

If you take exception to any of the terms, conditions or language in the contract, you must indicate those exceptions in your response to the RFP; certain exceptions may result in your proposal being disqualified from further review and evaluation. Only those exceptions indicated in your response to the RFP will be available for discussion or negotiation.

Professional and Technical Services Contract

State of Minnesota
Percent for Art in Public Places Program
SWIFT Contract #: _____
SWIFT PO #: _____
Funding string: _____

This Contract is between the State of Minnesota, acting by and through the Minnesota State Arts Board (“State”), [CUSTODIAL AGENCY] (“Custodial Agency”) and [ARTIST] (“Contractor” or “Artist”).

Vendor Address: [ARTIST ADDRESS, CITY, STATE, ZIP]
Vendor SWIFT ID number: [VENDOR SWIFT I.D.]

Recitals

1. Under Minn. Stat. § 16B.35 the Legislature authorized works of art to be acquired for public buildings.
2. Under a Delegation of Authority from the Department of Administration the Minnesota State Arts Board (“Arts Board”) is authorized to implement Minn. Stat. § 16B.35 through the Minnesota Percent for Art in Public Places program.
3. Under Minn. Stat. § 129D.04, subd. 5 the Arts Board is authorized to enter in to contracts.
4. The State is in need of design, fabrication, and installation of a permanent, site-specific public artwork (“Artwork”) located at [BUILDING, WORK SITE, ADDRESS] (“Worksite”) at the Custodial Agency.
5. The Custodial Agency controls the building or site where the Artwork will be installed and is responsible for stewardship of the Artwork.
6. The Contractor responded to a recent solicitation regarding the Minnesota Percent for Art in Public Places program, which response is incorporated by reference herein, and represents that it is duly qualified and agrees to perform all services described in this Contract to the satisfaction of the State.

Contract

1. Term of Contract

- 1.1 **Effective date.** The effective date of this Contract is when all required signatures are obtained. The Contractor must not begin work under this Contract until this Contract is fully executed.
- 1.2 **Expiration date.** [EXPIRATION DATE], or when all obligations have been satisfactorily fulfilled, whichever occurs first.
- 1.3 **Survival of terms.** The following clauses survive the expiration or cancellation of this Contract: 8. Indemnification; 9. State audits; 10. Government data practices and intellectual property; 10. Maintenance and care; 11. Material changes after acceptance of Artwork; 12. Publicity, endorsement, and reproduction; 15. Governing law, jurisdiction, and venue; and 16. Data disclosure.

2. Contractor's Duties

Contractor, who is not a State employee, will do the following:

- 2.1 **Schematic design proposal phase.** The Contractor will provide a schematic design proposal in accordance with the professional services and deliverables set forth in Attachment A, attached hereto.
- 2.2 **Commission of artwork phase.** If the Schematic Design Proposal is selected by the State, the State shall notify the Contractor and the parties shall execute an amendment to this Contract that shall not exceed [TOTAL CONTRACT AMOUNT] regarding the commissioning of the Artwork. The Contractor shall not proceed with the commission phase until the amendment has been fully executed.

3. Plan Review

The State and Custodial Agency shall make available for Contractor's use all pertinent information regarding the intended site of the Artwork. Where appropriate, the State or Custodial Agency may direct its professional consultants (i.e. architects, engineers, landscape architects, and other design professionals) to work with Contractor.

4. Time

4.1 Schedule of performance

The Contractor must fully comply with all of the deadlines set forth in Attachment A.

- 4.2 **Extension of time.** The State may, but is not obligated to, grant an extension of time to the Contractor in the event that there is a delay caused by the State, conditions beyond the Contractor's control, or pursuant to those circumstances set out in Section 18.4 of this Contract. Extensions of time must comply with the requirements of Section 7.2 of this Contract.

5. Consideration and Payment

- 5.1 **Consideration.** The State will pay for all services performed by the Contractor under this Contract as follows:

(a) *Compensation.* The Contractor will be paid [SCHEMATIC DESIGN AMOUNT] for the work described in Attachment A.

- 5.2 **Total obligation.** The total obligation of the State for all compensation and reimbursements to the Contractor under this Contract shall not exceed [SCHEMATIC DESIGN AMOUNT].

5.3 Payment

(a) Subject to subsection (b) below, the State will promptly pay the Contractor for Contractor's work for the Schematic Design Proposal Phase only after the Contractor fully complies with all of the terms and conditions of this Contract.

(b) *Retainage.* Under Minn. Stat. § 16C.08, subd. 5(b), no more than 90 percent of the amount due under this Contract may be paid until the final product of this Contract has been reviewed by the State's agency head. The balance due will be paid when the State's agency head determines that the Contractor has satisfactorily fulfilled all the terms of this Contract.

6. Authorized Representative

The State's Authorized Representative is Sue Gens, Executive Director, Minnesota State Arts Board, or her successor, and has the responsibility to monitor the Contractor's performance and the authority to accept the services provided under this Contract. If the services are satisfactory, the State's Authorized Representative will indicate acceptance on each invoice submitted for payment.

The Contractor's Authorized Representative is [CONTRACTOR'S AUTHORIZED REPRESENTATIVE], or his/her successor. If the Contractor's Authorized Representative changes at any time during this Contract, the Contractor must immediately notify the State.

7. Assignment, Amendments, Waiver, and Contract Complete

7.1 **Assignment.** The Contractor may neither assign nor transfer any rights or obligations under this Contract without the prior consent of the State and a fully executed assignment agreement, executed and approved by the same parties who executed and approved this Contract, or their successors in office.

7.2 **Amendments.** Any amendment to this Contract must be in writing and will not be effective until it has been executed and approved by the same parties who executed and approved the original Contract, or their successors in office.

7.3 **Waiver.** If the State fails to enforce any provision of this Contract, that failure does not waive the provision or its right to enforce it.

7.4 **Contract complete.** This Contract contains all negotiations and agreements between the State and the Contractor. No other understanding regarding this Contract, whether written or oral, may be used to bind either party.

