

CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: Museum and Cultural Affairs Dept.

AGENDA DATE: 03/10/2009

CONTACT PERSON/PHONE: Sean McGlynn 541-4896

DISTRICT(S) AFFECTED: 3

SUBJECT:

A resolution that the City Manager be authorized to sign a Service Agreement by and Between the City of El Paso and artist Mahaffey Fine Art LLC, to fabricate the El Paso International Airport Public Art Project, in the amount of NINETY THOUSAND AND 00/100 DOLLARS (\$90,000.00). (District 3)

BACKGROUND / DISCUSSION:

Discussion of the what, why, where, when, and how to enable Council to have reasonably complete description of the contemplated action. This should include attachment of bid tabulation, or ordinance or resolution if appropriate. What are the benefits to the City of this action? What are the citizen concerns?

A public art project to be included in the expansion of the El Paso International Airport to encourage the integration of art into the architecture of municipal structures for the City of El Paso. Artist Mahaffey Fine Art LLC, has been selected and approved to create and integrate a public artwork in the expansion of the El Paso International Airport. Forty Five glass panels will depict indian motif images originally located on the vigas in the Old El Paso International Airport.

PRIOR COUNCIL ACTION

Has the Council previously considered this item or a closely related one?

Ordinance No. 16324 adopted on April 4, 2006 providing for art in municipal places, establishing the El Paso public art committee and describing its powers and duties, and establishing a means of funding acquisition or commissioning of art for municipal places and repealing ordinances 15245 and 15073.

AMOUNT AND SOURCE OF FUNDING:

How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?

Fund 41077
Account # 508027
Dept 62620078

BOARD / COMMISSION ACTION:

Enter appropriate comments or N/A

N/A

*****REQUIRED AUTHORIZATION*****

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: _____

(Example: if RCA is initiated by Purchasing, client department should sign also)
Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____

DATE: _____

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

THAT the City Manager be authorized to sign a Service Agreement by and between the City of El Paso and Mahaffey Fine Art LLC, an Oregon Limited Liability Company ("Mahaffey"), to design, fabricate and oversee installation of public art to be known as the El Paso International Airport Public Art Project in the amount of NINETY THOUSAND AND NO/100 DOLLARS (\$90,000.00).

ADOPTED this ___ day of _____, 2009.

CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:

Sean P. McGlynn, Director
Museums and Cultural Affairs Department

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STATE OF TEXAS

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SERVICE AGREEMENT

COUNTY OF EL PASO

THIS Service Agreement ("Agreement") is entered into as of the _____ day of _____, 2009 ("Effective Date") between the following Parties:

CITY: the City of El Paso, Texas,
a Texas municipal corporation, and

ARTIST: Mahaffey Fine Art LLC, an Oregon Limited Liability Company

RECITALS

1. The City has determined that it requires the assistance of Artist to design and fabricate public art to be known as the El Paso International Airport Public Art Project (the "Artwork"), more specifically described in EXHIBIT "A", at the El Paso International Airport, El Paso, El Paso County, Texas, in District 3 and referenced herein as the "Site"; and

2. Artist has been approved by the Public Art Committee ("PAC") and the Cultural Affairs Advisory Board ("CAAB"), as having the experience and expertise in indoor public art and is qualified to provide the services required by the City.

3. Accordingly, the purpose of this Agreement is to memorialize the terms of the parties' agreement for the design, fabrication, delivery, presence during and advice concerning installation and acceptance of the Artwork at the Site.

FOR THESE REASONS, AND IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED IN THIS AGREEMENT, THE PARTIES AGREE AS FOLLOWS:

**ARTICLE ONE
Contractual Relationship**

1.1 The City agrees to engage Artist, and Artist hereby agrees to perform services as required under this Agreement. The selection of Artist was based on the qualifications of Rae Mahaffey who possesses the skills to render and produce the Artwork and who shall supervise all work related to Artist's completion of the Artwork.

1.2 Artist is an independent contractor. Except as may be expressly and unambiguously provided in this Agreement, no partnership or joint venture is intended to be created by this Agreement, nor any principal-agent or employer-employee relationship between the Parties or any of their officers, employees, agents or contractors.

