

AGREEMENT FOR COMMISSION OF PUBLIC ART WORK
AGREEMENT BETWEEN THE CITY OF AUSTIN AND MARGO SAWYER

This Agreement, entered into this _____ day of _____, 2001, is by and between the City of Austin, a municipal corporation, located in Travis County, Texas, (the "City") acting by and through its duly authorized City Manager or his designee and MARGO SAWYER ("Artist") residing at Opera House, 104 South Avenue C, Elgin, TX, 78621.

WHEREAS, the City is implementing the Art in Public Places Program pursuant to Chapter 9-2 of the Austin City Code by appropriating certain funds for the establishment of art works in public places and authorizing payments for the design, execution, fabrication, transportation, acquisition, installation and maintenance of works of art and the support of an artist selection process; and,

WHEREAS, the Public Art Fund for the AUSTIN CONVENTION CENTER DEPARTMENT (the "Sponsoring Department") and its AUSTIN CONVENTION CENTER EXPANSION Facility (the "City Facility") has been allocated for the selection, purchase, and placement of a work of art at, in, or near said City Facility; and,

WHEREAS, the Artist was selected by the City to design, execute, fabricate and install a three-dimensional work of art more particularly described as an installation of plated and powder-coated metal sculptural components entitled, *Index for Contemplation* (the "Work") to be installed in the designated public space located in, at, or near said City Facility, more particularly described as the Austin Convention Center Expansion, 500 East Cesar Chavez, Austin, TX, described in Exhibit "A" hereto (the "Site"); and,

WHEREAS, the City and the Artist wish to set out the terms and conditions under which said Work shall be designed, executed, fabricated and installed;

NOW, THEREFORE, the City and Artist for and in consideration of the covenants and agreements hereinafter set forth, the sufficiency of which is hereby acknowledged, agree as follows:

ARTICLE 1
SCOPE OF SERVICES

1.1. General.

a. The Artist shall perform all services and furnish all supplies, materials, and equipment as necessary for the design, execution, fabrication, transportation and installation of the Work at the Site (see Section 1.5).

b. The Artist shall determine the artistic expression, scope, design, color, size, material, and texture of the Work. The location at the Site at which the Work shall be installed has been mutually agreed upon by the City and the Artist.

c. The Artist shall install the Work on dates and at times (for a duration of approximately 30 days) mutually agreed upon by the Artist and the City.

1.2. Artist Selection.

a. City and Artist acknowledge that the Artist's Design attached hereto as Exhibit "B" has been reviewed and approved by the Art in Public Places Panel, the Austin Arts Commission and the Austin City Council as the basis for executing this Contract with the Artist.

b. City and Artist agree that the contract amount of EIGHTY-TWO THOUSAND DOLLARS AND NO CENTS (\$82,000) shall be full compensation to Artist for the completion of the Work as proposed, inclusive of design, execution, fabrication, transportation, installation, incidental costs and Artist's fees.

1.3. Structural Design Review.

The City and Artist hereby acknowledge that the requirement for detailed working drawings, sealed by a structural engineer licensed to practice in the State of Texas for review and approval by the City, is hereby waived.

1.4. Execution of the Work.

a. Upon execution of this contract, Artist shall promptly furnish to the City a schedule for completion of fabrication of the Work, including a schedule for the submission of progress reports, if any. After written approval of the schedule by the City, the Artist shall fabricate, transport and install the Work in accordance with such schedule. Schedule changes may be accomplished by written agreement between the Artist and the City.

b. The City shall have the right to review the Work at reasonable times during its fabrication. The Artist shall submit to the City progress reports in accordance with the schedule provided for in Paragraph a. of this Section.

c. The Artist shall complete the fabrication of the Work in substantial conformity with Exhibit "B" hereof. However, Artist may present to the City, in writing for further review and approval, any significant changes in the scope, design, color, size, material, or texture of the Work not in substantial conformity with Exhibit "B". The Art in Public Places Administrator in light of Exhibit "B" shall determine whether a significant change, must be approved.