8. Indemnification

In the performance of this Contract by Contractor, or Contractor's agents or employees, the Contractor shall indemnify, save, and hold harmless the State, its agents, and employees, from any claims or causes of action, including attorney's fees incurred by the State, to the extent caused by Contractor's:

- a) Intentional, willful, or negligent acts or omissions; or
- b) Actions that give rise to strict liability; or
- c) Breach of contract or warranty.

This clause will not be construed to bar any legal remedies the Contractor may have for the State's failure to fulfill its obligation under this Contract.

9. State Audits

Under Minn. Stat. § 16C.05, subd. 5, the Contractor's books, records, documents, and accounting procedures and practices relevant to this Contract are subject to examination by the State and/or the State Auditor or Legislative Auditor, as appropriate, for a minimum of six years from the termination of this Contract.

10. Government Data Practices and Intellectual Property

The Contractor and State shall comply with the Minnesota Government Data Practices Act, Minn. Stat. ch. 13. The civil remedies of Minn. Stat. § 13.08 apply to the release of the data governed by the Minnesota Government Practices Act by either the Contractor or the State. If the Contractor receives a request to release data referred to in this clause, the Contractor must immediately notify and consult with the State's Authorized Representative as to how the Contractor should respond to the request. The Contractor's response to the request must comply with applicable law.

11. Intellectual Property Rights and Obligations

(a) *Intellectual property rights.* The Contractor retains all copyrights and other intellectual property interests in the design and in any plans, drawings, renderings, schematics, design studies, and models

prepared by the Contractor in connection with this Contract. The Contractor is responsible, at his/her option, for registering any copyrightable material in his or her name with the U.S. Register of Copyrights, at no additional cost to the State. It is specifically understood that given the Contractor's retention of all intellectual property rights, in the event the State elects not to commission the Schematic Design Proposal, the State does not have the right to take the design to a third party for further development, including but not limited to fabrication and / or installation.

The State is not responsible for any third party infringement of the Contractor's copyright and is not responsible for protecting the intellectual property rights of the Contractor. It is understood that the Artwork may be photographed by the public.

In view of the intention that the Artwork produced under this Contract must be unique, the Contractor shall not make any additional exact duplicate editions of the Artwork, nor shall the Contractor grant permission to others to do so except with the written permission of the State. However, nothing shall prevent the Contractor from creating future artwork in the Contractor's manner and style of artistic expression.

- (b) *Visual Artists' Rights Act.* In all matters pertaining to the Artwork and its maintenance, the provisions of the Federal Visual Artists' Rights Act of 1990 shall apply.
- (c) *Representations and warranties.* The Contractor represents and warrants that the services, works, and documents rendered pursuant to this Contract are original or the result of disclosed and attributed collaboration, and do not and will not infringe upon any intellectual property rights of other persons or entities.
- (d) *Indemnification.* Notwithstanding Paragraph 8 above, the Contractor shall indemnify; defend, to the extent permitted by the Attorney General; and hold harmless the State, at the Contractor's expense, from any action or claim brought against the State to the extent that it is based on a claim that all or part of the works or documents infringe upon the intellectual property rights of others. The Contractor will be responsible for payment of any and all such claims, demands, obligations, liabilities, costs, and damages, including but not limited to attorney fees. If such a claim or action arises, or in the Contractor's or the State's opinion is likely to arise, the Contractor shall, at the State's discretion, either procure for the State the right or license to use the intellectual property rights at issue or replace or modify the allegedly infringing works or documents as necessary and appropriate to obviate the infringement claim. This remedy of the State will be in addition to and not exclusive of other remedies provided by law.

12. Workers' Compensation and Other Insurance

Contractor certifies that it is in compliance with all insurance requirements specified in the solicitation document relevant to this Contract. Contractor shall maintain such insurance in force and effect throughout the term of the Contract.

Further, the Contractor certifies that it is in compliance with Minn. Stat. § 176.181, subd. 2, pertaining to workers' compensation insurance coverage. The Contractor's employees and agents shall not be considered State employees. Any claims that may arise under the Minnesota Workers' Compensation Act on behalf of these employees or agents and any claims made by any third party as a consequence of any act or omission on the part of these employees or agents are in no way the State's obligation or responsibility.

13. Risk of Loss

The responsibility for, and risk of damage to, or loss of, the Artwork during fabrication and through installation shall be solely that of the Contractor. The Contractor must take such measures as are reasonably

necessary to protect the Artwork from loss or damage during the creation, storage, transportation, delivery of the Artwork, and through completion of installation of the Artwork. Upon successful installation of the Artwork, the responsibility for risk and damage to or loss of the Artwork shall no longer be the responsibility of the Contractor. Upon successful installation of the Artwork, the Custodial Agency shall be responsible for protecting the Artwork against loss, theft, vandalism, or other damage.

14. Debarment by State, its Departments, Commissions, Agencies, or Political Subdivisions

Contractor certifies that neither it nor its principals is presently debarred or suspended by the Department of Administration, or any of the State of Minnesota departments, commissions, agencies, or political subdivisions. Contractor's certification is a material representation upon which the commissioning was based. Contractor must provide immediate written notice to the State's Authorized Representative if at any time it learns that this certification was erroneous when submitted or becomes erroneous by reason of changed circumstances.

15. Governing Law, Jurisdiction, and Venue

Minnesota law, without regard to its choice-of-law provisions, governs this Contract. Venue for all legal proceedings out of this Contract, or its breach, must be in the appropriate state or federal court with competent jurisdiction in Ramsey County, Minnesota.

16. Data Disclosure

Under Minn. Stat. § 270C.65, subd. 3 and other applicable law, the Contractor consents to disclosure of its social security number, federal employer tax identification number, and/or Minnesota tax identification number, already provided to the State, to federal and state agencies, and state personnel involved in the payment of state obligations. These identification numbers may be used in the enforcement of federal and state laws which could result in action requiring the Contractor to file state tax returns, pay delinquent state tax liabilities, if any, or pay other state liabilities.

17. Payment to Subcontractors

Under Minn. Stat. § 16A.1245, a prime Contractor must pay all subcontractors, less any retainage, within 10 calendar days of the prime Contractor's receipt of payment from the State for undisputed services provided by the subcontractor(s) and must pay interest at the rate of one and one-half percent per month or any part of a month to the subcontractor(s) on any undisputed amount not paid on time to the subcontractor(s).

