of the space by enlivening and animating the space with color and light; creating a sense of calm or repose; or responding to the way people will move through the building and how the public will use the space.
- The artwork should provide a visual connection between ground level and roof top Public Park and highlight the vertical visibility and circulation throughout the building and encourage pedestrians from Mission Street to enter into the building.
- Artwork acquired and accepted into the TJPA collection should be appropriate to the context of its intended display location at the Transbay Transit Center, and be relevant within the cultural, historical, social/political, design, and environmental context of San Francisco and the Bay Area.
- All artworks commissioned must be permanent and require only routine maintenance in order to be maintained in excellent condition.
- The Transbay Transit Center Public Art Program should be diverse in its representation of artists and artistic styles and be reflective of the ethnic diversity of the San Francisco Bay Area population.

The Art Program will be implemented in two phases pending the availability of additional funds. Phase I will focus on significant artworks in the Grand Concourse, the building façade, the primary light column, and the rooftop park, as presented previously as well as today. Phase II of the public art program will include multiple smaller-scale opportunities for local San Francisco Bay Area artists in the passenger lobbies, corridors, passageways, pedestrian entrances, pedestrian bridges, treatment of chain link fencing and a new park planned at Second and Howard Streets. There will also be development of preliminary guidelines for a temporary public art or exhibition program and the determination of its location. The SFAC will work with the TJPA to identify other sources of funding, both public and private, to support the implementation of a second phase.

Following the Steering Committee's approval of artist selection criteria and the general identification of primary sites where artists might work, the SFAC conducted an artist selection process which resulted in the Steering Committee recommending five artists for the program to be presented for TJPA Board approval. On September 10, 2009, the TJPA Board approved five artists to enter into an MOU with the SFAC to develop conceptual proposals for specific sites in the new Transbay Transit Center (TTC), including Tim Hawkinson. SFAC has coordinated the site selection and development of each artist's project and budget in conjunction with Pelli Clarke Pelli Architects (PCPA). In July 2010, the TJPA Board approved the artists' projects and budgets for the four artists other than Mr. Hawkinson.

Tim Hawkinson

Following the Board's September 2009 approval to request a conceptual proposal from Tim Hawkinson, SFAC Director of Programs Jill Manton, PCPA, and TJPA staff and engineering

consultants met numerous times to coordinate the Tim Hawkinson project. The site for the Tim Hawkinson sculpture was selected by the artist in consultation with the TJPA, SFAC and PCPA. The Tim Hawkinson Transbay Transit Center Entry Sculpture will be placed on Mission Square at the corner of Mission and Fremont Streets. This is a visible and prominent site and will function as the main entry plaza for the Transbay Transit Center. The scale, character, and location of the sculpture are consistent with the Board's September 10, 2009 specific request for a "significant landmark" artwork at the entry to the Transbay Transit Center.

The artist's concept is unique and consistent with the sustainable objectives of the Transbay Transit Center. Tim Hawkinson will salvage some of the demolished material from the Transbay Terminal to reconstruct a welcoming figure for the new Transbay Transit Center. From the artist's statement:

"Conceived as a modern marker, its most basic and timeless statement—'I was here'— is an indication that one is on the right path. This Journey is underscored by the sculpture's original incarnation as a bus ramp, reminding us that life is composed largely of transitions. Its contrapposto gesture recalls classical sculpture, but its raw and immediate form speaks of the primitive and archetypal.

It references, among other things, stacked stone objects created by indigenous people of the Pacific Northwest, Greek Telamons (ornate architectural columns carved in the form of male figures), and the biblical Ebenezer. (Ebenezar is a name of Hebrew origin meaning "Stone of the help", derived from the phrase "Eben ha-Ezer")."

The sculpture will be constructed from the demolished remains of the Transbay Terminal, except for an internal steel armature and dedicated foundation, structural slab, and base-isolator system. The artist has described the sculpture as a "guardian," intended to help travelers navigate a safe journey.

The Hawkinson sculpture shall be built and assembled at the Northeast corner of Mission Square, near the intersection of Mission and Fremont Streets, during the course of constructing the Transit Center. The sculpture shall be protected and isolated from the Transit Tower development. It will not impede the construction of the Transit Tower, Mission Square, underground parking, utilities, or foundation structures.

The proposed budget for the artwork is defined below. The budget includes the artist's fee for consultation during design development, construction documents, production of a three-dimensional model, and consultation during assembly, fabrication and installation, and W/O's fee for protection of the salvaged material during construction activities; assembly, fabrication, and installation of the sculpture; and management and oversight of the construction of a dedicated foundation, structural slab, and base-isolator system to support the sculpture, all in accordance with the artist's design and Pelli Clark Pelli Architects' engineering design. As a result of close collaboration with PCPA, W/O, Turner Construction, Sheedy Crane and demolition contractor Evans Brothers, Inc. (EBI), the SFAC has been able to reduce the initial implementation cost of the sculpture from more than \$1.98 million to \$1,150,000. W/O, whose

contribution to the project is the most significant, has agreed to build the sculpture and manage the competitive bid process for and construction of the foundation, slab, and base-isolator system, for only \$600,000. The TJPA will pay W/O the direct costs of constructing the foundation, slab, and base-isolator, estimated to be \$127,000. SFAC staff worked with EBI to clarify and subsequently reduce their original estimate of \$535,000 for demolition, crane work and salvage of the artist material to \$159,837, which includes demolition and salvage, rough shaping and cutting and transportation services (lifting services provided by Sheedy Crane).

Tim Hawkinson – Budget for Sculpture in Mission Square	
Artist Fee	\$200,000
Webcor/Obayashi—Proposed Budget for Fabrication and Installation	\$600,000
Webcor/Obayashi—Foundation (Base Isolation and Mat Slab Foundation)	\$127,000
EBI—Demolition / Concrete Salvage / Transportation of Salvaged Pieces to Storage / Rough Shaping / Cutting by Evans Brothers Inc.	\$159,837
Turner—Concrete Testing	\$10,000
F3—Concrete 3d Scan of Salvaged Pieces	\$52,000
Total	\$1,148,837

The Visual Arts Committee of the SFAC has reviewed the proposal and budget and expresses its strong support and enthusiasm for this landmark artwork. The Director of the Berkeley Art Museum at the University of California reviewed the model of the figure and noted it was a strong, powerful, and original artwork.

The SFAC has engaged the firm of Architectural Resources Group to perform a conservation assessment of the sculpture. It is their belief that there will be minimal maintenance associated with the sculpture.

TJPA acknowledges the excellent collaboration among the PCPA team and the SFAC for their high level, intelligent and creative collaboration with the artist and the various contractors and sub-contractors involved.

If the TJPA Board approves the concept and budget for Tim Hawkinson’s proposed artwork today, the TJPA will enter into agreements with the artist and issue an amendment to its existing CM/GC contract with W/O. The proposed Agreement for Services with Tim Hawkinson is attached. The Agreement provides that Mr. Hawkinson’s total compensation will be \$200,000. Also attached is a letter of agreement from W/O that will result in a change in the scope of work to be performed by W/O under its existing contract. The compensation to W/O for its work assembling the artwork and the foundation will be \$727,000. The two contracts provide that the TJPA will not incur additional fees or charges unless the TJPA requests a change in the artwork from the current conceptual design; the \$127,000 of estimated costs of constructing the sculpture foundation will be adjusted to reflect actual costs which shall be determined based on competitive bids. All of the Hawkinson art project costs shall be paid from the approved art program budget.

RECOMMENDATION:

Approve the design proposal and budget for Tim Hawkinson's sculpture, as recommended by TJPA's Public Art Steering Committee, and authorize the Executive Director to execute an Agreement for Services with Tim Hawkinson for design development, construction documents, project administration and oversight of fabrication and installation and a change order with W/O for W/O to perform the fabrication, installation and construction of the sculpture's dedicated foundation, structural slab, and base-isolator system for a total amount not to exceed \$1,150,000.

ENCLOSURES:

1. Resolution
2. Design Proposal
3. Agreement for Services
4. Letter re W/O Change Order

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) acknowledges the importance of art in making public spaces more enjoyable, in reflecting the civic importance of the building, improving the quality of life in the community, and adding value to the user's experience of the public transportation system; and

WHEREAS, The TJPA has approved the development of a Public Art Program of the highest standards that will enhance the national and international prestige of the Transbay Transit Center Program; and

WHEREAS, The TJPA desires to commission original and exceptional artworks that complement the Transbay Transit Center Program's mission, purpose, and architectural design, and that are appropriate for the Transbay Transit Center's constituency and the general public; and

WHEREAS, Since 2008, the San Francisco Arts Commission (SFAC) has assisted the TJPA to plan the objectives and criteria that will guide the development of the Public Art Program, coordinate the artist selection process, and initiate development of an Arts Master Plan, and eventually will manage the installation of public art as part of the Transbay Program; and

WHEREAS, The TJPA and SFAC have established a Public Art Steering Committee to set goals and objectives for the TJPA Public Art Program; and

WHEREAS, To expedite the selection of artists for Phase I of the TJPA Public Art Program, the SFAC invited artists to compete for the chance to contribute art to the Transbay Program; and

WHEREAS, The Steering Committee reviewed the work of thirty-two artists who responded to the invitation, and interviewed ten; and

WHEREAS, On September 10, 2009, the TJPA Board of Directors approved the selection of James Carpenter, Julie Olcott (née Chang), Jenny Holzer, Ned Kahn, and Tim Hawkinson as the artists for the Program and authorized the San Francisco Arts Commission to execute MOUs on behalf of the TJPA for each of the artists to develop conceptual proposals and corresponding budgets in coordination with the Transbay Transit Center Architect; and

WHEREAS, Each of the five artists has prepared a scope of work and the TJPA Steering Committee approved the five proposals; and

WHEREAS, On July 16, 2010, the Board approved four of the five proposals and approved budgets for the four approved proposals, but allowed more time for Tim Hawkinson to develop his proposal; and

WHEREAS, Tim Hawkinson has now finalized the design, engineering and constructability of his proposal and has agreed to provide consultation during design development, construction documents, production of a three-dimensional model, and consultation during assembly, fabrication, and installation artwork, for a fee of \$200,000; and

WHEREAS, Pelli Clarke Pelli Architects, Inc., with its subconsultant engineer Thornton Thomasetti has prepared schematic designs for the artwork and will develop design documents and construction documents for the artwork and the artwork foundation system; and

WHEREAS, Webcor/Obayashi has agreed to assemble, fabricate, and install the sculpture and manage the competitive bid process for and construction of the foundation, slab, and base-isolator system for the Tim Hawkinson artwork in a change order under its existing contract with the TJPA, for \$727,000; and

WHEREAS, Evans Brothers, Inc. (EBI), the TJPA's demolition contractor, has agreed to perform the demolition, crane work, salvage of the artist material, rough shaping and cutting, and transportation services for the Tim Hawkinson artwork under its existing contract with the TJPA, for \$159,837; and

WHEREAS, Turner Construction will perform concrete testing and F3 will perform the Concrete 3D scan of the pieces for the artwork salvaged by EBI under its existing contract with the TJPA, for an established budget of \$62,000; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to enter into an Agreement for Services with Tim Hawkinson to create a landmark entry sculpture to be located in the Northeast corner of Mission Square (near the intersection of Mission and Fremont Streets) on a dedicated foundation, structural slab, and base-isolator system, for an amount not to exceed \$200,000; and be it

FURTHER RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to modify the existing agreement with Webcor/Obasyashi for an amount not to exceed \$727,000 to enable Webcor/Obasyashi to manage, assemble, and install the sculpture and dedicated foundation system consistent with the artist's design and in conformance with the plans and specifications prepared by Pelli Clarke Pelli Architects, Inc.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of March 10, 2011.

Secretary, Transbay Joint Powers Authority

**AGREEMENT BETWEEN THE
TRANSBAY JOINT POWERS AUTHORITY AND
ARTIST TIM HAWKINSON**

This AGREEMENT is dated for the convenience of the parties as of the **5th day of March 2011** in the City and County of San Francisco, State of California, by and between the Transbay Joint Powers Authority (the "TJPA") and Tim Hawkinson (the "Artist"), for the purposes and on the terms and conditions set forth below.

Recitals

A. The TJPA is responsible for implementing the Transbay Transit Center Program ("Program"). The Program includes the construction of a new multi-modal Transit Center on the site of the existing Transbay Terminal at First and Mission Streets in San Francisco, an extension of Caltrain from its existing terminus at Fourth and Townsend Streets through a tunnel to the new Transit Center, and the construction of new bus ramps and bus storage facilities. The TJPA has allocated budget for the acquisition and installation of artwork for the new Transbay Transit Center building;

B. By intergovernmental agreement, the TJPA has retained the San Francisco Arts Commission (the "SFAC") to manage the selection of artists and artwork for the Transit Center and to assist in the oversight of artwork fabrication and installation;

C. On October 20, 2009, the SFAC and the Artist entered into a memorandum of understanding for development and submission of preliminary design, budget and presentation (the "Conceptual Proposal MOU"). Under the Conceptual Proposal MOU, the Artist has submitted a concept design for the proposed artwork.

D. On _____, by Resolution No. _____, the TJPA Board approved the Artist's preliminary design and budget for the proposed artwork and authorized the Executive Director to execute an Agreement for the Artist's consultation during the design work for the artwork (to be performed by the TJPA Architect of Record (the "Architect")) and during assembly, fabrication, and installation of the artwork (to be performed by the TJPA Construction Manager/General Contractor (the "CM/GC")).

E. The TJPA and the Artist intend that this Agreement comply with the regulations of the Federal Transit Administration ("FTA") and Federal Railroad Administration ("FRA") of the United States Department of Transportation ("USDOT").

F. The Artist acknowledges and agrees that he is ready, able, and willing to perform the services to complete the artwork and the consulting services under the terms and conditions set forth in this Agreement.

