

AGREEMENT BETWEEN THE CITY OF OLATHE, KANSAS AND StudioKCA, LLC FOR ARTISTIC SERVICES

THIS AGREEMENT, is entered into this ____ day of _____, 2019, by and between The CITY of Olathe (hereinafter the "CITY"), and StudioKCA, LLC (hereinafter the "ARTIST") with offices at 55 Washington Street, Suite 255, Brooklyn, NY 11201.

WHEREAS, the ARTIST is a recognized ARTIST whose work and reputation make the ARTIST uniquely qualified to create the Artwork; and

WHEREAS, CITY intends to place and provide for Artwork for the Indian Creek Library Project ("Project") and desires to engage ARTIST to provide professional design and artwork in connection with the Project ("Services").

WHEREAS, ARTIST has represented that he has the necessary professional expertise, qualifications, and capability, and all required licenses and/or certifications to provide the Services.

WHEREAS, the ARTIST and CITY wish to undertake the obligations expressed herein;

NOW, THEREFORE, in consideration of the above-stated premises and subject to the conditions hereinafter set forth, the parties agree as follows:

Article 1: Scope of Services

1.1 ARTIST's Obligations

- a. The ARTIST will perform all services and furnish all supplies, material or equipment as necessary for the design and fabrication of the Artwork at the Site in accordance with the specified schedule. Services will be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.
- b. The ARTIST will determine the Artistic expression, design, dimensions and materials of the Artwork, subject to review and acceptance by the CITY as set forth in this Agreement. To ensure that the Artwork as installed will not interfere with the intended use of the Site, pedestrian and other traffic flow, parking, and safety devices and procedures at the Site, the ARTIST's proposal will be reviewed and approved by the CITY and, where appropriate, the CITY'S project architect to ensure compliance with these objectives.
- c. The ARTIST will prepare the design concept, which will include a description of all materials and products utilized in the Artwork and the required routine care and upkeep involved.
- d. ARTIST will attend design and construction coordination meetings with CITY, general contractor, architect and other parties, as appropriate, to communicate about the Artwork and to ensure appropriate integration and installation of the Artwork.
- e. The ARTIST will secure all required licenses, permits and similar legal authorizations at the ARTIST's expense as may be necessary for the installation and initial cleaning/maintenance of the

Artwork at the Site and will provide CITY a copy of its certificate of good standing to conduct business in the State of Kansas with this Agreement (**Exhibit F**).

f. The ARTIST will arrange the transportation and installation of the Artwork in consultation with the CITY.

g. ARTIST will provide required insurance in amounts and limits specified in Article 5 and Exhibit E.

h. ARTIST will provide a list of all subcontractors if any, along with a copy of the agreement between the ARTIST and each subcontractor.

i. ARTIST will provide a maintenance manual with a description of all materials and products utilized in the Artwork and the required care and upkeep schedule and frequency involved.

j. ARTIST will provide photographic documentation of the Artwork during fabrication, pre transport, and installation.

k. ARTIST will be available with reasonable advance notice for meetings, ceremonies and the like, as necessary.

1.2 CITY's Obligations

a. The CITY will perform all obligations in strict compliance with all terms and conditions in this Agreement.

b. The CITY will be responsible for providing the ARTIST, at no expense to the ARTIST, copies of existing designs, drawings, reports, list of required permits, and other existing relevant data such as site information, if any, which is needed by ARTIST in order to perform.

c. The CITY will prepare the Site in accordance with the specifications detailed in the approved design concept in Section 1.3 of this Agreement. The CITY will be responsible for all expenses, labor and equipment to prepare the Site for the timely transportation and installation of the Artwork, and to prepare the site's water feature (if any), and all elements below the water feature such as fountain, utility system, and/or electrical requirements. The CITY will complete the Site preparations by the scheduled installation date as provided in Section 1.4(b)(i) of this Agreement or will contact the ARTIST in writing informing him or her of any delays.

d. The CITY will provide and install a plaque on or near the Artwork containing a credit to the ARTIST and a copyright notice substantially in the following form: Copyright © Jason Klimoski and Lesley Chang (StudioKCA), 2020.

e. The CITY will not permit any use of the ARTIST's name or misuse of the Artwork which would reflect discredit on the ARTIST's reputation as an ARTIST or which would violate the spirit of the Artwork, should such use or misuse be within the CITY's control.

1.3 Design

a. Concept/Schematic

i. The ARTIST was selected pursuant to a competition organized for the procurement of an ARTIST to design and fabricate Artwork suitable for the current project. Within sixty (60) days of the execution of this Agreement, the ARTIST shall submit to the CITY the design concept (the "Design") in the form of detailed color drawings, models, and/or other documents

agreeable by both the ARTIST and CITY as are required to present a meaningful representation of the Artwork.

ii. The ARTIST shall visit, examine, research and consider the Site and surrounding area. If applicable, the ARTIST shall also consult with representatives of the community and consider their input and concerns.

iii. The Design will include: a description of the method by which the Artwork is to be fabricated and installed; a description of any operational, maintenance and conservation requirements for the Artwork; a description of the placement of the Artwork at the Site and any site preparations that may be required by the CITY including, but not limited to, any changes or modifications to any utility system or structure of the Site as necessary.

iv. The Design must provide sufficient detail to permit the CITY to assure compliance with applicable local, state or federal laws, ordinances and/or regulations.