1.3 Artist shall not receive any compensation or benefits from the City, other than as expressly set forth in this Agreement or in a subsequent written agreement that is signed by both parties.

1.4 Artist does not have, and will not attempt to assert, the authority to make commitments for or to bind the City to any obligation other than the obligations set forth in this Agreement or in any subsequent written agreement that is signed by both parties.

ARTICLE TWO

Scope of Services

2.1 Artist's Obligations.

- 2.1.1 Artist shall perform all services ("Services") and furnish all supplies, materials and/or equipment as necessary for the design, fabrication and transportation of the Artwork at the Site in accordance with the specified schedule, attendance at and input on the installation of the Artwork and as further described herein below and in EXHIBIT "B", including collaboration with the City, by and through its Museums and Cultural Affairs Department ("MCAD"), City Engineering Department and the El Paso International Airport. Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.
 - 2.1.1.1 Artist may subcontract portions of the services to be provided hereunder at the Artist's expense, provided that said subcontracting shall not affect the design, appearance or visual quality of the Artwork and shall be carried out under the personal supervision of the Artist.
- 2.1.2 Artist shall determine the expression, design, dimensions and materials of the Artwork, subject to review and acceptance by the City, through MCAD, the City Engineering Department and the El Paso International Airport as set forth in this Agreement. All aspects of Artist's Services shall be coordinated with MCAD's Public Arts Coordinator.
- 2.1.3 Artist shall prepare the design concept and the corresponding budget described in Sections 2.3 and 2.4 of this Agreement. The design concept shall include a description of all materials and products utilized in the Artwork and the required routine care and upkeep involved.
- 2.1.4 At the discretion of the City, through MCAD, Artist shall attend public information meetings with the general public, attend design and construction coordination meetings with MCAD, the City Engineering Department, the El Paso International Airport, general contractor, landscape architect and other parties, as appropriate, to communicate about the Artwork and to provide input on appropriate integration and/or installation of the Artwork. Artist may participate in meetings by telephone, except for the pre-installation site visit and the reception. Artist's budget anticipates three trips to El Paso, Texas for siting the work, delivery of finished product and installation consultation, and dedication of the work. This Agreement authorizes the City Manager or designee to negotiate and sign an amendment to this Contract to bring the Artist to El Paso, Texas should the City deem further trips necessary.

- 2.1.5 Artist shall complete the fabrication of the Artwork by the scheduled installation phase as provided in Section 2.4 of this Agreement.
- 2.1.6 Artist shall arrange the transportation of the Artwork in consultation with MCAD.
- 2.1.7 Artist shall take responsibility for paying all subcontractors and shall warrant the work to be free and clear of any liens upon delivery to the Site.
- 2.1.8 Artist shall provide photographic documentation of the Artwork upon completion of same as per Section 2.5.1.1.
- 2.1.9 Based on information provided to Artist by City pursuant to paragraph 2.2.1, Artist shall be responsible for compliance with all applicable laws and regulations, including but not limited to zoning or environmental regulations.

2.2 City's Obligations.

- 2.2.1 The City shall be responsible for providing Artist, at no expense to the Artist, copies of existing designs, drawings, reports, list of required permits, and other existing relevant data, if any, which is needed by Artist in order to perform hereunder.
- 2.2.2 The City shall inform Artist of any limitations to the Artwork, of which the City is aware, during any stage of its design or fabrication, imposed by zoning or environmental laws and/or regulations.
- 2.2.3 The City shall prepare the Site in accordance with the specifications detailed in the approved design concept in Section 2.3.2 of this Agreement. The City shall be responsible for all expenses, labor and equipment to prepare the Site for the timely transportation and installation of the Artwork. City shall also be responsible for providing and/or paying for any labor, equipment and hardware (fabricated or existing) necessary for the installation of the Artwork. The City shall begin site preparations once the City approves the design as in Section 2.3 of this Agreement and shall complete the site preparations as provided in Section 2.7 of this Agreement or shall contact the Artist in writing informing Artist of any delays.
- 2.2.4 MCAD shall be responsible for leading Artist through the required review process. MCAD shall be responsible for organizing and scheduling meetings with review entities, (PAC, CAAB, etc.) and for providing Artist written instructions for the materials required at such meetings.

