

STAFF REPORT FOR CALENDAR ITEM NO.: 18
FOR THE MEETING OF: September 8, 2016

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approve an agreement with the Jenny Holzer Studio, LLC related to the commission of an artwork for the Bus Deck level of the Transit Center in an amount not to exceed \$182,000 for the remaining artist fee, where the CMGC budget for fabrication and installation of the artwork is \$740,000; and approve a second amendment to the Intergovernmental Agreement between the TJPA and the San Francisco Arts Commission (“SFAC”).

EXPLANATION:

In 2008 the TJPA established a public art program budget of \$4.75 million, in the spirit of the City and County of San Francisco’s “Percent for Art Ordinance,” and consistent with policies established by the Federal Transportation Authority encouraging the inclusion of art in transportation facilities. In May of that year, the TJPA Board approved an intergovernmental agreement with the San Francisco Arts Commission (“SFAC”) to manage the development and implementation of the TJPA’s public art program (the “Intergovernmental Agreement”) for a maximum compensation of \$950,000 and a term of seven years. In 2015, the TJPA and SFAC amended the Intergovernmental Agreement to extend the term to a maximum of ten years with no change to the maximum compensation.

The TJPA established an art program steering committee (“Steering Committee”) made up of the TJPA Executive Director; Luis R. Cancel, Director of Cultural Affairs of the SFAC; Fred Clarke, Pelli Clarke Pelli Architects; 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.

After an invitational competition, the Steering Committee and SFAC recommended the following five artists to create significant, site specific artworks embedded in the architecture of the Transbay Transit Center -- Jamie Carpenter, Julie Olcott (née Chang), Timothy Hawkinson, Jenny Holzer, and Ned Kahn.

In September 2009, the TJPA Board approved the five recommended artists and authorized Memoranda of Understanding (MOUs) between SFAC and the artists to develop conceptual proposals and artwork budgets. SFAC entered a conceptual proposal MOU with Holzer. In July 2010 and March 2011, the TJPA Board approved the design concepts and budgets for the five artists, including Holzer, and authorized the TJPA to enter commission agreements which each of the artists.

The Holzer artwork is a semi-transparent LED array no less than 11 feet in height and 90 feet in length that will display animated scrolling text and other video content. It will be installed on the interior face of the glass curtain wall inside the Grand Hall at the Bus Deck level of the Transit Center. The text will be works of fiction and possibly non-fiction, selected or composed by the artist, in or about the Bay Area and the west. The artwork will have a significant visual impact and be a focal point for arriving and departing visitors. It is anticipated that this installation will make the Transit Center a destination for art patrons and culture-lovers. This is Holzer's first public art commission in San Francisco.

The budget for the Holzer artwork is \$1,025,000, which is made up of \$25,000 artist honorarium, \$260,000 artist fee, and no more than \$740,000 for design, fabrication, and installation of the artwork. The full amount of the honorarium and \$78,000 of the artist fee has already been paid to Holzer under two previously executed MOUs between the artist, SFAC, and the TJPA. Thus, \$182,000 of artist fee has not yet been paid to the artist.

Holzer is a conceptual artist. As such, she creates the conceptual design for the artwork but does not physically execute the artwork. Thus, the budgeted amount of up to \$740,000 for design, fabrication, and installation of the Holzer artwork is planned to be paid to Kiboworks, Custom LED Technologies for the fabrication and installation of the work through a contract with SFAC and in collaboration with the Holzer Studio. Kiboworks, Custom LED Technologies has a long history of working successfully with the Holzer Studio.

The TJPA anticipated that all five artists would enter a commission agreement with the TJPA in substantially the form presented to the TJPA Board at the July 2010 meeting. That form of agreement is based on a City and County of San Francisco's template artist contract, as modified to meet the needs of the Transbay Project; it was developed in consultation with the City Attorney's office.

In early 2014, Holzer continued to express concerns with the TJPA's form of commission agreement and requested that the parties agree to use Holzer's form of agreement. In an effort to retain this significant artwork for the facility, the TJPA agreed to negotiate based on the artist's preferred form of contract. In February 2016 the parties concluded negotiations of the commission agreement and TJPA staff advanced it for TJPA Board approval in May of 2016. This agenda item was removed due to concerns risen on the then contemplated means of procurement through the CMGC as well as clarity on the responsibilities of the Holzer Studio.

Between May 2016 and August 2016, the TJPA staff addressed the concern relating to procurement of the artwork fabrication. In particular, TJPA staff and SFAC negotiated a second amendment to the Intergovernmental Agreement between the TJPA and SFAC to allow SFAC to contract directly with Kiboworks for the fabrication and installation of the Holzer artwork with

requirements for the Holzer Studio to collaborate with Kiboworks throughout the process being managed and facilitated by SFAC. This procurement approach eliminates multiple subcontracting markups and schedule risk associated with developing the fabrication through Webcor and their subcontractors, albeit may entail more effort and cost for the SFAC broader engagement with the fabrication effort. The form of second amendment to the Intergovernmental Agreement is attached to this report.

The final negotiated form of commission agreement (“Commission Agreement”) is also attached to this report. Highlights of the Commission Agreement include:

- The \$182,000 remaining artist fee would be paid based on milestones; the largest portion of the payment would be made upon execution of the Commission Agreement.
- Holzer would retain sole discretion to select text for the artwork, but the selection must be consistent with Holzer’s 2009 conceptual proposal on which the artwork was selected for the Transit Center and appropriate for a public transportation facility. The artist also would agree to entertain suggestions from the TJPA regarding the text, and consider in good faith any objection by the TJPA that the artist’s proposed text is inconsistent with the requirements of the agreement.
- Although the TJPA would own the artwork once completed and approved by Holzer, in accordance with US copyright law, the artist would retain copyright and other intellectual property rights in the artwork.
- Although the TJPA expects to maintain the electronic and other components of the artwork, and otherwise care for the artwork in a manner befitting the public investment in the artwork and the significant nature of the piece, the artist may deem certain alterations of the artwork, including accidental and unintentional modifications, to comprise the artist’s intention and the integrity of the artwork and destroy the artwork such that it would cease to be a work by Holzer. This language is consistent with similar provisions in the standardized contracts used by the San Francisco Arts Commission.
- Given Holzer’s role as a conceptual artist and because she would not be conducting the technical design, fabrication, or installation of the artwork, the TJPA would be obligated to defend and hold Holzer harmless from claims arising from or in connection with the artwork, except to the extent caused by a breach of the Commission Agreement by the Holzer Studio. Holzer would defend and hold TJPA harmless from claims arising from or in connection with infringement of any copyright as a result of Holzer’s use of text in the artwork.

In its final form of agreement as attached the TJPA staff believe that recent concerns regarding the previously contemplated means of procurement through the CMGC have been fully addressed. The TJPA staff believe the responsibilities of the Holzer Studio have been delineated in the body of the contract to a satisfactory level.