v. The ARTIST shall attach to the Design a detailed budget for the design, fabrication and installation of the Artwork, including costs for Site preparation (the portion that are the responsibility of the Artist), as described in Section 1.4(a) of this Agreement.

b. Approval

i. Within fifteen (15) days after the ARTIST submits the Design, the CITY shall notify the ARTIST whether it approves or disapproves of the Design. The CITY shall have discretion in approving outright or with conditions, or rejecting the Design. The CITY shall notify the ARTIST of any revisions to the Design as are necessary for the Artwork to comply with any applicable laws, ordinances and/or regulations and other reasons including, but not limited to, ensuring the physical integrity of the Artwork or its installation at the Site. If agreed upon by both parties, such revisions will become a part of the accepted Design.

ii. If the CITY disapproves of the Design, the CITY will submit to the ARTIST in writing the reasons for such disapproval. In such event, the ARTIST will submit a Revised Design within thirty (30) days after the CITY has notified the ARTIST of its disapproval. The ARTIST will not be paid an additional fee for the Revised Design.

c. Redesign

i. The Revised Design will reflect changes made to address the CITY's stated reasons for disapproval, as well as any adjustments in the budget or schedule that may be necessary. The CITY shall notify the ARTIST in writing whether it approves or disapproves of the revised Design within fifteen (15) days after the ARTIST submits the revised design.

ii. If the ARTIST refuses to revise the Design pursuant to Section 1.3(b)(ii), or if the ARTIST fails to adequately revise the Design in the judgment of the CITY, the CITY may elect to terminate this Agreement and the parties shall be under no further obligation to each other as of the date of such termination. The effective date of termination shall be the date the CITY submits its written disapproval of the Revised Design to the ARTIST. The CITY shall submit to the ARTIST a written termination notice with the disapproval. The termination notice shall advise the ARTIST that this Agreement has been terminated pursuant to this Article. The termination notice shall notify the ARTIST that the ARTIST is entitled to retain the compensation paid prior to the termination date, and that the Parties are under no further obligation to each other. The

termination notice shall confirm that the ARTIST shall retain ownership of all Designs, Revised Designs and renderings thereof submitted hereunder.

d. Final/Construction Documents

i. The ARTIST shall prepare structural drawings detailing every physical feature of the construction of the Artwork and its integration with the Site. These drawings and supplementary documents shall indicate any issues involved in the construction, integration and maintenance of the Artwork, as well as any third party subcontractors needed to work on the project.

ii. Where appropriate, the ARTIST shall present such drawings to a qualified engineer, licensed by the state and paid by the ARTIST, for certification that the Artwork will be of adequate structural integrity and the ARTIST shall provide the CITY with such certification, signed and stamped by the licensed engineer.

iii. Where appropriate, the ARTIST shall present the Design to a qualified conservator, who will make recommendations on the maintenance of the Artwork and the ARTIST shall provide a written copy of the conservator's recommendations to the CITY.

1.4 Budget, Payment Schedule, Construction Schedule and Progress Reports

a. Budget

i. The ARTIST will prepare a budget, which will include all goods, services and materials, with such costs itemized. This will become Exhibit A.

ii. Calculation of the budget takes into consideration the possible inflation of service and material costs between the date of execution of this Agreement and the anticipated completion date.

iii. The ARTIST will keep a log of the ARTIST's project hours and will retain all original receipts pertaining directly to the project.

iv. If the ARTIST incurs costs in excess of the amount listed in the budget, the ARTIST will pay such excess from the ARTIST's own funds unless the ARTIST previously obtained approval for such costs from the CITY (or such costs were the result of actions or inaction of the CITY).

b. Schedule

i. The ARTIST will notify the CITY of the tentative schedule for the fabrication and installation of the Artwork, including a schedule for the submission of progress reports and inspections if any. The Schedule may be amended by written agreement. The schedule will be equitably adjusted to reflect delays or changes in the artwork that are not the fault of the ARTIST, and/or delays or changes to the preparation of the site that are not the responsibility of the ARTIST.

ii. A schedule for the payment of budget installments is attached to this Agreement as Exhibit C.

1.5 Fabrication Stage

- a. The ARTIST will fabricate and install the Artwork in substantial conformity with the Design. The ARTIST may not deviate from the approved design without written approval of the CITY.
- b. The ARTIST will take reasonable measures to protect or preserve the integrity of the Artwork such as the application of protective or anti-graffiti coatings, if applicable, unless the CITY disapproves. If the Artwork is being constructed on-site, the ARTIST will avoid creating nuisance conditions arising out of the ARTIST's operations. Prior to requesting authorization to transport and install the Artwork, the 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. All additional workers or subcontractors must provide proof of insurance prior to entering the site.
- c. The CITY will have the right to review the Artwork at reasonable times during the fabrication thereof upon reasonable notice.
- d. If the CITY, upon review of the Artwork, determines that the Artwork does not conform to the Design or Revised Design, the CITY reserves the right to notify the ARTIST in writing of the deficiencies and that the CITY intends to withhold the next budget installment.
- e. The ARTIST will promptly cure the CITY's objections and will notify the CITY in writing of completion of the cure. The CITY will promptly review the Artwork, and upon approval will release the next budget installment. If the ARTIST disputes the CITY's determination that the Artwork does not conform, the ARTIST will promptly submit reasons in writing to the CITY within 30 days of the CITY's prior notification to the contrary. The CITY will make reasonable efforts to resolve the dispute with the ARTIST in good faith. However, final determination as to whether the ARTIST has complied with the terms of this Agreement will remain with the CITY.
- f. The ARTIST will notify the CITY in writing when fabrication of the Artwork has been completed, and that the Artwork is ready for delivery and installation at the Site if the Artwork was fabricated off-site.
- g. The ARTIST will provide a photo library of the fabrication process and signed affidavit evidencing completion. The CITY will review the Artwork photos and affidavit within 15 days after receiving notification pursuant to paragraph (f), prior to installation, to determine that the Artwork conforms to the Design and to give final approval of the Artwork. The CITY will not unreasonably withhold final approval of the fabricated Artwork. In the event that the CITY does withhold final approval, the CITY will submit the reasons for such disapproval in writing within 15 days of examining the fabricated Artwork. The ARTIST will then have 15 days from the date of the CITY's notice of the disapproval to make the necessary adjustments to the fabricated Artwork in accordance with such writing. The ARTIST will not be penalized for any delay in the delivery and installation of the Artwork to the Site unless the ARTIST has willfully and substantially

