

ASD PROJECT #:00000.0		AIPP #: 00000.0
AGENCY ACCT.# 50-505	ACTIVITY/ACCT.# _____	LINE ITEM 087
CONTRACT AMT: \$0000.00	ASD CONTRACT # _____	PROJ. COOR:

**STATE OF NEW MEXICO
DEPARTMENT OF CULTURAL AFFAIRS
NEW MEXICO ARTS DIVISION
ART IN PUBLIC PLACES PURCHASE CONTRACT**

THIS AGREEMENT is made and entered into by and between the state of New Mexico, Department of Cultural Affairs/New Mexico Arts Division, hereinafter referred to as the "Agency", acting through Stuart Ashman, its Secretary, hereinafter referred to as the "Secretary", **Owner Agency Name**, hereinafter referred to as "Owner Agency", **User Agency Name** hereinafter referred to as "User Agency", and **Artist/Representative Name**, hereinafter referred to as "Artist".

WHEREAS, the Art in Public Places Act, Section 13-4A-1 NMSA 1978, authorizes the allocation of 1% of appropriations for capital expenditures to be set aside in a fund and used for the acquisition or commission of works of art to be used in, upon, or around public buildings;

WHEREAS, NMAD is authorized to administer the art in public places fund pursuant to the Art in Public Places Act;

WHEREAS, definitions as used in this Contract are:

- a) "Artwork" means the work of art designed and created by the Artist and accepted by the Local Selection Committee and includes the Work of Art and any attached Work Base;
- b) "Work Base" is considered a component of the Artwork and means the foundation or pedestal and Plexiglas cover or frame and Plexiglas protective covering, and device/devices for hanging 2D Artwork or securing a Plexiglas cover to a pedestal, upon which the Work of Art is mounted, as required according to attached *Framing and Installation Guidelines*;
- c) "Work Location" means the building, area, and community in which the Artwork will be located;
- d) "Work Site" means the specific area of either the Owner or User Agency's site within, upon, or around the Work Location in which the Artwork is to be permanently attached or installed;
- e) "User Agency" is the agency assigned as occupant of the building in which the Artwork will be located. The "User Agency Representative/Project Director" is the individual designated by the User Agency with authority to bind the User Agency with respect to this Contract. **For purposes of this contract, the User Agency Signatory is user signatory name and contact information.**
- f) "Owner Agency" is the agency having the control and management of the public building and the agency that received the appropriation for the construction or renovation of the building. The "Owner Agency Signatory" is the individual designated by the Owner Agency with authority to bind the Owner Agency with respect to this Contract. **For purposes of this contract, the Owner Agency Signatory is owner signatory name and contact information.**

WHEREAS, Owner Agency and User Agency, desire to acquire a completed public Artwork to be located at **owner agency address, location of artwork**, hereinafter referred to as the Owner/User Agency's "Work Site"; and,

WHEREAS, in conformity with the rules of the Art in Public Places Act, the Artist's Artwork, described as **art description and title**, was selected by the Owner/User Agency's Local Selection Committee; and

WHEREAS, NMAD, the Owner Agency, User Agency, and the Artist, for consideration and under the conditions hereinafter set forth, agree as follows:

Article 1. Scope of Services

1.1 *General Duties of Artist, Owner Agency, User Agency, and NMAD.*

- a) The **Artist** shall perform all services and furnish all supplies, material and equipment as necessary for the transportation of the Artwork and any attached Work Base [see *definitions* b) "Work Base" above], to the

Owner/User Agency's Work Site and permanent and secure installation of the Artwork at the Work Site, except as otherwise agreed to in this Contract.

b) The **Artist** represents and warrants that the Artwork is solely the result of the artistic effort of the Artist and is unique and original, except as otherwise disclosed in writing to NMAD and the Owner/User Agency. If the Artwork is one in a series (not exceeding a total of 50 copies, including variations of size, color, shape, or any distinguishing elements of the Artwork) of prints, photographs, castings or fabrications, or has been previously reproduced and accepted for sale elsewhere, the Artist will notify NMAD and the Owner/User Agencies of this and the edition number of the piece within the series shall be disclosed in writing to NMAD and the Owner/User Agency. The Artist further warrants that the Artwork does not infringe upon any copyright and is free and clear of any liens or claims from any source whatsoever.

