



Design Development Agreement

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and

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DESIGN DEVELOPMENT AGREEMENT OVERVIEW

Title: Design Development Agreement

Situation: A Client determines that it likes an Artist's conceptual design (perhaps pursuant to a prior Conceptual Design Agreement) and wishes to have the Artist fully develop the design concept so that, upon approval, it is ready to be commissioned for fabrication and/or installation.

Purpose: If the Client is unsure of how a concept will translate to an actual artwork, this is one way to get more detailed information. It is also a means for determining whether a particular concept is really appropriate for the situation and/or feasible from an economic or timing perspective.

Number of artists involved: One.

Cost involved: Depends on the overall budget for the finished, installed artwork.

Finished product: Deliverables include a fully designed artwork including all necessary plans, engineering and appropriate information and approvals to move forward with the permitting, fabrication and/or installation of the artwork.

Note: This is a general form contract and varying terms may be appropriate depending on the situation or parties involved. The purpose of this overview and form contract is to give a general idea of the structure and make up of a Design Development Agreement, not to suggest that this is the only way to draft such an agreement.

DESIGN DEVELOPMENT AGREEMENT

This **AGREEMENT FOR CONCEPTUAL DESIGN ONLY** (together with all Schedules, the “Agreement”) is made and entered into this ____ day of _____, by and between _____ (“Client”), and _____ (“Artist”).

WHEREAS, Client is developing _____ (“Project”) located at _____ (“Site”);

WHEREAS, Client desires to obtain public art design services in connection with the development of a design for artwork to be installed at the Site.

WHEREAS, Artist is in the business of creating original works of art;

WHEREAS, Client approved Artist’s Conceptual Design for artwork (the “Artwork”) pursuant to a prior agreement; and

WHEREAS, Client desires to contract Artist to fully develop the Artwork in anticipation of fabrication and installation.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

- 1. Scope of Services.** The Artist shall provide design services (the “Services”) and deliverables (“Deliverables”) as set forth in Schedule A, which is hereby incorporated by reference into this Agreement. The Services shall result in Deliverables embodying a final design (the “Design”) for the Conceptual Design for the Artwork as previously approved, including, but not limited to, a plan for fabrication and installation.
- 2. Schedule of Performance.** The parties agree that time is of the essence. Artist shall adhere to the schedule as set forth in Schedule A and shall provide the Design to Client no later than _____ [DATE].
- 3. Extension of Time.** The Client agrees to grant a reasonable extension of time to Artist in the event that there is a delay caused by the Client, conditions beyond Artist’s control, or pursuant to those circumstances set out in Section 18 of this Agreement. Extensions of time shall comply with the requirements of Section 15 of this Agreement.
- 4. Compensation.** Client agrees to pay Artist \$_____ plus expenses for the Design. The payment schedule is set forth in Schedule B, which is hereby incorporated by reference into this Agreement.
- 5. Reimbursable Expenses.** Client will reimburse Artist for all reasonable expenses incurred in the performance of this Agreement. Reimbursable expenses shall be

invoiced by Artist and shall include supporting documentation. These expenses include travel, lodging, food, materials, printing costs, postage and delivery costs. Reimbursable expenses also include third party professional consultant expenses necessary to the development of the Design (ie. Architects, engineers, or landscape architects). Artist agrees that the total fees, plus expenses, shall not exceed \$ _____ unless Artist obtains specific advance approval from Client in writing.

6. **Invoicing.** Invoices for Services and Reimbursable Expenses shall be submitted to: _____ (name) (address). Payment as set forth under this Agreement will be made payable to Artist and will be remitted by check to the address indicated in Section 22 below "Notices." Client will reimburse Artist within (30) calendar days of Client's receipt of Invoice from Artist.
7. **Late Payments.** If payments are not made on or before thirty (30) calendar days following Client's receipt of Artist's Invoice, but no later than sixty (60) days late, the completion and delivery of the Conceptual Design may be delayed by an equal number of days or Artist may elect to receive _____% of the remaining amount on Schedule A and terminate this Agreement.
8. **Representations and Warranties.** Artist represents and warrants that the services rendered pursuant to this Agreement shall result in an original Design that, to the best of Artist's knowledge, does not infringe on any third party intellectual property rights. Client shall make available for Artist's examination and use all information regarding the Site and Project, including but not limited to: plans, specifications, reports, narratives, publications, statistics, records and other information pertinent to Artist's performance under this Agreement and represents and warrants the accuracy and completeness of the same. Where appropriate, Client shall direct their professional consultants (ie. Architects, engineers, landscape architects, and other design professionals) to work in cooperation with Artist to fully develop the Design and fabrication and/or installation plans for the Artwork. Further, Client shall provide its reviews and approvals of Artist's design services in a prompt and timely manner.
9. **Design Approval Process.**
 - a. **Schematic Design.** Within _____ days after Artist submits to Client the design materials describing the Design in detail (the "Schematic Design") as defined in Schedule A, Client shall notify Artist whether it approves or disapproves of the Schematic Design. Client shall have the may reject the Schematic Design, approve it outright, or approve it with conditions. Client shall notify Artist in writing of any revisions to the Schematic Design necessary for approval. In this event, Artist shall provide a revised Schematic Design within _____ days after Client has notified Artist of the necessary revisions.
 - b. **Construction Documents.** Upon approval of the Schematic Design, Artist shall create a complete and accurate presentation of the Design sufficient for fabrication and/or installation (the "Construction Documents") pursuant to