2.3 Design.

2.3.1 Concept/Schematic.

- 2.3.1.1 If not heretofore accomplished, within 60 days of the execution of this Agreement, Artist shall submit to MCAD the design concept (the "Design") in the form of detailed color, drawings, models, and/or other documents as are required to present a meaningful representation of the Artwork. Upon the Design's final approval, the Design shall be attached hereto as EXHIBIT "C" and incorporated for all purposes.
- 2.3.1.2 The parties acknowledge that during the conceptual phase of the Artwork's Design, Artist consulted with the City Engineering Department, the El Paso International Airport, and representatives of the community and considered their input and concerns.
- 2.3.1.3 The Design will include: the project name, a description of the method by which the Artwork is to be fabricated and recommended installation; a description of any operational, maintenance and preservation 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.
- 2.3.1.4 The Design must provide sufficient detail to permit the City to assure compliance with applicable local, state or federal laws, ordinances and/or regulations. The Artist shall attach to the Design a detailed budget for the design and fabrication of the Artwork, as described in EXHIBIT "D" of this Agreement.

2.3.2 Approval.

- 2.3.2.1 Within fifteen (15) days after the Artist submits the Design, MCAD shall notify Artist whether it approves or disapproves of the Design. The City by and through MCAD, shall have sole discretion in approving outright or with conditions, or rejecting the Design. The City, through MCAD, shall notify 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.
- 2.3.2.2 If the City exercises its sole discretion to disapprove of or require revisions to the Design, MCAD will submit to Artist in writing the reasons for such disapproval or requested revisions. In such event, Artist will submit a revised design ("Revised Design") within ten (10) days after MCAD has notified

Artist of the City's disapproval or requested revisions. Artist will not be paid an additional fee for the Revised Design.

2.3.2.3 The Revised Design will reflect changes made to address the City's stated reasons for disapproval or requested revisions, as well as any adjustments in the budget or schedule that may be necessary. The City shall notify Artist in writing whether it approves or disapproves of the Revised Design within ten (10) days after Artist submits the Revised Design.

2.3.2.4 If Artist refuses to revise the Design pursuant to Section 2.3.2.2, or if Artist fails to adequately revise the Design in the judgment of the City, through MCAD, this Agreement shall terminate 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, through MCAD, submits its written disapproval of the Revised Design to Artist. MCAD shall submit to Artist a written termination notice with the disapproval. The termination notice shall advise Artist that this Agreement has been terminated pursuant to this Article. The termination notice shall notify Artist that 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 City shall retain ownership of all Designs, revised Designs and renderings thereof submitted hereunder. If the City terminates the contract under Section 3.2 herein, the City agrees to seek the written consent, which shall not be unreasonably withheld, from the Artist prior to exercising its rights to reproduce the Design with anyone other than with Artist; however, should Artist default, the City shall be under no obligation to seek Artist's consent prior to the City exercising its rights to reproduce the Design with another artist not a party to this Agreement.

2.3.2.4.1 In the alternative, once the City has notified Artist of the City's disapproval of the Revised Design pursuant to Subsection 2.3.2.3, the Parties have an additional 10-day period to agree in writing to a modified Revised Design. Should the Parties fail to agree in writing to a modified Revised Design during this 10-day period, this Agreement shall terminate pursuant to the terms set forth in the above Subsection 2.3.2.4.

2.3.3 Final/Construction Documents.

2.3.3.1 Within thirty (30) days of the City's acceptance of the Design or the Revised Design, 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.

2.3.3.2 Where appropriate, Artist shall present such drawings to the City's Engineering Department for review by an engineer and for certification that

the Artwork will be of adequate structural integrity. City shall further use such drawings and engineer reviews to ensure that the Site is properly constructed and/or prepared for the installation of the Artwork.

2.4 Budget, Construction Schedule and Progress Reports.

2.4.1 Budget.

2.4.1.1 Artist shall prepare a budget, which shall include all goods, services and materials, with such costs itemized (“the Budget”). The Budget shall be submitted to and approved by the City as part of the Design, and shall be consistent with the budget outline attached to this Agreement as EXHIBIT “D”. All costs, expenses of any kind and applicable taxes associated with the design, fabrication, delivery and curatorial consultation regarding installation of the Artwork shall not exceed NINETY THOUSAND AND NO/100 DOLLARS (\$90,000.00). Payment by City to Artist shall be upon completion and approval by the City of the Artist’s work through each phase described in section 4.2 of this Agreement.

