

**CONTRACT FOR THE FABRICATION AND INSTALLATION OF TWO SHADE  
BENCH SCULPTURES FOR USE AND DISPLAY AT OYSTER CREEK PARK AND  
THE SMART FINANCIAL CENTRE**

This Contract (“Contract”) is made between the City of Sugar Land, a Texas municipal corporation, and Richard Herzog, an individual, providing for the fabrication and installation of two shade bench sculptures for the City. The foregoing parties are herein collectively referred to as “Parties” and individually referred to as a “Party”. For good and valuable consideration, the sufficiency of which is acknowledged by all Parties, the Parties hereby agree as follows:

**1. Definitions.** In this contract:

*Artist* means Richard Herzog, the artist who will create and provide the Works to the City.

*City* means the City of Sugar Land, a Texas municipal corporation, the entity commissioning the Works from the Artist.

*Maintenance and Materials Form* means the form prepared by the City and provided to the Artist, which Artist will complete and return to the City with information about the materials used in the Works and the maintenance required thereof. A copy of this form is attached hereto as Exhibit B-2.

*Park* means the Oyster Creek Park, located at 4033 State Highway 6 South, Sugar Land, TX 77479.

*Smart Financial Centre* means the City’s performing arts venue located at 18111 Lexington Blvd, Sugar Land, TX 77479.

*Works* mean, collectively, the shade bench structure titled *Blue Bells* which will be located at the Park, and the shade bench structure titled *Lunaria* which will be located at the Smart Financial Centre, which will be fabricated, and installed by the Artist and provided to the City, as described in the proposals provided by the Artist, attached to this Contract as Exhibit A-1 (hereinafter, the “Proposals”).

**2. Effective Date.** This Contract will be effective as of the latest of the dates signed by the Parties (the “Effective Date”).

**3. Artist’s Obligations.**

(a) Artist will create and provide to the City the Works described in this Contract, in conformity with the Proposals and under the terms and conditions of this Contract.

(b) Artist will fabricate, and install the Work, and pay all costs associated with the fabrication, and installation of the Work.

(c) Artist will arrange the transportation and installation of the Works in consultation with the

City. At least one representative of the Artist, or one of the artist himself, will personally supervise and approve the installation.

(d) Artist will provide required insurance in amounts and limits specified herein.

(e) Artist will provide a list of all subcontractors, if any, along with a copy of the agreement between Artist and each subcontractor, if any.

(f) Artist will provide the City with educational text about the Works, for use on signage to be designed, fabricated, and installed by the City. Such text will be provided to the City on or before **April 30, 2023**.

(g) Artist will provide the City a completed Maintenance and Materials Form for each of the Works.

**4. Artist Credit.** The City will provide credit to the Artist and a copyright notice substantially in the following form: Copyright © [Artist Name] [date of publication]. This credit may be:

(a) installed on a plaque on or near the Work; or, in the alternative,

(b) included on educational signage to be placed near the Work.

#### **5. Compensation.**

(a) The City will pay the Artist a total of Seventy Thousand and No/100 Dollars (\$70,000.00), in three installments.

(1) The first installment payment of \$23,333.00 will be paid to the Artist after the Effective Date of this Contract, upon receipt by the City of the following from the Artist: completion of one Maintenance and Materials Form for each Work.

(2) The second installment payment of \$23,333.00 will be paid to the Artist upon approval of the following from the Artist: dimensions and instructions for a concrete footing to be the foundation for the Work, and Final Design as described in Section 6 below.

(3) The third, and final, installment payment of \$23,334.00 will be paid to the Artist upon final approval and acceptance of the Works by the City under Section 10 below. It is understood that this final payment will not be due until after the Works are installed by the Artist, at Artists costs and expense, in the Park, and after Artist provides notice of completion of the Contract services to the City as required by Section 10.

(b) This amount, as specified in Subsection 5(a) above, is intended to cover all of Artist's costs associated with the Works including, but not limited to, Artist's fabrication, installation, insurance, travel to and from the Park and Smart Financial Centre, per diem expenses, project documentation, and any and all other costs associated with the Contract.

(c) The City's payments to Artist, including the time of payment and the payment of interest

on overdue amounts, are subject to the provisions of Chapter 2251 of the Government Code. The City is not liable to Artist for any taxes which the City is not liable by law, including state and local sales and use taxes (Section 151.309 and Title 3, Texas Tax Code) and federal excise tax (Subtitle D of the Internal Revenue Code). Accordingly, those taxes may not be added to any bill.

## **6. Final Engineering Design Documents.**

### **(a) Final Engineering Documents**

(1) Upon written approval of a design by the City, Artist will undertake the preparation of final engineering drawings showing the final concept for each Work and structural drawings detailing every physical feature of the construction of the Works and their integration at Oyster Creek Park and Smart Financial Centre (the “Final Designs”). These final engineering drawings will include the seal of a professional engineer licensed by the State of Texas.