RECOMMENDATION:

Approve a Commission Agreement with the Jenny Holzer Studio, LLC and approve a second amendment to the Intergovernmental Agreement between the TJPA and SFAC, both in substantially the form enclosed, and authorize the Interim Executive Director to take such other actions as are reasonably necessary to implement the terms of the agreements.

ENCLOSURES:

1. Resolution
2. Commission Agreement
3. Second Amendment to Intergovernmental Agreement

**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, reflecting the civic importance of buildings, improving the quality of life in the community, and adding value to the user's experience of a public transportation system; and

WHEREAS, The TJPA has approved the development of a \$4.75 million 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, In May 2008, the TJPA Board approved an intergovernmental agreement with the San Francisco Arts Commission (SFAC) to manage the development and implementation of the TJPA's public art program, which has been once amended; and

WHEREAS, In September 2009, based on recommendation from the TJPA's public art steering committee and SFAC, the TJPA Board of Directors approved the selection of James Carpenter, Julie Olcott (née Chang), Timothy Hawkinson, Jenny Holzer, and Ned Kahn as five signature artists for the Program, and authorized Memoranda of Understanding (MOUs) between SFAC and the artists to develop conceptual proposals and artwork budgets; and

WHEREAS, In July 2010 and March 2011, the TJPA Board of Directors approved the design concepts and budgets for the five artists, including Jenny Holzer, and authorized the TJPA to enter commission agreements with each of the artists; and

WHEREAS, The budget for the Jenny Holzer artwork is \$1,025,000, which is made up of \$25,000 artist honorarium, \$260,000 artist fee, and no more than \$740,000 for design, fabrication, and installation of the artwork. To date, the full amount of the artist honorarium and \$78,000 of the artist fee have been incurred; and

WHEREAS, The Jenny Holzer Studio, LLC has approved a form of agreement related to the commission of an artwork made up of a semi-transparent LED array that will display animated

scrolling text and video content installed on the interior face of the glass curtain wall inside the Grand Hall at the Bus Deck level of the Transit Center (“Artwork”); and

WHEREAS, The TJPA and SFAC have negotiated a second amendment to the Intergovernmental Agreement to allow SFAC to contract directly for the fabrication and installation of the Holzer artwork with requirements for the Holzer Studio to collaborate with Kiboworks throughout the process being managed and facilitated by the SFAC; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Interim Executive Director to (1) enter into a Commission Agreement with the Jenny Holzer Studio, LLC, in substantially the form enclosed herewith, related to the commission of the Artwork in an amount not to exceed \$182,000 for the remaining artist fee, where the TJPA budget for fabrication and installation of the Artwork is \$740,000, (2) enter into a second amendment to the Intergovernmental Agreement with SFAC to allow SFAC to contract directly for the fabrication and installation of the Holzer artwork, and (3) to take such other actions as are reasonably necessary to implement the terms of the agreements.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 8, 2016.

Secretary, Transbay Joint Powers Authority

JENNY HOLZER STUDIO, LLC

AGREEMENT

This agreement (the "Agreement") is made and entered into on September 2, 2016, by and between Jenny Holzer Studio, LLC (the "Studio"), Hoosick Falls, New York, and the Transbay Joint Powers Authority (the "Client"), San Francisco, California. For good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, the Studio and the Client hereby agree as follows:

RECITALS

A. On October 20, 2009, the Studio and the San Francisco Arts Commission ("Arts Commission") entered into a memorandum of understanding for the development and submission of preliminary design, budget, and presentation ("Conceptual Proposal MOU") for the Artwork (defined below). Under the Conceptual Proposal MOU, the Studio submitted a preliminary design and budget for the Artwork and received a \$25,000 honorarium.

B. On June 21, 2012, the Studio and the Client entered into a Memorandum of Understanding for the Studio to: perform certain work related to developing the Artwork design; provide support for Pelli Clarke Pelli Architects' development of schematic designs and Pelli Clarke Pelli Architects' technical and mechanical specifications/requirements for the Artwork; and provide support for bidding by and selection of a contractor to prepare final construction drawings, and fabricate and install the Artwork ("Phase 1 Services MOU"). The Phase 1 Services MOU provides for a \$104,000 payment from the Client to the Studio. The Studio hereby acknowledges receipt of \$78,000 of the foregoing payment, and the parties hereto acknowledge and agree that the remaining \$26,000 of such payment shall be paid to the Studio in accordance with the terms below.

C. The Client's budget for the design, fabrication, and installation of the Artwork is \$740,000, exclusive of the foregoing honorarium and fees in connection with the Phase 1 Services MOU and the Studio's Fee, as defined below. Although either party may engage in fundraising efforts to attract donations to attempt to enhance the project budget, at the time of execution of this Agreement, the parties hereto acknowledge that any such additional funds are not currently available and the parties agree and acknowledge that this is the maximum authorized budget amount.

§1 GENERAL

1.1 The Client agrees that the Artwork by Jenny Holzer (the "Artist") being commissioned by the Client and currently entitled [JH1838.u] (title TBD) is a presentation of text written and/or chosen solely by the Artist (the "Text") (as more fully described in §4.1) on electronic LED elements (the Text and LED elements are collectively referred to herein as the "Artwork") to be installed on the Client's Bus Deck level of the Transbay Transit Center (the "Site"). The Artwork is to be installed, constructed, and applied to the Site in accordance with the specific instructions and approval of the Studio (as more fully described in §5). The Client understands and agrees that the Artwork is site-specific, that the Artwork incorporates the Site as an integral part of the Artwork and an inseparable part of the Artwork, and that any Alteration (defined below) of the Artwork or any display of the Artwork other than as set forth herein would (a) be a violation of this Agreement, and (b) compromise the Artist's intentions and the integrity of the Artwork and would destroy the Artwork such that it would cease to be a work by the Artist. In the unlikely event of Alteration, the Studio and the Artist shall be entitled to the remedies set forth in §11.6.

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For purposes of this Agreement, the term "Alter" or "Alteration" shall mean any alteration of the Artwork as determined by the Artist at her sole, reasonable and good faith discretion, including any distortion, mutilation, alteration or other modification of the Artwork or any destruction (whether accidental, unintentional, intentional or grossly negligent) of the Artwork.