18. Termination

18.1 Termination by the State. The State may cancel this Contract at any time, with or without cause, upon 30 days' written notice to the Contractor. Should the State elect to terminate the Contract under this section, the State does not have the right to commission any other party to create the Schematic Design Proposal, or any part thereof, without the written approval of the Contractor. Upon termination, the Contractor may be entitled to payment, determined on a pro rata basis, for services satisfactorily performed.

18.2 Termination for insufficient funding. The State may immediately terminate this Contract if it does not obtain funding from the Minnesota Legislature, or other funding source; or if funding cannot be continued at a level sufficient to allow for the payment of the services covered here. Termination shall be by written notice to the Contractor. The State is not obligated to pay for any services that are provided after notice and effective date of termination. However, the Contractor will be entitled to

payment, determined on a pro rata basis, for services satisfactorily performed to the extent that funds are available. The State will not be assessed any penalty if the Contract is terminated because of the decision of the Minnesota Legislature, or other funding source, not to appropriate funds. The State shall provide the Contractor notice of the lack of funding within a reasonable time of the State's receiving that notice.

18.3 Force majeure. The Parties will be excused from performing under this Contract if performance is prevented by a condition beyond the control of the Parties such as acts of God, war, civil insurrection, government action or public emergency (but only for as long as such unforeseen occurrences exist). Both Parties will take all reasonable steps to assure performance of their contractual obligation when the unforeseen occurrences have ceased to exist, but resumption of performance will be subject to negotiation between the Parties if more than one (1) year has passed since either suspension of obligations under this Contract, or substantially changed circumstances.

19. Non-discrimination (In accordance with Minn. Stat. § 181.59)

The Contractor will comply with the provisions of Minn. Stat. § 181.59 which require the following:

Every contract for or on behalf of the State of Minnesota, or any county, city, town, township, school, school district, or any other district in the state, for materials, supplies, or construction shall contain provisions by which the contractor agrees:

(1) that, in the hiring of common or skilled labor for the performance of any work under any contract, or any subcontract, no contractor, material supplier, or vendor, shall, by reason of race, creed, or color, discriminate against the person or persons who are citizens of the United States or resident aliens who are qualified and available to perform the work to which the employment relates;

(2) that no contractor, material supplier, or vendor, shall, in any manner, discriminate against, or intimidate, or prevent the employment of any person or persons identified in clause (1) of this section, or on being hired, prevent, or conspire to prevent, the person or persons from the performance of work under any contract on account of race, creed, or color;

(3) that a violation of this section is a misdemeanor; and

(4) that this contract may be canceled or terminated by the state, county, city, town, school board, or any other person authorized to grant the contracts for employment, and all money due, or to become due under the contract, may be forfeited for a second or any subsequent violation of the terms or conditions of this contract.

20. Affirmative action requirements for contracts in excess of \$100,000 and if the Contractor has more than 40 full-time employees in Minnesota or its principal place of business

20.1 Covered contracts and contractors.

If the Contract exceeds \$100,000 and the Contractor employed more than 40 full-time employees on a single working day during the previous 12 months in Minnesota or in the state where it has its principal place of business, then the Contractor shall comply with the requirements of Minn. Stat. § 363A.36 and Minn. R. 5000.3400-5000.3600. A contractor covered by Minn. Stat. § 363A.36 because it employed more than 40 full-time employees in another state and does not have a certificate of compliance, shall certify that it is in compliance with federal affirmative action requirements.

20.2 Minn. Stat. § 363A.36.

Minn. Stat. § 363A.36 requires the Contractor to have an affirmative action plan for the employment of minority persons, women, and qualified disabled individuals approved by the Minnesota Commissioner of Human Rights ("Commissioner") as indicated by a certificate of compliance. The law addresses suspension or revocation of a certificate of compliance and contract consequences in that event. A contract awarded without a certificate of compliance may be voided.

20.3 Minn. R. 5000.3400-.3600.

- (a) *General.* Minn. R. 5000.3400-.3600 implements Minn. Stat. § 363A.36. These rules include, but are not limited to, criteria for contents, approval, and implementation of affirmative action plans; procedures for issuing certificates of compliance and criteria for determining a contractor's compliance status; procedures for addressing deficiencies, sanctions, and notice and hearing; annual compliance reports; procedures for compliance review; and contract consequences for non-compliance. The specific criteria for approval or rejection of an affirmative action plan are contained in various provisions of Minn. R. 5000.3400-.3600 including, but not limited to, Minn. R. 5000.3420-.3500 and 5000.3552-.3559.
- (b) *Disabled Workers.* The Contractor shall comply with the following affirmative action requirements for disabled workers.
- (1) The Contractor shall not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The Contractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified disabled persons without discrimination based upon their physical or mental disability in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
 - (2) The Contractor agrees to comply with the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.
 - (3) In the event of the Contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with Minn. Stat. § 363A.36, and the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.
 - (4) The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Commissioner. Such notices shall state the Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled employees and applicants for employment, and the rights of applicants and employees.
 - (5) The Contractor shall notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Contractor is bound by the terms of Minn. Stat. § 363A.36, of the Minnesota Human Rights Act and is committed to take affirmative action to employ and advance in employment physically and mentally disabled persons.
- (c) *Consequences.* The consequences for the Contractor's failure to implement its affirmative action plan or make a good faith effort to do so include, but are not limited to, suspension or revocation of a certificate of compliance by the Commissioner, refusal by the Commissioner to approve subsequent plans, and termination of all or part of this Contract by the Commissioner or the State.
- (d) *Certification.* The Contractor hereby certifies that it is in compliance with the requirements of Minn. Stat. § 363A.36 and Minn. R. 5000.3400-.3600 and is aware of the consequences for noncompliance.

21. E-Verify certification (In accordance with Minn. Stat. § 16C.075)

For services valued in excess of \$50,000, Contractor certifies that as of the beginning date services are performed on behalf of the State, Contractor and all its subcontractors will have implemented or be in the process of implementing the federal E-Verify Program for all newly hired employees in the United States who will perform work on behalf of the State. Contractor is responsible for collecting all subcontractor certifications and may do so utilizing the *E-Verify Subcontractor Certification Form* available at <http://www.mmd.admin.state.mn.us/doc/VerifySubCertForm.doc>. All subcontractor certifications must be kept on file with Contractor and made available to the State upon request.