(2) The Final Design will also:

- A. Comply with a wind speed rating of a minimum of 110 mph;
- B. Include a list and technical explanation of all materials used within the final Work and anchoring system including, but not limited to, and to the extent feasible, brands, types, and technical specifications;
- C. Indicate any risks involved in the construction, installation, integration, and maintenance of the Work, as well as any third party subcontractors needed to work on the project, if any; and
- D. Take into consideration a material to protect the edges of the Work from destruction or lifting, such as a highly durable metal border edge trim.

(3) Artist will provide a detailed explanation of appropriate maintenance for the Work, in the form of a written maintenance manual.

(b) Artist will provide the Final Designs to the City for review and final approval on or before **April 30, 2023**. Within five (5) business days after receipt of the Final Designs from the Artist, the City will notify Artist, in writing: (1) of the City’s approval of the final engineering documents; or (2) if the City requires any revisions to the Final Designs in order to comply with any applicable laws, ordinances and/or regulations or for other reasons including, but not limited to, ensuring the physical integrity of the Work or its installation at Fire Station 3. If agreed upon by all Parties, such revisions will become a part of the Final Designs.

(c) Upon the City’s approval of the Final Design, the Final Design will immediately become the property of the City, subject to any Copyright rights retained by Artist. Should Artist fail to complete the fabrication or installation of the Work, the City will have the right to use the Final Design to complete the fabrication and/or installation of the Work. In such event the City will have the right to contact and contract directly with any third party

fabricator or installer, without the Artist's input or consent.

- (d) Notwithstanding the foregoing, City and Artist recognize that separate designs will be provided for *Blue Bells* and *Lunaria*. If the City approves the Final Design for one of the sculptures, but the other requires revision or is under review, Artist may proceed to the fabrication stage for the approved design while final approval of the other design is still pending.

## **7. Fabrication Stage.**

- (a) Artist shall fabricate and install the Works in substantial conformity with the Proposals. Artist may not deviate from the approved Proposals without written approval of the City.
- (b) Prior to fabrication, the City will notify Artist in writing of any potential siting concerns and offer the Artist the opportunity to perform site walk-throughs. The site walk-throughs may be done either virtually or in person.
- (c) Artist shall take reasonable measures to protect or preserve the integrity of the Works. Prior to requesting authorization to transport and install the Works, Artist will be required to provide the City with a list of all workers or subcontractors and equipment to be used along with the hours of operation and the scope of work to be performed on site. To the extent applicable, all additional workers or subcontractors must provide proof of insurance prior to entering the site, equal to that required of Artist.
- (d) The City shall have the right to review the Works at reasonable times during the fabrication thereof upon reasonable notice to Artist.
- (e) If the City, upon review of the Works, determines that the Works do not conform to the Proposals, the City reserves the right to notify Artist in writing of the deficiencies and require their immediate cure.
- (f) Artist will promptly cure the City's objections and will notify the City in writing of completion of the cure. If Artist disputes the City's determination that the Works do not conform, Artist shall promptly submit reasons in writing to the City within five (5) business days of the City's prior notification to the contrary. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether Artist has complied with the terms of this Contract shall remain with the City.
- (g) Artist shall notify the City in writing when fabrication of the Works has been completed, and that the Works are ready for delivery and installation at the Park and Smart Financial Centre. In order to meet the final approval requirements in this Section 7, and the installation schedule in Section 8, and subject to any provision herein allowing for an extension of time, fabrication of the Works must be complete on or before **October 31, 2023**, and notice of such completion must be provided to the City on or by that date.
- (h) The City shall promptly notify Artist of any delays impacting installation of the Works.

Any additional storage fees incurred as a result of such delays are the responsibility of the City, but only to the extent such delays are within the City's control.

- (i) Artist waives any right to inspect the installation areas at the Park and the Smart Financial Center prior to the transportation and installation of the Works and agrees that the City shall not be responsible for nor required to correct any adverse site conditions that will impact the installation of the Works and which are in need of correction.