1.5. Delivery and Installation.

a. The Artist shall notify the City in writing when she is ready to begin fabrication and installation at the Site.

b. The Artist shall fabricate and install the completed Work at the Site in compliance with the schedule approved pursuant to Section 1.4; provided, however, that delivery and installation activities may not commence until written permission is delivered to the Artist by the City (see Section 3.2.).

c. The City shall be responsible for all reasonable expenses, labor and equipment to prepare the Site for the installation of the Work,

including a grade 5 sheet rock finish and painted wall surface, per the architectural plans, on which the Work shall be installed. The Site shall be provided in a timely manner so as to accommodate the installation schedule for the Work (see Section 1.1.c.).

d. The Artist shall take all necessary precautions to protect and preserve the integrity and finish of adjacent building surfaces while installing the Work.

e. Prior to installation of the Work, the Artist shall provide to the City written instructions for appropriate maintenance and preservation of the Work.

1.6. Post-installation.

a. Within thirty (30) days after the installation of the Work, the Artist shall furnish the City with the following photographs of the Work as installed:

(i) Two (2) sets of three (3) color slides of the completed Work, one taken from each of three different viewpoints; and,

(ii) Two (2) sets of three (3) 8 x 10 black and white photographs of the completed Work, one taken from each of three different viewpoints.

b. The Artist shall be available at such time or times as may be agreed between the City and the Artist to attend any inauguration or presentation ceremonies relating to the transfer of the Work to the City. The City shall use its best efforts to arrange for publicity for the completed Work in such art publications and otherwise as may be determined between the City and the Artist as soon as practicable following installation.

1.7. Final Acceptance.

a. The Artist shall advise the City in writing when all services required prior to those described in Section 1.6 have been completed in substantial conformity with Exhibit "B" hereof. Included in such notice from the Artist shall be an affidavit certifying that all bills relating to services or supplies used in the performance of this Agreement have been paid.

b. The City shall notify the Artist in writing of its final acceptance of the Work.

c. Final acceptance shall be effective as of the earlier to occur of (1) the date of the City's notification of final acceptance; or, (2) the 35th day after the Artist has sent the written notice to the City required under Section 1.7 (a) unless the City, upon receipt of such notice and prior to the expiration of the 35-day period, gives the Artist written notice specifying and describing the services which have not been completed.

1.8. Risk of Loss

The risk of loss or damage to the Work shall be borne by the Artist prior to final acceptance, and the Artist shall take such measures as are necessary to protect the Work from loss or damage until final acceptance, including but not limited to the purchase of property loss insurance; except that the risk of loss or damage shall be borne by the City prior to final acceptance during such periods of time as the partially or wholly completed Work is in the custody, control or supervision of the City or its agents for the purposes of moving, storing, or performing any other ancillary services to the Work.

1.9. Title.

Title to the Work shall pass to the City upon final acceptance.

ARTICLE 2

COMPENSATION AND PAYMENT SCHEDULE

2.1. Fixed Fee.

The City shall pay the Artist a fixed fee of EIGHTY-TWO THOUSAND DOLLARS AND NO CENTS (\$82,000), which shall constitute full compensation for all services and

materials to be performed and furnished by the Artist under this Agreement. The fee shall be paid in the following installments, expressed as percentages (or portions) of such fixed fee, each installment to represent full and final, non-refundable payment for all services and materials provided prior to the due date thereof:

- a. Forty percent (40%) upon execution of this Agreement, recognizing the Artist has already invested time and expense in preliminary design coordination with the City and its consultants, and upon approval of the Artist's completion schedule [see Section 1.4 (a)].
- b. Twenty-five percent (25%) within ten (10) days after the City verifies that approximately 50% of the sculptural components have been fabricated (see Section 1.1.c.).
- c. Twenty-five percent (25%) within ten (10) days after the City notifies that the Artist may begin to install the work at the Site and receipt by City of such documentation it may require concerning payment of services and supplied rendered to the Artist [see Section 1.7 (a)].
- d. Ten percent (10%) within thirty-five (35) days after final acceptance; provided, however, that the final installment shall not be tendered prior to the expiration of thirty (30) days after final acceptance.