2.4.1.2 Calculation of the Budget will take into consideration the possible inflation of service and material costs between the date of execution of this Agreement and the anticipated completion date.

2.4.1.3 Artist shall retain all original receipts, if any, pertaining directly to the design and fabrication of the Artwork, and City shall have the discretion to review said receipts.

2.4.1.4 If Artist incurs costs in excess of the amount listed in the budget, Artist shall pay such excess from Artist’s own funds, unless Artist previously obtained written approval for such costs from the City. Without said prior written approval for such costs from the City, should Artist incur costs in excess of the amount listed in the budget, Artist shall not seek additional funds from the City. This section shall be subject to paragraph 2.6.3.

2.4.1.5 Artist’s books and other records related to the Artwork shall be available by Artist in El Paso, Texas, for inspection by the City upon written request.

2.4.2 Schedule of Completion.

2.4.2.1 Artist shall notify MCAD of the tentative schedule for the fabrication of the Artwork, including a schedule for the submission of progress reports and inspections if any (the “Schedule”). MCAD shall have the right to require any submitted schedule to be coordinated with any El Paso International Airport construction in the Artwork installation area. MCAD shall approve the tentative schedule before it shall take effect. The schedule may be amended by written agreement of both parties, which may require approval by City

Council. Any modifications to this schedule shall require an amendment to this Agreement and may allow for additional time for Artist to perform but shall not allow for additional compensation.

2.5 Fabrication Stage.

- 2.5.1 Artist shall fabricate the Artwork in substantial conformity with the Design or the Revised Design. Artist may not deviate from the approved design without the prior written approval of the City, through MCAD.
 - 2.5.1.1 Within fifteen (15) days after fabrication of the Artwork, Artist shall furnish MCAD with the following photographs of the Artwork as fabricated: A set of three digital, 300 dpi, JPG files, of the Artwork, provided to MCAD on a CD ROM. 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. Artist shall also furnish MCAD with a full written narrative description of the Artwork.
- 2.5.2 The City shall have the right to review the Artwork at reasonable times during the fabrication thereof upon reasonable notice to Artist.
- 2.5.3 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 Artist in writing of the deficiencies and that the City intends to withhold the next payment installment.
- 2.5.4 Within ten (10) days of the written deficiency notice described hereinabove, or during such timeframe as agreed upon by the parties, Artist will promptly cure the City's objections and will notify MCAD in writing of completion of the cure. The City shall promptly review the Artwork, and upon approval shall release the withheld payment installment pursuant to Section 4.2 herein. If Artist disputes the City's determination that the Artwork does not conform, Artist shall promptly submit reasons in writing to MCAD within ten (10) days of the City's prior notification to the contrary. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether Artist has complied with the terms of this Agreement shall remain with the City.
- 2.5.5 Artist shall notify MCAD in writing immediately once 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.
- 2.5.6 The City shall inspect the Artwork within ten (10) days after receiving notification pursuant to Section 2.5.5, prior to installation, to determine that the Artwork conforms with the Design and give approval of the Artwork. The City shall not unreasonably withhold approval of the fabricated Artwork. In the event that the City does withhold approval, MCAD shall submit the reasons for such disapproval in

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writing within ten (10) days of examining the fabricated Artwork. Artist shall then have thirty (30) days from the date of MCAD's notice of the disapproval to make the necessary adjustments to the fabricated Artwork in accordance with such writing. Artist shall then be held responsible for any expenses incurred in correcting such deviation.

2.6 Changes to Design.

- 2.6.1 Prior to the execution of any color change in the approved design, Artist shall present proposed changes in writing to the City, through MCAD, for further review and approval. The City will not withhold consent in the case of a reasonable color substitution. 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 or 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. A significant change is any change which materially affects costs, scheduling, site preparation or maintenance. This section shall be subject to Section 2.4.1.4.
- 2.6.2 If the City approves the changes, the City shall promptly notify Artist in writing. MCAD will also make the required presentations to PAC and CAAB. If the City disapproves of the changes, MCAD shall promptly notify Artist in writing and Artist shall continue to fabricate the Artwork in substantial conformity with the Design.
- 2.6.3 Artist's fee shall be equitably adjusted for any increase or decrease in Artist's cost of, or time required for, performance of any services under this Agreement as a result of revisions made to the Design under Section 2.6.1. Any claim of Artist for adjustment under this paragraph must be asserted in writing within fifteen (15) days after the date of the revision by Artist.