## **8. Installation.**

- (a) Upon the City's final approval of the fabricated Works, as being in conformity with the Proposals, Artist shall deliver and install the completed Works at the Park and the Smart Financial Centre in accordance with the schedule provided for herein. All transportation fees and installation costs will be paid by Artist.
- (b) Prior to installation, the City will prepare the footing for the Work. This footing will be prepared in accordance with the dimensions provided by the Artist and approved by the City.
- (c) Artist will complete and install the Works at the Park and the Smart Financial Centre on or before **November 15, 2023**. Subject to the City's right of termination as provided in this Contract, the date for completion and installation of the Works is extended by the time for which the Artist is unable to work because of illness or disability, or the time resulting from delays caused by events beyond the control of the Artist, including fire, theft, pandemics, and Acts of God. Notwithstanding the foregoing, Artist shall be liable to the City for liquidated damages, under Section 8 of this Contract, Artist fails to install the Works on or before **December 6, 2023**.
- (d) Artist will coordinate closely with the City to ascertain that the Park and the Smart Financial Centre are prepared to receive the Work. Artist must notify the City of any adverse conditions at the Park and the Smart Financial Centre that would affect or impede the installation of the Works. Artist is responsible for timely installation of the Works. Artist will confer and coordinate with the City to ensure timely coordination with the City's team. Artist may not install the Works until authorized to do so by the City.
- (e) If the Artist does not install the Works himself, at least one representative of Artist shall personally supervise and approve the installation.
- (f) Upon written acceptance of the installation, the Works shall be deemed to be in the custody of the City for purposes of Sections 18 and 19 of this Contract.
- (g) In accordance with Section 4, the City will provide a credit to the Artist.
- (h) Upon installation of the Works, Artist will provide the City with written instructions for the appropriate maintenance and preservation of the Works along with product data sheets for any material or finish used. The Works must be durable, taking into consideration that

the Park and the site at the Smart Financial Centre are outdoor spaces that will be exposed to elements such as weather and temperature variation. Artist must ensure that all maintenance requirements will be reasonable in terms of time and expense. The City is responsible for the proper care and maintenance of the Works.

- (i) The City may relocate or change the manner of presentation of the Works, including placing the Works into storage, at any time so long as the relocation or change in presentation is done without modification of the Works.

**9. Liquidated Damages for Untimely Installation.** If the Works are not installed at the Park and the Smart Financial Centre on or before **November 15, 2023**, Artist shall pay the City \$50.00 per calendar day for each day past **December 6, 2023** that the Works remain uninstalled. The Parties agree that this amount is liquidated damages and not a penalty. The Parties agree that this amount is reasonable in light of the anticipated or actual harm caused by Artist's delay in installation, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. If the installation date is extended as provided for elsewhere in this Contract, liquidated damages will not begin to be assessed until and unless installation is not complete by the extended installation date.

#### **10. Approval and Acceptance.**

- (a) Artist shall notify the City in writing when all services as required of the Parties by this Contract prior to this paragraph have been completed.
- (b) Unless the City disputes that all services have been performed, as provided for in Sections 10(c) and (d), the City shall promptly notify Artist of its final acceptance of the Works within five (5) business days after Artist submits written notice pursuant to paragraph 10(a) above. The effective date of final acceptance shall be the date the City submits written notice to Artist of its final acceptance of the Works. The final acceptance shall be understood to mean that the City acknowledges completion of the Works in conformity with the Proposals, and that the City confirms that all services as required of the Parties by this Contract prior to paragraph (c) of this section have been completed. Title to the Work passes upon final acceptance by the City and final payment to Artist.
- (c) If the City disputes that all the services have been performed, the City shall notify Artist in writing of those services Artist has failed to perform within five (5) business days after Artist submits written notice pursuant to paragraph (a) above. Artist shall promptly perform those services indicated by the City.
- (d) If Artist disputes the City's determination that not all services have been performed, Artist shall submit reasons in writing to the City within five (5) business days of the City's prior notification to the contrary. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether all services have been performed shall remain with the City. Such final determination shall not be unreasonably withheld.

- (e) Upon the resolution of any disputes that arise under paragraphs (c) and (d) of this section, the City shall notify Artist of its final acceptance of the Works pursuant to paragraph (b).
- (f) Upon the City's approval and acceptance of the Works, the Works will be considered finally delivered to, and accepted by, the City, subject to any Copyright rights retained by Artist.

**11. Warranties of Title.** Artist represents and warrants that:

- (a) The Works are solely the result of the artistic effort of the Artist and Artist is the sole author, as that term is used in the United States Copyright laws, of the Work. Artist further represents that it will be the sole author, as that term is used in the United States Copyright laws, of all artistic works that are created pursuant to this Contract, including any intermediate works created during the creation of the Work;
- (b) Except as otherwise disclosed in writing to the City, the Works are unique and original and do not infringe upon any copyright or the rights of any person;
- (c) The Works (or duplicates thereof) have not been accepted for sale elsewhere;
- (d) Artist has not sold, assigned, transferred, licensed, granted, encumbered, or utilized the Works or any element thereof or any copyright related thereto which may affect or impair the rights granted pursuant to this Contract;
- (e) Upon payment to the Artist by, and delivery of the Works to, the City, that the title transferred to the Works is free and clear of any claims or encumbrances from any source whatsoever;
- (f) All Works created or performed by the Artist under this Contract, including any intermediate works created during the creation of the Works, will be wholly with the Artist and will not infringe upon or violate the rights of any third party;
- (g) Artist has not and will not grant any licenses to the Works, including but not limited to the Work and any intermediate works created during the creation of the Works, other than the exclusive license granted herein to the City, its successors, and assigns;
- (h) Artist has the full power to enter into and perform this Contract and to make the grant of rights contained in this Contract;
- (i) All services performed hereunder will be performed in accordance with all applicable laws, regulations, ordinances, etc. and with all necessary care, skill, and diligence; and
- (j) These representations and warranties will survive the expiration, termination, or other extinction of this Contract.