deviated from the Design without the prior approval of the CITY. The ARTIST will then be held responsible for any expenses incurred in correcting such deviation.

h. The CITY will promptly notify the ARTIST of any delays affecting installation of the Artwork. The ARTIST will be required to inspect the Site prior to the transportation and installation of the Artwork and will notify the CITY of any adverse Site conditions that will impact the installation of the Artwork which are in need of correction.

1.6 Changes to Design

a. Prior to the execution of any change in the approved design, ARTIST will present proposed changes in writing to the CITY for further review and approval. The ARTIST must provide a detailed description of any significant changes in the artistic expression, design, dimensions and materials of the Artwork that is not permitted by nor in substantial conformity with the already approved design. Such notice will also include a detailed description of any additional costs that may be incurred or changes in the budget, if any. A significant change is any change that materially effects installation, scheduling, site preparation, or maintenance of the Artwork or the concept of the Artwork as represented in the Design.

b. If the CITY approves the changes, the CITY will promptly notify the ARTIST in writing. If the CITY disapproves of the changes, the CITY will promptly notify the ARTIST in writing and the ARTIST will continue to fabricate the Artwork in substantial conformity with the Design.

1.7 Installation

a. Upon the CITY's final approval of the fabricated Artwork, as being in conformity with the Design, the ARTIST will deliver and install the completed Artwork to the Site in accordance with the schedule provided for in Section 1.4(b). The ARTIST will pay transportation fees.

b. The ARTIST or representative will coordinate closely with the CITY to ascertain that the Site is prepared to receive the Artwork. ARTIST must notify CITY of any adverse conditions at the Site that would affect or impede the installation of the Artwork. The ARTIST is responsible for timely installation of the Artwork. The ARTIST will confer and coordinate with the CITY to ensure timely coordination with the CITY's construction team. ARTIST may not install the Artwork until authorized to do so by the CITY.

c. The ARTIST will be present to supervise the installation of the Artwork.

d. Upon written acceptance of the installation, the Artwork will be deemed to be in the custody of the CITY for purposes of Article 3 and Article 5 of this Agreement.

e. Within 7 days after installation of the Artwork, the ARTIST will furnish the CITY photographs of the Artwork as installed as a set of three digital, 300 dpi, JPG or TIFF files, of the Artwork. Photographs must be labeled with the name of the Artwork, the date upon which the photograph

was taken, and the viewpoint from which the photograph was taken. The ARTIST will also furnish the CITY with a full written narrative description of the Artwork.

f. Upon installation of the Artwork, the ARTIST will provide the CITY with written instructions for the appropriate maintenance and preservation of the Artwork along with product data sheets for any material or finish used and schedule frequency. The Artwork must be durable, taking into consideration that the Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. 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 Artwork.

1.8 Approval and Acceptance

a. The ARTIST will notify the CITY in writing when all services as required of both Parties by this Agreement prior to this paragraph have been completed in substantial conformity with the Design.

b. The CITY will promptly notify the ARTIST of its final acceptance of the Artwork within 3 working days after the ARTIST submitted written notice pursuant to paragraph (a) above. The effective date of final acceptance will be the date the CITY submits written notice to the ARTIST of its final acceptance of the Artwork. The final acceptance will be understood to mean that the CITY acknowledges completion of the Artwork in substantial conformity with the Design, and that the CITY confirms that all services as required of both Parties by this Agreement prior to paragraph (c) of this section have been completed. Title to the Artwork passes upon final acceptance and final payment.

c. If the CITY disputes that all the services have been performed, the CITY will notify the ARTIST in writing of those services the ARTIST has failed to perform within 3 working days after the ARTIST submitted written notice pursuant to paragraph (a) above. The ARTIST will promptly perform those services indicated by the CITY.

d. If the ARTIST disputes the CITY's determination that not all services have been performed, the ARTIST will submit reasons in writing to the CITY within 7 days of the CITY's prior notification to the contrary. The CITY will make reasonable efforts to resolve the dispute with the ARTIST in good faith. However, final determination as to whether all services have been performed will remain with the CITY.

e. Upon the resolution of any disputes that arise under paragraphs (c) and (d) of this section, the CITY will notify the ARTIST of its final acceptance of the Artwork pursuant to paragraph (b).

f. After final acceptance of the Artwork and with reasonable advanced notice, the ARTIST will be available at such time(s) as may be mutually agreed upon by the CITY and the ARTIST to attend any public meetings and community outreach functions, as well as any inauguration or presentation ceremonies relating to the dedication of the Artwork.

i. During such public presentations by the ARTIST, the ARTIST will acknowledge the CITY's role in funding the Artwork.

ii. The CITY will be solely responsible for coordinating public information materials and activities related to public presentations.