If required by NMAD, the Artwork will be reviewed by a professional fine art conservator, at the Artist's expense, in the event the Artwork is: 1) an exterior Artwork; 2) created with non-archival media; 3) exposed to adverse environmental conditions; and 4) questionable with regard to the durability of the media and other maintenance concerns. The fine art conservator will also establish the durability of the media and the required periodic maintenance. NMAD must approve of the conservator's report prior to payment to the artist for proposed purchased artwork.

c) The **Owner and/or User** Agency shall perform the following services in a satisfactory and proper manner as determined by NMAD, and is responsible and shall pay for the following:

1. In collaboration with the Artist, who will install the Artwork, preparation of the Work Site;
2. Provision of the Artist with reasonable access to the Work Site for the installation of the Artwork. The Owner/User Agency shall, in consultation with NMAD, take reasonable precautions to secure the Work Site and its contents during the installation of the Artwork but shall have no liability to the Artist for damage to or loss of the Artwork while the Artwork is in the possession of the Artist.

1.2 *Delivery and Installation.*

a) The **Artist** shall deliver and permanently and securely install the completed Artwork and the Project Plaque at the Work Site **no later than installation date**.

b) The Artist will be responsible for framing and installation of Artwork unless otherwise noted in this Contract. The Artist and the Owner Agency/User Agency shall ensure that the Artwork is installed with appropriate permanent and anti-theft measures and/or devices to protect the Artwork from undue wear and/or damage and/or loss.

c) The Artist shall provide a project identification plaque for the Artwork, as required by the attached *Plaque Guidelines*, which shall include the following information: The title of the Artwork, Artist's name, year of completion, and a statement that the Artwork was "Funded through the Art in Public Places Program of the State of New Mexico".

1.3 *Post-Installation Documentation.*

Within 30 days after the delivery of the Artwork, the Artist shall furnish NMAD with the following relating to the Artwork as completed:

- (1) a high resolution JPEG of the Artwork with a minimum of 350 dpi (dot per inch) resolution and a minimum size of 7 inches on the longest edge;
- (2) a full written description of the Artwork;
- (3) written instructions for appropriate maintenance and preservation of the Artwork, including a maintenance schedule; and
- (4) a comprehensive list of all media used in the creation of the Artwork (ex: type of paint, gauge and type of metal, adhesive materials, clay body and firing, acrylic, oil, etc).

1.4 *Final Acceptance.*

a) The Artist shall advise NMAD, in writing, using the NMAD *Final Payment Invoice - NOA* form, when all Artist services required under this Contract have been completed.

b) The Owner Agency shall notify the Artist and NMAD, in writing, using the "Notice of Acceptance" signature area on the NMAD *Notice of Acceptance* form, of its final acceptance of the Artwork.

c) If the Owner/User Agency determines and notifies NMAD within 10 days of installation by The Artist that the Artist services are incomplete or unsatisfactory, the Artist shall resolve the issues to the satisfaction of the Owner/User Agency and NMAD at no further cost to the Owner/User Agency or NMAD.

1.5 *Risk of Loss.*

The risk of loss or damage to the Artwork shall be borne by the Artist until acceptance by the Owner, as indicated by the NMAD-signed *Final Payment Invoice - NOA* form. The Artist shall carry insurance for the purchase price of the Artwork to cover risk of damage or loss to the Artwork until final acceptance by the Owner.

1.6 Title.

Title to the Artwork shall pass to the Owner Agency after installation and upon receipt by NMAD of the Notice of Acceptance form signed by the Owner Agency. If the Owner/User Agency fails, within 30 days of installation of the Artwork by The Artist, to return to NMAD an executed Notice of Acceptance form, or to notify NMAD of Artist services that are unsatisfactory, title and ownership of the Artwork will automatically transfer to the Owner Agency.

a) The Owner/User Agency shall provide insurance for the purchase price of the Artwork upon transfer of ownership from NMAD to the Owner Agency.

b) Title to the Artwork shall be owned by the Owner Agency, subject to applicable inventory requirements set forth by the State of New Mexico.

Article 2. Term.

THIS CONTRACT SHALL NOT BECOME EFFECTIVE AND THE ARTIST MUST NOT DELIVER THE ARTWORK UNTIL THIS AGREEMENT HAS BEEN APPROVED BY THE DEPARTMENT OF FINANCE AND ADMINISTRATION. The Contract shall terminate on **contract termination date** unless terminated pursuant to Article 10 herein. Services to be provided under this Contract shall be completed no later than approximately one year from the date this Contract is approved by the Dept of Finance & Administration.

It is agreed that any and all obligations arising under Article 1, Sections 1.4, 1.6, 1.6a, and Articles 5, 7, 8 shall survive the termination of this Contract, and such survival shall specifically include any other terms and provisions of the Contract necessary to give full force and effect to said provisions.

Article 3. Compensation and Payment Schedule.