2.2. Sales Taxes.

The City is a tax exempt organization and no state or local sales taxes or federal excise taxes shall be due upon the Work. The City shall supply Artist with the "Texas Sales Tax and Local Sales Tax Exemption Certificate for Contractors"; in substantially the same form as that attached hereto and incorporated herein as Exhibit "C". The City shall supply the Artist the "Texas Sales Tax and Local Sales Tax Exemption Certificate for Suppliers"; in substantially the same form as that attached hereto and incorporated herein as Exhibit "C", for use by Artist in acquiring materials and supplies for the Work. The City shall also supply Artist with a "Federal Excise Tax Exemption Certificate"; in substantially the same form as that attached hereto and incorporated herein as Exhibit "C".

2.3. Artist's Expenses.

The Artist shall be responsible for the payments of all mailings or shipping charges, including insurance, on submissions to the City, the costs of transporting the Work to the Site and the costs of all travel by the Artist, except as otherwise provided, and the labor costs for Artist's agents and employees necessary for the proper performance of the services required under this Agreement.

ARTICLE 3 TIME OF PERFORMANCE

3.1. Duration.

The services to be required of the Artist set forth in Article 1 shall be completed in accordance with the schedule for completion of the Work as proposed by the Artist and approved by the City pursuant to Section 1.4.a.; provided, however, such time limits may be extended or otherwise modified by written agreement between the Artist and the City.

3.2. Construction Delays.

If, in accordance with Section 1.5, after the Artist notifies the City that the Work is ready for delivery and the City does not notify the Artist that delivery may commence within the time specified in the approved schedule, because of the status of construction at the Site precluding reasonable delivery and installation of the Work, the City shall promptly make arrangements to store the Work at the site or reimburse the Artist for direct, out-of-pocket, reasonable transportation and storage costs incurred for the period between the time provided in the schedule for commencement of delivery and the date upon which the City is prepared to accept delivery and installation of the Work, as determined by the City.

3.3. Early Completion of Artist Services.

The Artist shall bear any transportation and storage charges incurred from the completion of her services prior to the time provided in the schedule for delivery.

3.4. Time Extensions; Force Majeure.

The City or the Artist, as appropriate, shall grant a reasonable extension of time to the other party if conditions beyond the parties' control or Acts of God, flood, riot, civil insurrection, labor strikes, or orders of local or federal government render timely performance of the parties' services impossible or unexpectedly burdensome. The party

suffering the impossibility or burdensome conditions must inform the other in writing within the ten (10) days of the onset of such performance delay, specifying the reasons therefore. Failure to fulfill contractual obligations due to conditions beyond either party's reasonable control shall not be considered a breach of this Agreement; provided, however, that such obligations shall be suspended only for the duration of such conditions.

ARTICLE 4 WARRANTIES

4.1. Warranties of Title.

The Artist represents and warrants that:

- a. The Work is solely the result of the artistic effort of the Artist;
- b. Except as otherwise disclosed in writing to the City, the Work is unique and original and does not infringe upon any copyright;
- c. The Work, or a duplicate thereof, has not been accepted for sale elsewhere; and,
- d. The Work is free and clear of any liens from any source whatever.

4.2. Warranties of Quality and Conditions.

The Artist represents and warrants, except as otherwise disclosed to the City in writing in connection with submission of the Proposal pursuant to Section 1.2, that:

- a. The execution and fabrication of the Work will be performed in a workmanlike manner;
- b. The Work, as fabricated and delivered, will be free of defects in material and workmanship, including any defects consisting of

"inherent vice" or qualities which cause or accelerate deterioration of the Work;

c. Reasonable maintenance of the Work will not require procedures substantially in excess of those described in the final maintenance recommendations to the submitted by the Artist to the City under Section 1.5.

The warranties described in this Section 4.2 shall survive for a period of one (1) year after final acceptance of the Work. The City shall give notice to the Artist of any observed breach with reasonable promptness. The Artist shall, at the request of the City, and at no cost to the City, cure reasonably and promptly the breach of any such warranty which is curable by the Artist and which cure is consistent with professional conservation standards, including but not limited to, cure by means of repair or refabrication of the Work, or any portion thereof.