the parameters set out in Schedule A. Client shall notify Artist in writing if any revisions to the Construction Documents are necessary for approval. In this event, Artist shall provide revised Construction Documents within _____ days after Client has notified Artist of the necessary revisions.

- c. **Commission.** If Client wishes to proceed with fabrication and/or installation of the Design, subject to approval by _____ (City Council, art commission, or other public body) pursuant to Section 10 below, the parties shall enter into a separate agreement for the commission of the Artwork.
- d. **Rejection.** If Client does not wish to commission the Design, Client may not use any part of Artist's Design including, but not limited to the Schematic Design and/or Construction Documents for future development without the specific written approval of Artist.

10. Further Approvals. In the event that further approvals or reviews are necessary for Client to select Artist's Design for commission, Artist, as part of this Agreement and for no further compensation except for Reimbursable Expenses, 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. Client will give Artist no fewer than _____ days notice of the scope of materials needed and time and location of the meeting.

11. Intellectual Property. Artist retains all copyrights and other intellectual property interests in the Design and in any plans, drawings, renderings, schematics, design studies and models and the like prepared by Artist in connection with this Agreement. The Artist 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 Client. It is specifically understood that given the Artist's retention of all intellectual property rights, in the event Client elects not to commission the Design, Client 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.

12. Transfer of Title. Simultaneous with Artist's receipt of the final payment, Artist shall transfer title to the Deliverables to Client.

13. Indemnification. Client agrees to indemnify and hold harmless Artist, his/her successors and assigns from any claim or suit arising or resulting from the breach by Client or its agents of any contractual obligations set forth in this Agreement including, but not limited to, Client's warranties set forth in Section 8 of this Agreement and from negligent conduct of Client, its agents, or assigns. Artist agrees to indemnify and hold harmless Client, its successors and assigns from any claim or suit arising or resulting from the breach by Artist of any contractual obligations set forth in this Agreement including, but not limited to, Artist's warranties set forth in Section 8 of this Agreement.

- 14. Independent Contractor.** Artist is furnishing his/her services hereunder as an independent contractor, and nothing herein creates any association, partnership or joint venture between the Parties hereto or any employer-employee relationship.
- 15. Modification.** Any modification of this Agreement shall be in writing and signed by all the parties.
- 16. Termination.** Either party may terminate this Agreement upon thirty (30) days written notice to the other party delivered by certified mail or in person. Termination of this Agreement for any cause shall be without prejudice to any obligations or liabilities of either party accrued prior to or because of such termination. Should Client elect to terminate the Agreement under this Section, Client does not have the right to commission any other party to create the Design, or any part thereof, without the written approval of Artist. Further, Client shall be liable under the payment provisions of this Agreement only for payment for services rendered before the effective date of termination. In the event of a breach, the non-breaching party may terminate this Agreement upon ten (10) days notice to the other, if the breaching party is in material breach of this Agreement and fails to cure the breach before the end of the ten (10) day notice period.
- 17. Death or Incapacity of Artist.** Should the Artist become ill, disabled, injured, or otherwise incapacitated at any time between the execution of this Agreement and the date of completion, the Artist or one of his representatives will notify Client promptly. In the event of Artist's physical incapacity or death prior to the completion of the Agreement, all payments made up to the point of incapacity or death will be retained by Artist or Artist's estate and all work performed to date of incapacity or death will be compensated. If the Design is substantially completed and it is feasible for the work to be fully completed without undue delay, Client may elect to proceed under the terms of this Agreement with the written consent of Artist's estate. In the event that Client elects to proceed with the completion of the Design, and/or a commission of the Artwork, all remaining work to be completed in accordance with this Agreement will be delegated to Artist's studio personnel.
- 18. Force Majeure.** The Parties will be excused from performing under this Agreement 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 Agreement or substantially changed circumstances.
- 19. Non-assignability.** Artist will not assign, transfer or subcontract the creative and artistic portions of the Design or the Artwork to another party without the prior written consent of Client. Client will assign its rights to the Artwork to an agency of the United States government promptly upon completion of the Memorial and will provide Artist with thirty (30) days notice of the date of that transfer. Upon Client's

assignment of rights to the Artwork to an agency of the United States government it will also delegate all of its duties regarding the Artwork to the same agency to which it assigns its rights.