3.1 Fixed Fee.

NMAD shall pay the Artist a fixed fee of **contract amount** including gross receipts tax and all applicable state and federal taxes, for the services performed under this Contract. Payment to the Artist shall be deducted from the allocation for the Art in Public Places program and shall constitute full compensation for all services, taxes, insurance, filing fees, engineering fees, professional conservator fees, materials, shipping or mailing charges, travel for the Artist or the Artist's subcontractors or employees to be furnished by the Artist under this Contract. The NMAD fee shall be paid upon receipt by NMAD of a Final Payment Invoice - NOA form **signed by the Artist, by the User Agency Signatory, by the Owner Agency Signatory and NMAD** for delivery and installation of the selected Artwork, the Project Plaque and any attached Work Base to Work Site.

Final completion of the Artwork will consist of written notification to NMAD by the Artist. Notification and verification will consist of submission of the Final Payment Invoice - NOA form to NMAD. The form must be filled out and signed by the Artist, by the User Agency Signatory, by the Owner Agency Signatory, and by NMAD's Project Coordinator to confirm completion and acceptance of the Artwork from the Artist. Prior to issuance of payment, an NMAD Coordinator will make a site visit to confirm the Artist's compliance with framing/exhibition and installation guidelines provided by NMAD.

Article 4. Extension of Time.

NMAD shall grant a reasonable extension of time to the Artist in the event that there is a reasonable delay on the part of the Owner/User Agency in performing its obligations under this Contract, or if conditions beyond the Artist's control or Acts of God render timely performance of the Artist's services impossible. Failure to fulfill contractual obligations due to conditions beyond either party's reasonable control will not be considered a breach of Contract provided that such obligations shall be suspended, with prior notice to and approval by NMAD, only for the duration of such conditions.

All requests by the Artist or the Owner/User Agency for time extensions shall be made in writing to NMAD at least 80 days prior to the end of term described in Article 2. NMAD will review all written requests and notify the Owner/User Agency and the Artist of its decision within 10 days of receipt of the written request.

Article 5. Warranties.

5.1 Warranties of Quality and Condition.

The Artist represents and warrants that: (a) the Artwork, as fabricated and installed, will be free of defects in material and workmanship, including any defects or qualities which cause or accelerate deterioration of the Artwork, for five (5) years; and (b) reasonable maintenance of the Artwork will not require procedures substantially in excess of those described in the Artist's maintenance recommendations.

The warranties described in this Article 5 shall survive for a period of five (5) years after the final acceptance of the Artwork, with periodic required maintenance by the Owner/User Agency, according to instructions provided by the Artist. The Owner/User Agency shall give written notice to NMAD of any breach of

the Artist's warranty within one hundred twenty (120) days of the breach during a five-year period after final acceptance of the Artwork. The Artist shall, at the request of NMAD and the Owner/User Agency, and at no cost to the Owner/User Agency or NMAD, cure reasonably and promptly the breach of any warranty which is repairable by the Artist or a professional fine art conservator, and which repair is consistent with accepted practices of professional fine art conservation (including, for example, repair by means of restoration, refurbishing or re-creation of part or all of the Artwork).

Article 6. Insurance.

6.1 General.

a) Until such time that final acceptance by NMAD and title to the Artwork passes to the Owner, the Artist is responsible for maintaining insurance coverage for claims and losses for both personal injury and property damage arising from performance under this Contract.

b) The Artist's insurance coverage shall be with a company authorized to do business in New Mexico. Such coverage shall include the Artist's subcontractors and employees, workmen's compensation insurance, automobile liability insurance and public liability insurance in the amount of \$1,000,000.

c) The Owner/User Agency shall insure the Artwork for the total purchase price after the transfer of title and of the Artwork from the Artist to the Owner/User Agency, and shall provide NMAD with a certificate of insurance for said Artwork.

Article 7. Reproduction Rights.

7.1 General.

The Artist retains all rights under The Copyright Act of 1976, 17 U.S.C. 101 et seq., and all other rights in and to the Artwork, except ownership and possession and any rights as may be limited by this Contract. Because its final form is unique, the Artist shall not make any 2- or 3-dimensional replication of the final Artwork, nor shall the Artist grant permission to others to do so except with the written permission of NMAD and the Owner/User Agency for the lifetime of the Artwork. The Artist grants to NMAD and the Owner/User Agency and its successors a non-revocable license to make 2-dimensional reproductions of the Artwork for non-commercial purposes, including but not limited to reproductions used in advertising, brochures, media publicity, and catalogues or other similar publications.