**12. Warranties of Quality and Condition.**

- (a) Artist warrants that the Works shall be free of any defects including, without limitation, defects caused by design error, defective, inferior, or inadequate materials, or production errors. Artist represents and warrants that all work will be performed in accordance with professional “workmanlike” standards and free from defective workmanship (including any defects consisting of “inherent vice,” or qualities that cause or accelerate deterioration of the Works) for one year after the date of final acceptance by the City under Section 10.
- (b) Artist represents and warrants that the Works and the materials used are not currently known to be harmful to public health and safety.
- (c) Artist represents and warrants that reasonable maintenance of the Works will not require procedures substantially in excess of those described in the completed Maintenance and Materials Forms.
- (d) If within one year the City observes any breach of warranty described in this Section 11 that it deems Artist capable of curing, Artist shall, at the request of the City, cure the breach promptly, satisfactorily and consistent with professional conservation standards, at no expense to the City. The City shall give notice to Artist of such breach with reasonable promptness.
- (e) If after one year the City observes any breach of warranty described in this Section 11 that it deems Artist capable of curing, the City shall contact Artist to make or supervise repairs or restorations at a reasonable fee during the Artist’s lifetime. Artist shall have the right of first refusal to make or supervise repairs or restorations. Should Artist be unavailable or unwilling to accept reasonable compensation under the industry standard, the City may seek the services of a qualified restorative conservator and maintenance expert.
- (f) If within one year the City observes a breach of warranty described in this Section 11 that it deems not curable by Artist, Artist is responsible for reimbursing the City for damages, expenses and loss incurred by the City as a result of the breach. However, if Artist disclosed the risk of this breach in the Proposals and the City accepted that it may occur, it shall not be deemed a breach for purposes of this Section 11 of this Contract.
- (g) Acceptable Standard of Display. Artist represents and warrants that:
  - (1) General routine cleaning and repair of the Works and any associated working parts and/or equipment will maintain the Works within an acceptable standard of public display.
  - (2) Foreseeable exposure to the elements and general wear and tear will cause the Works to experience only minor repairable damages and will not cause the Works to fall below an acceptable standard of public display.
  - (3) With general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the Works will not experience



irreparable conditions that do not fall within an acceptable standard of public display, including mold, rust, fracturing, staining, chipping, tearing, abrading and peeling.

- (4) **Manufacturer's Warranties.** To the extent the Works incorporates products covered by a manufacturer's warranty, Artist shall provide copies of such warranties to the City.

If the City fails to maintain the Works in good condition, the Artist shall have the limited right to disown the Works as the Artist's creation and request that all credits be removed from the Works until the Works' condition is satisfactorily repaired.

- (h) These representations and warranties will survive the expiration, termination, or other extinction of this Contract.

### **13. Repair; Replacement.**

- (a) The City shall notify Artist in writing of any warranty repairs that are required to be made to the Works, and shall give the Artist the opportunity to effect said repairs in a reasonable amount of time, which shall be not less than thirty (30) days. If Artist fails to make the required repairs in a reasonable time, as determined in the City's sole discretion, but in no event less than thirty (30) days after notifying Artist of the need for such repairs, then the City shall have the repairs made and Artist shall reimburse the City for its reasonable costs and expenses.
- (b) If it becomes necessary or appropriate to make non-warranty repairs of the Works, then the City shall provide written notice to Artist in order to afford Artist the opportunity to provide input and advice into making said repairs. The City shall make a good faith effort to follow Artist's advice in making any such repairs. If Artist decides to make the repairs itself, then the City shall decide in good faith whether to employ Artist to make such repairs at an agreed upon price.
- (c) Notwithstanding the foregoing, the City will have the right to remove, repair, or replace the Works, as needed, in the City's sole discretion.

**14. Maintenance.** The City will be responsible for maintenance and conservation of the Works, for so long as the Works remain on display or in possession of the City. The City will have the right, in its sole discretion, and without Artist's input or approval, to determine the appropriate method of maintenance, notwithstanding any provision in this Contract to the contrary.