22. Change of Address

The Contractor agrees to notify the State of any changes in the Contractor's address within fifteen (15) days of the change.

23. Required signatures

This contract shall not be considered accepted, approved, or effective until all required signatures are affixed.

24. Other Terms

None

SAMPLE

IN WITNESS WHEREOF, the parties have executed this Contract intending to be bound by the obligations contained herein, as of the date of the last signature.

1. ENCUMBERANCE VERIFICATION

Authorizing official, printed name

Signature

Title

Telephone number

Date

4. CUSTODIAL AGENCY

Authorizing official, printed name

Signature

Title

Telephone number

Date

2. CONTRACTOR
(If corporation, two officers must execute)

Authorizing official, printed name

Signature

Title

Telephone number

Date

5. MINNESOTA STATE ARTS BOARD

Authorizing official, printed name

Signature

Title

Telephone number

Date

3. CONTRACTOR
(If corporation, two officers must execute)

Authorizing official, printed name

Signature

Title

Telephone number

Date

6. DEPARTMENT OF ADMINISTRATION

Authorizing official, printed name

Signature

Title

Telephone number

Date

ATTACHMENT A: SCHEMATIC DESIGN PROPOSAL**1. Contractor's duties.**

The Contractor, who is not a State employee, will perform the following:

- 1.1 **Initial design meeting.** Consult with representatives appointed by the State and the Custodial Agency to determine project goals and requirements, discuss current construction status and schedule, answer questions about design and commissioning process, establish lines of communication, and request additional information necessary for the Contractor to research and develop the Schematic Design Proposal.
 - (a) *Initial Design Meeting.* The initial design meeting will be held at a location and time determined by the State. Contractor's attendance and participation in this meeting is mandatory.
- 1.2 **Plan review.** Consider and utilize all relevant information provided by the State regarding the work site and building project, including but not limited to: plans, specifications, reports, narratives, publications, statistics, records, and other information pertinent to Contractor's performance under this Contract.
- 1.3 **Schematic design proposal.** Provide deliverables of the Schematic Design Proposal, outlined below:
 - (a) *Maquette.* A small preliminary scale model, material samples, study drawings and sketches, computer renderings or other media illustrating the Artwork and its surroundings.
 - (b) *Written narrative.* Provide [NUMBER OF COPIES] bound copies of detailed information regarding the concept of the Artwork including Contractor's exploration of design ideas for collaborative and individual efforts for the project. The following must be addressed:
 - (1) Desired impact of the Artwork(s) and relationship to project goals;
 - (2) General size and / or scale of the Artwork(s);
 - (3) Physical properties of the Artwork(s) including but not limited to weight and finish;
 - (4) Potential relationships and connections to other sites;
 - (5) Potential materials and fabrication methods;
 - (6) Preliminary assessment of requirements for sub-consultants, including but not limited to structural, lighting, electrical, mechanical, hydraulic engineers and consultants;
 - (7) Opportunities to integrate artwork into the construction schedule; and
 - (8) Annotated plans and / or site plans illustrating the location and dimensions of the proposed Artwork(s), along with any critical explanatory notes.
 - (c) *Installation.* Preliminary assessment of installation methodology and necessary site preparation.
 - (d) *Maintenance and safety.* Preliminary discussion of maintenance and safety considerations, and public access to the proposed Artwork(s);
 - (e) *Itemized budget.* Preliminary assignment of all costs related to the Artwork, including but not limited to the Contractor's design fee, labor, consultants, travel, transportation, materials, site preparation, installation needs and equipment, storage, documentation, studio overhead, insurance, taxes, contingency, and if applicable, Contractor's participation in a public event related to the Artwork.
 - (f) *Preliminary Schedule.* Preliminary schedule for design development, construction documents and sub-consultant review, fabrication, and installation of the Artwork.
- 1.4 **Electronic submission.** The complete Schematic Design Proposal must be submitted via WebGrants to the State no later than [DATE] at [TIME] for initial review by the State.
- 1.5 **Schematic design presentation.** Contractor must personally present the Schematic Design Proposal to the site selection committee for review; discussion and / or approval during a meeting that is open to members the public. Contractor will use the presentation format of Contractor's choice sufficient to provide the site selection committee with a clear understanding of the proposed design. For purposes of this subsection, the Contractor and members of its firm are not considered members of the public and will not be permitted to attend the design presentation of the other finalist(s).

(a) *Schematic Design Presentation Meeting.* The schematic design presentation meeting will be held at [LOCATION] on [DATE] at [TIME] Contractor's attendance and participation in this meeting is mandatory.

2. Design approval process.

- 2.1 **Schematic design.** The State shall have the right to reject the Schematic Design Proposal, approve it as presented, or approve it with conditions. After Contractor presents the Schematic Design Proposal to the site selection committee as defined in this schedule, the State shall notify the Contractor whether it approves or disapproves of the Schematic Design Proposal. The State shall notify the Contractor in writing of any revisions to the Schematic Design Proposal necessary for approval. In this event, the Contractor shall provide a revised Schematic Design Proposal within 30 days after the State has notified the Contractor of the necessary revisions.
- 2.2 **Further approvals.** In the event that further approvals or reviews are necessary for the State to select the Contractor's Schematic Design Proposal for commission, Contractor, as part of this Contract and for no further compensation, shall prepare the necessary materials for and be available to personally present the same to the appropriate body/bodies for approval to proceed with the commission of the Artwork.
- 2.3 **Rejection.** If the State does not wish to commission the Schematic Design Proposal, the State may not use any part of the Contractor's Schematic Design Proposal for future development without the specific written approval of the Contractor. The State shall notify the Contractor in writing if the Schematic Design Proposal is not selected for commission. The Contractor's involvement with the project will terminate and the Contractor will be paid for the Schematic Design Proposal as outlined in Section 5 of this Contract.
- 2.4 **Commission.** If the Contractor's Schematic Design Proposal is selected for commission, the State shall notify the Contractor in writing, and the parties shall execute an amendment to this Contract regarding the terms and conditions of the commission.