Article 2: Term of Agreement

a. Duration

This Agreement will be effective on the date that this contract has been signed by both parties, and, unless terminated earlier pursuant to such provisions in the Agreement, will extend until final acceptance by the CITY under Section 1.8(b), or submission of final payment to the ARTIST by the CITY under Exhibit B, whichever is later.

b. Force Majeure or Acts of God

The CITY will grant to the ARTIST a reasonable extension of time in the event that conditions beyond the ARTIST's control render timely performance of the ARTIST's services impossible or unduly burdensome. All such performance obligations will be suspended for the duration of the condition. Both parties will 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, if such obligations will be suspended only for the duration of such conditions. In addition, the schedule or design will be equitably adjusted to reflect delays or changes in the artwork that are not the fault of the parties such as acts of Force Majeure or other acts of God.

Article 3: Risk of Loss

The ARTIST will bear the risk of loss or damage to the Artwork until the CITY's final acceptance of the Artwork under Section 1.8(b). The ARTIST will take such measures as are reasonably necessary to protect the Artwork from loss or damage.

Article 4: ARTIST's Representations and Warranties

4.1 Warranties of Title

The ARTIST represents and warrants that:

- a. the Artwork is solely the result of the Artistic effort of the ARTIST;
- b. except as otherwise disclosed in writing to the CITY, the Artwork is unique and original and does not infringe upon any copyright or the rights of any person;
- c. the Artwork (or exact duplicate thereof) has not been accepted for sale elsewhere;
- d. the ARTIST has not sold, assigned, transferred, licensed, granted, encumbered or utilized the Artwork or any element thereof or any copyright related thereto which may affect or impair the rights granted pursuant to this Agreement;

- e. the Artwork is free and clear of any liens from any source whatsoever;
- f. all Artwork created or performed by the ARTIST under this Agreement, whether created by the ARTIST alone or in collaboration with others, will be wholly original with the ARTIST and will not infringe upon or violate the rights of any third party;
- g. the ARTIST has the full power to enter into and perform this Agreement and to make the grant of rights contained in this Agreement;
- h. 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
- i. these representations and warranties will survive the termination or other extinction of this Agreement.

4.2 Warranties of Quality and Condition

- a. The ARTIST represents and warrants that all work will be performed in accordance with professional “workmanlike” standards and free from defective or inferior materials and workmanship (including any defects consisting of “inherent vice,” or qualities that cause or accelerate deterioration of the Artwork) for five years after the date of final acceptance by the CITY under Section 1.8(b). City agrees it shall exercise reasonable care and diligence to prevent conditions that may damage or otherwise degrade the materials and structure of the artwork.
- b. The ARTIST represents and warrants that the Artwork and the materials used are not currently known to be harmful to public health and safety.
- c. The ARTIST represents and warrants that reasonable maintenance of the Artwork will not require procedures substantially in excess of those described in the maintenance and preservation recommendations submitted by the ARTIST pursuant to Section 1.7(f).
- d. If within five years the CITY observes any breach of warranty described in this Section, the ARTIST will, 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 will give notice to the ARTIST of such breach with reasonable promptness.
- e. If after five years the CITY observes any breach of warranty described in this Section, the CITY will contact the ARTIST to make or supervise repairs or restorations at a reasonable fee during the ARTIST’s lifetime. The ARTIST will have the right of first refusal to make or supervise repairs or restorations. Should the 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 five years the CITY observes a breach of warranty described in this Section that is not curable by the ARTIST, the ARTIST is responsible for reimbursing the CITY for damages, expenses and loss incurred by the CITY as a result of the breach.
- g. Acceptable Standard of Display. ARTIST represents and warrants that:
 - i. General routine cleaning and repair of the Artwork and any associated working parts and equipment will maintain the Artwork within an acceptable standard of public display.
 - ii. Foreseeable exposure to the elements and general wear and tear will cause the Artwork to experience only minor repairable damages and will not cause the Artwork to fall below an acceptable standard of public display.

iii. With general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the Artwork 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, weld breaks, and polish finish.

iv. Manufacturer's Warranties. To the extent the Artwork incorporates products covered by a manufacturer's warranty, ARTIST will provide copies of such warranties to the CITY.

Article 5: Insurance/Indemnity

5.1 General

a. The ARTIST acknowledges that until final acceptance of the Artwork by the CITY under Section 1.8(b), any injury to property or persons caused by the ARTIST's Artwork or any damage to, theft of, vandalism to, or acts of God affecting the ARTIST's Artwork are the sole responsibility of the ARTIST, including, but not limited to, any loss occurring during the creation, storage, transportation or delivery of the ARTIST's Artwork, regardless of where such loss occurs.

b. Terms for the procurement and duration of insurance and required insurance policies are described are provided in Exhibit E.