Now, THEREFORE, the TJPA and the Artist hereby agree as follows:

Definitions

Where any word or phrase defined below, or a pronoun used in place thereof, whether singular or plural, is used in any part of this Agreement or the Contract Documents, it shall be considered neutral in gender and have the meaning set forth below:

a. "ADA" shall mean the Americans with Disabilities Act (including all rules and regulations under the ADA), Title 24 (California Building Code) and all other applicable federal, state and local disabled access legislation, as the same may be amended, modified or supplemented from time to time.

b. "Agreement" shall mean this agreement, including all addenda, appendices and modifications, whether created now or in the future.

c. "Alter" or "Alteration" shall mean, with respect to the Artwork, to alter, repair, modify, remove, relocate, sell, dispose of, distort, destroy, mutilate, or deface.

d. "Approved Costs" shall mean such costs as are scheduled on Appendix C, "Artwork Costs," including the maximum expenditure authorized for each item.

e. "Architect" shall mean the firm Pelli Clarke Pelli Architects, Inc., retained by the TJPA to design the Transbay Transit Center.

f. "Artist" shall mean: **TIM HAWKINSON.**

g. "Artwork" shall mean the work of art designed by Artist for the Transbay Transit Center Site under the terms of this Agreement, as described and defined in the Preliminary Design and Budget, attached to this Agreement as Appendix A and incorporated by reference as if set forth here in full.

h. "Authorization" shall mean a Notice to Proceed or Purchase Order of TJPA properly executed by the TJPA Executive Director, and certified by the TJPA Finance Coordinator for the specific funding of this Agreement or any modification thereof.

i. "Board" or "TJPA Board" shall mean the Transbay Joint Powers Authority Board.

j. "Budget" shall mean a specific and detailed document annexed to this Agreement as Appendix C, itemizing the cost of all labor and materials necessary to complete the fabrication, delivery, and installation of the Artwork under this Agreement (estimated at 2010 costs indices) including all modifications. The Artist shall prepare his design in conformance with the Budget. (See paragraph 4(c), below.)

k. "City" shall mean City and County of San Francisco, a municipal corporation.

l. "Conceptual Design" shall mean drawings (in plan and elevation) and/or 3-dimensional models, a written description, proposed materials and samples and cost estimates at 30% design completion. The information provided in Conceptual Design shall be complete enough to fully illustrate the design intent of the Artwork.

m. "Construction Documents" shall mean final and complete architectural, structural, mechanical and engineering drawings, written specifications, structural and engineering calculations at 100% design completion, prepared by the Architect with consultation from the Artist, setting forth in detail the design and specifications of the Artwork and which are suitable for bidding. Construction Documents shall describe and fix the location, size, materials and character of the Artwork with respect to architectural, structural engineering, mechanical and electrical systems, materials, colors, method of attachment and fabrication methods, and other such elements as may be appropriate. Construction Documents must be signed and stamped by design professionals licensed in the State of California as required by the California Building Code, as may be amended or supplemented by state or local authority. The parties to this Agreement intend that the Architect will sign and stamp any drawings and be paid by the TJPA directly.

n. "Contract Documents" shall mean the complete plans and specifications for the fabrication and installation of the Artwork, to be prepared by the Architect and bid by the CM/GC as one or more Trade Package(s) for the assembly and installation of the Artwork. The Architect shall prepare the Contract Documents with the advice and consultation of the Artist.

o. "Design Development Documents" shall mean 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, (to be paid out of Fabrication budget) final color and materials samples (to be paid out of Fabrication budget), proposed fabrication methods, feasibility studies and final cost estimates 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.

p. "Executive Director" shall mean the Executive Director of the TJPA.

q. "General Contractor" or "CM/GC" shall mean the construction manager/general contractor hired by TJPA to construct the Transbay Transit Center and/or its Trade Subcontractor(s) whose scope of work includes fabrication and/or installation of the Artwork.

r. "Force Majeure" with respect to a delay in or prevention of performance shall mean (a) any strike, lockout or other labor or industrial disturbance (whether or not on the part of the employees of either party), civil disturbance, future order claiming jurisdiction, act of the public enemy, war, riot, sabotage, blockade, embargo, inability to secure customary materials, supplies or labor through ordinary sources by reason of regulation or order of any government or regulatory body; (b) any changes in any applicable laws or the interpretation thereof; or (c) any flood, washout, explosion, or any other cause beyond the reasonable control of the party from whom performance is required.

s. "Mock-ups" or "Samples" shall mean illustrations such as standard schedules, performance charts, instructions, brochures, diagrams, and physical samples of all or any portion of the Work, and other information furnished by Artist to illustrate materials or equipment for all or any portion of the Work. The purpose of the Mock-ups and Samples is to provide physical examples that illustrate materials, equipment or workmanship and establish the standards by which the Work will be judged.

t. "Preliminary Design" shall mean the proposed visual, aesthetic, and artistic intent and design of the Artwork. The most recent Preliminary Design approved by the Board is attached to this Agreement as Appendix A (see "Artwork"), and is binding unless changes are approved by resolution of the Board.

u. "Public Work" shall have the same meaning as under San Francisco Administrative Code Section 6.1, as currently written or as may be amended from time to time.

v. "SFAC" shall mean the San Francisco Arts Commission.

w. "Shop Drawings" shall mean drawings, diagrams and other data specifically prepared by General Contractor or the General Contractor's subcontractors, fabricators, manufacturers, suppliers, General Contractor, or distributors illustrating in detail exactly how the Work, or any element thereof, is to be fabricated and installed. Shop Drawings shall be signed and stamped by a licensed design professional paid by the TJPA directly or the General Contractor unless this requirement is specifically waived by the Board.

x. "Site" shall mean the Northeast corner of Mission Square, near the intersection of Mission and Fremont Streets at the Transbay Transit Center where the Artwork will be installed.

y. "TJPA" or "Transbay Joint Powers Authority" is a public entity charged with the duties associated with implementing the Transbay Transit Center Program.

z. "Work" shall mean only the conceptual and consultation services by Artist to the TJPA as provided under this Agreement (see Appendix B). The Work **shall not** include the development of design drawings, plans, or specifications. The Work also **shall not** include the construction, assembly, fabrication, delivery or installation of the Artwork. The Work **shall** include advice and consultation during design development, assembly, fabrication, and installation of the Artwork necessary to achieve

the intent of the Preliminary Design (Appendix A), as modified only by approval of the TJPA or the Board as appropriate.

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

Terms and Conditions

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

This Agreement is subject to the budget and fiscal provisions of the TJPA. Charges will accrue only after prior written authorization certified by the TJPA Chief Financial Officer ("CFO"). The TJPA's obligation under this Agreement shall not at any time exceed the amount certified for the purpose and period stated in such certification.

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

TJPA has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. TJPA budget decisions are subject to the discretion of the Board. Artist's assumption of risk of possible non-appropriation is part of the consideration for this Agreement.

THIS SECTION CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS AGREEMENT.

2. Term of the Agreement

The term of this Agreement shall be from the Effective Date of the Agreement, as defined in Section 3 below, to December 31, 2017, unless extended by contract modification pursuant to the contract modification requirements in this Agreement. Notwithstanding the above, this Agreement may be extended by mutual written agreement of the parties for a period not to exceed two years beyond the initial term, provided that such extension does not create a contract with a total aggregate term of more than 9 years.

3. Effective Date of Agreement

This Agreement shall become effective when the Chief Financial Officer has certified to the availability of funds and Artist has been notified in writing via a Notice to Proceed ("NTP").

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

a. Services. Artist agrees to perform the consultation services necessary for the creation of the Artwork, as depicted by the Preliminary Design (Appendix A) and as more specifically provided for in Appendix B, "Services to be Provided by Artist," attached to this Agreement and incorporated by reference as though set forth here in full, as well as any scope of services included in any subsequent modification to this Agreement mutually agreed to by the TJPA and the Artist.

b. Procedure for Execution of Work.

(1) The TJPA and the Artist generally intend that Artist will complete all services necessary for the creation of the Artwork at the Site (as provided in Appendix B), provided that TJPA determines, in its

sole discretion, to proceed with the completion of the Artwork. The Work shall be completed in three separately defined, successive stages ("Phases"): Phase 1 shall be the Design Development Consultation Phase; Phase 2 shall be the Construction Document Consultation Phase; and Phase 3 shall be Fabrication and Installation Consultation Phase. In addition to the Phases set forth in Appendix B, at the time this initial Agreement is entered into, the parties may modify this Agreement to include subsequent Phases. Each Phase shall be governed by this Agreement, and by any modifications to this Agreement setting forth specific terms and conditions governing each Phase of Work. Each modification will include the Phase for which the TJPA has given authorization, the scope of work covered by that Phase, the schedule of deliverables, insurance requirements, and payment terms.

(2) By authorizing any particular Phase, the TJPA is not obligated to authorize any subsequent Phase. Subject to the limitations contained in this Agreement, the TJPA may terminate this Agreement at any time and is under no obligation to modify the Agreement to include subsequent Phases.

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

(4) If requested to do so in writing by the TJPA, Artist shall enter into modifications of this Agreement to include later Phases of the Work, up to and including consultation during final installation at TJPA's option. Artist's fee for such subsequent Phases shall be in accordance with the Compensation terms under paragraph 5 below. TJPA must exercise its option to require a subsequent Phase within five years of completion of the prior Phase. If TJPA fails timely to exercise its option, Artist is released from its obligation under this Section. Artist agrees that, if TJPA exercises its option to enter into subsequent Phases of Work, Artist shall be bound to modify this Agreement to include such additional Phases of Work under the terms and conditions set forth in this Agreement.

(5) The Work to be completed by Artist is unique and personal to Artist, and may not be capable of completion by anyone other than Artist. Therefore, if Artist fails or refuses to modify this Agreement to include subsequent Phases (Phases II and III (see Appendix B), after having been requested to do so by the TJPA, or fails to complete the Work required by any Phase, the TJPA may consider such refusal a material breach of contract and grounds for termination of this Agreement for cause.

c. Budget. The total Budget for fabrication, delivery, and installation of the Artwork shall not exceed **NINE HUNDRED FIFTY THOUSAND DOLLARS (\$950,000.00)**. The Budget does not include costs or fees for Design Development or Construction Document plans or specifications (including but not limited to stamped drawings), to be prepared by the TJPA Architect of Record, under separate agreement with the TJPA. The Budget does not include the Artist's compensation under this Agreement (see paragraph 5, below), nor the Artist's conceptual design fee paid through the first MOU issued by the San Francisco Arts Commission. The Artist acknowledges and agrees that there is no separate budget for the Artist's expenses, which are included in the Artist's Fee (paragraph 5).

The TJPA has established the Budget for the Artwork based on 2010 cost indices. Although a tentative construction period has been established to occur in mid 2012, the TJPA and the Artist further acknowledge and agree that the fabrication and installation of the Artwork may not occur for several years after such approved conceptual design. Anticipating the protracted period between design and installation, the Artist shall as part of Design Development and/or Construction Document Phase services, cooperate with the TJPA, the SFAC, the Architect, and the General Contractor to explore possible cost saving measures, such as advance purchase and storage of materials. In the event that actual fabrication and/or installation costs exceed the Budget, the Artist shall cooperate with the SFAC, the TJPA, the Architect and the General Contractor to reduce the scale or scope of the Artwork for no additional Artist's Fee (see paragraph 5, below). However, in the event that TJPA determines, in its sole discretion, that

market forces or other factors outside the control of the Artist result in actual costs in excess of the Budget, the TJPA and the Artist may agree to an additional Artist's Fee to design or to develop proposals for significant changes to the fabrication or installation of the Artwork. In no event shall the Artist be required to agree to changes in the Artwork which the Artist believes, in his sole discretion, would materially compromise the integrity of the approved conceptual design. Artist may advise the TJPA in writing of his determination and TJPA, in its sole discretion, may address such circumstances by terminating this Agreement for convenience or taking other steps to address the Artist's concerns in order to proceed with the completion of the Artwork.

d. Consultation. Artist agrees to cooperate in good faith with the TJPA and to be available as reasonably necessary for consultation with the TJPA, SFAC, Architect, and General Contractor during all Phases of the Work. The SFAC will facilitate cooperation and arrange for and coordinate all necessary consultation among the TJPA, SFAC, Artist, Architect, and General Contractor.

Artist shall copy the TJPA and the SFAC on all correspondence between Artist, Architect, Construction Management Team, or General Contractor in which the TJPA or SFAC is not a party. Artist shall notify the TJPA and the SFAC in writing of any verbal agreements and/or understandings that are arrived at in conversations or meetings between Artist and Architect, and/or General Contractor to which TJPA or SFAC is not a party. Artist understands that failure to inform TJPA and SFAC of such agreements, and failure to confirm such agreements in writing with TJPA and SFAC, Architect, Construction Management Team and/or General Contractor may result in such agreements not being honored.

5. Compensation

The total payment amount due to Artist under this Agreement shall not exceed **TWO HUNDRED THOUSAND DOLLARS (\$200,000)** (the "Artist's Fee"). The Artist's Fee is a Fixed Fee and includes all of Artist's costs and expenses associated with the Work, including any overhead or administration costs, the cost of supplies, computer hardware or software, communications, presentation materials, transportation to and from meetings, and all other expenses associated with the scope of the Work specified in this Agreement.

The TJPA shall pay the Artist the Artist's Fee incrementally, based on the progress of the Artwork. The fee increments shall be payable within thirty (30) days of the TJPA's acceptance and approval of the following completed Phases:

Phase 1 Design Development (consultation only)	30%
Phase 2 Construction Document (consultation only)	35%
Phase 3 Fabrication and Installation (consultation only)	35%

TJPA shall remit any compensation under this Agreement to Artist based upon Artist's successful completion, in the sole reasonable discretion of the TJPA Executive Director, of each Phase set forth above and as more particularly described in the Appendices to this Agreement.

No charges shall be incurred under this Agreement nor shall any payments become due to Artist until deliverables, services, or both, required under this Agreement are received from Artist and approved by the TJPA as being in conformance with the terms and conditions of this Agreement. TJPA may withhold payment to Artist in any instance in which Artist has failed or refused to satisfy any material obligation provided for under this Agreement

In no event shall TJPA be liable for interest or late charges for any late payments.

In no event shall the Artist be liable to refund any Compensation paid to him for services satisfactorily performed under this Agreement. Any liability for damages for breach of contract or violation of law, however, shall not be considered a "refund"; TJPA reserves all rights under law.

6. Guaranteed Maximum Costs

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

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

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

The Chief Financial Officer is not authorized to make payments on any contract for which funds have not been certified as available in the TJPA budget.

7. Payments; Invoice Format; Suppliers and Subcontractors

Artist Invoices. The Artist shall submit to the TJPA regular invoices in a form acceptable to the TJPA. At a minimum, invoices must identify this Agreement as "**THE TIM HAWKINSON TRANSBAY TRANSIT CENTER ENTRY SCULPTURE**," and include the date of transaction, Artist's name and address, interim payment number for which compensation is requested, and amount requested. TJPA shall make payment to **TIM HAWKINSON**, at the address for notices in this Agreement. All amounts paid by TJPA under this Agreement shall be subject to audit by TJPA.

8. Submitting False Claims; Monetary Penalties

Pursuant to San Francisco Administrative Code §21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to the City for the statutory penalties set forth in that section. The text of §21.35, along with the entire San Francisco Administrative Code, is available on the City and County of San Francisco website (www.sfgov.org) at <http://www.municode.com/Library/clientCodePage.aspx?clientID=4201>. An Artist, subcontractor or consultant will be deemed to have submitted a false claim to TJPA if Artist, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of TJPA a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by TJPA; (c) conspires to defraud TJPA by getting a false claim allowed or paid by TJPA; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to TJPA; or (e) is a beneficiary of an inadvertent submission of a false claim to TJPA, subsequently discovers the falsity of the claim, and fails to disclose the false claim to TJPA within a reasonable time after discovery of the false claim.