Professional and Technical Services Contract

State of Minnesota
Percent for Art in Public Places Program

SWIFT Contract #: _____

SWIFT PO #: _____

Funding string: _____

AMENDMENT NUMBER 1

COMMISSIONING OF ARTWORK

This amendment is between the State of Minnesota, acting by and through the Minnesota State Arts Board (“State”), [CUSTODIAL AGENCY] (“Custodial Agency”) and [ARTIST NAME, ADDRESS, CITY, STATE, ZIP] (“Contractor” or “Artist”).

Recitals

1. The State and the Custodial Agency have a contract with the Contractor identified as SWIFT Contract Number [SWIFT CONTRACT #] (“Original Contract”) to provide design, fabrication, and installation of a permanent, site-specific public artwork (“Artwork”) located at [BUILDING, WORK SITE, ADDRESS] (“Worksite”) at the Custodial Agency.
2. Contractor’s design has been selected for commissioning of the Artwork, which necessitates the following changes to the Original Contract.
3. The State, the Custodial Agency, and the Contractor are willing to amend the Original Contract as stated below.

Contract Amendment

In this amendment, changes to pre-existing contract language will use ~~strike through~~ and underlining for insertions.

REVISION 1. Clause 1. “**Term of Contract**” is amended as follows:

- 1.1 **Effective date.** The effective date of this Contract is when all required signatures are obtained. The Contractor must not begin work under this Contract until this Contract is fully executed.
- 1.2 **Expiration date.** ~~{ORIGINAL EXPIRATION DATE}~~ [AMENDED EXPIRATION DATE], or when all obligations have been satisfactorily fulfilled, whichever occurs first.
- 1.3 **Survival of terms.** The following clauses survive the expiration or cancellation of this Contract: ~~8. Indemnification; 9. State audits; 10. Government data practices and intellectual property; 10. Maintenance and care; 11. Material changes after acceptance of Artwork; 12. Publicity, endorsement, and reproduction; 15. Governing law, jurisdiction, and venue; and 16. Data disclosure.~~
5.10. Warranty Against Defects; 8. Indemnification; 9. State audits; 10. Government data practices and intellectual property; 11. Intellectual Property Rights and Obligations; 15. Governing law, jurisdiction, and venue; 16. Data disclosure; 26. Maintenance and care; 27. Material changes after acceptance of Artwork; and 28. Publicity, endorsement, and reproduction.

REVISION 2. Clause 2. “**Contractor’s Duties**” is amended to add:

- 2.3 **Design Development.** Within 90 days after this Amendment is fully executed, the Contractor must prepare and submit to the State a fully developed design of the Artwork. The deliverables of the Design Development phase must include design specifications describing the Artwork in detail, including but not limited to, the following:
- (a) *Dimensioned drawings.* Detailed plan(s), section(s), elevation(s), and site plan(s) showing any effected mechanical, electrical, plumbing, structural, and architectural details.
 - (b) *Models, materials, samples.* Produce any necessary models, materials and samples.
 - (c) *Structural considerations.* Preliminary sub-consultant reports as appropriate, such as structural, lighting, electrical, mechanical, hydraulic engineers and consultants licensed to practice in the State of Minnesota.
 - (d) *Maintenance and safety.* Preliminary assessment of maintenance requirements, surface integrity, protection against theft and vandalism.
 - (e) *Fabrication.* Preliminary fabrication narrative and budget.
 - (f) *Installation.* Preliminary installation narrative and budget.
 - (g) *Schedule.* Preliminary schedule for fabrication and installation of the Artwork, and completion of the project.
- 2.4 **Construction Documents.** Within 45 days after the State approves the Contractor’s submission of deliverables required in Clause 2.3 of this Amendment, Contractor must submit to the State a set of construction documents detailing every physical feature of the Artwork and its integration with the site including specifications for construction details and materials. The deliverables of the construction documents phase must include, but not be limited to, the following:
- (a) *Dimensioned drawings.* Complete plan(s), section(s), elevation(s), and site plan(s) showing any effected mechanical, electrical, plumbing, structural, and architectural details.
 - (b) *Material samples.* Samples of all primary materials to be used in the fabrication of the Artwork.
 - (c) *Structural review.* Final consultant reports, drawings, and specifications where appropriate.
 - (d) *Maintenance and safety.* Final maintenance requirements and instructions.
 - (e) *Fabrication.* Final fabrication schedule and budget.
 - (f) *Installation.* Final installation narrative and budget.
 - (g) *Final Schedule.* Final schedule for fabrication and installation of the Artwork, and completion of the project.
- 2.5 **Fabrication and Installation.** After the State approves the Contractor’s submission of the deliverables required in Clause 2.4 of this Amendment, Contractor will fabricate and install the Artwork at the Worksite in accordance with the terms and conditions of the Amendment.
- 2.6 **Coordination with Custodial Agency.** The Contractor must attend construction coordination meetings with the State, the Custodial Agency, the general contractor, architect, and other parties as appropriate to discuss the Artwork and to coordinate appropriate integration and/or installation of the Artwork.
- 2.7 **Further Approvals.** In the event that further approvals are necessary for the State to approve the design development or construction documents produced by the Contractor, the Contractor may be required to make such revisions as are necessary for the Artwork to comply with applicable statutes, ordinances, or regulations of any governmental regulatory agency having jurisdiction over the project. The State may also require non-aesthetic revisions, if necessary.

REVISION 3. Clause 4. “**Time**” is amended as follows:

- 4.1 **Schedule of performance.** The Contractor must fully comply with all of the deadlines set forth in Attachment A. The Contractor must adhere to the schedule as set forth in the construction documents provided in accordance with this Amendment and must deliver and successfully install the Artwork no later than [DATE].
- 4.2 **Extension of time.** The State may, but is no obligated to, grant an extension of time to the Contractor in the event that there is a delay caused by the State, conditions beyond the Contractor’s control, or

pursuant to those circumstances set out in Section 18.4 of this Contract. Extensions of time must comply with the requirements of Section 7.2 of this Contract.