ARTICLE 5 INSURANCE

5.1. General.

a. The Artist shall carry any required statutory Workers' Compensation Insurance, Employers' Liability Insurance in the amount of at least ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000). The Artist shall also carry General Liability Insurance in the amount of at least FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$500,000) with the City named as an additional insured with respect to this coverage to insure against loss or damage to the Work during fabrication and installation. A certificate of Insurance shall be filed with the Contract Administrator prior to commencement of fabrication and installation of the Work. See Section 1.5.

The certificate of insurance for the General Liability coverage required herein shall provide that the coverage shall not be canceled or reduced, restricted, or limited until thirty (30) days after the City has received written notice by return receipt of registered or certified mail.

Except as provided in Section 1.8 hereof, the risk of damage to or loss of the Work during fabrication and installation, but prior to final acceptance by the City, shall be solely that of Artist. This risk shall transfer to the City and shall no longer be the responsibility of the Artist upon final acceptance of the Work.

5.2. Performance Bonds.

The Artist shall not be required by the City to post any performance bonds or similar undertakings, and any requirement of any other authority for performance bonds shall be the responsibility of the City.

ARTICLE 6
REPRODUCTION RIGHTS

6.1. General.

The Artist retains all reproduction rights under the Copyright Act of 1975, 17 U.S.C. §§ 101 et. seq., and all other rights in and to the Work except as such rights are limited by this Section 6. In view of the intention that the Work in its final dimension shall be unique, the Artist shall not make any additional exact duplicate, three-dimensional reproductions of the final Work, nor shall the Artist grant permission to others to do so except with the prior written permission of the City. The Artist grants to the City and it assigns an irrevocable license to make two-dimensional reproductions of the Work for any municipal purpose, including reproductions used in advertising, brochures, stationery, media publicity, CD Rom, website, and catalogues or other similar publications.

6.2. Notice.

All reproductions by the City shall contain a credit to the Artist and a copyright notice substantially in the following form: "© Artist's name, title, date of completion."

6.3. Credit to City.

The Artist shall use her best efforts to give a credit reading substantially, "an original Work owned and commissioned by the City of Austin" in any public showing of reproductions of the Work which are under the Artist's control.

ARTICLE 7
ARTIST'S RIGHTS

7.1. Identification.

The City shall, at its expense and in consultation with Artist, prepare and install at the Site, a plaque identifying the Artist, the title of the Work, and the year of completion.

7.2. Maintenance.

The City recognizes that maintenance of the Work on a regular basis is essential to the integrity of the Work. The City shall reasonably assure that the Work is properly maintained and protected, taking into account the maintenance instructions provided by Artist in accordance with Section 1.5, and shall reasonably protect and maintain the Work against the ravages of time, vandalism, and the elements.

7.3. Repairs and Restoration.

a. The City shall have the right to determine, when and if repairs and restorations to the Work will be made. During the Artist's lifetime and to the extent practicable, the City shall give the Artist the right to approve all major repairs and restorations; provided, however, the Artist shall not unreasonably withhold approval for any repair or restoration of the Work. Should Artist unreasonably withhold approval of any intended major repair or restoration, the City 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 major repairs and restorations and shall be paid a reasonable fee for any such services, provided that the City and the Artist shall agree in writing, prior to commencement of any significant repairs and restorations, upon the Artist's fee for such services. Should the Artist fail to agree to make or supervise the repairs and restorations, the City shall have the right to solicit bids and award contracts for the services to other qualified professionals.

b. All repairs and restorations shall be made in accordance with recognized principles of conservation.

c. When emergency repairs are necessary in order to prevent the loss of or further damage to the Work, such repairs shall be undertaken or arranged by City without advance notice to Artist, and such repairs shall not be deemed to constitute artistic alteration.