5.2 Indemnity

a. Loss: For purposes of indemnification requirements, the term "Loss" means any and all loss, damage, liability or expense, of any nature whatsoever, whether incurred as a judgment, settlement, penalty, fine or otherwise (including reasonable attorney's fees and the cost of defense), in connection with any action, proceeding, demand or claim for injury, including death, to any person or persons or damages to or loss of, or loss of the use of, property of any person, firm or corporation, including the parties hereto, which arise out of or are connected with the performance of this Agreement.

b. Indemnification and Hold Harmless: For purposes of this Agreement, ARTIST agrees to indemnify, defend and hold harmless CITY and its agents from any and all Loss where Loss is caused or incurred as a result of the intentional misconduct, recklessness, negligence, or other actionable fault of ARTIST or subcontractors. For purposes of this Agreement and subject to the Kansas Tort Claims Act (K.S.A. 75-6101 et seq.), CITY agrees to indemnify, defend and hold harmless ARTIST and its agents from any and all Loss where Loss is caused or incurred as a result of the intentional misconduct, recklessness, negligence, or other actionable fault of CITY or subcontractors.

c. Comparative Fault & Contributory Negligence: It is a specific element of consideration of this Agreement that the indemnity in Section 5.2(b) will apply notwithstanding the joint, concurring or contributory or comparative fault or negligence of CITY or any Third Party and, further notwithstanding any theory of law including, but not limited to, a characterization of CITY's or any Third Party's joint, concurring or contributory or comparative fault or negligence as either passive or active in nature; provided, however, that ARTIST's obligation hereunder will not

include amounts attributable to the fault or negligence of CITY or any Third Party for whom ARTIST is not responsible.

d. Damage Limitations: The indemnification obligation contained in this Agreement will not be limited by any limitation on amount or type of damages, compensation or benefits payable by or for ARTIST or its subcontractors, by the minimum insurance required by this Agreement, nor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

e. Negligence by the CITY: ARTIST is not required hereunder to defend CITY or its agents from assertions that they were negligent, nor to indemnify and hold them harmless from liability based on CITY's negligence.

Article 6: Ownership and Intellectual Property Rights

6.1 Title

Title to the Artwork will pass to the CITY upon the CITY's written final acceptance and payment for the Artwork pursuant to Sections 1.4 and 1.8. ARTIST will provide CITY with a Transfer of Title upon written final acceptance.

6.2 Ownership of Documents

One set of presentation materials prepared and submitted under this Agreement will be retained by the CITY for possible exhibition and to hold for permanent safekeeping. ARTIST shall remain the author and owner of the documents (presentations, materials, drawings, images, renderings, sketches, specifications, and or models, collectively the "documents") prepared and submitted under this agreement, and shall all common law, statutory, and reserved rights therein, including but not limited to copyright.

6.3 Copyright Ownership

The ARTIST retains all rights under the Copyright Act of 1976, 17 U.S.C. § 101 et seq., as the sole author of the Artwork for the duration of the copyright.

6.4 Reproduction Rights

a. In view of the intention that the final Artwork will be unique, the ARTIST will not make any additional exact duplicate reproductions of the final Artwork, nor will the ARTIST grant permission to others to do so except with the written permission of the CITY.

b. The ARTIST grants to the CITY and its assigns an irrevocable license to make two-dimensional reproductions of the Artwork for non-commercial purposes, including, but not limited to, reproductions used in brochures, media, and exhibition catalogues or other similar publications provided that these rights are exercised in a tasteful and professional manner.

- c. All reproductions by the CITY will contain a credit to the ARTIST and a copyright notice as follows: Copyright © Jason Klimoski and Lesley Chang (StudioKCA), 2020.
- d. The ARTIST will use the ARTIST's best efforts in any public showing or resume use of reproductions to give acknowledgment to the CITY in substantially the following form: "an original Artwork commissioned by and in the public art collection of the CITY."
- e. The ARTIST will, at the ARTIST's expense, register with the copyright in the Artwork in the ARTIST's name.
- f. If the CITY wishes to make reproductions of the Artwork 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 if any, the ARTIST will receive.
- g. Third Party Infringement. The CITY is not responsible for any third party infringement of ARTIST's copyright and is not responsible for protecting the intellectual property rights of ARTIST.

Article 7: ARTIST's Rights

7.1 General

- a. The ARTIST retains all rights under state and federal laws including §106A of the Copyright Act of 1976.
- b. The CITY agrees that it will not intentionally alter, modify, change, destroy or damage the Artwork without first obtaining permission from the ARTIST.
- c. If any alteration or damage to the Artwork occurs, the ARTIST will have the right to disclaim authorship of the Artwork in addition to any remedies the ARTIST may have in law or equity under this contract. Upon written request, the CITY will remove the identification plaque and all attributive references to the ARTIST at its own expense within 30 days of receipt of the notice. No provision of this Agreement will obligate the CITY to alter or remove any such attributive reference printed or published prior to the CITY's receipt of such notice. The ARTIST may take such other action as the ARTIST may choose in order to disavow the Artwork.