9. Disallowance

If Artist claims or receives payment from TJPA for a service, reimbursement for which is later disallowed by the State of California or United States Government, Artist shall promptly refund the disallowed amount to TJPA upon TJPA's request. At its option, TJPA may offset the amount disallowed from any payment due or to become due to Artist under this Agreement or any other Agreement.

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

10. [left blank by agreement of the parties]

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

a. Payment does not imply acceptance of work. The granting of any payment by TJPA, or the receipt thereof by Artist, shall in no way lessen the liability of Artist to replace unsatisfactory work, equipment, or materials although the unsatisfactory character of such work, equipment or materials may not have been apparent or detected at the time such payment was made. Materials, equipment, components, or workmanship that does not conform to the requirements of this Agreement may be rejected by TJPA and in such case must be replaced by Artist without delay. **TJPA acknowledges and agrees that the scope of this paragraph is limited to the scope of services, work, and consultation provided by the Artist under this Agreement (Appendix B) and does not apply to materials, equipments, work, or services provided by others in the creation of the Artwork.**

b. Approval and Final Acceptance.

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

(2) Final Acceptance. Artist shall advise the TJPA in writing when Artist has completed all obligations, services and deliverables under this Agreement and all modifications. The TJPA promptly shall send a Notice of Response identifying in writing any obligations, services or deliverables that Artist has not satisfactorily met any defects in Artist's performance, and the requirements for Artist to cure any such default. Artist shall have 20 days from dispatch of the Notice of Response to cure any defects in Artist's performance identified in the TJPA's Notice of Response. The Artwork shall not be finally accepted by TJPA unless the TJPA has issued a resolution of Final Acceptance. TJPA shall make a good faith effort to make a determination as to Final Acceptance promptly.

(3) Transbay Transit Center Art Collection. Upon Final Acceptance, the Board shall accession the Artwork into the Transbay Transit Center Art Collection.

12. Qualified Personnel

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

13. Responsibility for Equipment

TJPA and the Artist intend that the Artist will not use any equipment at the Site in the performance of this Agreement. However, in the event that the Artist does use equipment at the Site, TJPA is not responsible for any damage to persons or property, including Artwork, as a result of the use, misuse or failure of any equipment used by Artist, or by Artist's employees (if any), even though such equipment be furnished, rented or loaned to Artist by TJPA. Artist, rather than TJPA, is responsible for the health and safety of himself and, if any, his employees, subcontractors, and all other persons that work on or visit the Site at the invitation of Artist.

14. Independent Contractor

Artist shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which Artist performs the services and work requested by TJPA under this Agreement.

Artist is liable for the acts and omissions of itself, its employees and its agents. Nothing in this Agreement shall be construed as creating an employment or agency relationship between TJPA and Artist.

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

15. Insurance

a. Required Insurance. Without in any way limiting Artist's liability pursuant to Section 16, the "Indemnification and General Liability" section of this Agreement, Artist shall maintain, or cause to be maintained, in force insurance in the following amounts and coverages, or as modified in Appendix B. Artist shall obtain such insurance on or before the time specified below; if no time is specified below, Artist shall obtain such insurance when required to do so by Appendix B or a modification to this Agreement. Artist shall maintain all required insurance continuously from the time originally specified, throughout the term of this Agreement until Final Acceptance of the Work by resolution of the TJPA Board. The Director of Cultural Affairs, with the approval of the TJPA, may authorize in writing the release of an interest in such insurance at an earlier date.

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

(2) **Professional Liability Insurance.** Not required.

(3) **Commercial General Liability Insurance.** Artist shall provide Commercial General Liability insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations. Artist shall obtain such insurance prior to providing consultation services as provided in Appendix B as to the fabrication of the Artwork and shall maintain such coverage through the completion of Artist's Phase III services (Appendix B).

(4) **Automobile Liability Insurance:** If Artist is an *individual*, Personal Automobile Liability Insurance with limits not less than \$100,000/\$300,000 each occurrence. If Artist is a *corporation or other legal entity*, Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable, unless a lesser amount is approved by TJPA. Artist shall obtain such insurance prior to certification of this Agreement.

b. Required Policy Language.

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

- i. Endorse the policy to name as Additional Insured the TJPA, its Members, Directors, Officers, Agents, and Employees;
- ii. Professional Liability policies shall name the specific project as a covered project; and
- iii. State that such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought, but the inclusion of more than one insured shall not operate to increase the insurer's limits.

iv. Regarding Workers' Compensation, Contractor hereby agrees to waive subrogation which any insurer of Contractor may acquire from Contractor by virtue of the payment of any loss. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the TJPA for all work performed by the Contractor, its employees, agents and subcontractors.

(2) All policies shall provide thirty days' advance written notice to the TJPA of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notices shall be sent to the address specified in the Section entitled "Notices to the Parties".

c. Miscellaneous Insurance Requirements:

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

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

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

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

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

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

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

16. Indemnification

The Artist shall indemnify and save harmless TJPA, the City, SFAC, and their respective board members, commission members, officers, agents and employees (the "Indemnitees") from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Artist or loss of or damage to property, arising directly or indirectly from Artist's negligent performance of this Agreement, including, but not limited to,

Artist's use of facilities or equipment provided by TJPA or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on TJPA, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of any Indemnitee and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Artist, its subcontractor or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and Indemnitees' costs of investigating any claims covered by this provision.

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

Artist shall indemnify and hold the Indemnitees harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark, and all other intellectual property claims of any person or persons in consequence of the use by TJPA, or any of its officers or agents, of articles or services to be supplied in the performance of this Agreement.

17. [left blank by agreement of the parties]

18. Liability of TJPA

TJPA'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED FOR IN THIS AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL TJPA BE LIABLE TO ARTIST (REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT) FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOST PROFITS) ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE WORK PERFORMED IN CONNECTION WITH THIS AGREEMENT.

19. Timely Provision of Services; Delay due to Injury

a. Time is of the essence in this Agreement. Artist agrees to provide all deliverables in accordance with the times specified in this Agreement, unless changes are approved in writing by the TJPA.

b. Delay due to Illness, Injury, Death or Incapacity. Should Artist die, become ill, injured or otherwise incapacitated (collectively, "incapacitated") such that Artist is unable to work for any period not exceeding 30 days (whether consecutive or non-consecutive), any delay arising out of such incapacity will be allowed by TJPA whenever it is practicable to do so, considering the facts and circumstances of the Work, the Project, the Architect, the General Contractor and the Client. TJPA may require Artist to provide medical certification of any claimed incapacity. In the event Artist is incapacitated such that Artist Team is unable to work for a period exceeding a total of 30 days (whether consecutive or non-consecutive), TJPA may, at its option, undertake to complete and install the Work in Artist's absence, so long as the final Artwork is substantially similar to that designed by Artist. If TJPA undertakes to complete the Work, TJPA shall give due consideration to Artist's suggestions, and Artist may disclaim authorship of the Work. If TJPA exercises its option to implement the Artwork in Artist's absence, any compensation paid or payable to Artist shall be reduced by the costs and expenditures of TJPA in completion and installation of the Work. In case of incapacity exceeding 30 days, the following person shall be Artist's representative to the TJPA for purposes of this Section 19 (Timely Provision of Services;

Damages for Delayed Performance;): Patty Wickman, 1990 South Sinaloa Avenue, Altadena, CA 91001, (626) 398-0572, unless otherwise directed in writing by the Artist.

20. Artist's Default; Remedies

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

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

- | | |
|---|---------------------------------------|
| 8. Submitting False Claims; Monetary Penalties | 37. Drug-free workplace policy |
| 10. Taxes | 53. Compliance with laws |
| 15. Insurance | 55. Supervision of minors |
| 22A. Artist's Warranties | |
| 24. Proprietary or confidential information of TJPA | 57. Protection of private information |
| 30. Assignment | 58. Graffiti removal |

(2) Artist's Default: Artist's failure or refusal to perform or do any act required of Artist in this Agreement, including unexcused failure to meet the delivery deadlines, shall constitute a default.

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

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

b. Termination in the Case of Default: On or after any event of Artist default, TJPA shall have the right to exercise its legal and equitable remedies. TJPA's remedies include the right to terminate this Agreement upon written notice to Artist (setting forth with specificity the basis for the Board's termination), or to seek specific performance of all or any part of this Agreement. Upon termination by the TJPA, this Agreement shall be of no further force or effect. The date of termination shall be 5 calendar days from the TJPA's dispatch of notice of termination, unless a later termination date is specified in the notice of termination. The TJPA may rescind the notice of termination or extend the date for termination, but no rescission or extension is valid unless it is in writing and approved by resolution of the Board.

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

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

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

21. Termination for Convenience

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

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

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

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

(3) Terminating all existing orders and subcontracts.

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

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

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

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

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

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

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

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

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

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

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

f. TJPA's payment obligation under this Section shall survive termination of this Agreement.

22. Rights and Duties Upon Termination or Expiration

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

- | | |
|---|--|
| 8. Submitting False Claims | 24. Proprietary or confidential information of TJPA |
| 9. Disallowance | 26. Ownership of Results |
| 10. Taxes | 27. (Intellectual Property and Publicity Rights) |
| 11. Payment does not imply acceptance of work | 28. Audit and Inspection of Records |
| 13. Responsibility for equipment | 48. Modification of Agreement. |
| 14. Independent Contractor; Payment of Taxes and Other Expenses | 49. Administrative Remedy for Agreement Interpretation |
| 15. Insurance | 50. Agreement Made in California; Venue |
| 16. Indemnification | 51. Construction |
| 17. Incidental and Consequential Damages | 52. Entire Agreement |
| 18. Liability of TJPA | 56. Severability |
| | 57. Protection of Private Information |

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

22A. Artist's Warranty

Warranty of Title. Artist represents and warrants that Artist is the sole author of the Art concept and design and that Artist is the sole owner of any and all copyrights pertaining to the Art concept and design. Artist further represents that the Art concept and design is free and clear of outstanding disputes in connection with intellectual property rights or any other rights in the Artwork other than materials, fabrication, and installation of the Artwork.

22B. Instructions for Maintenance; Variable Media Guidelines; Anticipated Life Span of Artwork

a. **Instructions for Maintenance.** Unless specifically provided in this Agreement, Artist shall not be responsible for ongoing maintenance of the Artwork. Artist shall review any maintenance plan for the Artwork prepared by the Architect but shall have no obligation to prepare any such document. The Artwork shall be durable, taking into consideration that the Site is an unsecured exterior public space that will be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment.

Although TJPA will strive to maintain the Transbay Transit Center Art Collection in good repair and condition, TJPA is not required by this or any other Agreement to maintain the Artwork to any particular standard. If the Artwork suffers deterioration, TJPA shall have sole discretion to determine whether to remove the Artwork from display as a result of deterioration, whether to replace any defective or unstable portion of the Artwork or translate any component into new materials, or whether to maintain the Artwork on display despite its deteriorated condition. TJPA shall consult with the Artist and SFAC prior to taking action.

b. **Anticipated Life Span of Artwork.** The anticipated life span of the Artwork is fifty (50) years from the date of final acceptance by the TJPA. After that time, the TJPA or its successor, in its sole discretion, may re-evaluate the Artwork to determine if it retains its identity as a work of art and, if not, whether to take appropriate action, including the possibility of destroying the Artwork. If the TJPA determines that, through decay, vandalism or other forces, the Artwork has lost its integrity to the point where it should be destroyed, the TJPA shall first offer the Artwork to Artist free of charge, except that Artist shall bear his own costs to remove and relocate the Artwork.

22C. Artist's Moral Rights; TJPA's Ownership Rights

a. The TJPA, having expended considerable public funds to commission the Artwork, and pursuant to its responsibilities, intends to display the Artwork at the Site as originally created by Artist and to maintain the Artwork in good condition. Public artworks commissioned by the TJPA are sometimes integrated into their site, such that they become an integral, permanent and site-specific part of the building's architecture or landscaped environment and removal of the artwork would result in significant changes to the artwork and the building's architecture. TJPA, however, shall preserve complete flexibility to operate and manage TJPA property in the public's interest. Therefore, TJPA retains the absolute right to Alter the Artwork in TJPA's sole judgment. For example, TJPA may Alter the Artwork to eliminate hazard, to comply with the ADA, to otherwise aid TJPA in the management of its property and affairs, or through neglect or accident. If, during or after the term of this Agreement, TJPA finds the Site to be inappropriate, TJPA has the right to install the Artwork at an alternate location that TJPA chooses in its sole discretion. If the Artwork is free-standing such that it can be removed without significant damage to the Artwork or the Site, and if the Board authorizes the removal of the Artwork, the TJPA shall take reasonable precautions to minimize Alteration of the Artwork during removal.

b. With respect to the Artwork produced under this Agreement, and in consideration of the procedures and remedies specified in this Agreement, Artist waives any and all claims, arising at any time and under any circumstances, against TJPA, its members, directors, officers, agents, employees, successors and assigns, arising under the federal Visual Artists Rights Act (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 et seq.), and any other local, state,

federal or international laws that convey rights of the same nature as those conveyed under 17 U.S.C. §106A, Cal. Civil Code §§987 et seq., or any other type of moral right protecting the integrity of works of art. Artist waives any and all claims against any future owners of the Site, and its agents, officers and employees, for alteration of the Artwork, including alteration due to incorporation of the Artwork in a building or removal of the Artwork from a building.

c. If TJPA intends to take any action with respect to the Site or the Artwork that would Alter the Artwork, other than routine cleaning and maintenance, the following procedures shall apply:

(1) Notice. Where time permits, TJPA shall make reasonable good faith efforts to notify Artist at least 20 calendar days prior to authorizing any Alteration of the Artwork, at the last phone number or address provided by Artist to the TJPA's Collections Manager. Where time does not permit prior to Alteration of the Artwork – for example, in cases of public hazard, accident or unauthorized Alteration – TJPA shall notify Artist within 30 calendar days after such Alteration.

(2) Consultation. After receiving such notice, Artist shall consult with TJPA to determine whether the Artwork can be restored or relocated, and to attempt to come to a mutually agreeable plan for disposition of the Artwork. Such consultation shall be without charge by Artist unless otherwise specifically agreed in writing. If TJPA intends to remove the Artwork, Artist shall consult regarding methods to minimize or repair any Alteration to the Artwork caused by such removal and the potential costs of such removal.