2.7 Delivery and Installation.

- 2.7.1 Upon the City's approval of the fabricated Artwork, as being in conformity with the Design, or the Revised Design, as the case may be, Artist shall deliver the completed Artwork to the Site and provide curatorial advice to the City concerning installation of the completed Artwork at the Site in accordance with the schedule provided for in Section 2.4. Transportation fees shall be paid by Artist.
- 2.7.2 Artist shall coordinate closely with the City to ascertain that the Site is prepared to receive the Artwork. Artist must notify MCAD of any adverse conditions at the Site that would effect or impede the installation of the Artwork. The City is responsible for timely installation of the Artwork. Artist shall confer and coordinate with the City to ensure timely coordination with the City's construction team. Artist is not responsible for establishing that engineering or other technical parameters at the Site have been properly met. It is the City's responsibility to ensure that the construction of the Site was completed in conformance with Artist's stated needs for installation.

- 2.7.3 Artist shall be present to provide advice to the City concerning the installation of the Artwork at times required by City. Artist shall not interfere with the City's periodic site visits to verify the percent of completion and the City's inspection of the plaque, referred to in Section 2.7.5, below.
- 2.7.4 Upon delivery of the Artwork to the Site, Artist shall provide MCAD with written instructions for the appropriate maintenance and preservation of the Artwork along with product data sheets for any material or finish used. 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.
- 2.7.5 Upon delivery of the Artwork to the Site, Artist shall provide a plaque to be installed by the City near the Artwork containing a credit to the Artist and in the following form: Artist's name, title of Artwork and date of installation. The plaque is subject to review and acceptance by MCAD prior to installation.
- 2.7.6 Upon delivery of the Artwork to the Site, Artist and the City together shall inspect the Artwork during an inspection period that shall commence upon delivery and shall last no more than five (5) days. Unless the City determines during the inspection that there has been damage to the Artwork in transit, and upon acceptance by MCAD after the City's five (5) day inspection period, all risk of loss (but not title) with regard to the Artwork transfers to the City. Should the City need to delay installation the City shall be solely responsible for the cost and liability of storing the Artwork. The City shall have a thirty (30) day period after delivery by Artist and prior to the City moving the Artwork for installation during which time City may make a claim to Artist for breakage that occurred during transit or prior to delivery and was discovered during the five (5) day inspection period set forth herein. Breakage may be resolved by replacement of any broken panel with one of the five (5) extra panels that Artist will produce, or through Artist's insurance policy if the referenced extra panels are not acceptable to the City. A delay by the City in the installation of the Artwork shall not affect the conclusion of Artist's services pursuant to this Agreement, except for any curatorial services needed by the City for installation of the Artwork, and shall not delay Artist's ability to notify the City of completion of Artist's services pursuant to paragraph 2.8.1.
- 2.7.7 In the event that City delays installation of the Artwork more than thirty-five (35) days after Artist delivers the Artwork to the Site, and/or the City anticipates that it will need further curatorial assistance from Artist at the time of installation, this Agreement authorizes the City Manager or designee to negotiate and sign an amendment to this Contract to bring Artist to El Paso, Texas should the City deem further trips necessary.