**15. Destruction.** The City will not intentionally destroy or damage the Works without the prior written consent of the Artist, provided that the Artist, its successors, or heirs are capable of being located to request such consent. No such written consent will be required if, after reasonable search and in the City's sole discretion, the Artist, its successors or heirs cannot be located. Artist waives any claim for damages against the City if the Works are destroyed or damaged by any cause other than the intentional act of the City.

### **16. Term of Contract.**

- (a) Duration. The Contract is effective as of the Effective Date and, unless terminated earlier pursuant to such provisions in the Contract, shall extend until final acceptance by the City under Section 10 or submission of final payment to the Artist by the City, whichever is later.
- (b) Force Majeure. The City shall grant to Artist, by written notice, a reasonable extension of time in the event that conditions beyond Artist's control render timely performance of Artist's services impossible or unduly burdensome. Artist must give written notice to the City that it cannot perform one or more obligations under this Contract because of force majeure within ten days of the force majeure. All such performance obligations shall be suspended for the duration of the condition. All Parties shall take all reasonable steps during the existence of the condition to assure performance of their contractual obligations when the condition no longer exists. Failure to fulfill contractual obligations due to conditions beyond either Party's reasonable control will not be considered a breach of contract, provided that such obligations shall be suspended only for the duration of such conditions. For purposes of this provision, "force majeure" means lightning, earthquakes, hurricanes, storms, floods, or other natural occurrence; strikes, lockouts, riots, wars, or other civil disturbances; pandemics; or explosions, fires, or similar accidents not reasonably within the control of Artist, or its agents or contractors.

#### **17. Termination.**

- (a) The City may terminate this Contract during its term at any time for any reason by giving written notice to Artist not less than five (5) business days prior to the termination date, but the City will pay Artist for all services rendered in compliance with this Contract to the date of termination, but only as to costs over and above the payments rendered to the date of termination.
- (b) Termination of this Contract will not terminate the license or any other rights herein granted to City, its successors and assigns.

**18. Risk of Loss.** Artist shall bear the risk of loss for damage to the Works until the City's final acceptance of the Works under Section 10. Artist shall take such measures as are reasonably necessary to protect the Works from loss or damage. The City shall bear the risk of loss or damage to the Works prior to final acceptance only if, during such time, the partially or wholly completed Works are in the custody, control or supervision of the City or its agent(s) for the purposes of installing or performing other services to the Works.

#### **19. Insurance.**

- (a) Artist acknowledges that until final acceptance of the Works by the City under Section 10, any injury to property or persons caused by the Artist's Works or acts of God affecting the Artist's Works are the sole responsibility of Artist, including, but not limited to, any loss occurring during the creation, storage, transportation, delivery, or installation of the Works, regardless of where such loss occurs.

- (b) Artist will procure and maintain insurance as shown in Exhibit B-1. Artist will maintain such insurance until final acceptance of the Works by the City under Section 10.

**20. Liability and Indemnity.**

- (a) **ARTIST HEREBY RELEASES THE CITY AND THE CITY'S ELECTED OFFICIALS, THE RESPECTIVE OFFICERS, EMPLOYEES, AGENTS, ATTORNEYS, AND REPRESENTATIVES OF THE CITY AND ITS/THEIR SUCCESSORS AND ASSIGNS, IN BOTH THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, AND THE AFFILIATES OF AND PERSONS AND ENTITIES RELATED TO ALL OF THE FOREGOING, INDIVIDUALLY AND COLLECTIVELY, (COLLECTIVELY REFERRED TO AS THE "CITY-RELATED PARTIES") FROM, AND SHALL INDEMNIFY, DEFEND, AND HOLD THE CITY-RELATED PARTIES HARMLESS AGAINST, ALL ALLEGATIONS, CLAIMS (INCLUDING WITHOUT LIMITATION CLAIMS OF PERSONAL INJURY, ENVIRONMENTAL INJURY, BODILY INJURY, SICKNESS, DISEASE, DEATH, PROPERTY DAMAGE, CONSEQUENTIAL DAMAGES, DESTRUCTION, OR OTHER IMPAIRMENT), DEMANDS, LEGAL ACTIONS, EQUITABLE ACTIONS, COSTS (INCLUDING ALL COURT COSTS, REASONABLE ATTORNEYS' FEES, EXPERTS' FEES OR OTHER COSTS INCURRED IN CONNECTION WITH INVESTIGATING, PREPARING, PROSECUTING OR SETTLING ANY LEGAL OR ALTERNATIVE DISPUTE RESOLUTION ACTION OR PROCEEDING), EXPENSES, LIABILITIES, ASSESSMENTS, TAXES, COSTS, FEES, LIENS, PENALTIES, FINES, OBLIGATIONS, LOSSES, DAMAGES, JUDGMENTS, OR PENALTIES OF WHATEVER NATURE OR DESCRIPTION, WHETHER KNOWN OR UNKNOWN (COLLECTIVELY "LIABILITIES") INCURRED BY ANY CITY-RELATED PARTY, WHICH LIABILITIES, DIRECTLY OR INDIRECTLY, IN WHOLE OR IN PART, ARISE FROM OR MAY IN THE FUTURE ARISE FROM, OR ARE ALLEGED TO HAVE ARISEN FROM, ANY OF THE FOLLOWING:**