7.2 Alterations of Site or Removal of Artwork

- a. The CITY will notify the ARTIST in writing upon construction or alteration of the Site, which would result in the Artwork being destroyed, distorted or modified. The ARTIST will be granted the right of consultation regarding the removal or relocation of the Artwork. If the Artwork cannot be successfully removed or relocated as determined by the CITY, the ARTIST may disavow the Artwork or have the Artwork returned to the ARTIST at the ARTIST's expense.
- b. The Artwork may be removed or relocated or destroyed by the CITY should the ARTIST and the CITY not reach mutual agreement on the removal or relocation of the Artwork after a period not to exceed 90 days after written notice to the ARTIST. During the 90-day period, the Parties will engage in good faith negotiations concerning the Artwork's removal or relocation.
- c. In the event of changes in building codes, zoning laws or regulations that cause the Artwork to be in conflict with such codes, laws or regulations, the CITY may authorize the removal or relocation of the Artwork without the ARTIST's prior permission. In the alternative, the CITY may

commission the ARTIST by a separate agreement to make any necessary changes to the Artwork to render it in conformity with such codes, laws or regulations.

d. If the CITY reasonably determines that the Artwork presents imminent harm or hazard to the public, other than because of the CITY's failure to maintain the Artwork as required under this Agreement, the CITY may authorize the removal of the Artwork without the prior approval of the ARTIST.

e. This clause is intended to replace and substitute for the rights of the ARTIST under the Visual Artists Rights Act to the extent that any portion of this Agreement is in direct conflict with those rights. The parties acknowledge that this Agreement supersedes that law to the extent that this Agreement is in direct conflict therewith.

Article 8: Permanent Record

The CITY will maintain on permanent file a record of this agreement and of the location and disposition of the Artwork.

Article 9: ARTIST as Independent Contractor

The ARTIST agrees to perform all Artwork under this Agreement as an independent contractor and not as an agent or employee of the CITY. The ARTIST acknowledges and agrees that the ARTIST will not hold himself or herself out as an authorized agent of the CITY with the power to bind in any manner. The ARTIST will provide the CITY with the ARTIST's Tax Identification Number and any proof of such number as requested by the CITY.

Article 10: Nondiscrimination

1. Kansas Act Against Discrimination: During the performance of this Agreement, ARTIST agrees that:

- a. ARTIST will observe the provisions of the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and will not discriminate against any person in the performance of work under the present contract because of race, religion, color, gender, disability, national origin, ancestry, or age;
- b. in all solicitations or advertisements for employees, ARTIST will include the phrase, "equal opportunity employer," or a similar phrase to be approved by the Kansas Human Rights Commission ("commission");
- c. if ARTIST fails to comply with the way ARTIST reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, ARTIST will be deemed to have breached the present contract and it may be canceled, terminated or suspended, in whole or in part, by CITY without penalty;

- d. if ARTIST is found guilty of a violation of the Kansas Act Against Discrimination under a decision or order of the commission which has become final, ARTIST will be deemed to have breached the present contract and it may be canceled, terminated or suspended, in whole or in part, by the contracting CITY; and
- e. ARTIST will include the provisions of subsections a. through d. in every subcontract or purchase order so that such provisions will be binding upon such subcontractor or vendor.

2. Exceptions to Applicability: The provisions of this Section will not apply to a contract entered into by CITY with ARTIST if (a) ARTIST employs fewer than four (4) employees during the term of such contract; or (b) ARTIST's contract with CITY totals Ten Thousand Dollars (\$10,000) or less in aggregate.

3. Kansas Age Discrimination in Employment Act: ARTIST further agrees and acknowledges that it will abide by the Kansas Age Discrimination In Employment Act (K.S.A. 44-1111 et seq.) and the applicable provision of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) as well as all other federal, state and local laws, ordinances and regulations applicable to this Project and to furnish any certification required by any federal, state or local governmental CITY in connection therewith.

Article 11: Assignment of Artwork

The Artwork and services required of the ARTIST are personal and will not be assigned, sublet or transferred. Any attempt by the ARTIST to assign this Agreement or any rights, duties or obligations arising hereunder will be void and of no effect unless prior written consent is given by the CITY. The CITY will have the right to assign or transfer any and all of the CITY's rights and obligations under this Agreement, subject to the ARTIST's consent, if ownership of the Site is transferred. If the ARTIST refuses to give consent, this Agreement will terminate.

Article 12: Termination

1. Notice: CITY reserves the right to terminate this Agreement for either cause (due to ARTIST's failure to substantially perform its obligations hereunder) or for its convenience and without cause or default on the part of ARTIST, by providing fifteen (15) days' written notice of such termination to ARTIST. Upon receipt of such notice from CITY, ARTIST will, at CITY's option as contained in the notice: (1) immediately cease all Professional Services; or (2) meet with CITY and, subject to CITY's approval, determine what Professional Services will be required of ARTIST in order to bring the Project to a reasonable termination in accordance with the request of CITY. ARTIST will also provide to CITY copies of all drawings and documents completed or partially completed at the date of termination for which ARTIST has been fully paid. If CITY defaults on its obligations under this Agreement, (due to CITY's failure to substantially perform its obligations under this Agreement), ARTIST must notify CITY by written notice of its intent to terminate and CITY will have fifteen (15) days from the date of the notice to cure or to submit a plan for cure

acceptable to ARTIST. In no event may ARTIST terminate the contract solely for its convenience without cause.