REVISION 4. Clause 5. “**Consideration and Payment**” is amended as follows:

- 5.1 **Consideration.** The State will pay for all services performed by the Contractor under this Contract as follows:
- (a) *Compensation.* The Contractor will be paid [SCHEMATIC DESIGN AMOUNT] for the work described in Attachment A and [TOTAL CONTRACT AMOUNT] for the work described in this Amendment.
- 5.2 **Total obligation.** The total obligation of the State for all compensation and reimbursements to the Contractor under this Contract shall not exceed [~~SCHEMATIC DESIGN AMOUNT~~] [SCHEMATIC DESIGN AMOUNT + TOTAL CONTRACT AMOUNT].
- 5.3 **Payment.**
- (a) Subject to subsection (b) below, the State will promptly pay the Contractor for Contractor’s work for the Schematic Design Proposal Phase only after the Contractor fully complies with all of the terms and conditions of this Contract.
- (b) *Retainage.* Under Minn. Stat. § 16C.08, subd. 5(b), no more than 90 percent of the amount due under this Contract may be paid until the final product of this Contract has been reviewed by the State’s agency head. The balance due will be paid when the State’s agency head determines that the Contractor has satisfactorily fulfilled all the terms of this Contract.

REVISION 5. Clause 5. “**Consideration and Payment**” is amended to add:

- 5.4 **Contractor’s Responsibility.** The Contractor is responsible for payment of all costs related to the Artwork, including but not limited to the Contractor’s design fee, labor, consultants, travel, transportation, materials, site preparation, installation needs and equipment, storage, documentation, studio overhead, insurance, taxes, contingency, and if applicable, Contractor’s participation in public events related to the Artwork.
- 5.5 **Invoices.** The State will promptly pay the Contractor after the Contractor presents an itemized invoice for the services actually performed and the State’s Authorized Representative approves the invoice. Invoices must be submitted on a form supplied by the State, according to the following schedule:
- (a) [INVOICE ONE AMOUNT] upon the State’s written notification to the Contractor of its approval of the Schematic Design Proposal.
- (b) [INVOICE TWO AMOUNT] upon the Contractor’s submission and the State’s approval of the complete Design Development and Construction Documents as set forth in Sections 2.3 and 2.4 of this Amendment.
- (c) [INVOICE THREE AMOUNT] upon the Contractor’s submission of an invoice and documentation showing cost of materials purchased and delivered in satisfactory condition, and completion of thirty percent (30%) of the fabrication of all Artwork components.
- (d) [INVOICE FOUR AMOUNT] upon the Contractor’s submission of an invoice and documentation for complete fabrication and installation of all Artwork components.
- (e) [FINAL INVOICE AMOUNT] upon the Contractor’s submission of a final invoice, receipt of documentation as set forth in Section 13 of this Amendment, and acceptance of the Artwork by the State.
- 5.6 **State’s Satisfaction.** All services provided by the Contractor under this Amendment must be performed to the State’s satisfaction, as determined in the sole discretion of the State’s Authorized Representative and in accordance with all applicable federal, state, and local laws, ordinances, rules, and regulations including business registration requirements of the Office of the Secretary of State. The Contractor will not receive payment for work found by the State to be unsatisfactory, not in accordance with the terms and conditions of this Amendment or performed in violation of federal, state, or local law.

- 5.7 **Inspection and Review.** The State reserves the right to inspect and review the Artwork at any time after giving Contractor reasonable notice and to require and receive progress reports from the Contractor. The State will provide its reviews and approvals of Contractor's design services and deliverables as soon as administratively feasible.
- 5.8 **Change of Design.** Any change in scope, design, color, size, texture, material, or detail that significantly alters the approved design, or affects installation, scheduling, site preparation, or maintenance of the Artwork shall require review and written approval of the State. Prior to execution of any significant change, the following procedure shall be followed:
- (a) *Proposed changes.* The Contractor must provide a detailed description of proposed changes in writing to the State for review and approval.
 - (b) *Review.* The State will review the requested change(s).
 - (c) *Written approval.* If the State approves the requested change(s), written approval in the form of an amendment to the Contract will be executed. If the State does not approve the proposed change(s), the State will notify the Contractor in writing and the Contractor must continue to fabricate the Artwork in conformity with the approved design for the Artwork.
 - (d) *Budget.* Any changes to the budget resulting from approved changes are the sole responsibility of the Contractor. No extra payments will be allowed as a result of changes unless expressly set forth in a written amendment to the Contract.
- 5.9 **Warranty of Title.** The Contractor warrants and represents that, upon final installation of the Artwork and final payment to the Contractor, the State shall acquire good title to the Artwork, and that the Artwork shall be free from any and all claims, liens, and charges by any person or entity, including but not limited to any employee, supplier, or subcontractor.
- 5.10 **Warranty Against Defects.** If applicable, Contractor warrants and represents that the Artwork shall comply with the appropriate stamped engineering documents provided by an engineer licensed to practice in the State of Minnesota. Contractor also warrants and represents that the Artwork shall be free from defective or inferior materials and/or inferior or faulty fabrication and installation techniques. At the State's option, the Contractor must remedy and/or pay for any loss or damage resulting from faulty materials or workmanship that occurs or appears within a period of two years after completion of installation of the Artwork.
- (a) *Responsibility.* The State shall determine whether there are any faults or defects in the Artwork during the two year period.
 - (b) *Notification.* The State shall give written notice with reasonable promptness to the Contractor regarding faults or defects in the Artwork.

REVISION 6. Clause 18. "**Termination**" is amended to add:

- 18.4 **Termination due to death or incapacity.** Should the Contractor die or become incapacitated at any time between the execution of this Contract and the expiration date, the Contractor or one of his representatives will notify the State promptly. Such death or incapacity will not be deemed a breach of this Contract. If the Artwork is substantially completed and it is feasible for the Artwork to be fully completed without undue delay, the State may elect to proceed under the terms of this Contract with another Contractor; however nothing in this section shall obligate the State to accept the Artwork.
- (a) *Incapacity.* In the event of the Contractor's incapacity, all remaining work to be completed in accordance with this Contract will be delegated to the Contractor's studio personnel or to another Contractor, provided that the State, in its sole discretion, approves of such delegation. Alternatively, the State may elect to terminate this Contract.
 - (b) *Death.* In the event of the Contractor's death, this Contract shall terminate effective on the date of death. Should the State accept the partially completed Artwork, the executor of the Contractor's estate shall deliver the Artwork to the State in whatever form or degree of completion it may be at the time. Title of the Artwork shall then transfer to the State. The Artwork

shall not be represented to be the completed Artwork of the Contractor unless the State wishes to do so and it is agreed to by the Contractor's estate.