- (1) **ARTIST'S INSTALLATION OF THE WORKS AT THE PARK AND SMART FINANCIAL CENTRE;**
- (2) **ANY PERSONAL INJURY OR PROPERTY DAMAGE CAUSED, DIRECTLY OR INDIRECTLY, BY ANY ACT OR OMISSION OF ARTIST;  
OR**
- (3) **ANY INFRINGEMENT OF PATENT, COPYRIGHT, TRADEMARK, TRADE SECRET OR OTHER PROPRIETARY RIGHT CAUSED BY ARTIST.**

**FOR PURPOSES OF THIS INDEMNITY AND RELEASE, THE TERM "ARISE FROM" MEANS OCCURS IN CONNECTION WITH OR AS A RESULT OF OR IS CAUSED BY.**

**ARTIST ACKNOWLEDGES AND AGREES THAT ITS OBLIGATION TO DEFEND IN THIS SECTION: (I) IS AN IMMEDIATE OBLIGATION, INDEPENDENT OF THEIR OTHER OBLIGATIONS HEREUNDER; (II) APPLIES TO ANY LOSS WHICH ACTUALLY OR POTENTIALLY FALLS WITHIN THE SCOPE OF THIS SECTION, REGARDLESS OF WHETHER THE APPLICABLE ALLEGATIONS ARE OR MAY BE GROUNDLESS, FALSE OR FRAUDULENT; AND (III) ARISES AT AND CONTINUES AFTER THE TIME NOTICE OF THE LOSS IS TENDERED TO ARTIST.**

**THIS SUBSECTION 20(a) SURVIVES THE TERMINATION OR EXPIRATION OF THIS CONTRACT.**

**(b) ARTIST IS LIABLE TO THE CITY FOR DAMAGES SUSTAINED BY THE CITY AND RESULTING FROM THE ACTS AND OMISSIONS OF ANY CONTRACTOR, SUBCONTRACTOR, OR ANY PARTY INVOLVED DIRECTLY OR INDIRECTLY IN THE FABRICATION AND INSTALLATION OF THE WORKS AT THE PARK AND THE SMART FINANCIAL CENTRE. ANY ACT OR OMISSION OF SUCH PARTY SHALL BE CONSIDERED AN ACT OR OMISSION OF THE ARTIST. THIS SUBSECTION 20(b) SURVIVES THE TERMINATION OR EXPIRATION OF THIS CONTRACT.**

**(c) PROMPTLY UPON LEARNING OF ANY CLAIM FOR WHICH IT SEEKS INDEMNIFICATION UNDER THIS CONTRACT, THE CITY SHALL GIVE WRITTEN NOTICE TO ARTIST OF THE CLAIM. ARTIST SHALL BEAR THE COST OF AND SHALL HAVE THE RIGHT TO SELECT COUNSEL OF THEIR OWN CHOICE. THE CITY SHALL COOPERATE AND ASSIST ARTIST IN INVESTIGATING AND DEFENDING AGAINST THE CLAIM. IF ARTIST DOES NOT PROVIDE THE INDEMNITY AND DEFENSE, OR IF ARTIST DOES NOT MAKE DILIGENT EFFORT TO SETTLE THE CLAIM OR PROVIDE FOR A DEFENSE, THE CITY MAY ASSUME CONTROL OF THE MATTER WITH COUNSEL OF ITS OWN CHOOSING AND EITHER MAKE A REASONABLE SETTLEMENT OF THE CLAIM OR UNDERTAKE A DEFENSE, ALL AT ARTIST'S SOLE COST AND EXPENSE.**

**21. Title.** Title to the Works shall pass to the City upon the City's written final payment for the Works pursuant to Section 5. Upon transfer of title to the City, the City shall have the right to freely transfer title of the Works, at the City's sole discretion.

**22. Access and Ownership of Documents and Materials.** Throughout the course of this Contract the City will have access to all project documentation developed by the Artist, including but not limited to, the Works, drawings, photographs, and videos. The City will own all materials submitted to it by Artist pursuant to this Contract. Artist will provide to the City any photographs, representations of the Works, or other documentation related to the Works prepared by it during the course of this Contract. Such materials may be used by the City at its discretion, for marketing and any other purpose for which the City deems such materials fit.