2.8 Approval and Acceptance.

- 2.8.1 The Artist shall notify MCAD in writing when the Services have been completed in substantial conformity with the Design.
- 2.8.2 MCAD shall promptly notify Artist of its final acceptance of the Artwork within thirty (30) days after receipt of Artist's written notice pursuant to Section 2.8.1 above. The effective date of final acceptance shall be the date MCAD submits written notice to Artist of its final acceptance of the Artwork. The final acceptance shall be understood to mean that the City acknowledges completion of the Artwork in substantial conformity with the approved design and proper fabrication, and that the City confirms that all services as required of both Parties by this Agreement prior to paragraph (3) of this section have been completed. Title to the Artwork passes to the City upon final acceptance by the City and final payment by the City to Artist.
- 2.8.3 If the City disputes that all the Services have been performed, MCAD shall notify Artist in writing of those Services that Artist has failed to perform within thirty (30) days after receipt of Artist's written notice pursuant to Section 2.8.1 above. The City, through MCAD, shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether all Services have been performed shall remain with the City.
- 2.8.4 If Artist disputes the MCAD's determination that not all Services have been performed, the Artist shall submit reasons in writing to MCAD within ten (10) days of the City's prior notification to the contrary. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether all Services have been performed shall remain with the City.
- 2.8.5 Upon the resolution of any disputes that arise under Section 2.8.3 and 2.8.4 of this section, MCAD shall notify Artist of its final acceptance of the Artwork pursuant to Section 2.8.2 above.
- 2.8.6 After final acceptance of the Artwork, Artist shall be available at such time(s) as may be mutually agreed upon by MCAD and 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, including but not limited to the reception after installation. This paragraph is subject to the terms stated in Section 2.1.4.
- 2.8.6.1 During such public presentations by Artist, Artist shall acknowledge the City's role in funding the Artwork.
- 2.8.6.2 MCAD shall be responsible for coordinating public information materials and activities related to public presentations.

ARTICLE THREE
Term and Termination

3.1 Term. Artist shall complete all obligations undertaken hereunder no later than two (2) years following the Effective Date, or until terminated earlier as provided for herein.

3.2 Unilateral Termination. The City may unilaterally terminate the Agreement with or without cause at any time, such termination effective immediately upon written notice to Artist as provided herein. In the event the City terminates this Agreement, Artist shall be entitled to compensation for Services in accordance with the Payment Schedule as described herein below in Article 4, with the understanding that the final 25% of the contract price may be withheld unless 100% completion of the Artwork is provided by Artist and is accepted by the City. Should the City unilaterally terminate this Agreement, the City shall retain the Design and all rights thereto. If the City terminates the contract under this Section 3.2, the City agrees to seek the written consent, which shall not be unreasonably withheld, from the Artist prior to exercising its rights to reproduce the Design with anyone other than with Artist; however, should Artist default, the City shall be under no obligation to seek Artist's consent prior to the City exercising its rights to reproduce the Design with another artist not a party to this Agreement.

3.3 Termination by Mutual Consent. The Parties may terminate the Agreement by mutual consent upon such terms as they may agree in writing.

3.4 Time of Performance– Force Majeure. The Services shall be undertaken and completed as appropriate to carry out the purposes of this Agreement. Except as otherwise provided, neither Artist nor the City shall be liable to the other for any delay in, or failure of performance of any requirement contained in this Agreement caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. "Force majeure" includes those causes generally recognized under Texas law as constituting impossible conditions.

3.5 Incapacity of Artist.

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

3.5.2 If the Design, or Revised Design, as the case may be, has been approved or if the Artist's work has progressed to the point of fabrication of the Artwork, in the event of termination under this subsection, the City shall have the right to complete the Artwork. Due regard shall be made for Artist's intended results and proper credit and acknowledgement shall be given to Artist.

**ARTICLE FOUR
Fees and Expenses**

4.1 Fee. Artist agrees to perform the Services contemplated hereunder for a total fee of NINETY THOUSAND AND NO/100 DOLLARS (\$90,000.00). Artist shall be paid in accordance with the Payment Schedule described herein.