- 1.2 The Client acknowledges that the Artist is acting as a conceptual artist and her role in the production of the Artwork is to create the Conceptual Design (as described in Appendix [A] attached hereto and made part hereof), which Conceptual Design is executed physically by fabricators, technicians and other experts. The Client further acknowledges that neither the Artist nor the Studio is responsible for the physical realization of the Artwork and that neither has any liability therefor. The parties hereto acknowledge and agree that the execution of the Artist's Conceptual Design will be effected by persons engaged by the Client, in accordance with the terms of this Agreement, and the Client is to bear any and all costs of the realization and execution of the Artwork, as well as site preparation, crating, shipping, insurance, and installation of the Artwork (as more fully described in §5). For the avoidance of doubt, the Studio shall not be responsible for any architectural, technical, electrical or engineering studies, renderings or documents of any sort that may be required by authorities, by building codes or by contractors that the Client may engage for the site preparation and the installation; provided, however, that the Studio reserves the right to review all such documents prepared by such contractors or others to ensure that any construction and installation arrangements conform to the Conceptual Design provided by the Studio (as more fully described in §5). Except as expressly set forth herein, the Studio shall have at least ten (10) business days from the Studio's receipt of written request to respond to any items or matters submitted for review or approval hereunder or otherwise.
- 1.3 The Client agrees that the Artwork cannot be considered a work of art until the Studio has inspected it and deemed it to comply with the Artist's Conceptual Design. No Alteration to the Artwork may be made without the advance written permission of the Studio in each instance. The Client further agrees that the Text and the LED elements are the constituent parts of the work that together make up the Artwork, that no one element constitutes the Artwork, and that no one element of the Artwork can be separated from the Artwork and sold or exhibited separately.
- 1.4 The Client shall engage and compensate project coordinators (the "Coordinators") whose names and contact information will be supplied to the Studio. The Coordinators shall act as liaisons between the Studio, the Client, Pelli Clarke Pelli Architects, the Arts Commission, and the Fabricator (as defined below). In cooperation with the Studio, the Coordinators shall see that the LED elements are fabricated and installed and that the Artwork is realized according to the Studio's instructions and specifications for the Conceptual Design (as more fully described in §5). The Coordinators shall supervise and examine the installation of the LED elements to be certain that dimensions, construction and general workmanship are of excellent quality and done according to the agreed specifications and plans for the Conceptual Design provided by the Studio (as more fully described in §5). The Coordinators shall meaningfully consult with the Studio on all decisions, and shall send the Studio written reports, and when appropriate, photographs of the work in progress.

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§2 REPRESENTATIONS AND WARRANTIES OF THE STUDIO

- 2.1 The Studio represents and warrants that the Artwork will be original, a unique edition of one, and the result of the artistic efforts of the Artist, and that so long as the Client complies with the terms and conditions of this Agreement and causes the Artwork to be fabricated and installed according to plans and specifications for the Conceptual Design approved by the Studio (as more fully described in §5), and that the Artwork functions as conceived, the Studio shall promptly approve the Artwork upon completion of successful installation and receipt of the final payment provided for in §9.
- 2.2 The Studio represents and warrants that the Artist is the sole author of the Artwork; that, except with respect to any Text incorporated in the Artwork that is owned by third parties, the Artist is the sole owner of any and all copyrights pertaining to the Artwork, and the Studio, to the best of its knowledge, has secured all necessary permissions for the use of Text or other content in the Artwork that is not created by the Artist.

§3 OWNERSHIP

- 3.1 Upon approval of the Artwork by the Studio (as described in §2) and receipt of final payment under §9.1, the Artwork shall become the property of the Client, subject at all times to the terms herein and to the Artist's copyright in and to the Artwork. Except as otherwise provided or limited under this Agreement, the Artist possesses and will at all times possess all copyright, droit moral, and other rights of intellectual property in, and derived from, the Artwork, and to each component part thereof. Subject to the terms herein, the Studio grants the Client a one-time limited and exclusive right and license to design, fabricate, install, and program the Artwork, consistent with the terms of this Agreement, and to enter into any corresponding sublicense(s) with the Client's contractors (which may include the Arts Commission and its subcontractors) as necessary to achieve same, consistent with the terms of this Agreement. Accordingly, as a condition to the Client's requirement to engage any third party to perform services in connection with the realization of the Artwork (including, without limitation, the Fabricator [as defined below]), the Client and any contractors shall (and shall cause any of its contractors to) include in its (or their) agreements standard work-for-hire provisions for the express benefit of the Studio and any other related provisions reasonably requested by the Studio. Such provisions will be subject to the prior written approval of the Studio prior to the Client's or any contractor's entering into such agreements.
- 3.2 Subject to the terms herein, the Studio grants the Client a limited, perpetual, non-exclusive right and license to photograph, film or video the Artwork and to print images, catalogues, brochures and press releases (in any media) about the Artwork for archival, educational, and noncommercial purposes only, provided that the following terms are met:
 - a. The Client shall adhere to any copyright notice and/or caption requirements communicated by the Studio to the Client.
 - b. Jenny Holzer is named as the creator of the Artwork and owner of every copyright, with the exception of any Text incorporated into the Artwork that is owned by third parties, in all publications and for all reproductions related to the Artwork. Artists Rights Society (ARS) in New York shall be informed of each usage and the following credit line shall be used:

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[insert title] © [insert date of creation] Jenny Holzer, member Artists Rights Society (ARS), NY.

- c. To the extent any images focused primarily on the Artwork may be utilized by the Client hereunder, any image of the Artwork must be reproduced in its entirety, except for minor cropping, and may not be distorted, morphed, or manipulated in any way, including, but not limited to, the superimposing of anything, such as lettering or logos, on or around the image of the Artwork, without the advance written permission of the Studio in each instance.
- d. The Client shall provide the Studio (or cause the Studio to be provided) with two gratis copies of each photograph, video, catalogue, brochure, press release, or any other printed matter focused primarily on the Artwork generated by the Client for the Studio's archives.
- e. Notwithstanding the above, nothing in this Agreement shall prohibit the Client from creating or using photographs of the Transbay Transit Center that may incidentally or inadvertently include portions of the Artwork, but whose focus is not primarily on the Artwork, or that otherwise, constitute a fair use under federal copyright law. The Client is also authorized to take images of the Artwork needed to record the condition of the Artwork for ongoing maintenance purposes or required notices under this Agreement.
- f. Where captions and/or credits are possible, the Studio hereby agrees that all references to the Artwork and any reproductions of the Artwork made by the Studio in any form shall include the following credit: "Collection of the Transbay Joint Powers Authority (TJPA) — San Francisco, California."

- 3.3 All preliminary embodiments of the Artist's concepts, whether produced by the Studio or others, shall remain the property of the Studio and shall be returned to the Studio as soon as possible after such embodiments are used to create the Artwork. No physical embodiment of the Artwork, or any documentation thereof, may be sold, licensed and/or transferred.

§4 TEXT

- 4.1 The Artist agrees to select Text that is consistent with the 2009 Conceptual Proposal for the Artwork and, in the Artist's reasonable judgment and to the best of the Artist's knowledge, appropriate for a public transportation facility (e.g., to the best of the Artist's knowledge the Text shall not concern a current political campaign; not be libelous, slanderous, or defamatory; not advocate or promote the use of illegal goods or services, or unlawful conduct; not infringe on any copyright, trademark, or other protected intellectual property; not demean or disparage an individual or group; and not contain, imply, or declare an endorsement by the Client), and to entertain suggestions from the Client on the selection of Text. In the event that the Client reasonably believes that the Text is inconsistent with the above criteria, the Artist will consider in good faith making edits to the Text to address the Client's concerns; provided, however, that all final decisions on the Text shall be made by the Artist at her sole discretion.