7.4. Alteration of the Work or of the Site.

a. In the event that the Work is incorporated into a building, structure or realty, the installation of the Work may subject it to destruction, distortion, mutilation or other modification by reason of its removal. If removal of the Work would damage either the Work or the building or structure, the City shall have the right to remove the Work by any means, including destruction, in performing maintenance, repair, renovation, or reconstruction of the building, structure or in devoting realty to a new use.

b. In the event that the Work is freestanding, or incorporated into a building, structure or realty such that it may be removed without damaging or destroying the Work or the building or structure, the Artist may be given written notice and 90 days to remove the Work at her or her sole expense. Upon Artist's failure to remove the Work, the City shall have the right to remove and dispose of the Work by any means, including its destruction.

c. The City agrees that it will not willfully destroy, damage, or modify the work, except as provided in paragraphs a. and b. above.

d. In the event the Work is substantially damaged or altered, the City shall no longer represent the Work as that of the Artist if the Artist gives written notice to the City that it is the position of the Artist to deny authorship on the grounds stated in this paragraph.

e. The City shall at all times have the right to move the Work, or remove it from public display. The City shall also have the right to sell or trade the Work. It is understood that the Work is site-specific.

7.5. Permanent Record.

The City shall maintain on permanent file a record of this Agreement and of the location and disposition of the Work.

7.6. Artist's Address.

The Artist shall notify the City of changes in this address. The failure to do so, if such failure prevents the City from locating the Artist, shall be deemed a waiver by the Artist of the right subsequently to enforce these provisions of Article 7 that require the express approval of the Artist. Notwithstanding this provision, the City shall make every reasonable effort to locate the Artist when matters arise relating to the Artist's rights.

7.7. Surviving Covenants.

The covenants and obligations set forth in this Article 7 shall not survive the death or legal incapacity of the Artist.

7.8. Additional Rights and Remedies.

Nothing contained in this Article 7 shall be construed as a limitation on such other rights and remedies available to the Artist under the law which may now or in the future be applicable.

ARTICLE 8

ARTIST AS AN INDEPENDENT CONTRACTOR

The Artist shall perform all work under this Agreement as an independent contractor and not as an agent or an employee of the City. The Artist shall not be supervised by any employee or official of the City nor shall the Artist exercise supervision over an employee or official of the City.

ARTICLE 9

SUBCONTRACTING

9.1. Subcontracting by Artist.

The Artist may subcontract portions of the services to be provided hereunder at the Artist's expense, provided that said subcontracting shall not affect the design, appearance or visual quality of the Work and shall be carried out under the personal supervision of the Artist.

ARTICLE 10 TERMINATION

10.1. Gratuities.

The City may cancel this Agreement if it is found that gratuities in the form of entertainment, gifts or otherwise were offered or given by the Artist or any agent or representative to any City official or employee with a view toward securing favorable treatment with respect to the awarding, amending, or making of any determinations with respect to this performance of this Agreement. In the event this Agreement is canceled by the City, pursuant to this Section 10.1, the City shall be entitled, in addition to any other rights and remedies, to recover from the Artists a sum equal in amount to the cost incurred by the Artist in providing such gratuities.

10.2. Termination for Cause.

If either party to this Agreement shall willfully or negligently fail to fulfill in a timely and proper manner, or otherwise violate, any of the covenants, agreements or stipulations material to this Agreement, the other party shall thereupon have the right to terminate this Agreement by giving written notice to the defaulting party of the intent to terminate specifying the grounds for termination. The defaulting party shall have thirty (30) days after receipt of the notice to cure the default. If it is not cured, then this Agreement shall terminate. Termination of this Agreement under this provision shall not relieve the party in default of any liability for damages resulting from a breach or a violation of the terms of this Agreement.

10.3. Termination for Convenience.

- a. The services to be performed under this Agreement may be terminated by either party, subject to written notice submitted thirty (30)

days before termination. The notice shall specify whether the termination is for convenience or cause.

b. If the termination is for the convenience of the City, the Artist shall have the right to an equitable adjustment in the fee (without allowance for anticipated profit on unperformed services), in which event the City shall have the right at its discretion to possession and transfer of title to the sketches, designs and models already prepared and submitted or presented for submission to the City by the Artist under this Agreement prior to the date of termination, provided that no right to fabricate or execute the Work shall pass to the City.

c. If termination is for the convenience of the Artist, the Artist shall remit to the City a sum equal to all payments (if any) made to the Artist pursuant to this Agreement prior to termination.