4.2 Payment Schedule.

- 4.2.1 Upon execution of this Agreement, and upon receipt of an invoice from Artist, the City shall pay to Artist an amount not to exceed EIGHTEEN THOUSAND AND NO/100 DOLLARS (\$18,000.00), representing 20% of the total cost of the project.
- 4.2.2 The City agrees to pay Artist an additional EIGHTEEN THOUSAND AND NO/100 DOLLARS (\$18,000.00), which represents an additional 20% of the total cost, within ten (10) City working days of receipt by the City of an itemized statement from Artist for the completion of the Design, Revised Design or modified Revised Design, as the case may be, and the fabrication of ten (10) glass panels based on the Design, Revised Design or modified Revised Design, subject to the City's acceptance of same.
- 4.2.3 The City agrees to pay Artist an additional TWENTY SEVEN THOUSAND AND NO/100 DOLLARS (\$27,000.00), which represents an additional 30% of the total cost, within ten (10) days of receipt by the City of an itemized statement from Artist for the completion of the fabrication of the remaining forty (40) panels of the Artwork. Such itemized statement may be submitted following MCAD's selection of forty-five (45) panels for purchase during City's onsite visit to Portland, Oregon.
- 4.2.4 The City agrees to pay Artist an additional THIRTEEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$13,500.00), which represents an additional 15% of the total cost, within ten (10) days of receipt by the City of an itemized statement from Artist for the completion of Artist's delivery of the panels to the Site.
- 4.2.5 The City agrees to pay Artist final payment of THIRTEEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$13,500.00), which represents an additional 15% of the total cost, within ten (10) days of receipt by the City of an itemized statement from Artist for the completion of 100% of the Services, including, but not limited to, fabrication, transportation of the Artwork to the Site and curatorial direction for the installation through completion, subject to a positive inspection and acceptance by MCAD of the Artwork and said Services. In addition, Artist shall provide City with all releases of lien and manufacturers' warranty, if any, required in paragraph 2.1.7 of this Agreement before final payment is made under this paragraph. MCAD acceptance at this stage shall not be granted unless the Artist provides to MCAD the photographic documentation and written instructions for the maintenance and preservation of the Artwork as stated hereinabove.

ARTICLE FIVE
Insurance and Indemnification Provisions

5.1 LIABILITY INSURANCE. Artist shall provide liability insurance for personal injuries and death arising out of any one accident or other cause in a minimum amount of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) per person, and Five Hundred Thousand and No/100 Dollars (\$500,000.00) for two (2) or more persons in any one accident, and, in addition, shall provide property damage liability insurance in a minimum sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) for property damage growing out of any one accident or other cause.

- 5.1.1 Artist is required to purchase liability insurance for the term of this Agreement on behalf of the City or, alternatively, may name the City as an additional insured on the policy of general liability insurance referenced above.. Any Certificate of Insurance should name the City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901, as an additional insured.
- 5.1.2 Artist shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all claims and lawsuits which arise out of this Agreement and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and contractors, its officers, agents, servants or employees for actions or liability arising out the performance of this Agreement.
- 5.1.3 No Services shall be provided by the City until Artist files a copy of the policy or certificate of liability insurance as herein set forth with the City Clerk, the City Attorney's Office, and the Department. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without ten (10) days prior written notice to the City Clerk. Failure to keep the policy in full force and effect throughout the Term of this Agreement shall be grounds for cancellation of this Agreement.

5.2 INDEMNITY AND HOLD HARMLESS. AS A CONDITION OF THIS AGREEMENT, ARTIST OR ITS INSURER SHALL INDEMNIFY, DEFEND AND HOLD THE CITY, ITS OFFICERS, AGENTS AND EMPLOYEES, HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE,) INCLUDING BUT NOT LIMITED TO ALL JUDGMENTS, SETTLEMENT AMOUNTS, ATTORNEYS' FEES, COURT COSTS AND EXPENSES INCURRED IN THE INVESTIGATION, HANDLING, DEFENSE AND LITIGATION

OF ANY CLAIM OR SUIT, INCLUDING BUT NOT LIMITED TO ANY CLAIM OR SUIT FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON REGARDLESS OF THE MERITS OF OR OUTCOME OF SUCH CLAIM OR SUIT ARISING OUT OF OR RELATED TO THIS AGREEMENT. THIS INDEMNIFICATION PARAGRAPH SHALL NOT APPLY WHERE SUCH BODILY OR PERSONAL INJURY, ILLNESS, LOSS OF SERVICES, PHYSICAL OR MENTAL IMPAIRMENT TO OR DEATH OF ANY PERSON, OR FOR DAMAGE OR DESTRUCTION TO ANY PROPERTY RESULTS FROM OR INVOLVES NEGLIGENCE OR ALLEGATIONS OF NEGLIGENCE ON THE PART OF THE CITY, ITS OFFICERS, AGENTS OR EMPLOYEES. Without modifying the conditions precedent for preserving defenses, asserting claims or enforcing any legal liability, against the City as required by the City Charter or any law, the City shall promptly forward to Artist every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein. Artist shall 1) investigate or cause the investigation of accidents or occurrences involving such injuries or damages; 2) negotiate or cause to be negotiated the claim as Artist may deem expedient; and 3) defend or cause to be defended on behalf of the City all suits for damages even if groundless, false or fraudulent, brought because of such injuries or damages. Artist shall pay all judgments in actions defended by Artist pursuant to this section along with all attorneys' fees and costs incurred by the City including interest accruing to the date of payment by Artist, and premiums on any appeal bonds. The City, at its election shall have the right to participate in any such negotiations