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- 4.2 The Text, once chosen by the Artist and included in the Artwork, may not be deleted, shortened, lengthened or modified in any way without advance written permission from the Studio in each instance, which may be given or withheld at the Studio's sole and absolute discretion.
- 4.3 The Studio shall be responsible for obtaining, at the Studio's costs, any rights necessary to include the Text in the Artwork, including the right to reproduce the Text within the Artwork for the purposes allowed under §3.2. The Studio shall provide the Client and the Arts Commission copies of all agreements granting such rights. Upon the Client's request, the Studio shall provide the Client a printout of all Text to be included in the Artwork.

§5 LED ELEMENTS: FABRICATION, SHIPPING, INSTALLATION

- 5.1 The Client shall cause the Arts Commission to enter into a separate agreement with KiboWorks (or a mutually approved replacement therefor) (the "Fabricator") which shall be responsible for the design, fabrication, installation, and delivery of the LED elements of the Artwork according to the Studio's Conceptual Design specifications at the Client's sole cost and expense, all on a work-for-hire basis for the express benefit of the Studio. The Client's agreement with the Arts Commission, and the Arts Commission's corresponding agreement with the Fabricator shall be consistent with the terms of this Agreement and shall require that the Artwork be consistent with the final design phases, including but not limited to the final technical specifications.

The Client's agreement with the Arts Commission, and the Arts Commission's corresponding agreement with the Fabricator shall include the following terms: (a) prohibition on the Fabricator's use of work produced under the agreement for any other project that is substantially similar to the scope of work under the agreement without the Artist's consent, (b) acknowledgment of the Artist's ownership and intellectual property rights as specified in Section 3.1, and (c) prohibition on the Fabricator's photography of the Artwork and elements thereof except for incidental or inadvertent inclusion of portions of the Artwork where the focus is not primarily on the Artwork, consistent with Section 3.2.

The Studio shall consult with the Client, the Arts Commission, and the Fabricator to ensure that the Fabricator's work comports with the Artist's Conceptual Design, but the Studio shall not be responsible for the performance of the Fabricator's work or its conformity with the Artist's Conceptual Design. In the event that the Client or the Arts Commission becomes aware that any work does not comport with the Artist's Conceptual Design, the Client shall promptly notify the Studio in writing. In the event that the Studio becomes aware that any work does not comport with the Artist's Conceptual Design, the Studio shall promptly notify the Client in writing.

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The Client and the Arts Commission have the right to negotiate any and all terms of their agreements with each other and with the Fabricator at their sole discretion so long as such terms are consistent with the terms of this Agreement and such agreements require that the Artwork shall be consistent with final design phases, including but not limited to the final technical specifications.

- 5.2 The Client has exclusive jurisdiction over the Site and shall be responsible for any and all preparation of the Site, including permits, labor and materials, required for the installation of the LED elements. The Client acknowledges that such Site preparations may include, but are not limited to, installing and routing power from an electrical service to the display location, providing a secure climate-controlled location for the LED elements' control computer, and installing and routing specified data cables from the control computer to the display location. Further, the Client is responsible for the preparation of all technical, engineering, or architectural studies, renderings or documents that may be required by authorities, by building codes or by contractors that the Client might engage for the construction and installation of the LED elements. Nevertheless, the Studio shall review and, if necessary, comment on such documents prepared by architects, engineers, contractors or others to ensure that any construction and installation arrangements conform to the Artist's Conceptual Design. The parties acknowledge that the Studio shall not be required to review them for their technical or legal sufficiency. The Client acknowledges that the Studio is not 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 Conceptual Design. The Studio shall have no responsibility for the accuracy, quality, or fitness of the work to be performed from such documents.
- 5.3 The Client shall be responsible for the installation of the completed LED elements, coordinating its efforts with instructions from the Studio (subject to §1.2 and §8.2) and the Fabricator. All labor, equipment, materials, services, transport, insurance, and supervision required for the aforementioned tasks shall be the sole responsibility of the Client at its expense. The Client shall ensure all LED elements are outfitted with proper surge protection and the Client shall provide the Studio with written confirmation in detail upon such requirement having been fulfilled.
- 5.4 The Client shall provide the Studio with a detailed final cost run of all costs and expenses incurred in connection with the realization of the Artwork.

§6 MAINTENANCE

- 6.1 The Client recognizes that proper inspection, maintenance and care of the Artwork on a regular basis are essential to the integrity of the Artwork, and the Client agrees to conduct regular visual inspections of the Artwork. The Client shall assure that the Artwork is properly maintained and protected in accordance with the Maintenance Guidelines (defined below), taking into account any maintenance instructions that may be provided by the Studio and/or the Fabricator, and the Client shall protect and maintain the Artwork over its lifespan in accordance with the Maintenance Guidelines, against the ravages of time, vandalism, and the elements as reasonably practicable. The parties agree that temporary disruptions of the Text or LED elements in order to facilitate maintenance, conservation, preservation, or repairs, or when the Transbay Transit Center is closed to the public, or as a result of a

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force majeure event, or as part of Client facility systems maintenance and repair efforts, shall not constitute a material breach of this Agreement. The Client shall also notify the Studio of any proposed alteration of the Site that would affect the intended character and appearance of the Artwork and shall consult with the Studio in the planning and execution of any such alteration. No alterations to the Artwork may be made without the advance written permission of the Studio in each instance. In connection with the foregoing obligations, the Client shall engage (or shall cause the Arts Commission to engage) the Fabricator to produce a document including guidelines for maintaining the Artwork ("Maintenance Guidelines"), which will form part of the agreement with the Fabricator and shall (for the avoidance of doubt) be subject to the prior written approval of the Studio. The Studio will be reasonably available at the Client's request to review and advise as to any such Maintenance Guidelines, it being acknowledged and agreed that the Studio will review such document solely to advise, to the extent discernible by a layperson, that such Maintenance Guidelines clearly instruct the Client as to how to maintain the Artwork. Notwithstanding anything to the contrary herein, the Studio shall have no responsibility for the accuracy, quality and/or fitness of the Maintenance Guidelines.