10.4. Incapacity of Artist.

a. In the event of Artist's death or Artist becoming physically or legally incapacitated during the term of this Agreement, the City shall have the right to terminate this Agreement on payment to Artist or Artist's successors for all work and services performed prior to death or incapacity. All finished and unfinished drawings, sketches, photographs, models and work shall become property of the City.

Should Artist's design been approved or if the Artist's work has progressed to the point of fabrication of the Work, in the event of termination under this section, the City shall have the right to complete the Work. Due regard shall be made for Artist's intended results and proper credit and acknowledgement shall be given to Artist. It is understood that Artist's final design shall be developed during the installation process and may be difficult to determine in advance.

ARTICLE 11 CONTRACT ADMINISTRATOR

The Contract Administrator for this Agreement shall be the Art in Public Places Administrator and the Director of the Parks and Recreation Department. Whenever this Agreement requires any notice to be given to or by the City, or any determination or action to be made by the City, the Art in Public Places Administrator and the Director of the Parks and Recreation Department shall represent and act for the City.

ARTICLE 12
EQUAL OPPORTUNITY

a. The Artist shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Artist shall take affirmative action to ensure that employees are treated during employment, without regard to their race, color, religion, sex and national origin. Such action shall include but not be limited to the following: Employment, upgrading, demotion, transfer, recruitment or pay or other forms of compensations, and selection for training, including apprenticeship. The Artist agrees to post in conspicuous places, available to employees and applications for employment, notices to be provided by the City setting forth the provision of this nondiscrimination clause.

b. The Artist shall in all solicitation or advertisements for employment placed on or on behalf of the Artist, state that all qualified applicants shall receive consideration for employment without regard to race, color, religion, sex or national origin.

c. The Artist shall furnish all information and reports requested by the City of Austin, and shall permit access to its books, records, and accounts for purposes of investigation to ascertain compliance with such rules and regulations.

d. In the event of the Artist noncompliance with the nondiscrimination clauses of this Agreement, this Agreement may be canceled, terminated, or suspended in whole or in part, and the Artist may be debarred from further agreements with the City of Austin.

ARTICLE 13
MISCELLANEOUS

13.1. Compliance.

The Artist shall be required to comply with Federal, State and City statutes, ordinances and regulations application to the performance of the Artist services under this Agreement.

13.2. Entire Agreement.

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

13.3. Amendments.

No alteration, change, modification or amendment of the terms of this Agreement shall be valid or effective unless made in writing and signed by both parties hereto and approved by appropriate action of the City.

13.4. Waiver.

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

13.5. Governing Law and Venue.

This Agreement, regardless of where executed or performed, shall be governed by and construed in accordance with the laws of the State of Texas. Venue for any litigation arising from this Agreement shall be in Austin, Travis County, Texas.

13.6. Heirs and Assigns.

This Agreement shall be binding upon and shall inure to the benefit of the City and the Artist and their respective successors and assigns.

ARTICLE 14

NOTICES

All notices, requests, demands, and other communications which are required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon the delivery or receipt thereof, as the case may be, if delivered personally or sent by registered or certified mail, return receipt requested, postage prepaid, as follows:

1. CITY OF AUSTIN: Director, Parks and Recreation Department
City of Austin
P. O. Box 1088
Austin, TX 78767

Copies to: Art in Public Places Administrator
Parks and Recreation Department
City of Austin
P. O. Box 1088
Austin, TX 78767

City Attorney's Office
P. O. Box 1088
Austin, TX 78767
ATTN.: Art in Public Places Attorney

2. ARTIST Margo Sawyer
Opera House
104 S. Avenue C
Elgin, TX 78621

IN WITNESS HEREOF, the parties hereto have executed this Agreement on this day and year first written above.

CITY OF AUSTIN

By: _____
Its City Manager or his Designee

Printed Name

ARTIST

Printed Name

APPROVED AS TO FORM:

Assistant City Attorney