(3) Restoration. If the Artwork is Altered, with or without prior notice to Artist, and TJPA intends to maintain the Artwork on display, TJPA shall make a reasonable good faith effort to engage Artist in the restoration of the Artwork and to compensate Artist for Artist's time and efforts at fair market value, which may be the subject of a future Agreement between Artist and TJPA. However, TJPA has no obligation under this Agreement to restore the Artwork to its original condition, to compensate Artist for any restoration work, or to maintain the Artwork on display. If Artist fails or refuses to negotiate with TJPA in good faith with respect to any restoration, TJPA may contract with any other qualified art conservator or artist for such restoration. During Artist's lifetime, TJPA shall make best efforts not to display or deaccession only a portion of the Artwork without Artist's consent.

(4) Removal by Artist. Where time permits, if TJPA intends to take action that will destroy or significantly Alter the Artwork, such as destruction of all or part of the Site, and TJPA determines that it will not remove the Artwork itself, TJPA shall allow Artist to remove the Artwork at Artist's expense within 60 days of notice from the TJPA of the need to remove the Artwork, in which case title shall revert to Artist. If Artist fails to remove the Artwork within that 60 day period, TJPA may Alter the Artwork in any manner, including destroying it, in TJPA's sole discretion.

(5) Remedies. If TJPA breaches any of its obligations under this Section, Artist's remedies shall be limited as follows: If TJPA inadvertently fails to provide a required prior notice of Alteration, TJPA will provide notice as soon as it discovers the omission, and before Alteration of the Artwork if that remains possible. If TJPA Alters the Artwork without providing Artist a required prior notice of Alteration, Artist shall be given the first right of refusal to restore the Artwork at the same location and TJPA shall make reasonable efforts to provide funding for the restoration. If TJPA funds cannot be made available after reasonable efforts are made to secure such funding, Artist may, but is not obligated to, restore the Artwork at Artist's expense. If Artist elects not to restore the Artwork, TJPA may retain another artist or conservator to restore it, or may Alter the Artwork in any manner, at TJPA's sole discretion.

d. If TJPA Alters the Artwork without Artist's consent in a manner that is prejudicial to Artist's reputation, Artist retains the right to disclaim authorship of the Artwork in accordance with California Civil Code §987(d) and 17 U.S.C. §106A(a)(2).

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

23. Conflict of Interest

Through its execution of this Agreement, Artist acknowledges that it is familiar with the provisions of the Conflict of Interest Code of the TJPA; Section 15.103 of the San Francisco City Charter; Article III, Chapter 2 of San Francisco's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitutes a violation of said provisions and agrees that it will immediately notify the TJPA if it becomes aware of any such fact during the term of this Agreement.

24. [left blank by agreement of the parties]

25. Notices to the Parties; Department Liaison

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

To TJPA:
Attn: Maria Ayerdi-Kaplan, Executive Director
201 Mission Street, Suite 2100
San Francisco, CA 94105
Phone: (415) 597-4620
Fax: (415) 597-4615

To Artist:
Tim Hawkinson
1990 South Sinaloa Avenue
Altadena, CA 91001
Email: timhawkinson@earthlink.net

Any notice of default shall be sent by registered mail.

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

b. Department Liaison. In performing the services provided for in this Agreement, Artist's liaison with the TJPA will be SFAC Director of Programs, **JILL MANTON**.

26. Ownership of Results and Risk of Loss

a. **Title Transfer.** Except in the case of early termination of this Agreement, title to the Artwork shall transfer to TJPA upon the Board's Final Acceptance of the Artwork. Title transfer shall be self-executing upon Board's Final Acceptance. Artist will cooperate in providing to TJPA any title transfer documents TJPA may request or require during or after the Term of this Agreement.

b. The TJPA staff shall make a good faith effort to inspect the Artwork within 15 days after completion so that the Board can approve the Artwork by resolution in a timely fashion.

c. **Ownership of Documents.** The TJPA shall own all Conceptual Design, Design Development Documents, Construction Documents, Samples, Mock-ups and any other documents or things prepared under or as a result of this Agreement. Artist may retain originals of his documents and items and provide copies to TJPA. Artist shall retain copyrights as provided in paragraph 27A, below.

27. Works for Hire – Left Blank By Agreement of the Parties.

27A. Intellectual Property and Publicity Rights

a. **Copyright.** Subject to usage rights and licenses granted to TJPA hereunder, Artist shall retain all 17 U.S.C. §106 copyrights in all original works of authorship produced under this Agreement. Artist's copyright shall not extend to predominantly utilitarian aspects of the Work, such as landscaping elements, furnishings, or other similar objects. If Artist is comprised of two or more individual persons, the individual persons shall be deemed joint authors of the Work.

b. **TJPA's Intellectual Property License.** Artist grants to TJPA, and to TJPA's agents, authorized contractors and assigns, an unlimited, non-exclusive and irrevocable license to do the following with respect to the Work, the Artwork, and any original works of authorship created under this Agreement, whether in whole or in part, in all media (including electronic and digital) throughout the universe:

(1) Implementation, Use and Display. TJPA may use and display the Work (to the extent the Work includes graphic representations or models) and the Artwork. To the extent the Work involves design elements that are incorporated by TJPA into the design of the Site, TJPA may implement such elements at the Site.

(2) Reproduction and Distribution. TJPA may make and distribute, and authorize the making, display and distribution of, photographs and other 2-dimensional reproductions. TJPA may use such reproductions for any TJPA-related purpose, including advertising, educational and promotional materials, brochures, books, flyers, postcards, print, broadcast, film, electronic and multimedia publicity, gifts for the TJPA benefactors, documentation of TJPA's Transbay Transit Center Art Collection, and catalogues or similar publications. TJPA shall ensure that such reproductions are made in a professional and tasteful manner, in the sole and reasonable judgment of the TJPA. The proceeds from the sale of any such reproductions shall be used to maintain and support TJPA's Transbay Transit Center Art Collection or for any other public purposes that TJPA deems appropriate. The license granted hereunder does not include the right to create 2- or 3-dimensional reproductions on items such as tote-bags, T-shirts, coffee mugs and similar merchandise. Such reproductions may only be created pursuant to separate license agreements with Artist.

(3) Public Records Requests. Any documents provided by Artist to TJPA are public records and TJPA may authorize third parties to review and reproduce such documents pursuant to public records laws, including the San Francisco Sunshine Ordinance and California Public Records Act.

c. **Third Party Infringement.** The TJPA is not responsible for any third party infringement of Artist's copyright and not responsible for protecting the intellectual property rights of Artist.

d. **Credit.** Artist hereby agrees that all formal references to the Artwork and any reproductions of the Artwork in any form shall include the following credit: "Collection of the Transbay Joint Powers Authority - San Francisco, California." TJPA shall credit Artist for the Artwork upon publication of any two dimensional reproductions of the Artwork. Wherever the TJPA finds practicable, the TJPA shall make an effort to ensure that all reproductions by TJPA shall contain a copyright notice substantially in the following form: "Copyright (c), Artist's name, date," in such a manner and location as shall comply with the U.S. Copyright laws.

e. **Publicity.** TJPA shall have the right to use Artist's name, likeness, and biographical information, in connection with the display or reproduction and distribution of the Artwork including all advertising and promotional materials regarding TJPA. Artist shall be reasonably available to attend any inauguration or presentation ceremonies relating to the public dedication of the Artwork.

f. **Trademark.** In the event that TJPA's use of the Artwork creates trademark, service mark or trade dress rights in connection with the Artwork, TJPA shall have an exclusive and irrevocable right in such trademark, service mark, or trade dress.

g. **Unique.** Artist warrants that the design of the Artwork as expressed in the Proposal is an edition of one, and that neither Artist nor Artist's agents will execute or authorize another to execute another work of the same or substantially similar image, design, dimensions and materials as the Artwork. Artist may create works that utilize or incorporate various individual art elements that comprise the Artwork, so long as the work utilizing or incorporating such individual elements (1) does not consist predominantly of such elements (2) is not the same or substantially similar in image, design, dimensions and materials as the Artwork, and (3) is not displayed in an environment that is the same or substantially similar to the environment in which the Artwork is to be displayed at the Site. This warranty shall continue in effect for a period consisting of the life of Artist plus 70 years or for the duration of the Artwork's copyright protected status, whichever is longer, and shall be binding on Artist and Artist's heirs and assigns. In the case where Artist Team is comprised of two or more individual persons or a group of people, the measuring life shall be the life of the last surviving individual person comprising Artist Team. Recognizing that TJPA has no adequate remedy at law for Artist's violation of this warranty, Artist agrees that, in the event Artist breaches this warranty, TJPA shall be entitled to enjoin Artist's breach. Nothing hereunder shall be construed to constrain Artist from creating posters, note cards, or other reproductions of the Artwork with appropriate credit to the Board.

h. **Resale Royalty.** If TJPA 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 TJPA under this Agreement. Thus, TJPA has no obligation to pay resale royalties pursuant to California Civil Code §986 or any other law requiring the payment of resale royalties. If TJPA sells the Artwork as an individual piece, separate from or itemized as part of a real property transaction, TJPA shall pay to Artist a resale royalty to the extent required by law, based upon the sale price of the Artwork.

28. Audit and Inspection of Records; Reports

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

28A. TJPA Access to Artwork and Inspection; Status Reports; Artist Availability

a. **TJPA Access to Artwork; Inspection of Work and Artwork.** TJPA shall have the right to inspect the Work, including the Artwork, at the Site during any phase of the project at any time. In the event that all or part of the Work is created in a location other than the Site, the TJPA shall have the right to inspect the Work, including the Artwork, at any phase of the project following 48 hours written notice from the TJPA to the Artist.

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

c. Artist Availability. Artist or Artist's authorized agent shall be available at Artist's sole expense as set forth in Appendix B: Scope of Work.

29. Subcontracting

Artist is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by TJPA in writing. Neither party shall, on the basis of this Agreement, contract on behalf of or in the name of the other party. An agreement made in violation of this provision shall confer no rights on any party and shall be null and void. This paragraph 29 shall apply to the extent the Artist retains subcontractors as provided by this Agreement.

30. Assignment or Transfer

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

TJPA may assign this Agreement to the General Contractor on such terms and conditions as are acceptable to TJPA.

31. Non-waiver of Rights

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

32. Earned Income Credit (EIC) Forms [left blank by agreement of the parties, not applicable to this Agreement]

33. Nondiscrimination

The Artist or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement.

34. Prompt Payment to Subcontractors [left blank by agreement of the parties, not applicable to this Agreement]

35. MacBride Principles—Northern Ireland [left blank by agreement of the parties, not applicable to this Agreement]

36. Tropical Hardwood and Virgin Redwood Ban

Pursuant to San Francisco Environment Code section 804(b), TJPA urges Artist not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product in the performance of this Agreement.

37. Drug-Free Workplace Policy

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

38. [left blank by agreement of the parties]

39. Compliance with Americans with Disabilities Act

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

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

40. Sunshine Ordinance

Pursuant to San Francisco Administrative Code §67.24(e), contracts, Artist's bids, responses to solicitations and all other records of communications between TJPA and persons or firms seeking contracts, shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this paragraph will be made available by TJPA to the public upon request.

41. Public Access to Meetings and Records

If the Artist receives a cumulative total per year of at least \$250,000 in TJPA funds or TJPA-administered funds and is a non-profit organization as defined in Chapter 12L of the San Francisco Administrative Code, Artist shall comply with and be bound by all the applicable provisions of that Chapter. By executing this Agreement, the Artist agrees to open its meetings and records to the public in the manner set forth in §§12L.4 and 12L.5 of the Administrative Code. Artist further agrees to make-good faith efforts to promote community membership on its Board of Directors in the manner set forth in §12L.6 of the Administrative Code. The Artist acknowledges that its material failure to comply with any of the provisions of this paragraph shall constitute a material breach of this Agreement. The Artist further

acknowledges that such material breach of the Agreement shall be grounds for the TJPA to terminate and/or not renew the Agreement, partially or in its entirety.

42. Limitations on Contributions

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

43. Requiring Minimum Compensation for Employees [left blank by agreement of the parties, not applicable to this Agreement]

44. Requiring Health Benefits for Covered Employees [left blank by agreement of the parties, not applicable to this Agreement]

45. First Source Hiring Program [left blank by agreement of the parties, not applicable to this Agreement]

46. Prohibition on Political Activity with TJPA Funds

In accordance with San Francisco Administrative Code Chapter 12.G, Artist may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure (collectively, "Political Activity") in the performance of the services provided under this Agreement. Artist agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the TJPA's CFO. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event Artist violates the provisions of this section, the TJPA may, in addition to any other rights or remedies available hereunder, (i) terminate this Agreement, and (ii) prohibit Artist from bidding on or receiving any new TJPA contract for a period of two (2) years. The CFO will not consider Artist's use of profit as a violation of this section.

47. Preservative-treated Wood Containing Arsenic

Artist may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of Environment under Section 1304 of the

Code. The term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Artist may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude Artist from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

48. Modification of Agreement

This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved in the same manner as this Agreement.

49. Administrative Remedy for Agreement Interpretation

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

50. Agreement Made in California; Venue

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

51. Construction

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

52. Entire Agreement

This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. This contract may be modified only as provided in Section 48 (Modification of Agreement).

53. Compliance with Laws

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

54. Services Provided by Attorneys

Any services to be provided by a law firm or attorney must be reviewed and approved in writing in advance by the TJPA. No invoices for services provided by law firms or attorneys, including, without limitation, as subcontractors of Artist, will be paid unless the provider received advance written approval from the TJPA.

55. Left Blank by Agreement of the Parties

56. Severability

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

57. Protection of Private Information

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

58. Graffiti Removal [left blank by agreement of the parties, not applicable to this Agreement]

59. Food Service Waste Reduction Requirements [left blank by agreement of the parties, not applicable to this Agreement]

60. Slavery Era Disclosure [left blank by agreement of the parties].

61. Cooperative Drafting.

This Agreement has been drafted through a cooperative effort of both parties, and both parties have had an opportunity to have the Agreement reviewed and revised by legal counsel. No party shall be considered the drafter of this Agreement, and no presumption or rule that an ambiguity shall be construed against the party drafting the clause shall apply to the interpretation or enforcement of this Agreement.

62. Dispute Resolution Procedure [left blank by agreement of the parties]

63. USDOT Requirements

The provisions contained in "USDOT Requirements for Professional Services Contracts," attached as Appendix F, are incorporated into this Agreement, and the Artist agrees to abide by such provisions. Such provisions supplement the provisions in this Agreement, and shall be interpreted in the broadest possible manner to avoid any conflicts. If there is an unavoidable conflict between the USDOT terms and conditions and any other terms and conditions of this Agreement, in the TJPA's sole determination, the USDOT terms and conditions shall take precedence.