- 6.2 The Client, having expended considerable public funds to commission the Artwork, intends to display the Artwork at the Site as originally created by Artist, maintain the Artwork in good condition, and repair the Artwork as needed. It is the Client's responsibility to ensure the integrity of the Artwork while on its Site by conducting weekly condition inspections. If the condition of LED elements and/or the Site changes or becomes damaged at any point, the Client must notify the Studio within ten (10) days about the nature and extent of the condition changes or damages. Should it become necessary to repair or restore the LED elements other than as described in the Maintenance Guidelines, and/or there are material changes or damage to the Site, the Client must do so in consultation with the Studio and in accordance with the Studio's and/or the Fabricator's instructions. The Client acknowledges that failure to repair or restore the LED elements, material changes or damage to the Site and/or failure to maintain the Artwork in accordance with the Maintenance Guidelines may cause the Artwork to cease to be a work of art, as defined by the Studio. For the avoidance of doubt, the Artwork is considered to adhere to the Artist's concept when it is functioning (both visually and electronically) and is structurally intact as it was on the day the Studio provided final approval of the Artwork. It is expressly agreed that to the extent the Client elects not to repair or restore the LED elements and/or maintain the Artwork (as applicable) within a reasonable time, or to the extent the Client otherwise elects at its sole discretion not to display the Artwork for any reason, the Client promptly shall, in the Studio's sole and reasonable discretion, either remove the Artwork from the Site or shut the LED elements off. In the event of removal the Artwork may not be displayed again except in the manner and position in which it was previously installed and displayed and as approved by the Studio. For the avoidance of doubt, neither the Studio nor the Artist is responsible for repair and maintenance and shall bear no costs thereof.

§7 DOCUMENTATION

- 7.1 The Client shall hire a professional photographer and a professional videographer to record images of the realized Artwork. The Client shall require both the hired photographer and videographer to sign work-for-hire agreements, provided by the Studio for the express benefit of the Studio. The masters of the recorded images shall be given to the Studio at no cost to the Studio. All rights in and to this

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documentation, including copyright, shall belong to the Artist and not to the Client, the photographer, the videographer or any other person, and, to the extent required to accomplish the same, shall be transferred to the Artist at no cost to her. The Studio shall caption a final set of photographic and videographic documentation. The Client may copy and use this final set of documentation provided by the Studio for archival, educational, and noncommercial purposes only, subject to the restrictions set forth in §3.2.

- 7.2 The Artwork shall be photographed using the highest-resolution digital SLR camera available (a 39-Megapixel Hasselblad is preferred; a 22-Megapixel Canon 5D Mark III or Nikon D800 is also acceptable). The Studio shall receive at least twenty (20) images in both digital raw format and as retouched PSD files. PSD files should be exported at full size at 300 dpi. A raw file and its corresponding PSD should carry the same file name. The photography shall show the Artwork from a variety of vantage points, include wide angle, middle-distance, and close-up. The files shall be saved to an external hard drive or USB flash drive(s) and delivered to the Studio at no cost to the Studio. All physical materials will become the sole ownership of the Studio.

The professional videography shall be made using a Broadcast Quality Uncompressed HD camera (a Sony EX1, EX3, Panasonic HVX200 or equivalent is preferred; a Canon 5D Mark III is also acceptable), at 1080/60i. Some adjustments may be required in order to match the refresh rate of the sign in order to minimize visual interference. The camera shall be equipped with a standard HD Wide Angle Lens and mounted on a tripod with a fluid head. The videography shall show the Artwork from a variety of vantage points, with and without people, including wide angle, middle distance, and close-up. The footage should include at least 2-3 static shots of the Artwork, from various wide angles, each for a duration of 10-15 minutes, showing multiple effects and texts. At least 60 minutes of footage is required in a digital raw format, plus an edit of approximately 3-5 minutes showing the Artwork from a variety of vantage points.

Following the shoot, all footage shall be delivered to the Studio at no cost to the Studio in an uncompressed, raw format on external hard drives or USB flash drives. All physical materials will become the sole ownership of Jenny Holzer Studio.

§8 INDEMNITY/WARRANTY

- 8.1 The Client hereby releases, and shall cause the Arts Commission to release, the Studio, the Artist and their respective heirs and assigns (the "Released Parties") from any and all claims and hereby agrees to defend and hold the Released Parties harmless from any and all liability, claims, damages, suits, proceedings, and expenses (including, without limitation, reasonable attorney's fees and costs) that may arise from or in connection with the Artwork and/or any obligations of the Client hereunder, or with the use of the Text, the realization, fabrication, delivery, site preparation, installation, maintenance, or continued presence of the Artwork, unless caused by a breach of this Agreement by the Studio.
- 8.2 The Studio, on behalf of itself and the Artist, hereby agrees to defend and hold the Client and the Arts Commission harmless from any and all liability, third party claims, damages, suits, proceedings, and out-of-pocket expenses (including, without limitation, reasonable attorney's fees and costs) that may arise from or in connection with the infringement of any copyright of any person or persons in consequence of the use of the Text in the Artwork, unless caused by a breach of this Agreement by the Client or the Arts Commission.

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- 8.3 It is expressly understood and agreed that neither the Studio nor the Artist shall be responsible for the safety precautions or for claims on the part of any persons or claims of any kind arising from or in any way connected to the realization, site preparation, fabrication, delivery, installation, maintenance, or the continued presence of the Artwork, including, without limitation, claims for personal injury, property damage, workers' compensation, or employment taxes. Notwithstanding anything to the contrary herein, it is understood that neither the Studio nor the Artist is responsible for the acts or omissions of any contractor, subcontractor, or any other persons performing any tasks required to realize, fabricate, install and maintain the Artwork, or the failure of any of them to carry out the provisions of their respective contracts.

§9 COMPENSATION

- 9.1 The Client shall pay the Studio the remaining amount payable under the Phase 1 Services MOU (i.e., \$26,000) and the Client shall pay the Studio a remaining fee of \$156,000 (comprising a total fee to the Artist in the amount of \$260,000, including the portion of fees previously paid under the Phase 1 Services MOU [the "Fee"]), net of all taxes, deductions or withholding of any kind, in consideration for the Artist's Conceptual Design and Text selection, the Studio's project coordination and consultation, accounting and legal fees, text preparation and proofing fees, professional consultant fees, content creation, and travel and lodging for the Artist and a studio assistant. The remaining Fee will be paid according to the following schedule:
- a. \$109,500 immediately upon execution of this Agreement. The obligations of the Studio shall not arise, and no work on this project will be required to be undertaken by the Studio, unless and until payment provided for in this §9.1a has been received by the Studio;
 - b. \$45,500 due upon the Studio's approval of a price proposal from the Fabricator for the design, fabrication, installation, and delivery of the LED elements of the Artwork that conforms with the Client's budget for the Artwork or is otherwise approved by the Client consistent with §5.1.
 - c. \$15,500 due upon presentation of the final Text selection, consistent with §4.
 - d. \$6,500 due upon the Studio's approval of fabrication and installation of the LED elements.
 - e. \$5,000 due upon the Studio's representation that it approves the Artwork upon the Studio's receipt of final payment.