7.2 Artist Credit.

All reproductions by the Owner/User Agency shall credit the Artist and include a copyright notice substantially in the following form: "©[Artist's name], installation date, date of publication, Funded through the Art in Public Places Program of New Mexico Arts, a division of the New Mexico Department of Cultural Affairs."

7.3 Artist Reproduction Credit.

If the Artist is granted permission by NMAD and the Owner/User Agency to reproduce the Artwork, the Artist agrees to include on or in any form of reproduction of the Artwork initiated or authorized by the Artist a credit to NMAD in the following form: "Collection of the New Mexico Arts Division Art in Public Places Program."

Article 8. Artist's Rights.

8.1 General.

In all matters pertaining to the Artwork and its maintenance, including but not limited to the Articles in this Contract and the provisions of the New Mexico Fine Art Building Act, Section 13-4B-1, and the Federal Visual Artists' Rights Act of 1990 (VARA) shall apply.

8.2 Maintenance.

The Owner/User Agency recognizes that maintenance of the Artwork on a regular basis is essential to the integrity of the Artwork. The Owner/User Agency shall reasonably assure that the Artwork is properly maintained and protected, in accordance with the Artist's maintenance schedule, instructions, and the requirements of this Contract.

8.3. Repairs and Restoration.

a) The Owner/User Agency and NMAD shall have the right to determine, after consultation with a professional fine art conservator, when and if repairs and restorations to the Artwork will be made. During the Artist's lifetime, the Artist shall have the right to approve all repairs and restorations, provided, however, that the Artist shall not unreasonably withhold approval for any repair or restoration of the Artwork. If the Artist unreasonably fails to approve any repair or restoration, NMAD or the Owner/User Agency shall have the right to make such repair or restoration. To the extent practicable, the Artist, during the Artist's lifetime, shall be given the opportunity to make or personally supervise significant repairs and restorations as recommended by a professional fine art conservator and shall be paid a reasonable fee for any such services, provided that NMAD and the

Owner/User Agency and the Artist shall agree in writing, prior to the commencement of any significant repairs or restoration, upon the Artist's fee for such services.

b) Repairs and restoration occurring five years after Owner/User Agency acceptance of the Artwork will be the responsibility of the Owner/User Agency.

c) De-accessioning of Artwork will occur if one or more of the following conditions exist during the life of the Artwork: 1) The Artwork is damaged where repair is impractical or costs exceed the value of the artwork; 2) The Artwork has faults that require repeated and excessive maintenance; 3) The Artwork endangers public safety; 4) Public protest has continued unabated over a period of five years and a public hearing has not led to a solution. Any removal or alteration of the Artwork shall conform to VARA and all salvage costs to remove the Artwork from the site will be the responsibility of the Artist unless the Owner/User Agency agrees to incur the costs.

d) All repairs and restorations shall be made in accordance with accepted practices of professional fine art conservation.

e) This Contract shall not be construed to restrict the Owner/User Agency's use or disposition of the property on which or in which the Artist's Artwork is located or adhered. The Owner/User Agency will give NMAD one hundred twenty (120) days' notice prior to any change in the Agency's property that will require removal or relocation of the Artist's Artwork. Permission or approval of NMAD or the Artist is not required in these instances.

f) The Owner/User Agency is responsible for adherence to the requirements of VARA.

Article 9. Artist as Independent Contractor.

The Artist, and his/her agents and employees, are independent contractors performing services for NMAD and are not employees of the New Mexico Arts Division. The Artist, his/her agents and employees, shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the New Mexico Arts Division, as a result of this Contract.

Article 10. Termination.

a) The services to be performed under this Contract may be terminated by any party, subject to written notice submitted to NMAD thirty (30) days before termination, provided that reasonable attempts to reconcile the reason for termination have been undertaken. If either the Artist or the Owner/User Agency shall willfully or negligently fail to fulfill in a timely and proper manner, or otherwise violate, any of the covenants, agreements or conditions material to the Contract, the other party shall thereupon have the right to terminate this Contract by giving thirty (30) days written notice to NMAD of the party's intent to terminate, specifying the grounds for termination.

b) If this Contract is terminated by NMAD for failure of Artist to comply with the terms of this Contract, the Artist may be held liable for the return of any monies paid under the terms of this Contract for services not rendered.

c) If the Owner/User Agency and/or NMAD terminate this Contract for non-compliance on the part of the Artist, the Artist will be ineligible to apply for new Art in Public Places projects for a period of three (3) years or more, depending on the length of time the dispute is in litigation and the time it takes the Artist to settle the breach.

Article 11. Contract Administrator.

The administrator of this Contract, including responsibility for issuing payments to the Artist, shall be NMAD.