- (c) *Payments.* All uncompensated services performed by the Contractor up to the date of incapacity or death will be compensated, as determined by the State in its sole discretion.

REVISION 7. Clause 24. “**Other Terms**” is amended to add:

24. **Other Terms.** If other obligations are necessary, they are listed below along with the responsible party. Other obligations include, but are not limited to, clarification of the responsibilities of the Contractor, the Custodial Agency, and the State, and/or obligations related to structural engineering, site preparation, lighting, and specification of site conditions to be considered integral to the Artwork and its base, footings, or other anchoring devices.
- 24.1 **Site Modifications and Relocation of Artwork.** The Contractor will ensure that the bypassing track is divided into two sections of equal length, allowing the Custodial Agency to relocate the sculpture once the planned skyway across 85th Avenue North has been completed. The Contractor and the Custodial Agency agree that future relocation of the Artwork will be handled in agreement with the procedures outlined in Clause 27 of this Amendment.
- 24.2 **Community Engagement.** The Contractor will work with the Custodial Agency and the community of Brooklyn Park to create a platform for the submittal of text to be included in the Artwork, and will ensure that final words and phrases to be used are fully representative of the values of the Custodial Agency.

REVISION 8. The following clause is added to the contract:

25. **Description of Artwork.** Contractor must complete the design, fabrication, and installation of the Artwork in accordance with the Contractor's approved Schematic Design Proposal. The Artwork is described as:
- 25.1 **Introduction.** Entitled [ARTWORK TITLE], the Artwork will be [SUMMARY ARTWORK DESCRIPTION] at the [BUILDING] (“Work Site”).
- 25.2 **Location.** The Artwork will be installed at [ARTWORK LOCATION] of the Work Site.
- 25.3 **Materials.** The primary visual component of the Artwork will be [MATERIALS] the Contractor's design of the Artwork.
- 25.4 **Installation.** The [ARTWORK INSTALLATION].
- 25.5 **Amount / Size.** Overall dimensions of the Artwork will be [ARTWORK DIMENSIONS].
- 25.6 **Weight.** Estimated weight will be [ARTWORK WEIGHT].
- 25.7 **Pattern / Design.** The [ARTWORK PATTERN/DESIGN].
- 25.8 **Color.** The primary color of the installation will be [ARTWORK COLOR].
- 25.9 **Texture / Finish.** [ARTWORK TEXTURE/FINISH].
- 25.10 **Subparts.** The [ARTWORK SUBPARTS DESCRIPTION].

REVISION 9. The following clause is added to the contract:

26. **Maintenance and Care.** The Contractor represents and warrants that routine and special routine maintenance of the Artwork will not require procedures substantially in excess of those recommendations described in the Schematic Design Proposal and the Detailed Artwork Report submitted by the Contractor pursuant to Paragraph 13(a) herein. The Custodial Agency assumes responsibility for routine and special routine maintenance of the Artwork as specified by the State with consideration of the Detailed Artwork Report provided by the Contractor. The State will monitor the condition of the Artwork and will provide oversight to ensure that routine and special routine maintenance of the Artwork is being performed by the Custodial Agency. Neither the State nor the Custodial Agency shall be required to contact the Contractor prior to routine and/or special routine maintenance.

REVISION 10. The following clause is added to the contract:

27. **Material Changes After Acceptance Of Artwork.** Except as provided herein, the State will not make material changes to the Artwork without written authorization from the Contractor regarding the proposed changes. A material change is a change affecting the intended character or appearance of the Artwork resulting from an intentional act by a third party.
- 27.1 **Conservation and Restoration.** If any material change occurs to the Artwork after transfer of title to the State, the State reserves the right to determine if, when, and how any conservation and restoration of the Artwork can be made, and the nature, scope, and anticipated cost of any such conservation and restoration. The State reserves the right to contract with a conservator to implement any such conservation or restoration.
- 27.2 **Funding Of Conservation and Restoration.** The Custodial Agency shall be responsible for making all necessary conservation and restoration of the Artwork.
- 27.3 **Notification.** In the event the State determines conservation and restoration should be undertaken, the State shall notify the Contractor in writing of:
- (a) The nature of the material change, including documentation in the form of one or more drawings, photographs, diagrams, plans, or other documentation to illustrate the change;
 - (b) The State's recommendations for the proposed means and methods for conservation and restoration; and
 - (c) A timeline establishing the date by which the Contractor must respond in writing with any concerns regarding the proposed plan for conservation and restoration.
- 27.4 **Approval of Conservation and Restoration.** If the Contractor and the State cannot reach mutual agreement on the conservation or restoration means or methods the Artwork may be repaired or restored as determined by the State.
- 27.5 **Relocation, removal, and site modifications.** The State reserves the right to determine whether it is necessary to relocate or remove the Artwork and/or modify the site in/on which it is located. The State will make a good faith effort to notify the Contractor of a proposed modification to the site in/on which the Artwork is located and will attempt to reach agreement with the Contractor regarding the future appearance or location of the Artwork. The Contractor shall not unreasonably withhold approval of the relocation or removal of the Artwork from the site in/on which it is located or the modification of such location, as proposed by the State.
- 27.6 **Removal for imminent harm or hazard.** If the State reasonably determines that the Artwork presents imminent harm or hazard to the public, other than as a result of the State's or the Custodial Agency's failure to maintain the Artwork, the State may authorize modifications of, including material changes, or removal of the Artwork without prior approval of the Contractor.
- 27.7 **Disassociation.** If a modification of the Artwork occurs without the Contractor's written permission and the Contractor gives written notice to the State requesting that the Contractor's name and the Artwork be disassociated, the Artwork will no longer be designated as the Artwork of the Contractor.
- 27.8 **Deaccession.** In the event the State deaccessions the Artwork, the Contractor shall have the right of first refusal to purchase the Artwork in its current condition at the greater of salvage cost or the cost to retrieve the Artwork, providing it is not integrated into a larger piece or a structure, and/or can be removed without destruction of the Artwork.
- 27.9 **Integrated artwork.** If the Artwork is integrated into or otherwise made part of a building, facility, or public site, the Contractor acknowledges that such installation may be subject the Artwork to destruction, distortion, mutilation, or other modification by reason of its removal from or significant changes to that location.
- 27.10 **Inherent nature of materials and public presentation.** For purposes of this Amendment, no modification of the Artwork that results from the passage of time or the inherent nature of the materials used in the Artwork shall constitute modification for which the Contractor may claim relief or any remedy for the State. In addition, no modification of the Artwork that is the result of conservation, restoration, or of its public presentation, including but not limited to lighting and placement, shall constitute a modification that is prejudicial to the Contractor's honor or reputation