Address for Notice:

CITY of Olathe
Attn: Jeff Blakeman,
Public Works Department
100 E. Santa Fe, PO P.O. Box 768
Olathe, KS 66051-0768

StudioKCA, LLC
Attn: Jason Klimoski
55 Washington Street, Suite 255
Brooklyn, NY 11201

2. Compensation for Convenience Termination: If CITY terminates for its convenience as provided herein; CITY will compensate ARTIST for all Professional Services completed and accepted and reimbursable expenses incurred to the date of its receipt of the termination notice and any additional Professional Services and reimbursable expenses requested by CITY to bring the Project to reasonable termination. Compensation will not include anticipatory profit or consequential damages, neither of which are allowed.

3. Compensation for Cause Termination: If CITY terminates for cause or default on the part of ARTIST, CITY will compensate ARTIST for the reasonable cost of Professional Services and reimbursable expenses completed and accepted to date of its receipt of the termination notice. Compensation will not include anticipatory profit or consequential damages, neither of which will be allowed. CITY also retains all its rights and remedies against ARTIST including but not limited to its rights to sue for damages, interest and attorney fees.

4. Incomplete Documents: Neither ARTIST nor its subcontractors will be responsible for errors or omissions in documents which are incomplete because of an early termination under this Section, or ARTIST having been deprived of the opportunity to complete such documents and prepare them to be ready for construction.

5. Termination for Lack of Funds: If, for whatever reason, adequate funding is not made available to CITY to support or justify continuation of the level of Professional Services to be provided by ARTIST under this Agreement, CITY may terminate or reduce the amount of Professional Services to be provided by ARTIST under this Agreement. In such event, CITY will notify ARTIST in writing at least thirty (30) days in advance of such termination or reduction of Professional Services for lack of funds.

Article 13: Death or Incapacity

If the ARTIST becomes unable to complete this Agreement due to death or incapacitation, such death or incapacity will not be deemed a breach of this Agreement or a default on the part of the ARTIST for the purpose of this Article. However, nothing in this Article will obligate the CITY to accept the Artwork.

- a. In the event of incapacity, the ARTIST will assign the ARTIST's obligations and services under this contract to another ARTIST if the CITY, in the CITY's sole discretion, approves of the new ARTIST. Alternatively, the CITY may elect to terminate this Agreement. The ARTIST will retain all rights under Article 6 and Article 7. The Artwork and any reproductions thereof will contain a credit to the ARTIST and a copyright notice in substantially the following form: Copyright © Jason Klimoski and Lesley Chang (StudioKCA), 2020.
- b. In the event of death, this Agreement will terminate effective the date of death. The ARTIST's heirs will retain all rights under Article 6 and Article 7. [The ARTIST's executor will deliver to the CITY the Artwork in whatever form or degree of completion it may be at the time. Title to the Artwork will then transfer to the CITY. However, the Artwork will not be represented to be the completed Artwork of the ARTIST unless the CITY is otherwise directed by the ARTIST's estate.]

Article 14: Notices and Documents

Notices required under this Agreement will be delivered personally or through certified mail, return receipt requested, postage prepaid, to the addresses stated below, or to any other address as may be noticed by a Party:

For the CITY:

City of Olathe: Attn. Jeff Blakeman, Public Works Department
PO Box 768
Olathe, KS 66051-0768

For the ARTIST:

StudioKCA, LLC
Attn: Jason Klimoski
55 Washington St, Suite 255
Brooklyn, NY 11201

Notice will be deemed effective on the date personally delivered or, if mailed, [three (3) days] after the postmarked date.

Article 15: Waiver

The Parties agree that a waiver of any breach of violation of any term or condition of this Agreement will not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term of condition.

Article 16: Audit

The CITY will maintain records of all documents, notices, checks, and other records required or produced under this Agreement or related thereto. The ARTIST agrees to the maintenance of such records for archival purposes. Such records will be made available for inspection or audit,

at any time during regular business hours, upon written request by the CITY. Copies of such documents will be provided to the CITY for inspection when it is practical to do so. Access to such records and documents will also be granted to any Party authorized by the ARTIST, the ARTIST's representatives, or the ARTIST's successors-in-interest. The CITY will comply with any open records law applicable to these records.

Article 17: Conflict of Interest

The ARTIST and the CITY will avoid all conflicts of interest or appearance of conflicts of interest in the performance of this Agreement.

Article 18: Dispute Resolution

CITY and ARTIST agree that disputes relative to the Project will first be addressed by negotiations between the Parties. If direct negotiations fail to resolve the dispute, the Party initiating the claim that is the basis for the dispute may take such steps as it deems necessary to protect its interests; provided, however, that notwithstanding any such dispute, ARTIST will proceed with the Professional Services as per this Agreement as if no dispute existed, and CITY will continue to make payment for ARTIST's completed Professional Services; and provided further that no dispute will be submitted to arbitration without both Parties' express written consent.

Article 19: Amendments

This Agreement, including all documents and exhibits included by reference herein, constitutes the entire Agreement between the parties and supersedes all prior agreements, whether oral or written, covering the same subject matter. This Agreement may not be modified or amended except in writing mutually agreed to and accepted by both Parties to this Agreement.

Article 20: Applicable Law, Jurisdiction, and Venue

Interpretation of this Agreement and disputes arising out of or related to this Agreement will be subject to and governed by the laws of the State of Kansas, excluding Kansas' choice-of-law principles. Jurisdiction and venue for any suit arising out of or related to this Agreement will be in the District Court of Johnson County, Kansas.

(remainder of this page intentionally left blank)

EXECUTION OF CONTRACT

The parties hereto have caused this Agreement to be executed this ____ day of _____ 201__.