Article 12. Non-Discrimination.

In carrying out the performance of the services designated, neither the Artist nor the Owner/User Agency shall discriminate as to race, creed, religion, sex, age, national origin or any physical, mental or sensory disability, and the Artist and Owner/User Agency shall comply with the equality of employment opportunity provisions of New Mexico and federal law as presently existing or hereafter amended.

Article 13. ADA Compliance.

In performing any services required hereunder, the Artist shall comply with all applicable requirements of the Americans with Disabilities Act of 1990 (the "ADA"). The Artist's responsibility to defend and indemnify NMAD, as provided in this Contract, includes but is not limited to claims arising from the Artist's, or Artist's agents' or employees' acts or omissions in violation of the ADA.

Article 14. Compliance.

The Artist shall be required to comply with federal, state and city statutes, ordinances and regulations applicable to the performance of the Artist's services under this Contract.

Article 15. Entire Agreement.

This writing embodies the entire Contract and understanding between the parties hereto, and there are no other contracts, agreements and understandings, oral or written, with reference to the subject matter hereof that are not merged herein and superseded hereby.

Article 16. Modification.

No alteration, change or modification of the terms of the Contract shall be valid unless made in writing and signed by all parties hereto and approved by appropriate action of the Owner/User Agency and NMAD.

Article 17. Waiver.

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

Article 18. Governing Law.

This Contract, regardless of where executed or performed, shall be governed by and construed in accordance with the laws of the State of New Mexico.

Article 19. Heirs and Assigns.

This Contract shall be binding upon and shall inure to the benefit of the Owner/User Agency and the Artist and their respective heirs, personal representatives, successors and permitted assigns.

Article 20. Written Notices.

- a) All notices, requests, demands and other communications which are required or permitted to be given under this Contract shall be in writing and shall be deemed to have been duly given upon the receipt thereof.
- b) For purposes of giving formal, written notice and/or to contact the Owner Agency Representative, User Agency Representative and Project Director, Artist, or NMAD, the following addresses apply:

**OWNER AGENCY
SIGNATORY**

**USER AGENCY
SIGNATORY**

ARTIST

**NMAD CONTRACT
CONTACT**

**OWNER AGENCY
CONTACT**

**USER AGENCY
CONTACT**

c) For purposes of giving formal written notice to the Artist, Owner Agency Signatory, User Agency Representative/Project Director, or NMAD, the addresses are as stated above. Until NMAD receives the Final Payment Invoice - NOA form with Artist signature and the Owner-signed Notice of Acceptance form, the Artist and/or Owner/User Agency Representative will provide NMAD with notice of any change in address within ten (10) days following that change.

After the final payment in this Contract has been made, the Artist and/or Owner/User Agency will notify NMAD of any change in address within thirty (30) days following the change. Failure to do so will be a waiver of the Artist's and/or Owner/User Agency's rights described in this Contract, except for the Artist's copyright and reproduction rights. NMAD will notify the Artist and/or the Owner/User Agency of any change in address within five (5) days following that change.

Article 21. Conflict of Interest.

The Artist warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Contract. The Artist certifies that the requirements of the Governmental Conduct Act, Section 10-16-1 through 10-16-18 NMSA 1978, regarding Contracting with a public officer or state employee, have been followed.

Article 22. Bribes, Gratuities, Kickbacks, Applicable Law.

The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and criminal penalties for violation of the Code. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

Article 23. Records and Audits.

The Artist shall maintain, for three years, records which indicate the date, time and nature of services rendered. These records shall be subject to inspection by NMAD, the Owner Agency, the Department of Finance and Administration, and the State Auditor. NMAD, the Department of Finance and Administration, the State Auditor, and the Owner Agency shall have the right to audit billings both before and after payment. Payment under this Contract shall not foreclose the right of NMAD and/or the Owner Agency to recover excessive and/or illegal payments.

Article 24. Required Signatures.

This Contract will not be binding upon any parties hereto until all signatures required below have been obtained.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the last date of signature by all the parties below:

DEPARTMENT OF CULTURAL AFFAIRS:

Secretary, Dept of Cultural Affairs

Date

Executive Director, New Mexico Arts Division

Date

DCA General Counsel, As to legal form and sufficiency only

Date

OWNER AGENCY:

OWNER AGENCY SIGNATORY

Date

OWNER AGENCY LEGAL REPRESENTATIVE (if required by Owner Agency):

Print name & title, then sign above

Date

FOR USER AGENCY:

USER AGENCY SIGNATORY

Date

ARTIST:

ARTIST/REPRESENTATIVE

Date