The Fee is based on the parties' reasonable assumptions about the level of effort required of the Studio for each task. In the event that the Client requests, for reasons that are not related to any fault of the Studio, that the Studio materially increase or expand the Studio's level of effort ("Extraordinary Effort") which materially increases the Studio's actual expense ("Extraordinary Expense"), the Studio shall be entitled to reimbursement from the Client for such actual Extraordinary Expense. Prior to undertaking

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any Extraordinary Effort or incurring any Extraordinary Expense, however, the Studio must provide written notice to the Client of the anticipated Extraordinary Effort and estimated Extraordinary Expense and the Client must provide written authorization. For the avoidance of doubt, the Studio shall not be obligated to undertake any Extraordinary Effort for any reason whatsoever, and the Studio agrees not to undertake any Extraordinary Effort without first receiving written notice of the Client's request to do so. The Client agrees that if the Extraordinary Effort is approved, the Studio will be entitled to additional compensation for such additional work and expenses, to be billed on an hourly basis at USD\$250.00 per hour, subject to change, and billed to the Client monthly in statements detailing the Studio's time charges along with corresponding invoices for the amounts due.

- 9.2 Payment is due immediately upon receipt of an invoice from the Studio and is to be made by automated clearing house electronic funds transfer according to the instructions given on the invoice. Any and all wire transfer fees are the responsibility of the Client. If invoices are unpaid after 45 days of issue, the Studio will advise the Client of the delinquency in writing. If any invoice remains unpaid after 45 days of its issue, the Studio reserves all of its available rights and remedies, including, without limitation, declaring all amounts outstanding due and owing and stopping all work in connection with the Artwork until all due amounts are paid in full. Any cost or expense arising in connection with the Artwork or otherwise occasioned by the Client's delay in effectuating the foregoing payments shall be borne solely by the Client.
- 9.3 In the event that the Client determines at any point not to proceed with the physical realization of the Artwork, then, without in any way limiting any other rights or remedies the Studio may have: (i) the Studio shall retain all compensation theretofore paid and (ii) the Studio shall have no further obligation to the Client with respect to the Artwork.

§10 NOTICES

- 10.1 All notices and requests made to the Studio or approval rights to be exercised by the Studio as specified in this Agreement shall be in writing, and shall be delivered to 80 Hewitts Road, Hoosick Falls, New York 12090, USA, E-mail: erik@jennyholzer.com, with a copy to Frankfurt Kurnit Klein & Selz, 488 Madison Avenue, New York, NY 10022, Attn: Iddo I. Arad, E-mail: iarad@fkks.com, until the Client is notified otherwise in writing. Notices shall be delivered by a recognized expedited delivery service that provides proof of delivery. The parties agree that where any notice must be delivered to the Studio and/or the Artist, the Hoosick Falls address shall serve as the official address for both the Studio and the Artist. A copy of any such notice shall also be sent by email to the email addresses specified above.
- 10.2 All notices and requests from the Studio to the Client or any approval rights to be exercised by the Client as specified in this Agreement shall be in writing, and shall be delivered to Transbay Joint Powers Authority, Attn: Executive Director, 201 Mission Street, Suite 2100, San Francisco, California, 94105, with a copy to Shute, Mihaly & Weinberger LLP, Attn: Deborah Miller, 396 Hayes Street, San Francisco, California, 94102, until the Studio is notified otherwise in writing. Notices shall be delivered by a recognized expedited delivery service that provides proof of delivery.

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§11 MISCELLANEOUS

- 11.1 Modifications and/or supplements to this Agreement are only valid if made in writing, signed by both parties and expressly designated as such. In case any term of this Agreement is held invalid, illegal or unenforceable in whole or in part, neither the validity of the remaining part of such term, nor the validity of any other term of this Agreement, will in any way be affected thereby.
- 11.2 This Agreement contains the entire understanding among the parties hereto and supersedes any prior understanding and agreements (including any oral agreements) among them regarding the subject matter hereof, including, without limitation, the Conceptual Proposal MOU and the Phase 1 Services MOU.
- 11.3 The failure of a party hereto to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.
- 11.4 A breach by the Client of any of the provisions hereof will cause the Studio permanent and irreparable injury and damage. The Client expressly agrees that the Studio shall be entitled to specific performance, injunctive, and other equitable relief in the event of, or to prevent, a breach of any term of this agreement by the Client. Resort to such equitable relief, however, shall not be construed to be a waiver of any other rights or remedies which the non-breaching party may have for damages or otherwise. In the event of an alleged breach of this Agreement, the non-breaching party shall provide the other party with written notice and a 30 calendar day period (or, in the event of an Alteration or a monetary breach, a 10 calendar day period) in which to cure the alleged breach prior to being entitled to exercise any of the remedies herein (the "Notice and Cure Period").
- 11.5 The parties shall seek to settle disputes amicably. This Agreement shall be governed by and construed in accordance with the laws of the State of California, without giving effect to its conflict of law rules. The parties hereby irrevocably consent to the jurisdiction of the California State or United States Federal courts located in San Francisco for all purposes in connection with any action relating to this Agreement and agree that any action instituted by a party under this Agreement shall be brought only in such courts. The parties agree that service of process in connection with any action relating to this Agreement shall be deemed sufficient and proper if made by the mailing of copies thereof by certified mail, return receipt requested, to the appropriate party's address set forth above. Service by certified mail as provided above shall be deemed complete five (5) days after the date of mailing. The foregoing shall not limit either party's right to serve process in any other manner permitted by law.
- 11.6 If the Client or any subsequent owner of the Artwork Alters or displays the Artwork in violation of the terms of this Agreement, then the Studio and the Artist shall be entitled to the following exclusive remedies:
- (a) In addition to all the Studio's and Artist's rights and remedies, the Studio and the Artist retain the right to disclaim authorship of the Artwork in accordance with California Civil Code §987(d) and 17 U.S.C. §106A(a)(2). In addition, in such event, the Artwork shall no longer be a Jenny Holzer artwork and Jenny Holzer's name may not be used by the Client in connection therewith;

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(b) The Studio retains the right to require the Client to remove the Artwork from the Site at the Client's expense; and,

(c) The Artist retains the 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 the 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 the Client. As owner of the Artwork, the Client may pursue claims against third parties for damages or to restore the Artwork.

- 11.7 The Client shall require any subsequent purchaser, donee, or transferee of the Artwork or (if the Artwork remains with the Site) the Site to agree in writing to be bound by all of the terms of this Agreement for the express benefit of the Studio and the Artist and their respective heirs, successors, legal representatives, and assigns and shall promptly deliver a signed original of such agreement to the Studio.
- 11.8 The Artist shall be a third party beneficiary of this Agreement, entitled to the protections provided to the Artist and the Studio in this Agreement, and empowered to enforce the terms and conditions of this Agreement against the Client as if the Artist were a signatory hereto.
- 11.9 The parties agree to comply with all applicable federal, state, or local laws in the performance of this Agreement, including, but not limited to, the provisions described in Appendix [B] attached hereto.
- 11.10 The Client shall have the option, at its sole discretion, to terminate this Agreement, at any time during the term hereof, for convenience and without cause. The Client shall exercise this option by giving the Studio written notice of termination. The notice shall specify the date on which termination shall become effective. Immediately upon any such termination, this Agreement shall automatically terminate and the Artwork shall be the sole and exclusive property of the Studio and all rights licensed herein shall automatically revert to the Studio and Artist, and the Studio shall be entitled to retain all compensation theretofore paid and shall have no further obligation to the Client with respect to the Artwork.