SIGNATURES

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

TRANSBAY JOINT POWERS AUTHORITY

ARTIST

Maria Ayerdi-Kaplan
Executive Director

Transbay Joint Powers Authority
Board of Directors
Resolution No. _____
Adopted: _____
Attest:



Authorized Signature
Tim Hawkinson

Secretary, TJPA Board

Approved as to Form:

Dennis J. Herrera
City Attorney

By _____

Deputy City Attorney

APPENDICES:

- A: Artist's Proposal
- B: Services to be Provided by Artist
- C. Artist's Approved Costs
- D. Payment Schedule
- E. Transbay Transit Center Art Collection Forms
- F. USDOT Requirements for Agreements with TJPA

APPENDIX A

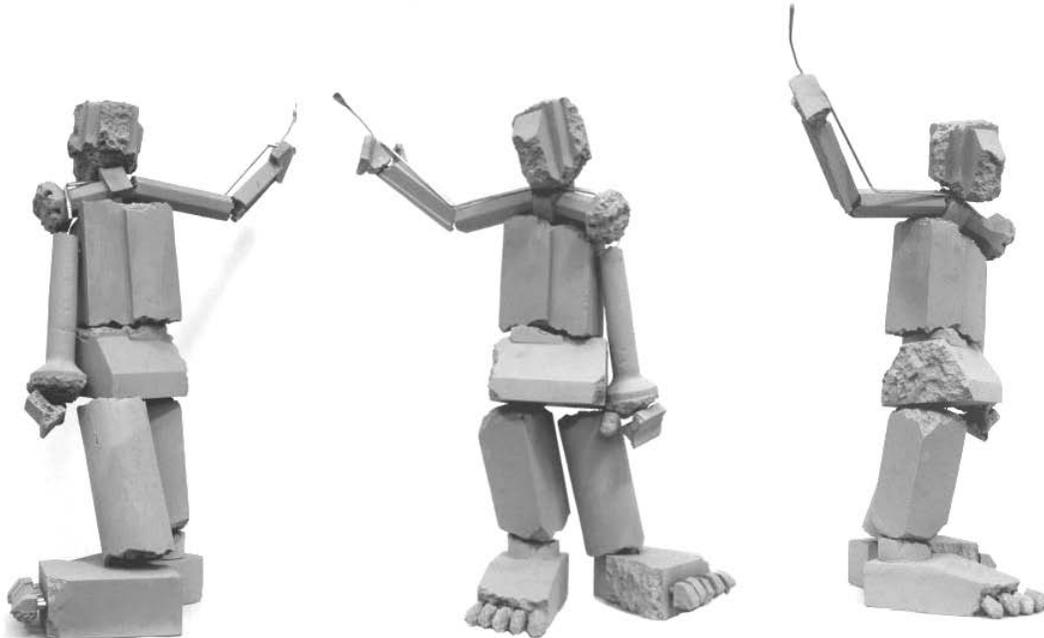
Artist's Proposal

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

- a. Attached is Artist's Proposal at the time of the Agreement date. Artist's Proposal shall be automatically superseded by any Contract Documents that are later approved by the TJPA.

TIM HAWKINSON - UNTITLED

The artist's concept is unique and consistent with the sustainable objectives of the Transbay Transit Center. Tim Hawkinson will salvage some of the demolished material from the Transbay Terminal to reconstruct from the ruins, a figure of welcome for the new Transbay Transit Center. The sculpture will be approximately 41 feet high and constructed from the demolished remains of the Transbay Terminal, except for an internal steel armature and seismic foundation. The artist sees the sculpture as a "guardian", intended to help travelers navigate a safe journey.



APPENDIX B

Services to be provided by Artist

Concept Design and Consultation for

THE TIM HAWKINSON TRANSBAY TRANSIT CENTER ENTRY SCULPTURE

Authorization: Phase I of this Agreement has been authorized by **TJPA Resolution Number**

.The TJPA, through the Executive Director, must approve Artist's work at each phase of development before the Artist proceeds to the next phase.

PHASE I: Design Development Consultation

- (1) The Architect, in consultation with Artist, shall incorporate the further development and refinement of the Proposal and Budget developed under Conceptual Design (attached as Appendix A).
- (2) The Architect will support Artist as required to produce the Design of the Artwork. In collaboration with Artist, the Architect will produce presentation quality materials, which shall include drawings or computer-generated 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, as well as proposed fabrication methods, feasibility studies and final cost estimates 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. Artist shall confer with the Architect, in the preparation of architectural drawings and engineering studies. The Artist shall not be responsible for any architectural, technical, electrical or engineering studies, renderings or documents of any sorts that may be required by authorities, by building codes, by contractors, or any other person that the TJPA might engage for the site preparation and the installation. Nevertheless, the Artist reserves the right, but shall have no obligation, to review all such documents prepared by such contractors or others to help ensure that any construction and installation arrangements conform to the specifications provided by the Artist.
- (3) Artist, along with the Structural Engineer and Fabricator for the Artwork, shall review all Design Development drawings, materials and documents for consistency with the Design for the Artwork and shall report any engineering, structural concerns, or constructability concerns to the TJPA. Modifications to the aesthetic design necessitated by this review shall be submitted and approved by the Artist, the TJPA, in consultation with the SAN FRANCISCO ARTS COMMISSION ("SFAC") and the Architect prior to beginning the production of Construction Documents and incorporated therein. TJPA acknowledge that the Artist is not an expert in construction or engineering matters and that its review shall be solely to confirm that, to the extent discernible by a layperson, such documents conform to the aesthetic intent and Design of the Artwork and that Artist shall not be responsible for any structural engineering or any fabrication of the Artwork in any way.
- (4) Maintenance Plan. Artist shall review Preliminary Maintenance Plan prepared by the SFAC's Conservator and provide TJPA with written comments and/or corrections which shall be forwarded to the SFAC. The Artwork must be durable, taking into consideration that the Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. Artist shall not be responsible in any way for the Maintenance Plan prepared by the SFAC's Conservator.

PHASE II: Construction Document Consultation

- (1) Artist shall be reasonably available in accordance with Artist's schedule for consultation and review to support the production of Construction Documents by the Architect for the construction and/or installation of the proposed Artwork as approved, but shall have no responsibility for any Construction Documents.
- (2) Artist, following provision of scanned documents of concrete elements, shall deliver 3D Mock-ups and Samples if deemed necessary and appropriate by TJPA. TJPA acknowledges that the Artist is not an expert in construction or engineering matters and that any mock-ups Artist delivers shall be for the sole purpose of illustrating the concept.
- (3) Artist shall review Architect's Design Development and/or Construction Documents for accuracy of the integration of Artist's Design within the Site and provide TJPA with written comments and/or corrections.

PHASE III: Fabrication and Installation Consultation

- (1) Artist shall consult with the TJPA, SFAC, the Architect, and the Construction Contractor as reasonably required, during the fabrication and installation of the Artwork. Artist, in collaboration with the Architect, shall review all submittals, work samples, Shop Drawings as needed for Artwork and/or armature, foundation and attachment hardware, which will be prepared by the Fabricator, for aesthetic purposes only. TJPA acknowledges that the Artist is not expert in construction or engineering matters and that his review shall be solely to confirm that, to the extent discernible by a layperson, such documents conform to the specifications and aesthetic Design of the Artwork. While the Artist shall have no responsibility for the accuracy, quality, or fitness of the Artwork to be performed from such documents, the Artist shall notify the TJPA in writing if the fabrication or installation is not consistent with the Artist's aesthetic design, approved by the TJPA and the Architect during Design Development. Artist shall coordinate Artist's activities on site with the TJPA.
- (2) Artist shall review the Final Maintenance Documents developed by the Fabricator and reviewed by the SFAC Conservator, and provide written comments to TJPA. SFAC shall submit the Final Maintenance Plan to TJPA, which will include all information to properly care for and maintain the Artwork, including information regarding the physical make-up of the Artwork, and methods and materials. Artist shall submit to TJPA information about the artistic and aesthetic Design of the Artwork in the form of the Artist Collections Form, Appendix D to this Agreement.

APPENDIX C
Artist's Approved Costs

Tim Hawkinson – Budget for Sculpture in Mission Square	
Artist Fee	\$200,000
Webcor/Obayashi Proposed Budget for Fabrication and Installation	\$600,000
Foundation (Base Isolation and Mat Slab Foundation)	\$127,000
Demolition / Concrete Salvage / Transportation of Salvaged Pieces to Storage / Rough Shaping / Cutting by Evans Brothers Inc.	\$159,837
Turner-Concrete Testing	\$10,000
F3-Concrete 3d Scan of Salvaged Pieces	\$52,000
Total	\$1,148,837

APPENDIX D

Artist Payment Schedule

Payment #	Phase	Date	% of Total	Amount (\$)
Payment 1	Phase I: Design Development: Upon contract certification	Upon contract certification	15%	\$30,000
Payment 2	Phase I: Design Development 100%	June 30, 2011	15%	\$30,000
Payment 3	Phase II: Construction Documents 100% (consultation only)	July 1, 2011	35%	\$70,000
Payment 4	Phase III: Transportation, Fabrication and Installation 100% (consultation only)	December 31, 2011	35%	\$70,000
	TOTAL PAYMENTS		100%	\$200,000

1. Payment One

Upon certification of this Agreement, Artist may submit an invoice to SFAC for an interim artist fee payment of \$30,000 for commencement of **Phase I: Design Development**.

Deliverables include:

- a) Evidence of required insurance as referenced in Paragraph 15 in the main body.

2. Payment Two

Following approval by the TJPA of the following submittals per Scope of Work, Artist may submit an invoice to TJPA for an interim artist fee payment of \$30,000 for 100% completion of **Phase I: Design Development**.

Deliverables include:

- a) Evidence of required insurance, as referenced in Paragraph 15 in the main body.
- b) 100% completion of final Artwork design, approved by TJPA

3. Payment Three

Following approval by the TJPA of the following submittals per Scope of Work, Artist may submit an invoice to SFAC for an interim artist fee payment of \$70,000 for the 100% completion of **Phase II: Construction Documents Consultation**.

Deliverables include:

- a) Evidence of required insurance, as referenced in Paragraph 15 in the main body.
- b) 100% completion of Construction Documents Consultation, approved by TJPA

4. Payment Four

Following approval by the TJPA of the following submittals per Scope of Work, Artist may submit an invoice to SFAC for a final artist fee payment of \$70,000 for 100% completion of **Phase III: Fabrication and Installation Consultation**.

Deliverables include:

- a) Evidence of required insurance, as referenced in Paragraph 15 in the main body.
- b) 100% completion of Consultation on Fabrication and Installation, approved by TJPA
- c) Artist Collections Form in Appendix D: Transbay Transit Center Art Collection Form.

Return to:
San Francisco Arts Commission
25 Van Ness Ave., Suite 240
San Francisco, CA 94102

ARTIST BIOGRAPHY

Artist Surname:		Given Name:	
Birth Date:	Birth Place:		Sex:
Ethnicity: (optional)			
Contact Information: (current address, phone number and e-mail)			
Attach Artist Resume: (curriculum vitae or resume)			

OBJECT INFORMATION

Title of Artwork:
Object Description: (describe the artwork and the components that comprise the complete installation)
Installation Location:
In the interest of history, as well as for future conservation and restoration, should that become necessary, please complete the attached Technical and Maintenance Record Sheet . Describe all materials used to create this work of art, providing trade names wherever possible.

NON-COMMISSIONED WORKS

Provenance: (history of ownership, including dates work was transferred)

Artist Collections Form

Exhibition History: (list all exhibitions by title, date and museum/gallery name)

ARTIST INTENT

Statement of Intent: (provide any information about the subject of the work, sources of inspiration, ideas expressed in it or historical value relating to the work. You may attach a separate sheet.)

Artist Signature and Date certifies that the information provided is accurate and complete:

**Attach photographic documentation of the fabrication and completed artwork for the archive.
Digital images on disk are preferred.**

APPENDIX E
3D Artwork Technical Maintenance Record

Please print or type answers
to be completed before final payment

Return to:
San Francisco Arts Commission
Civic Art Collection
25 Van Ness Ave., Suite 240
San Francisco, CA 94102

Full Name of Artist:
Title of Artwork:
Date of Execution:
Dimensions:
Artwork Material/s: (List type and brand name for all materials; attach Material Safety and Technical Data Sheets. Include contact names for each supplier and attach warranties when possible.)
Material Thickness:
Welding or Joint Material:
Welding Rod Alloy or Joint Material:
Casting Alloy, Wax Body, Glass or Fiber Type:
Framing Materials and Construction Method: (List type and brand name for all materials; attach Material Safety and Technical Data Sheets. Include contact names for each supplier and attach warranties when possible.)
Technique or Construction Method: (List all architects and fabricators. Attach any warranties or agreements.)
Finish: (all anti-graffiti coatings, fixative coatings, fire retardant sprays, etc., attach Material Safety and Technical Data sheets.)
Foundation/Installation Method:
Maintenance and Care of Artwork: (Suggested cleaning agent and procedure, attach Material Safety and Technical Data sheets.)
Placement of Artwork: (cautions regarding sunlight, heat, etc.)
Handling Instructions:

3D Artwork Technical Maintenance Record

Attach any diagrams and disassembly instructions.

APPENDIX F

USDOT REQUIREMENTS FOR AGREEMENTS WITH THE TJPA

The USDOT's requirements for agreements between the TJPA and a third party are summarized below. Certain USDOT provisions described below may not be applicable to all agreements with the TJPA. The italicized text is intended to assist the Contractor in understanding which Federal requirements may be applicable to an agreement. The USDOT and the TJPA have sole discretion to apply any particular provision described below.

These provisions supplement the provisions in the Agreement, and shall be interpreted in the broadest possible manner to avoid any conflicts. If there is an unavoidable conflict between the USDOT requirements and any other terms and conditions of the Agreement, in the TJPA's sole determination, the USDOT requirements shall take precedence.

The following provisions (1-11) apply to all Agreements (excluding micropurchases).

1. DEFINITIONS

****** *The Definitions apply to all Agreements.*

- (a). **Approved Project Budget** means the most recent statement, approved by the FTA, of the costs of the Project, the maximum amount of Federal assistance for which the TJPA is currently eligible, the specific tasks (including specified contingencies) covered, and the estimated cost of each task.
- (b). **Contractor** means the individual or entity awarded an Agreement financed in whole or in part with Federal assistance originally derived from FTA.
- (c). **Federal Cooperative Agreement** means the instrument by which FTA awards Federal assistance to the TJPA to support a particular Project, and in which FTA takes an active role or retains substantial control.
- (d). **FTA** is the acronym for the Federal Transit Administration, one of the operating administrations of the U.S. DOT.
- (e). **FRA** is the acronym for the Federal Railroad Administration, one of the operating administrations of the U.S. DOT.
- (f). **FRA Directive** includes any FRA regulation, policy, procedure, directive, circular, notice, order or guidance providing information about FRA's programs, application processing procedures, and Project management guidelines, including the Master Agreement between FRA and the TJPA. In addition to FRA Directives, certain U.S. DOT directives also apply to the Project.
- (g). **FTA Directive** includes any FTA regulation, policy, procedure, directive, circular, notice, order or guidance providing information about FTA's programs, application processing procedures, and Project management guidelines, including the Master Agreement between FTA and the TJPA. In addition to FTA Directives, certain U.S. DOT directives also apply to the Project.
- (h). **Grant Agreement** means the instrument by which FTA or FRA awards Federal assistance to the TJPA to support a particular Project, and in which FTA or FRA does not take an active role or retain substantial control, in accordance with 31 U.S.C. Section 6304.