or for which the Contractor may claim relief of any remedy from the State unless such modification is the direct result of gross negligence.

- 27.11 **Deaccessioning policy.** The parties agree that the Minnesota State Arts Board's policies regarding collection, modification, relocation, and deaccessioning, as they may be subsequently amended, shall apply to the Artwork and is incorporated by reference as part of this Amendment.

REVISION 11. The following clause is added to the contract:

28. **Publicity, Endorsement, and Reproduction.**

28.1 **Attribution.** In any publicity regarding the Artwork, the Contractor shall include acknowledgement in substantially the following form: "Commissioned by Minnesota Percent for Art in Public Places." In the event of oral presentations with no accompanying printed material and/or in-person interviews with journalists, the Contractor agrees to give oral credit.

28.2 **Endorsement.** The Contractor shall not claim that the State endorses its products or services.

28.3 **Reproduction.** The Contractor grants to the State and its assigns an irrevocable license to make and use graphic reproductions of the Artwork, including reproductions in all graphic media now known or later developed, digital or otherwise, provided that these rights are exercised in a tasteful and professional manner. Additionally, the Contractor agrees to the following:

- (a) *Noncommercial usage.* Reproduction rights granted to the State for noncommercial purposes shall be royalty-free, unrestricted, nonexclusive, and permanent.
- (b) *Commercial usage.* Reproductions of the Artwork for commercial purposes shall be executed under a separate agreement to address the terms and royalties to be received by the Contractor.
- (c) *Other usage.* The Contractor agrees that the State shall have the right to use the Contractor's name, voice, signature, photograph, biography, and likeness in connection with the display, publication, and promotion of the Artwork.
- (d) *Limitations of usage.* Reproductions of the Artwork may include, but are not limited to, the Schematic Design Proposal, preliminary studies, images of models of the Artwork, and/or images of the Artwork during fabrication, installation, as installed, or during conservation. The State shall not identify or represent reproductions of the Schematic Design Proposal, preliminary studies, or models of the Artwork as the finished Artwork.
- (e) *Model waiver.* If the Contractor uses the recognizable likeness of an individual in the Artwork, the Contractor shall be liable and must secure a signed model waiver from the individual or legal guardian unless the imagery is in the public domain.
- (f) *Attribution.* All reproductions by the State shall contain a credit line that includes the title of the Artwork, the artist's name, copyright notice, year of completion, and a statement that the artwork was "Commissioned by the Minnesota State Arts Board in partnership with [CUSTODIAL AGENCY]" and photography credit as designated by the Contractor, if applicable.

REVISION 12. The following clause is added to the contract:

29. **Documentation.** Upon installation of the Artwork, and before final payment will be issued, the Contractor shall furnish the State with the following:

- (a) *Detailed Artwork Report.* A written technical description of the Artwork, including a comprehensive list of all materials used in the creation of the Artwork, record drawings of the Artwork and its components, and a schedule for routine maintenance and special routine maintenance of the Artwork;
- (b) *Final Budget Report.* An itemized accounting of all project-related expenditures, including but not limited to items identified in the final fabrication and installation budgets; and
- (c) *High resolution images.* Digital images (minimum of 300 dpi, saved as .JPG or .TIFF) at main assembly (as built) intervals in studio and on site, and publication quality images of each component of the Artwork and entire installed Artwork. Digital images should be submitted on CD, saved as separate image files, and labeled with production stage and photography credit.

REVISION 13. The following clause is added to the contract:

30. **Public Notice.** The Contractor agrees to design, fabricate, install, and procure a permanent project identification plaque near or as part of the Artwork at a location agreed upon by the State and Custodial Agency. The project identification plaque shall be installed on the date that the Artwork is completed and installed. The State agrees to the public display of this notice on or near the Artwork and shall reasonably maintain such notice in good repair. The Contractor will use the following format with final text approval by the State in writing:

Title

Artist Name

Year Installed

Commissioned by Minnesota Percent for Art in Public Places

The public notice may also contain 1-3 sentences provided by Contractor to encourage discourse on the Artwork, including the primary medium(s) used in the creation of the Artwork.

Effect

Except as amended herein, the terms and conditions of the Original Contract and all previous amendments remain in full force and effect.

Required signatures

This Amendment shall not be effective until all required signatures are affixed hereto.

SAMPLE

IN WITNESS WHEREOF, the parties have executed this Amendment intending to be bound by the obligations contained herein, as of the date of the last signature.

1. ENCUMBERANCE VERIFICATION

Authorizing official, printed name

Signature

Title

Telephone number

Date

4. CUSTODIAL AGENCY

Authorizing official, printed name

Signature

Title

Telephone number

Date

2. CONTRACTOR
(If corporation, two officers must execute)

Authorizing official, printed name

Signature

Title

Telephone number

Date

5. MINNESOTA STATE ARTS BOARD

Authorizing official, printed name

Signature

Title

Telephone number

Date

3. CONTRACTOR
(If corporation, two officers must execute)

Authorizing official, printed name

Signature

Title

Telephone number

Date

6. DEPARTMENT OF ADMINISTRATION

Authorizing official, printed name

Signature

Title

Telephone number

Date