[SIGNATURE PAGE FOLLOWS]

JENNY HOLZER STUDIO, LLC

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THE AGREEMENT, IF THIS AGREEMENT IS NOT FULLY EXECUTED BY ALL PARTIES HERETO ON OR BEFORE OCTOBER 7, 2016, THEN THIS AGREEMENT (INCLUDING ANY PARTIALLY EXECUTED COPIES OF THIS AGREEMENT) SHALL AUTOMATICALLY TERMINATE, BE OF NO FURTHER FORCE AND EFFECT, AND FOR THE AVOIDANCE OF DOUBT, WILL NOT BE BINDING ON ANY PARTY HERETO THAT MAY HAVE PARTIALLY EXECUTED THIS AGREEMENT PRIOR TO THE FULL EXECUTION HEREOF BY SUCH DATE.

ACCEPTED AND AGREED:

TRANSBAY JOINT POWERS AUTHORITY
(the "Client")

By: _____

Maria Ayerdi-Kaplan

Its: Executive Director

JENNY HOLZER STUDIO, LLC
(the "Studio")

By:  _____

Its: Operating Officer

APPROVED AS TO FORM:

By: _____

Deborah L. Miller
Shute, Mihaly & Weinberger LLP

JENNY HOLZER STUDIO, LLC

APPENDIX [A]

CONCEPTUAL DESIGN

APPENDIX [A]

CONCEPT DESCRIPTION

Overview

The Artwork is a semi-transparent LED array no less than 11 feet in height and no less than 90 feet in length that will display animated scrolling text and other video content. It will be installed on the interior face of the U-shaped, outward-sloping glass curtain wall (W-4) inside the Grand Hall of the Transbay Transit Center, located at First and Mission streets in San Francisco, California. Once the Artwork is installed, it is not to be repositioned or installed at a different site.

The LED array will be composed of thin vertical aluminum extrusions populated with white or RGB diodes. These LED bars will be mounted to a lightweight aluminum frame with a minimalist design. The LED bars and the support frame must be perfectly aligned and uniform to preclude any distortions to the text or video content. The mounting method and support structure for the array must not feature prominent hardware.

The LED bars should be double-sided so that both front and back faces illuminate and content is visible from within the Grand Hall and from the Bus Deck level of the building. The front and back faces need not be separately addressable—the illumination on one face can be achieved via light pipes or another reflective device, provided that it is of a minimal, elegant design.

The pixel resolution must be tight enough to allow legibility from a distance of 4 feet: 2 inches horizontal and 1 inch vertical. The character height of the text that will be displayed will range from 1 foot to 11 feet in height. The screen cannot be solid; it must be semi-transparent with space between elements.

Content

The text that will be displayed on the LED artwork will be works of fiction and possibly non-fiction composed in or about the Bay Area and about the west. The text will be displayed on the screen combined and/or in conjunction with a variety of visual effects. The effects will include abstract background animations that move smoothly behind the scrolling text. The letters themselves might also pulse, dissolve, or morph as they scroll across the screen.

LED Wall Materials, Support Structure, and Finish

Jenny Holzer will determine colors and finishes of all materials to be used in the artwork (e.g. LED board colors, paint color(s) for the extrusions and support frame, among others), and the final components must be uniform in finish and color with no perceptible scratches, abrasions, losses, or inconsistencies. Jenny Holzer will approve any patterns or perforations in the structure or frame.

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APPENDIX [B]

(For Purposes of this Appendix, Studio and Artist shall be a "contractor").

1. False Claims. Pursuant to San Francisco Administrative Code §21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to TJPA 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 https://law.resource.org/pub/us/code/city/ca/SanFrancisco/Administrative_Code/chapter21.html
2. Independent Contractor. Any party entering a contract with TJPA shall be deemed at all times to be an independent contractor, wholly responsible for the manner in which contractor performs under its agreement with TJPA. Nothing in contractor's agreement with TJPA shall be construed as creating an employment or agency relationship between TJPA and contractor.
3. Disallowance. If a contractor claims or receives payment from TJPA for a service, reimbursement for which is later disallowed by the State of California or United States Government, contractor 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 contractor under its agreement with TJPA.
4. Debarment. By executing a contract with TJPA, contractor certifies that contractor 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 its agreement with TJPA.
5. Insurance. Any party entering a contract with TJPA shall maintain or cause to be maintained for the life of the contract liability insurance in amount and scope appropriate to the services performed by contractor.

**AMENDMENT NO. 2 TO THE
INTERGOVERNMENTAL AGREEMENT**

between

TRANSBAY JOINT POWERS AUTHORITY

and

CITY AND COUNTY OF SAN FRANCISCO ARTS COMMISSION

for

Management of the Public Art Program

for the

Transbay Transit Center Program

This Amendment No. 2 (this "Amendment") to the Intergovernmental Agreement between the Transbay Joint Powers Authority ("TJPA") and the City and County of San Francisco Arts Commission ("SFAC"), effective as of May 15, 2008, and Amendment No. 1 to the Intergovernmental Agreement effective as of _____ (collectively, the "Agreement"), is made as of this ___ day of September, 2016.

Whereas TJPA has entered into that certain Agreement dated _____ with Jenny Holzer Studio, LLC (the "Holzer Agreement") which includes the fabrication of an artwork by Jenny Holzer (the "Artist") being commissioned by TJPA and currently entitled [JH1838.u] (title TBD) (the "Artwork") as more fully described in the Holzer Agreement, attached for reference; and

Whereas TJPA desires that SFAC contract for the fabrication of the Artwork; and

Whereas SFAC shall enter into a separate agreement with KiboWorks (the "Fabricator") for fabrication of the Artwork (the "Fabrication Agreement"); and

Whereas the parties desire to update the Agreement to include SFAC's contract for fabrication of an artwork;

Now, therefore, in consideration of the promises and conditions contained herein, the parties agree as follows:

1. Recital "E" of the Agreement shall be amended as follows (new text in ***bold italics***):

E. This Agreement addresses only the selection, ***fabrication***, and installation of artworks for the Transbay Program, during construction of the Transbay Center Building, with the intention that the TJPA shall own all artworks selected, ***fabricated***, and installed on property under the jurisdiction of the TJPA and shall insure, maintain, and manage the artworks in conformance with applicable law and TJPA policy.