- (i). **Government** means the United States of America and any executive department thereof.
- (j). **Project** means the task or set of tasks listed in the Approved Project Budget that is the subject of this Agreement, as well as any modifications stated in the Conditions to the Grant Agreement or Federal Cooperative Agreement applicable to the Project. In the case of the formula assistance programs for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. sections 5307, 5310, and 5311, respectively, the term "Project" encompasses both a program and each project within a program, as the context may require, to effectuate the requirements of the Grant Agreement or Federal Cooperative Agreement.
- (k). **Recipient** means the TJPA.
- (l). **Secretary** means the U.S. DOT Secretary, including his or her duly authorized designee.
- (m). **Agreement** means a contract, purchase order, memorandum of understanding or other agreement awarded by the TJPA to a Contractor, financed in whole or in part with Federal assistance awarded by FTA or FRA.
- (n). **Subcontract** means a subcontract at any tier entered into by Contractor or its subcontractor relating to the Agreement, financed in whole or in part with Federal assistance originally derived from FTA or FRA. Unless otherwise specified, the Contractor must include each of these Federal provisions in any Subcontract related to this Agreement.
- (o). **U.S. DOT** is the acronym for the U.S. Department of Transportation, including its operating administrations.

2. NO GOVERNMENT OBLIGATION TO THIRD PARTIES

****** *This requirement applies to all Agreements.*

The TJPA and Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the Agreement, absent the express written consent by the Federal Government, the Federal Government is not a party to this Agreement and shall not be subject to any obligations or liabilities to the TJPA, Contractor, or any other party (whether or not a party to that Agreement) pertaining to any matter resulting from the Agreement.

3. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS

****** *This provision applies to all Agreements.*

(a). The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. Section 3801 et seq., and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 CFR Part 31, apply to its actions under the Agreement. Upon execution of the Agreement, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the Agreement or the FTA- or FRA-assisted Project for which this Agreement work is being performed. In addition to other penalties that may be applicable, the Contractor further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Contractor to the extent the Federal Government deems appropriate.

(b). The Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under an Agreement connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA or FRA under the authority of 49 U.S.C. Section 5307, the Government reserves the right to impose the penalties of 18 U.S.C. Section 1001 and 49 U.S.C. Section 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

4. ACCESS TO DOCUMENTS

****** *This requirement applies to all Agreements. FRA requires the inclusion of these requirements in Subcontracts over \$100,000.*

****** *Please be aware that the requirements in the Agreement regarding audit and inspection of records may require the Contractor to maintain files relating to this Agreement for a longer period of time than described in the requirement below. Please also be aware that, as described in the Agreement, the TJPA follows the provisions of the City and County of San Francisco Sunshine Ordinance regarding responses to public requests for certain bid documents. The Contractor must comply with the requirements described below and in the Agreement.*

(a). Where the TJPA is considered a “local government” and is a Recipient or a subgrantee of a Recipient, in accordance with 49 CFR Section 18.36(i), the Contractor agrees to provide the TJPA, the FTA or FRA Administrator, the Comptroller General of the United States and/or any of their authorized representatives access to any books, documents, accounts papers and records of the Contractor which are directly pertinent to this Agreement (“Documents”) for the purposes of making audits, examinations, excerpts and transcriptions. Contractor also agrees, pursuant to 49 CFR Section 633.17, to provide the FTA or FRA Administrator or its authorized representatives, including any project management oversight Contractor, access to Contractor's Documents and construction sites pertaining to a major capital project, defined at 49 U.S.C. Section 5302(a)1, which is receiving Federal financial assistance through the programs described at 49 U.S.C. sections 5307, 5309 or 5311.

(b). Where the TJPA is a Recipient or a subgrantee of a Recipient, in accordance with 49 U.S.C. Section 5325(a), and enters into a contract for a capital project or improvement (defined at 49 U.S.C. Section 5302[a]1) through other than competitive bidding, the Contractor agrees to provide the TJPA, the Secretary and the Comptroller General, or any authorized officer or employee of any of them, access to any Documents for the purposes of conducting an audit and inspection.

(c). The Contractor agrees to permit any of the foregoing parties to reproduce, by any means whatsoever, or to copy excerpts and transcriptions, as reasonably needed, of any Documents.

(d). The Contractor agrees to maintain all Documents required under this Agreement for a period of not less than three years after the date of termination or expiration of this Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case Contractor agrees to maintain same until the TJPA, the FTA or FRA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. (See 49 CFR Section 18.39[i][11]).

5. FEDERAL CHANGES

****** *This requirement applies to all Agreements.*

Contractor shall at all times comply with all applicable federal laws and regulations, and all FTA Directives, FRA Directives and U.S. DOT Directives applicable to the Project, as they may be amended or promulgated from time to time during the term of this Agreement. It is Contractor's responsibility to be

aware of any amendments or changes to such federal requirements and directives. Contractor's failure to so comply shall constitute a material breach of this Agreement.

6. CIVIL RIGHTS REQUIREMENT

** *This requirement applies to all Agreements.*

** *Please be aware that the requirements in the Agreement regarding nondiscrimination are broader than the USDOT Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

(a). **Nondiscrimination** - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. Section 2000d, Section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. Section 6102, Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12132, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA or FRA may issue.

(b). **Equal Employment Opportunity** - The following equal employment opportunity requirements apply to the Agreement:

(1). **Race, Color, Creed, National Origin, Sex** - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. Section 2000e, and Federal transit laws at 49 U.S.C. Section 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 CFR Parts 60, (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. Section 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA or FRA may issue.

(2). **Age** - In accordance with Section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 623, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA or FRA may issue.

(3). **Disabilities** - In accordance with Section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. Section 12112, the Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA or FRA may issue.

7. DISADVANTAGED BUSINESS ENTERPRISE (DBE)

** *The specific provisions checked below apply to this Agreement.*

(a). This Agreement is subject to the requirements of 49 CFR Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. The national goal for participation of Disadvantaged Business Enterprises (DBEs) is 10 percent. The TJPA's Anticipated DBE Participation Level for each Federal Fiscal Year is published on the TJPA website by August 1 of each year.

A separate Agreement goal of _____ percent DBE participation has been established for this Agreement.

A separate Agreement goal **has not** been established for this Agreement.

(b). The Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this DOT-assisted Agreement. Failure by the Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the TJPA deems appropriate. Each Subcontract the Contractor signs with a subcontractor must include the assurance in this paragraph (*see* 49 CFR Section 26.13[b]).

(c). (*Checked box is applicable to this Agreement.*)

(*If a separate Agreement goal has been established, use the following*)

The Contractor was required to document sufficient DBE participation to meet the separate Agreement goal established for this Agreement or, alternatively, document adequate good faith efforts to do so, as provided for in 49 CFR Section 26.53.

(*If no separate Agreement goal has been established, use the following*)

The Contractor is required to report its DBE participation obtained through race-neutral means throughout the period of performance.

(d). The Contractor is required to pay its subcontractors performing work related to this Agreement for satisfactory performance of that work no later than ten (10) days after the Contractor's receipt of payment for that work from the TJPA. In addition, the Contractor is required to return any retainage payments to those subcontractors within thirty (30) days after incremental acceptance of the subcontractor's work by the TJPA and Contractor's receipt of the partial retainage payment related to the subcontractor's work.

(e). The Contractor must promptly notify the TJPA whenever a DBE subcontractor performing work related to this Agreement is terminated or fails to complete its work, and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work. The Contractor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of the TJPA.

8. INCORPORATION OF U.S. DEPARTMENT OF TRANSPORTATION TERMS

** *This requirement applies to all Agreements.*

The preceding provisions include, in part, certain standard terms and conditions required by U.S. DOT of the TJPA's agreements, whether or not expressly set forth in the preceding Agreement provisions. All contractual provisions required by U.S. DOT, as set forth in FTA Circular 4220.1F and any replacement

or revision thereof, and any provisions set forth by FRA, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all USDOT-mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any TJPA requests which would cause the TJPA to be in violation of the USDOT terms and conditions.

9. FLY AMERICA REQUIREMENTS

****** *This provision applies to all Agreements that involve the transportation of persons or property, by air, between a place in the U.S. and a place outside the U.S., or between places outside the U.S.*

- (a). The Contractor agrees to comply with 49 U.S.C. Section 40118 (the "Fly America Act") in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act.
- (b). The Contractor shall submit the "Fly America Certification" if the regulation is applicable to the particular Agreement.
- (c). The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier.
- (d). Notwithstanding the foregoing, transportation on a foreign air carrier is permissible when provided by a foreign air carrier under a code share agreement when the ticket identifies the U.S. air carrier's designator code and flight number. Transportation by a foreign air carrier is also permissible if there is a bilateral or multilateral air transportation agreement to which the U.S. Government and a foreign government are parties and which the U.S. DOT has determined meets the requirements of the Fly America Act.

10. CARGO PREFERENCE REQUIREMENTS

****** *This provision applies to all Agreements involving equipment, materials, or commodities which may be transported by ocean vessels.*

The Contractor agrees to:

- (a). use privately owned United States flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to the Agreement to the extent such vessels are available at fair and reasonable rates for United States flag commercial vessels;
- (b). furnish within twenty (20) working days following the date of loading for shipments originating within the United States or within thirty (30) working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-landing in English for each shipment of cargo described in the preceding paragraph to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590 and to the TJPA (through the Contractor in the case of a subcontractor's bill-of-landing).

11. ENERGY CONSERVATION REQUIREMENTS

****** *This provision applies to all Agreements.*

The Contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act, 42 U.S.C. Section 6201 et seq.

The following provisions (12-13) apply to Agreements exceeding \$10,000.

12. TERMINATION

*** This requirement applies to all Agreements in excess of \$10,000, except when the Contractor is a nonprofit organization or institution of higher education. When the Contractor is a nonprofit organization or institution of higher education, this requirement applies to all Agreements greater than \$100,000.*

*** Please be aware that the requirements in the Agreement regarding termination for convenience are more broadly applicable than the USDOT Requirements described below. Both the requirements described below and the provisions in the Agreement are applicable to the Agreement.*

(a). **Termination for Convenience (General Provision)** - The TJPA may terminate this Agreement, in whole or in part, at any time by written notice to the Contractor when it is in the Government's best interest. The Contractor shall be paid its costs, including Agreement close-out costs, and profit on work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the TJPA. If the Contractor has any property in its possession belonging to the TJPA, the Contractor will account for the same, and dispose of it in the manner the TJPA directs.

(b). **Termination for Default [Breach or Cause] (General Provision)** - If the Contractor (1) does not deliver supplies in accordance with the Agreement delivery schedule, or (2) if the Agreement is for services the Contractor fails to perform in the manner called for in the Agreement, or (3) if the Contractor fails to comply with any other provisions of the Agreement, the TJPA may terminate this Agreement for default. Termination shall be effected by serving a notice of termination on the Contractor setting forth the manner in which the Contractor is in default. The Contractor will only be paid the Agreement price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the Agreement.

If it is later determined by the TJPA that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of the Contractor, the TJPA, after setting up a new delivery of performance schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

(c). **Opportunity to Cure (General Provision)** - The TJPA in its sole discretion may, in the case of a termination for breach or default, allow the Contractor a period of time in which to cure the defect. In such case, the notice of termination will state the time period in which cure is permitted and other appropriate conditions.

If Contractor fails to remedy to the TJPA's satisfaction the breach or default of any of the terms, covenants, or conditions of this within ten (10) days after receipt by Contractor of written notice from the TJPA setting forth the nature of said breach or default, the TJPA shall have the right to terminate the Agreement without any further obligation to Contractor. Any such termination for default shall not in any way operate to preclude the TJPA from also pursuing all available remedies against Contractor and its sureties for said breach or default.

(d). **Waiver of Remedies for any Breach** - In the event that TJPA elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this Agreement, such waiver by the TJPA shall not limit the TJPA's remedies for any succeeding breach of that or of any other term, covenant, or condition of this Agreement.

(e). **Termination for Convenience (Professional or Transit Service Agreements)** - The TJPA, by written notice, may terminate this Agreement, in whole or in part, when it is in the Government's interest. If this Agreement is terminated, the TJPA shall be liable only for payment under the payment provisions of this Agreement for services rendered before the effective date of termination.

(f). **Termination for Default (Supplies and Service)** - If the Contractor fails to deliver supplies or to perform the services within the time specified in this Agreement or any extension or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. The Contractor will only be paid the Agreement price for supplies delivered and accepted, or services performed in accordance with the manner or performance set forth in this Agreement.

If, after termination for failure to fulfill Agreement obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the TJPA.

(g). **Termination for Default (Transportation Services)** - If the Contractor fails to pick up the commodities or to perform the services, including delivery services, within the time specified in this Agreement or any extension or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of default. The Contractor will only be paid the Agreement price for services performed in accordance with the manner of performance set forth in this Agreement.

If this Agreement is terminated while the Contractor has possession of TJPA goods, the Contractor shall, upon direction of the TJPA, protect and preserve the goods until surrendered to the TJPA or its agent. The Contractor and the TJPA shall agree on payment for the preservation and protection of goods. Failure to agree on an amount will be resolved under the Dispute clause.

If, after termination for failure to fulfill Agreement obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the TJPA.

(h). **Termination for Default (Construction)** - If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in this Agreement or any extension or fails to complete the work within this time, or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. In this event, the TJPA may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the TJPA resulting from the Contractor's refusal or failure to complete the work within specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the TJPA in completing the work.

The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause if:

(1). The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include acts of God, acts of the

TJPA, acts of another Contractor in the performance of a Agreement with the TJPA, epidemics, quarantine restrictions, strikes, freight embargoes; and

(2). The Contractor, within ten (10) days from the beginning of any delay, notifies the TJPA in writing of the causes of delay. If in the judgment of the TJPA, the delay is excusable, the time for completing the work shall be extended. The judgment of the TJPA shall be final and conclusive on the parties, but subject to appeal under the Disputes clauses.

If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the TJPA.