20. Severability. Each paragraph and provision of this Agreement is severable from the entire Agreement, and if any provision is declared invalid, the remaining provisions will remain in effect.

21. Governing Law and Venue. This Agreement and all matters arising out of or relating to this Agreement will be construed and enforced according to the laws of _____. Unless otherwise agreed, any litigation shall take place in the state or federal courts located in _____, and the Parties will accept the exclusive jurisdiction of these courts. Each Party agrees to service of process through the procedure defined in the Notices Section ___.

22. Notices. All notice, submittals, requests, and reports required under this Agreement will be hand delivered or sent by certified mail as follows:

For Artist:

For Client:

Notice is deemed to have been received either upon the date recipient signs the return certificate, or five (5) days after the notice is transmitted to recipient, whichever is sooner. A change in the designation of the person or address to which submittal, requests, notices and reports will be delivered is effective when the other party has received notice of the change by certified mail.

23. Dispute Resolution. In the event of any disputes arising from the terms of or performance under this Agreement, the parties shall first attempt resolution through good faith discussion and/or mediation. If discussion and/or mediation do not resolve the dispute(s), the parties may resort to litigation and equitable relief to resolve disputes that still exist after good faith discussion and/or mediation. In addition, either party may seek equitable relief (injunction and/or specific performance) at any time when immediate enforcement or cessation of performance under this Agreement is required to avoid foreseeable damages to relief-seeking party's interests, including but not limited to intellectual property interests.

24. Attorney Fees and Costs. There will be no recovery of fees or costs for mediation. The prevailing party in any court action or proceeding shall be entitled to receive from the other party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in connection with such action or proceeding.

25. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements in this matter. There are no other written or oral agreements, representations or understandings with respect to the subject matter of this Agreement. This Agreement and its terms may be amended, modified, or waived only by written agreement, signed by both parties.

- 26. Non-waiver.** No waiver will be binding on a party unless it is in writing and signed by the party making the waiver. A party's waiver of a breach of a provision of this Agreement will not be a waiver of any other provision or a waiver of a subsequent breach of the same provision.
- 27. Execution by Counterpart and Facsimile.** This Agreement may be executed in counterpart and by facsimile.

SIGNATURES ON FOLLOWING PAGE

ACCEPTED AND AGREED AS OF THE DATE FIRST SHOWN ABOVE:

CLIENT

By: _____

Title: _____

Date: _____

ARTIST

By: _____

Date: _____

SCHEDULE A: DESIGN SERVICES & DELIVERABLES

1. Schematic Design

Artist (in collaboration with Architect or other design professionals as appropriate) shall submit to Client a Schematic Design for the Artwork. Schematic design shall include information sufficient to describe the Artwork in detail, including but not limited to:

- Dimensioned drawings such as plan(s), section(s), elevation(s), site plans
- Models, materials and samples
- Structural considerations
- Preliminary assessment of maintenance requirements, surface integrity, protection against theft and vandalism
- Preliminary sub-consultant reports as appropriate, such as structural, lighting, electrical, mechanical, hydraulic engineers/consultants
- Preliminary fabrication narrative
- Preliminary installation narrative
- Estimated fabrication budget
- Preliminary fabrication budget
- Estimated installation budget
- Preliminary installation schedule
- Ability to meet Client provided preliminary installation timeline

2. Construction Documents

Artist (in collaboration with Architect or other design professionals as appropriate) shall submit to Client a set of Construction Documents detailing every physical feature of the construction of the Artwork and its integration with the Site.

Construction Documents include:

- Detailed drawings to meet standards specified by Client
- Material samples
- Final consultant reports/drawings/specifications where appropriate
- Final fabrication budget
- Final fabrication schedule
- Final maintenance requirements/instructions
- Final installation narrative
- Final installation budget

SCHEDULE B: PAYMENT SCHEDULE

Design fees will be paid pursuant to an invoice submitted by Artist to Client according to the following schedule:

Payment terms shall be as follows:

\$ _____ or _____ % upon execution of this Agreement.

\$ _____ or _____ % upon submission of the Schematic Design as set forth in this Agreement under Section 9.a. "Schematic Design."

\$ _____ or _____ % upon Client's notification to Artist of approval of the Schematic Design.

\$ _____ or _____ % upon submission of the Construction Documents as set forth in this Agreement under Section 9.b. "Construction Documents."

\$ _____ or _____ % upon Client's notification to Artist of approval of the Construction Documents.

Reimbursable Expenses shall be paid as submitted pursuant to this Agreement.