2. The second paragraph of Section 1. Scope of Services shall be amended as follows (new text in **bold italics**):

The Services consist of a series of activities identified in **Exhibit A** that the TJPA may choose to authorize by way of Task Orders in conformance with the following phases: Phase 1 Master Plan; Phase 2 Qualification and Selection of Artists; Phase 3 Art Development and Installation Plan; Phase 4 Installation and Maintenance Plan; **Phase 5 Contract for Fabrication of an Artwork.**

3. Section 2. Term of Agreement and Termination shall be amended as follows (new text in **bold italics**; deleted text in ~~strikethrough italics~~):

Section 2. TERM OF AGREEMENT AND TERMINATION

The term of this Agreement shall be seven (7) years from the Effective Date of this Agreement, unless earlier terminated. This Agreement may be terminated by either Party, with or without cause, upon thirty (30) days written notice. The TJPA has the sole discretion to determine whether any of the Services are satisfactory to the TJPA, which determination shall be made in good faith. If the TJPA determines that any of the Services are not satisfactory, the TJPA may terminate this Agreement by giving written notice to SFAC or may delete specific services from this Agreement. Upon receipt of notice of termination by either Party, SFAC shall cease performing Services on the termination date specified in the written notice. ~~The compensation payable to SFAC shall cover only the period for which SFAC has performed Services.~~ **Upon termination of this Agreement by either party, with or without cause, TJPA shall pay all costs accrued by SFAC prior to the specified termination date and any costs associated with termination of the Fabrication Agreement.**

4. Section 5.1 shall be amended as follows (new text in **bold italics**):

5.1 Independent Contractor. The relationship of SFAC to the TJPA is that of an independent contractor and all persons working for or under the direction of SFAC are its agents or employees and not agents or employees of the TJPA. The TJPA and SFAC shall, at all times, treat all persons working for or under the direction of SFAC as agents and employees of SFAC, and not as agents or employees of the TJPA. The TJPA shall have the right to control SFAC only insofar as allowed by this Agreement. **For the sake of clarity, the parties agree that any fabricators engaged by SFAC for fabrication of an artwork are not SFAC employees or agents.**

5. Section 5.6.3 shall be amended as follows (new text in **bold italics**):

5.6.3 *Except as expressly set forth herein,* the TJPA shall assume no liability whatsoever to any such subcontractor. In any contract, agreement, or task order between SFAC and its subcontractors for the Services, SFAC shall require the following:

- a. The TJPA shall be recognized as a third-party beneficiary of any such agreement or task order;
 - b. The TJPA shall be named as additional insured of any insurance policy provided by a subcontractor covering general and professional liability for the project as set forth in Section 6 of this Agreement; and
 - c. The subcontractor shall indemnify the TJPA consistent with the indemnification provisions set forth in Section 16 of this Agreement.
6. The following new Section 18 is added to the Agreement:

Section 18. Relationship to Other Agreements. To the extent that there is any conflict between this Agreement and the 2016 Transbay Project Construction Management and Oversight Service Intergovernmental Agreement (the “Transbay Project Agreement”), the Transbay Project Agreement shall control.

7. The following Phase 5 shall be added to EXHIBIT A, section I.A.:

Phase 5 Contract for Fabrication of an Artwork

- Contract for fabrication of the Artwork;
- Commitment to implement TJPA’s fabrication requirements in the Holzer Agreement in the Fabrication Agreement as follows:
 - Provide that the Fabricator will work with TJPA project coordinators;
 - Provide that the Fabricator shall see that the LED elements are fabricated according to the Studio’s instructions and specifications and Conceptual Design, as described in Appendix [A] of the Holzer Agreement;
 - Include standard work-for-hire provisions for the express benefit of the Studio;
 - Provide that all preliminary embodiments of the Artist’s concepts, shall remain the property of the Studio and shall be returned to the Studio as soon as possible after such embodiments are used to fabricate the Artwork;
 - Provide for a prohibition on the Fabricator’s use of work produced under the Holzer Agreement for any other project that is substantially similar to the scope of work under the Holzer Agreement without the Artist’s consent;
 - Provide for the acknowledgment of the Artist’s ownership and intellectual property rights as specified in Section 3.1 of the Holzer Agreement;
 - Provide for a prohibition on the Fabricator’s photography of the Artwork and elements thereof except for incidental or inadvertent inclusion of portions of the Artwork where the focus is not primarily on the Artwork;
 - Provide for the Fabricator to produce a document including guidelines for maintaining the Artwork (“Maintenance Guidelines”);
- Notwithstanding anything to the contrary herein, SFAC shall not be responsible for the performance of the Fabricator’s work or its conformity with the Artist’s

Conceptual Design. SFAC shall assume no liability whatsoever for performance of the fabrication of the Artwork.

8. The following shall be added to EXHIBIT A, section I.B.:

The roles and responsibilities of TJPA and the TJPA staff related to the fabrication of the Artwork are as follow:

- TJPA will bear any and all costs of fabrication, including preparation, crating, shipping, insurance, and installation of the Artwork;
- TJPA shall grant SFAC a one-time limited and exclusive right and license to fabricate the Artwork, consistent with the terms of the Holzer Agreement, and to enter into any corresponding sublicense(s) with the Fabricator as necessary to achieve same. TJPA represents and warrants that it is authorized by the Artist and the Studio to grant such sublicense;
- Upon request, TJPA shall provide SFAC copies of all agreements granting the Studio any rights necessary to include the Text (as defined in Section 1.1 of the Holzer Agreement) in the Artwork, including the right to reproduce the Text within the Artwork;
- Notify SFAC in the event that TJPA becomes aware that any fabrication work does not comport with the Artist's Conceptual Design;
- TJPA represents and warrants the following:
 - TJPA has notified the Studio of the identity of the Fabricator and the Studio has approved the Fabricator;
 - TJPA's existing agreement with its Construction Manager/General Contractor (CMGC), Webcor/Obayashi, Joint Venture requires CMGC to allow the Fabricator on site;
 - TJPA shall ensure that the site is prepared to receive the Artwork and shall cause CMGC to perform the electrical connection.

IN WITNESS WHEREOF, the PARTIES hereto have caused this Amendment to be executed on the date(s) indicated by their respective officers duly authorized on their behalf.

TRANSBAY JOINT POWERS AUTHORITY

DATED: _____,
2016

By:

Mark Zabaneh, Interim Executive Director

Resolution
No. Adopted:

By:

Attested by: Nila Gonzales, Secretary

SAN FRANCISCO ARTS COMMISSION

DATED: _____,
2016

By:

Tom DeCaigny, Director

Attested by: Sharon Page Richie, Secretary

APPROVED AS TO FORM FOR TJPA

DATED: _____,
2016

By:

Yadira Taylor, Deputy City Attorney

APPROVED AS TO FORM FOR SFAC

DATED: _____,
2016

BY:

Lauren Curry, Deputy City Attorney