(i) **Termination for Convenience or Default (Architect and Engineering)** - The TJPA may terminate this Agreement in whole or in part, for the TJPA's convenience or because of the failure of the Contractor to fulfill the Agreement obligations. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature, extent, and effective date of the termination. Upon receipt of the notice, the Contractor shall (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the contracting officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process.

If the termination is for the convenience of the TJPA, the contracting officer shall make an equitable adjustment in the Agreement price but shall allow no anticipated profit on unperformed services.

If the termination is for failure of the Contractor to fulfill the Agreement obligations, the TJPA may complete the work by contract or otherwise and the Contractor shall be liable for any additional cost incurred by the TJPA.

If, after termination for failure to fulfill Agreement obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the TJPA.

(j). **Termination for Convenience or Default (Cost-Type Agreements)** - The TJPA may terminate this Agreement, or any portion of it, by serving a notice of termination on the Contractor. The notice shall state whether the termination is for convenience of the TJPA or for the default of the Contractor. If the termination is for default, the notice shall state the manner in which the Contractor has failed to perform the requirements of the Agreement. The Contractor shall account for any property in its possession paid for from funds received from the TJPA, or property supplied to the Contractor by the TJPA. If the termination is for default, the TJPA may fix the fee, if the Agreement provides for a fee, to be paid the Contractor in proportion to the value, if any, of work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the TJPA and the parties shall negotiate the termination settlement to be paid the Contractor.

If the termination is for the convenience of the TJPA, the Contractor shall be paid its Agreement close-out costs, and a fee, if the Agreement provided for payment of a fee, in proportion to the work performed up to the time of termination.

If, after serving a notice of termination for default, the TJPA determines that the Contractor has an excusable reason for not performing, such as strike, fire, flood, events which are not the fault of and are beyond the control of the Contractor, the TJPA, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

13. RECYCLED PRODUCTS

****** *This provision applies to all Agreements to procure \$10,000 or more of any one item designated by the EPA under 40 CFR Part 247, Subpart B in a single fiscal year, and to all Agreements to procure any items designated in 40 CFR Part 247, Subpart B where the TJPA or the Contractor has used Federal funds to procure \$10,000 or more of any one item in the previous fiscal year.*

****** *Please be aware that the requirements in the Agreement regarding resource conservation may be more restrictive than the USDOT Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

The Contractor agrees to comply with the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. Section 6962 et seq.), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in 40 CFR Part 247, Subpart B.

The following provision (14) applies to Agreements exceeding \$25,000.

14. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

****** *This requirement applies to all Agreements and Subcontracts greater than or equal to \$25,000, and to any Agreement for auditing services at any dollar value.*

(a). This Agreement is a “covered transaction” for purposes of 49 CFR Part 29, and the Contractor is required to comply with 49 CFR Section 29, Subpart C. In particular, the Contractor is required to verify that the Contractor, its “principals,” as defined at 49 CFR Section 29.995, and its “affiliates,” as defined at 49 CFR Section 29.905, are not “excluded” or “disqualified,” as defined at 49 CFR sections 29.940 and 29.945.

(b). The Contractor shall submit the “Certification Regarding Debarment, Suspension, and Other Responsibility Matters.”

The following provisions (15-16) apply to Agreements exceeding \$50,000.

15. CLEAN AIR

****** *This provision applies to all Agreements greater than \$50,000 and to subcontracts greater than \$50,000.*

(a) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. Section 7401 et seq. The Contractor agrees to report each violation to the TJPA and understands and agrees that the TJPA will, in turn, report each violation as required to assure notification to FTA and FRA and the appropriate EPA Regional Office.

(b) The Contractor also agrees to include these requirements in each subcontract exceeding \$50,000.

16. CLEAN WATER REQUIREMENTS

****** *This provision applies to all Agreements greater than \$50,000.*

(a). The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 et seq. The Contractor agrees to report each violation to the TJPA and understands and agrees that the TJPA will, in turn, report each violation as required to assure notification to FTA and FRA and the appropriate EPA Regional Office.

(b). The Contractor also agrees to include these requirements in each Subcontract exceeding \$50,000 financed in whole or in part with Federal assistance provided by FTA and FRA.

The following provisions (17-20) apply to Agreements exceeding \$100,000.

17. BUY AMERICA REQUIREMENTS

*** This provision applies only to the following types of Agreements: construction agreements of any value; agreements for the acquisition of goods valued at more than \$100,000; and agreements for the acquisition of rolling stock valued at more than \$100,000. This requirement does not apply to lower tier Subcontracts.*

(a). The Contractor agrees to comply with 49 U.S.C. Section 5323(j) and 49 CFR Part 661, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA- and FRA-funded projects, such as the Transbay Transit Center Program that is the subject of this Agreement, are produced in the United States, unless a waiver has been granted by FTA, FRA, or the product is subject to a general waiver. General waivers are listed in 49 CFR Section 661.7. Separate requirements for rolling stock are set out at 49 U.S.C. Section 5323(j)(2)(C) and 49 CFR Section 661.11. Rolling stock must be assembled in the United States and have a 60 percent domestic content.

(b). The Contractor shall submit the "Buy America Certification" at the time of bid/offer if the regulation is applicable to the particular agreement. The Prime Contractor is responsible for ensuring that lower tier subcontractors are in compliance.

18. BREACHES AND DISPUTE RESOLUTION

*** This requirement applies to all Agreements in excess of \$100,000.*

(a). **Disputes** - Disputes arising in the performance of this Agreement which are not resolved by agreement of the parties shall be decided in writing by the authorized representative of TJPA's Executive Director. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the Executive Director. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the Executive Director shall be binding upon the Contractor and the Contractor shall abide by the decision.

(b). **Performance During Dispute** - Unless otherwise directed by the TJPA, Contractor shall continue performance under this Agreement while matters in dispute are being resolved.

(c). **Claims for Damages** - Should either party to the Agreement suffer injury or damage to person or property because of any act or omission of the party or of any of the party's employees, agents or others for whose acts the party is legally liable, a claim for damages therefore shall be made in writing to such other party within a reasonable time after the first observance of such injury of damage.

(d). **Remedies** - Unless this Agreement provides otherwise, all claims, counterclaims, disputes and other matters in question between the TJPA and the Contractor arising out of or relating to this

Agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the state in which the TJPA is located.

(e). **Rights and Remedies** - The duties and obligations imposed by the Agreement Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the TJPA or Contractor shall constitute a waiver of any right or duty afforded any of them under the Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

19. LOBBYING

** *This provision applies to the following types of Agreements, if the Agreement is equal to or greater than \$100,000: construction, architectural and engineering; acquisition of rolling stock; professional services; operational services; and Turnkey.*

** *Please be aware that the requirements in the Agreement regarding limitations on contributions may be more restrictive than the USDOT Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

(a). The contractor shall submit the "New Restrictions on Lobbying Certification" if the regulation is applicable to the particular agreement.

(b). The Contractor and each subcontractor shall certify to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. Section 1352. The Contractor and each subcontractor shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to a Federal contract, grant or award covered by 31 U.S.C. Section 1352. Such disclosures are forwarded from tier to tier up to the TJPA.

20. AGREEMENT WORK HOURS AND SAFETY STANDARDS ACT

** *This requirement applies to Agreements and Subcontracts for construction over \$100,000, and to non-construction Agreements valued at more than \$100,000 that employ "laborers or mechanics on a public work," as defined by 42 U.S.C. Section 3701.*

(a). **Overtime requirements** - No Contractor or subcontractor contracting for any part of the Agreement work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(b). **Violation; liability for unpaid wages; liquidated damages** - In the event of any violation of the clause set forth in paragraph (a) of this section the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (a) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.

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

The following provisions (21-23) apply to Construction Agreements.

21. SEISMIC SAFETY REQUIREMENTS

*** This provision applies only to Agreements for the construction of new buildings or additions to existing buildings.*

The Contractor agrees that any new building or addition to an existing building that is the subject of this Agreement will be designed and constructed in accordance with the standards for Seismic Safety required in U.S. DOT Seismic Safety Regulations 49 CFR Part 41 and will certify to compliance with such regulations to the extent required by the regulations. The Contractor also agrees to ensure that all work performed under this Agreement, including work performed by a subcontractor, is in compliance with the standards required by the Seismic Safety Regulations and the certification of compliance issued on the project.

22. BONDING REQUIREMENTS

*** This provision applies to Agreements for construction or facility improvements. For those Agreements or Subcontracts exceeding \$100,000, however, USDOT may accept the bonding policy and requirements of the TJPA, provided that the TJPA's bonding policy and requirements meet the minimum requirements as follows:*

(a). *A bid guarantee from each bidder equivalent to 5 percent of the bid price. The "bid guarantees" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.*

(b). *A performance bond on the part of the Contractor for 100 percent of the Agreement price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the Contractor's obligations under such contract.*

(c). *A cash deposit, certified check or other negotiable instrument may be accepted by the TJPA in lieu of performance and payment bonds, provided the TJPA has established a procedure to assure that the interest of USDOT is adequately protected. An irrevocable letter of credit would also satisfy the requirement for a bond.*

TJPA requirements regarding payment bonds are more stringent than USDOT amounts stated below. The TJPA requires a payment bond on the part of the Contractor for 100 percent of the Agreement price.

(1). Bid Bond Requirements (Construction)

(a). Bid Security

A Bid Bond must be issued by a fully qualified surety company acceptable to TJPA and listed as a company currently authorized under 31 CFR Part 223 as possessing a Certificate of Authority.

(b). **Rights Reserved**

In submitting a bid, it is understood and agreed by bidder that the right is reserved by TJPA to reject any and all bids, or part of any bid, and it is agreed that a bid may not be withdrawn for a period of ninety (90) days subsequent to the opening of bids, without the written consent of the TJPA.

It is also understood and agreed that if a bidder should withdraw any part or all of its bid within ninety (90) days after the bid opening without the written consent of the TJPA, shall refuse or be unable to enter into this Agreement, or refuse or be unable to furnish adequate and acceptable Performance Bonds and Labor and Material Payments Bonds, or refuse or be unable to furnish adequate and acceptable insurance, it shall forfeit its bid security to the extent of TJPA's damages occasioned by such withdrawal, or refusal, or inability to enter into an agreement, or provide adequate security therefor.

It is further understood and agreed that to the extent the defaulting bidder's Bid Bond, Certified Check, Cashier's Check, Treasurer's Check, and/or Official Bank Check (excluding any income generated thereby which has been retained by the TJPA) shall prove inadequate to fully recompense the TJPA for the damages occasioned by default, then a bidder agrees to indemnify the TJPA and pay over to the TJPA the difference between the bid security and the TJPA's total damages, so as to make the TJPA whole.

A bidder understands that any material alteration of any of the above or any of the material contained on this form, other than that requested, will render the bid unresponsive.

(2). **Performance and Payment Bonding Requirements (Construction)**

The Contractor shall be required to obtain performance and payment bonds as follows:

(a). **Performance Bonds**

1. The penal amount of performance bonds shall be 100 percent of the original Agreement price, unless the TJPA determines that a lesser amount would be adequate for the protection of the TJPA.
2. The TJPA may require additional performance bond protection when an Agreement price is increased. The increase in protection shall generally equal 100 percent of the increase in Agreement price. The TJPA may secure additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(b). **Payment Bonds**

1. The penal amount of the payment bonds shall equal:
 - (i) 50 percent of the Agreement price if the Agreement price is not more than \$1 Million;
 - (ii) 40 percent of the Agreement price if the Agreement price is more than \$1 Million but not more than \$5 Million; or
 - (iii) \$2.5 Million if the Agreement price is more than \$5 Million.
2. If the original Agreement price is \$5 Million or less, the TJPA may require additional protection, as required by subparagraph 1, if the Agreement price is increased.

(3). **Performance and Payment Bonding Requirements (Non-Construction)**

The Contractor also may be required to obtain performance and payment bonds when necessary to protect the TJPA's interest.

(a). The following situations may warrant a performance bond:

1. TJPA property or funds are to be provided to the Contractor for use in performing the Agreement or as partial compensation (as in retention of salvaged material).

2. A Contractor sells assets to or merges with another concern, and the TJPA, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.
3. Substantial progress payments are made before delivery of end items starts.
4. Agreements are for dismantling, demolition, or removal of improvements.

(b). When it is determined that a performance bond is required, the Contractor shall be required to obtain performance bonds as follows:

1. The penal amount of performance bonds shall be 100 percent of the original Agreement price, unless the TJPA determines that a lesser amount would be adequate for the protection of the TJPA.
2. The TJPA may require additional performance bond protection when an Agreement price is increased. The increase in protection shall generally equal 100 percent of the increase in Agreement price. The TJPA may secure additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(c). A payment bond is required only when a performance bond is required, and if the use of payment bond is in the TJPA's interest.

(d). When it is determined that a payment bond is required, the Contractor shall be required to obtain payment bonds as follows:

1. The penal amount of payment bonds shall equal:
 - (i) 50 percent of the Agreement price if the Agreement price is not more than \$1 Million;
 - (ii) 40 percent of the Agreement price if the Agreement price is more than \$1 Million but not more than \$5 Million; or
 - (iii) \$2.5 Million if the Agreement price is increased.

(4). Advance Payment Bonding Requirements

The Contractor may be required to obtain an advance payment bond if the Agreement contains an advance payment provision and a performance bond is not furnished. The TJPA shall determine the amount of the advance payment bond necessary to protect the TJPA.

(5). Patent Infringement Bonding Requirements (Patent Indemnity)

The Contractor may be required to obtain a patent indemnity bond if a performance bond is not furnished and the financial responsibility of the Contractor is unknown or doubtful. The TJPA shall determine the amount of the patent indemnity to protect the TJPA.

(6). Warranty of the Work and Maintenance Bonds

(a). The Contractor warrants to the TJPA, the architect and/or engineer that all materials and equipment furnished under this Agreement will be of highest quality and new unless otherwise specified by the TJPA, free from faults and defects and in conformance with the Agreement documents. All work not so conforming to these standards shall be considered defective. If required by the Executive Director, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

(b). The work furnished under the Agreement must be of first quality and the workmanship must be the best obtainable in the various trades. The work must be of safe, substantial and durable construction in all respects. The Contractor hereby guarantees the work against defective materials or faulty workmanship for a minimum period of one (1) year after Final Payment by the TJPA and shall replace or repair any defective materials or equipment or faulty workmanship during the period of the guarantee at no cost to the TJPA. As additional security for these guarantees, the Contractor shall, prior to the release of final payment, furnish separate Maintenance (or Guarantee) Bonds in form acceptable to the TJPA written by the same corporate surety that provides the Performance Bond and Labor and Material Payment Bond for this Agreement. These bonds shall secure the Contractor's obligation to replace or

repair defective materials and faulty workmanship for a minimum period of one (1) year after final payment and shall be written in an amount equal to 100 percent of the Agreement sum, as adjusted (if at all).