### **23. Copyright Ownership.**

- (a) Subject to the terms of this Contract, including any covenants herein prohibiting the creation of additional works, the exclusive license granted to the City, its successors and assigns, and the tangible ownership rights of the City in the Works, Artist will have and retain all rights to the Works afforded to Artist by the Copyright and Patent Laws of the United States. Artist agrees to do and perform all acts necessary to effect and protect the copyright and renewals thereof. However, if necessary, the City, its successors and assigns, may take reasonable steps to conserve or maintain the Works in its original form upon prior consultation with the Artist.
- (b) The requirements and obligations in this Section 22 will survive termination or expiration of the Contract.

### **24. Covenant; License; Reproduction Rights.**

- (a) In view of the intention that the final Works will be unique, Artist, on behalf of themselves and their successors, assigns, and affiliates, covenant, warrant, and agree that they will not knowingly aid, abet, participate in, assist, authorize, condone, or permit the making, copying, displaying, or selling of any exact duplicate, or three-dimensional reproductions of the final Works, nor will the Artist grant permission to others to do so except with the written permission of the City. This covenant will endure forever in perpetuity and will survive termination or expiration of the Contract. However, nothing herein will prevent the Artist from creating future works in the Artist's manner and style of artistic expression, including works that include design elements similar to the Works, so long as such works do not replicate the exact composition of the Works.
- (b) Artist grants to the City, its successors and assigns, a paid-up, irrevocable, perpetual, fully transferable, fully sub-licensable, exclusive license to make unlimited two- and three-dimensional reproductions of the Works for non-commercial purposes including, but not limited to, photographs and digital reproductions of the Works for inclusion in the City of Sugar Land's catalogues, books, brochures, website, postcards, posters, invitations, magazines, newspapers, journals, films, television programs, and other electronic, online media. The City may include information about the Works and Artist on other plaques or materials and in other information as determined by the City.
- (c) All reproductions by the City will contain a credit to the Artist and a copyright notice in substantially the following form: Copyright © [Artist], [date of publication].
- (d) Artist will use the Artist's best efforts in any public showing or résumé use of reproductions to give acknowledgment to the City in substantially the following form: "an original Work commissioned by and in the public art collection of the City of Sugar Land."
- (e) Artist will, at Artist's expense, cause to be registered with the United States Register of Copyrights, a copyright in the Works in the Artist's name.

- (f) If the City wishes to make reproductions of the Works for commercial purposes, including, but not limited to tee shirts, post cards, and posters, the Parties will execute a separate agreement to address the terms of the license granted by the Artist and the royalty the Artist will receive.
- (g) Third Party Infringement. The City is not responsible for any third party infringement of Artist's copyright and not responsible for protecting the intellectual property rights of Artist.

**25. Artist's Waiver Under 17 U.S.C. § 106A.**

- (a) Scope of Waiver. Artist's waiver applies to the Works described herein.
- (b) Uses Covered. This waiver applies to the following uses: any and all applications in which either the attribution right or the integrity right may be implicated.
- (c) Waiver. With respect to works enumerated in subparagraph (a) above for uses enumerated in subparagraph (b) above, Artist hereby expressly and forever waives any and all rights arising under 17 U.S.C. § 106A, and any rights arising under United States federal law, the laws of any states within the United States, or the laws of any other country that convey rights of the same nature as those conveyed under 17 U.S.C. § 106A, or any other type of moral right.

**26. Assignment and Transfer.**

- (a) Except as otherwise provided in this Contract, no Party has the right to assign this Contract without the prior written consent of the other Parties.
- (b) The Works and services required of the Artist are sole and personal and will not be assigned, sublet or transferred. Any attempt by Artist to assign any rights, duties, or obligations arising under this Contract will be void and of no effect unless prior written consent is given by the City.
- (c) The City will have the right to assign or transfer the Contract, and any and all of the City's rights and obligations under the Contract, without Artist's consent, if ownership of the Park or the Smart Financial Centre are transferred.

**27. Death or Incapacity.** If Artist become unable to complete this Contract due to death or incapacitation, such death or incapacity will not be deemed a breach of this Contract or a default on the part of the Artist. However, nothing in this Section shall obligate the City to accept the Works, or to make further payment for the Works if the Works are not accepted by the City.