CITY OF OLATHE, KANSAS

By: _____
Michael E. Copeland, Mayor

ATTEST:


CITY Clerk

(Seal)

APPROVED AS TO FORM:

City Attorney/Deputy City Attorney/
Assistant City Attorney

StudioKCA, LLC



Jason Klimoski, Principal, Artist

APRIL 9, 2019

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Exhibit A

Budget

The budget for this project is One Hundred Thousand dollars (\$100,000.00), excluding costs of site preparations that are the responsibility of the CITY per Article 1.2.c.

Exhibit B

Payment Schedule

The CITY will pay the ARTIST a fixed fee not to exceed One Hundred Thousand dollars (\$100,000.00), which will constitute full and complete compensation for all the services performed and materials furnished by the ARTIST under this Agreement. Payment will be made in accordance with the following scheduled installments, each installment representing full and final payment for all services and materials provided prior to payment thereof:

- a. \$10,000 upon delivery of a signed copy of the approved agreement.
- b. \$30,000 upon CITY approval of the design as set forth in 1.3.b.
- c. \$30,000 upon acceptance by CITY of the engineering structural certification and prior to commencement of fabrication.
- d. \$5,000 upon City's review of fabrication progress as set forth in 1.5.c and prior to shipping.
- e. \$25,000 upon final acceptance of the artwork by the CITY as set forth in 1.8.e.

Exhibit C

Timeline/Schedule

<u>Milestone</u>	<u>Completion Date</u>
Submit Design for Approval	Within 60 day of execution of agreement, per article 1.3.a.i
CITY Notice of Approval or Disapproval of Design.....	Within 15 days of submission of design, per article 1.3.b.i
Submit Revised Design for Approval (if required)	Within 30 days, per article 1.3.b.ii
CITY Notice of Approval or Disapproval of Revised Design	Within 15 days, per article 1.3.c.i
Final/Construction Documents	Within 60 days of CITY approval of design
CITY Acceptance of Engineering Structural Certification.....	Within 7 days of receiving certification
Sculpture Fabrication	Approximately 5-6 months after CITY acceptance of engineering structural certification
Site Preparation	To be completed by CITY prior to beginning of installation, per article 1.2.c
Shipping.....	Approximately 2-4 weeks upon completion of sculpture fabrication
Begin Installation.....	April 17, 2020 (estimated)
Testing and Final Adjustment	April 29, 2020 (estimated)

EXHIBIT D

CITY OF OLATHE INSURANCE REQUIREMENTS

A. ARTIST shall procure, and maintain as required, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the project. The cost of such insurance shall be included in the ARTIST's bid.

B. ARTIST shall maintain the following coverages and minimum limits.

1. Commercial General Liability (CGL): [ISO "occurrence" form or its equivalent] \$1,000,000 per occurrence limit including personal and advertising injury and products - completed operations. Any general aggregate limit should be at least \$2,000,000.
2. Business Auto Coverage: (*Owned and non-owned autos*) \$500,000 per occurrence, combined single limit.
3. Workers Compensation and Employers Liability: Workers compensation limits as required by applicable state workers' compensation laws and employer's liability limits or equivalent of \$500,000/\$500,000/\$500,000.
4. Professional Liability: Minimum limits to be \$1,000,000 each claim / annual aggregate.
5. Coverage Limits. Coverage limits for General and Auto Liability exposures may be met by a combination of primary and umbrella policy limits.
6. Exposure Limits: The above are minimum acceptable coverage limits and do not infer or place a limit on the liability of the ARTIST nor has the CITY assessed the risk that may be applicable to ARTIST. ARTIST shall assess its own risks and if it deems appropriate and/or prudent maintain higher limits and/or broader coverages. The ARTIST's insurance shall be primary and any insurance or self-insurance maintained by the CITY will not contribute to, or substitute for, the coverage maintained by ARTIST.

C. Additional Insured. CGL and auto policies must be endorsed to include the CITY as additional insured for the project. Any and all coverage available to the named insured is applicable to the additional insured. The ARTIST's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

D. Verification of Coverage.

1. A certificate of insurance, listing the CITY as a certificate holder, accompanied by an additional insured endorsement or equivalent.
2. The insurance coverages are to be provided by Kansas authorized insurance companies with a Best's rating of at least A- VII. Those not meeting this standard must be approved by CITY.
3. Any self-insurance or self-insured retentions must be specified on the certificate of insurance. In addition, when self-insured the name, address, and telephone number of the claims office must be indicated on the certificate or separate attached document. Any and all deductibles or self-insurance in the above described coverages shall be the responsibility and at the sole risk of the ARTIST.
4. When any of the foregoing insurance coverages are required to remain in force after final payment, additional certificates with appropriate endorsements evidencing continuation of such coverage shall be submitted along with the application for final payment.
5. Any coverage provided by a Claims-Made form policy must contain a three-year tail option, extended reporting period, or must be maintained for three years' post contract.

E. Cancellation. Each insurance policy required shall not be suspended, voided, or canceled, except after ARTIST has provided thirty (30) days' advance written notice to the CITY.

F. Sub-Contractors. All coverages for sub-Contractors must meet all of the requirements stated herein.

Exhibit E

Certificate of Insurance

Exhibit F

**Certificate of Good Standing to Conduct Business in Kansas
Registered Agent in Kansas**