23. DAVIS-BACON AND COPELAND ANTI-KICKBACK ACTS

****** *This requirement applies to any Agreement for construction greater than \$2,000.*

“Construction,” for purposes of this requirement, includes “actual construction, alteration and/or repair, painting and decorating.” (29 CFR Section 5.5[a]).

(a). Minimum Wages

(1). All laborers and mechanics employed or working upon the site of the work that is the subject of this Agreement (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the Project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act [29 CFR Part 3]), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor, regardless of any contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR Part 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein, provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(2). (A). The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the Agreement shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (i). Except with respect to helpers as defined as 29 CFR Section 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (ii). The classification is utilized in the area by the construction industry; and
- (iii). The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and
- (iv). With respect to helpers as defined in 29 CFR Section 5.2(n)(4), such a classification prevails in the area in which the work is performed.

(B). If the Contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within thirty (30) days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C). In the event the Contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within thirty (30) days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D). The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this Agreement from the first day on which work is performed in the classification.

(3). Whenever the minimum wage rate prescribed in the Agreement for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(4). If the Contractor does not make payments to a trustee or other third person, the Contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, provided that the Secretary of Labor has found, upon the written request of the Contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(5). (A). The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the Agreement shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

- (i). The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (ii). The classification is utilized in the area by the construction industry; and
- (iii). The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B). If the Contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within thirty (30) days of receipt and

so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C). In the event the Contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination with thirty (30) days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D). The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(v) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this Agreement from the first day on which work is performed in the classification.

(b). **Withholding** - The TJPA shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the Contractor under this Agreement or any other Federal contract with the same Contractor, or any other federally assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same Contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any subcontractor the full amount of wages required by the Agreement. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the Agreement, the TJPA may, after written notice to the Contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(c). **Payrolls and Basic Records**

(1). Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of three (3) years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in Section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR Section 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in Section 1(b)(2)(B) of the Davis-Bacon Act, the Contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(2). (A). The Contractor shall submit weekly for each week in which any Agreement work is performed a copy of all payrolls to the TJPA for transmission to the USDOT. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under Section

5.5(a)(3)(i) of Regulations, 29 CFR Part 5. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, DC 20402. The Contractor is responsible for the submission of copies of payrolls by all subcontractors.

(B). Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the Agreement and shall certify the following:

- (i). That the payroll for the payroll period contains the information required to be maintained under Section 5.5(a)(3)(i) of Regulations, 29 CFR Part 5 and that such information is correct and complete;
- (ii). That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the Agreement during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR Part 3;
- (iii). That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the Agreement.

(C). The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D). The falsification of any of the above certifications may subject the Contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code.

(3). The Contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the USDOT or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the Contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the Contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR Section 5.12.

(d). **Apprentices and Trainees**

(1). **Apprentices** - Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first ninety (90) days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage

rate on the wage determination for the work actually performed. Where a Contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator of the Wage and Hour Division of the U.S. Department of Labor determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(2). Trainees - Except as provided in 29 CFR Section 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(3). Equal employment opportunity - The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(e). **Compliance with Copeland Act Requirements** - The Contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this Agreement.

(f). **Subcontracts** - The Contractor or subcontractor shall insert in any Subcontracts the clauses contained in 29 CFR Section 5.5(a)(1) through (10) and such other clauses as the USDOT may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier Subcontracts. The Contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR Section 5.5.

(g). **Agreement Termination: Debarment** - A breach of the contract clauses in 29 CFR Section 5.5 may be grounds for termination of the Agreement, and for debarment as a contractor and a subcontractor as provided in 29 CFR Section 5.12.

(h). **Compliance with Davis-Bacon and Related Act Requirements** - All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this Agreement.

(i). **Disputes Concerning Labor Standards** - Disputes arising out of the labor standards provisions of this Agreement shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(j). **Certification of Eligibility**

(1). By entering into this Agreement, the Contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the Contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR Section 5.12(a)(1).

(2). No part of this Agreement shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR Section 5.12(a)(1).

(3). The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. Section 1001.

FLY AMERICA CERTIFICATION

49 U.S.C. Section 40118
41 CFR Part 301-10

The bidder or offeror hereby certifies that it will meet the requirements of 49 U.S.C. 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10.

Date

Signature

Company Name

Title

BUY AMERICA CERTIFICATION

Certification requirement relating to procurement of steel, iron, or manufactured products.

Certificate of Compliance

The Contractor hereby certifies that it will comply with the requirements of Section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations in 49 CFR Part 661.

Date

Contractor Name

Authorized Representative Name _____

Signature

Title

OR

Certificate of Non-Compliance

The Contractor hereby certifies that it cannot comply with the requirements of Section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, but it may qualify for an exception pursuant to Section 165 (b) (2) or (b) (4) of the Surface Transportation Assistance Act of 1982 and regulations in 49 CFR 661.7.

Date

Contractor Name

Authorized Representative Name _____

Signature

Title

NEW RESTRICTIONS ON LOBBYING CERTIFICATION

The Contractor certifies, to the best of his or her knowledge and belief, that:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for making lobbying contacts to an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (3) The Contractor shall require that the language of this certification be included in all Subcontracts, and that all subcontractors shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. Section 1352 (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The Contractor certifies and affirms the truthfulness and accuracy of each statement of this certification and disclosure. In addition, the Contractor understands and agrees that the provisions of 31 U.S.C. Section 3801 et seq., apply to this certification and disclosure.

Date

Contractor Name

Authorized Representative Name _____

Signature

Title

**CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER
RESPONSIBILITY MATTERS**

By signing and submitting its bid or proposal, the bidder or proposer certifies as follows:

- (1) The prospective participant certifies to the best of its knowledge and belief that it and its principals:
 - a. Are not presently debarred, suspended, proposed for disbarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
 - b. Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1) b. of this certification; and
 - d. Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.
- (2) Where the prospective participant is unable to certify to any of the statements in this certification, such prospective primary participant shall attach an explanation to this proposal.

The certification in this clause is a material representation of fact relied upon by the TJPA. If it is later determined that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to the TJPA, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or proposer agrees to comply with the requirements of 49 CFR 29, Subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

Bidder/Offeror Name:

Authorized Representative Name: _____

Authorized Representative Title: _____

Authorized Representative Signature: _____

Date: _____



TRANSBAY JOINT POWERS AUTHORITY

Maria Ayerdi-Kaplan • Executive Director

March 3, 2011

Mr. Andy Ball
Webcor Builders
951 Mariners Island Blvd. 7th Flr
San Mateo, CA 94404

RE: Transbay Transit Center Program
Webcor/Obayashi, JV
Artwork by Tim Hawkinson

Dear Andy:

I am writing to confirm our understanding as to the funding, construction, and installation of the artwork by Tim Hawkinson (the "Hawkinson Artwork"). Subject to the TJPA Board's approval, the Hawkinson Artwork will be a sculpture for the Mission Square area intended to be located in the Northeast corner of the intersection of Mission and Fremont Streets near the main entrance to the new Transbay Transit Center. We thank Webcor/Obayashi, Joint Venture ("W/O") for assisting the TJPA to realize this unique artwork. The sculpture is expected to be approximately 40 feet tall and resemble a human form, made from materials salvaged from the demolition of the old Transbay Terminal. Installation of the Hawkinson Artwork will require construction of a dedicated foundation, structural slab, and base-isolator system (the "Artwork Foundation System").

Should the TJPA Board approve the concept and budget for the Hawkinson Artwork, Mr. Hawkinson will provide the vision, design intent, and conceptual artwork for the piece. The TJPA's Architect of Record, Pelli Clarke Pelli Architects, Inc. ("PCPA"), will provide the plans and specifications for the assembly of the Hawkinson Artwork and the construction of the Artwork Foundation System. The TJPA's demolition contractor, Evans Brothers, Inc. ("EBI"), will provide the salvage work. W/O will provide oversight, management, and construction services under its Construction Management/General Contractor Agreement, Contract No. 08-04-CMGC-000, with the TJPA (the "Contract"), for the assembly and installation of the Hawkinson Artwork.

The TJPA estimates that the assembly and installation of the Hawkinson Artwork will cost approximately \$727,000. This amount includes W/O's fee and costs (\$600,000), and the construction cost of the Artwork Foundation System (estimated at \$127,000). Attached as Schedule A to this letter is a detailed cost estimate for the assembly and installation of the Hawkinson Artwork and the Artwork Foundation System.

Following approval of the Hawkinson Artwork by the TJPA Board, we expect to proceed with W/O as follows:

1. **Generally.** The TJPA will issue a modification under the Contract (the "Hawkinson Change Order"), for W/O to perform the following: (a) manage the construction of the Artwork Foundation System (see paragraph 3, below), and (b) assemble, build, and install the Hawkinson Artwork.

Under the Hawkinson Change Order, the TJPA will pay W/O as follows: (a) \$600,000 (lump sum) for W/O's fee and W/O's cost of assembly and installation of the Hawkinson Artwork; and (b) \$127,000 (estimated allowance) for the Direct Costs for construction of the Artwork Foundation System. The TJPA and W/O further agree as follows:

- The Hawkinson Change Order amount is based on the artistic vision and conceptual design by Mr. Hawkinson, as provided in the Schematic drawings dated July 26, 2010, prepared by Thornton Tomasetti for PCPA.
 - The TJPA shall not be responsible for any direct or indirect costs associated with the assembly and installation of the Hawkinson Artwork, in excess of \$600,000, unless the TJPA directs material changes to the Hawkinson Artwork that result in an actual increase or decrease in the cost of assembly and installation (see Schedule A). In such event, the \$600,000 W/O fee under the Hawkinson Change Order will be adjusted accordingly.
 - The TJPA shall provide W/O with complete plans and specifications for the Hawkinson Artwork and the Artwork Foundation System. W/O shall not be responsible for the design, engineering or permitting of the Hawkinson Artwork or the Artwork Foundation System. Except for construction submittals required or necessitated by the plans and specifications, W/O shall not be responsible for any architectural, technical, electrical or engineering studies, renderings or documents that may be required by regulatory authorities or by building codes.
 - The Hawkinson Change Order amounts (\$727,000, as may be adjusted), shall not be included as part of the Contract Sum when calculating dollar values under the Agreement (Section 00 05 20), Article 5, paragraph 5.01B.
 - The TJPA and W/O intend that the Hawkinson Artwork and the Artwork Foundation System will be constructed during the time that W/O and its Trade Contractors performing the below grade concrete and steel scopes of work are on site and performing the construction work for the Transbay Transit Center Building. W/O shall coordinate, sequence, and schedule such work accordingly.
 - Harvesting, rough shaping, and scanning of the harvested elements for the Hawkinson Artwork shall be performed by others, under separate agreements with the TJPA. Coring and fine cutting necessary for structural assembly of the Hawkinson Artwork shall be performed by W/O and/or its Trade Subcontractors.
 - The costs of procurement of "Jersey Barrier", pre-cast GFRC, or other concrete elements not salvaged from the old Transbay Terminal are currently excluded from the scope and cost of the Hawkinson Change Order. The TJPA does not anticipate the Hawkinson Artwork to include such elements, but if such elements were added, the TJPA would adjust the amount of the Hawkinson Change Order to include the actual documented cost (without markup) of such items.
 - Inspection and testing costs are excluded from the Direct Costs for construction of the Artwork and Artwork Foundation System.
2. **Protection of Salvaged Materials.** As part of W/O's fee (\$600,000), W/O will (a) assist and cooperate in the selection of the material salvaged for the Hawkinson Artwork (salvage work to be performed by EBI under a separate, direct contract with the TJPA) and (b) assist in the storage and protection of the salvaged material by building and/or maintaining a construction fence or barricade around the salvaged material, at Parcel M.
- The materials will be stored on TJPA property, under the possession and control of TJPA, until such time as W/O takes possession and control of Parcel M (or other storage/staging location which is within the Project site, as defined in the Contract Documents).
 - W/O does not warrant or guarantee the condition and stability of the harvested material.

3. **The Artwork Foundation System.** Included in W/O's fee (\$600,000), is the cost of project and construction management services that W/O will provide for the Artwork Foundation System. Such services shall include but not be limited to the incorporation of the Artwork Foundation System work in appropriate Trade Packages and the scheduling, management, and coordination of such work.

- Understanding the budget limitations for the Hawkinson Artwork and the intrinsic value of making the Hawkinson Artwork available to the public, W/O shall make efforts to obtain reduced pricing and/or donated time and/or materials for the work to be performed by its Trade Subcontractors, particularly with a view toward reducing the Direct Costs associated with constructing the Artwork Foundation System.
- The Artwork Foundation System shall be independent of the Transbay Transit Center and Transbay Tower foundation and/or structure.
- The cost of site preparation for the Artwork Foundation System shall be included in the Direct Costs for construction of the Artwork Foundation System.
- The Direct Costs for construction for the Artwork Foundation System shall be considered a Trade Package Direct Cost and invoiced and paid in conformance with the Contract terms and conditions. The TJPA shall be responsible only for actual Direct Costs, currently estimated at \$127,000 (estimated allowance). If the actual Direct Costs for construction of the Artwork Foundation System are more or less than the estimated allowance, the Hawkinson Change Order amount shall be adjusted by further change order to account for the difference between the actual Direct Costs and the allowance amount.

4. **Ownership.** TJPA will own the Hawkinson Artwork and the Artwork Foundation System upon completion of assembly and installation and acceptance by the TJPA.

Please indicate your acceptance of the terms and conditions described above by signing this letter in the space provided below.

Very truly yours,



Maria Ayerdi-Kaplan
Executive Director

APPROVED AND ACCEPTED:
WEBCOR/OBAYASHI J. V.

BY:  _____

BY: _____

Name:  _____

Name: _____

Title:  _____

Title: _____

Schedule A

Funding breakdown for the construction and installation of the **Hawkinson Artwork** and foundation system

Webcor/Obayashi Fee	Lump Sum	\$600,000
Construction of the Artwork Foundation System	Estimated at	\$127,000

Detail for the Tim Hawkinson - Mission Square Foundation

Level: Rough Order of Magnitude

Date: 21-Dec-10

Estimator: E. Sum

Item Description	Amount	Unit	Unit Cost	Subtotal
Slab (20 x 20 x 2)	30	CY	1,000.00	30,000.00
Seismic Isolation Pad Fabrication	4	EA	8,000.00	32,000.00
Seismic Isolation Pad Installation	200	HRS	150.00	30,000.00
Foundation Modifications				
Design	80	HRS	200.00	16,000.00
Reinforced Concrete Beams	9	CY	1,000.00	9,000.00
Tie Downs	4	EA	2,500.00	10,000.00
Total				127,000.00