- (a) In the event of incapacity of the Artist, the Artist will assign the Artist's obligations and services under this contract to another artist or artists provided that the City, in its sole

discretion, approves of the new artist or artists. Alternatively, the City may elect to terminate this Contract. Artist will retain all rights, if any, under Sections 23 and 24. The Works and any reproductions thereof will contain a credit to the Artist and a copyright notice in substantially the following form: Copyright © [Artist], [date of publication]

(b) In the event of Artist's death, this Contract will terminate effective as of the date of the death. Artist's heirs will retain all rights under Sections 23 and 24. Artist's executors will deliver to the City the Works in whatever form or degree of completion it may be at the time. Title to the Works will then transfer to the City. However, the Works will not be represented to be the completed Works of the Artist unless the City is otherwise directed by the Artist's estate.

**28. Entire Contract.** This Contract represents the entire Contract between the City and the Artist and supersedes all prior negotiations, representations, or contracts, either written or oral. This Contract may be amended only by written instrument signed by both parties.

**29. Independent Contractor.** Artist will perform the work under this Contract as an independent contractor and not as an employee of the City. The City has no right to supervise, direct, or control Artist, or Artist's officers or employees, in the means, methods, or details of the work to be performed by Artist. Artist acknowledges and agrees that it will not hold itself out as an authorized agent of the City with the power to bind the City in any manner. Artist will provide the City with its Tax Identification Number and any proof of such numbers as requested by the City.

**30. Records.** Artist will maintain records related to all expenditures and reimbursables made pursuant to this Contract. The City or its designate will have the right, upon written request, to inspect the records of Artist with respect to Artist's compliance with the terms of this Contract and the appropriateness of any expenditures or reimbursables.

**31. Nondiscrimination.** Artist will not discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin, in connection with or related to the performance of this Contract.

**32. Dispute Resolution Procedures.** If any Party disputes any matter relating to this Contract, the Parties agree to try in good faith, before bringing any legal action, to settle the dispute by submitting the matter to mediation before a third party who will be selected by agreement of the Parties. The City will pay one-half and Artist will pay one-half of the mediator's fees.

**33. Attorney's Fees.** Should any Party to this Contract bring suit against another Party for any matter relating to this Contract, neither Party will seek or be entitled to an award of attorney's fees or other costs relating to the suit.

**34. Severability.** If a court finds or rules that any part of this Contract is invalid or unlawful, the remainder of the Contract continues to be binding on the parties.

**35. Contractual Limitations Period.** Any provision of the Contract that establishes a limitations

period that does not run against the City by law or that is shorter than two years is void. (Sections 16.061 and 16.070, Texas Civil Practice and Remedies Code)

**36. Conflicting Provisions.** If there is a conflict between a provision in Artist's Additional Contract Documents and a provision in the remainder of this Contract, the latter controls.

**37. Waivers.** A waiver of any breach of any of the provisions of this Contract will not be construed as a continuing waiver of other breaches of the same or other provisions.

**38. Notices.** All notices will be in writing and may be delivered by mail, in person, or by email. Mailed notice is deemed received three days after the date of deposit in the United States mail. Unless otherwise provided in this Contract, all notices will be delivered to the following addresses:

To Artist: Richard Herzog  
[REDACTED]  
[REDACTED]  
Email: [rick@rickherzog.com](mailto:rick@rickherzog.com)

To the City: Economic Development  
City of Sugar Land  
P. O. Box 110  
Sugar Land, TX 77487-0110  
Email: [pholley@sugarlandtx.gov](mailto:pholley@sugarlandtx.gov)

If any Party changes its mailing or email address it will notify the other Parties in writing of the change, as provided for in this section.

**39. Law Governing and Venue.** This Contract is governed by the law of the State of Texas and a lawsuit may only be prosecuted on this Contract in a court of competent jurisdiction located in or having jurisdiction in Fort Bend County, Texas.

**40. Compliance with Laws.** Artist must comply with any federal, state, and local laws, rules and regulations applicable to the Work and its services under this Contract.

**41. Additional Contract Documents.** The following documents attached to this Contract are part of this Contract:

A. Artist's Additional Contract Documents:

A-1. Artist's Proposals (1 page)

Exhibit B. City's Additional Contract Documents:

B-1. Insurance Requirements (2 pages)

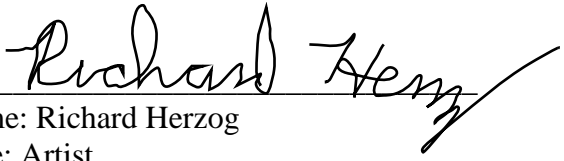
B-2. Maintenance and Materials Form (7 pages)



**CITY OF SUGAR LAND, TEXAS**

**RICHARD HERZOG**

By: \_\_\_\_\_  
Name: Michael W. Goodrum  
Title: City Manager  
Date: \_\_\_\_\_

By:   
Name: Richard Herzog  
Title: Artist  
Date : March 5, 2023

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_, City Secretary

Approved as to Form:  