or legal proceedings to the extent of its interest. The City shall not be responsible for any loss of or damage to Artist's property from any cause.

ARTICLE SIX Repairs

6.1 Artist shall be given the right of first-refusal on repair contracts with fair-market remuneration, regardless of whether such repair contract is entered into during the term of the present Agreement or subsequent to this Agreement's termination provided that repairs and subsequent cost is not due to acts/omissions of Artist, unless otherwise provided by the laws of the State of Texas.

ARTICLE SEVEN Copyright

7.1 The issue of copyright shall be treated in accordance with applicable law and City ordinances.

7.2 The City shall have absolute, unrestricted rights incidental to its full ownership of the final artistic work to alter, change, modify, destroy, remove, move, replace, transport, or transfer in whole or in part, the final artistic work when the City deems necessary within its discretion in order to exercise the City's powers and responsibilities in regard to public works and improvements, in furtherance of the City's operations or for any other good cause. The Artist may retain copyright and other intellectual property rights in and to the final design and the final artistic work itself. Should the City move, alter, change, modify or destroy the Artwork, the City shall notify the Artist and the Artist shall have the option to sever the Artist's association with the Artwork, or in the case of destruction, Artist shall have the opportunity to retrieve the Artwork at no cost other than Artist's cost of removal and retrieval. The Artist shall grant to the City a perpetual, irrevocable license to graphically depict or display the final artistic work for any non-commercial purpose whatsoever. For purposes of this Agreement, the parties agree that any advertisement of the El Paso International Airport, which encourages the use of said facility, and includes any image of the Artwork, shall not be considered to be a commercial purpose, as the facility serves a governmental function. If City wishes to make reproductions of any other sort or for any other purpose not described in this paragraph, City must obtain separate written permission from Artist and negotiate the payment of royalties.

7.3 The City acknowledges that Artist is retaining the copyright of the Artwork. Artist, at Artist's option, will be responsible for registering with the United States Register of Copyrights, a copyright in the Artwork in the Artist's name, at Artist's expense. The City shall not be responsible for the payment of any royalties to the Artist who created the Artwork, through any permitted activities of the City or any third party.

7.4 Artist agrees that it is selling, transferring and releasing to the City full and exclusive right to the project name: El Paso International Airport Public Art Project. Artist further agrees to cease and desist from using the project name El Paso International Airport Public Art Project for future

commercial use. The City agrees that Artist may use the name El Paso International Airport Public Art Project for historical reference and non-commercial purposes.

- 7.4.1 The non-commercial use of the El Paso International Airport Public Art Project, including the name and reproduction of the images of the Artwork by Artist, shall not require the prior written consent of the City. Non-commercial uses of the Artwork include, but are not limited to, publication of the Artwork in order to show Artist's body of work, or publication or reproduction of the name of the project or the Artwork in a pamphlet or brochure or other historical documentation for Artist's archival purposes. All other parties shall request the City's consent to use the El Paso International Airport Public Art Project name and/or reproduce the images of the assets.
- 7.4.2 The parties agree that the current project name "El Paso International Airport Public Art Project" may change during the term of this Agreement. Said name change must occur in writing and be approved in accordance with the provisions of Section 2.3.2. A formal amendment to this Agreement shall not be necessary, but the City Clerk's Office must have on file the agreed to name change. Should the name change from "El Paso International Airport Public Art Project", all provisions of this Agreement related to the name "El Paso International Airport Public Art Project" shall apply to the new project name, including, but not limited to, this Article Seven.

ARTICLE EIGHT

Warranties

- 8.1 **Warranties of Title.** Artist represents and warrants that:
- 8.1.1 The Artwork is solely the result of the Artist's artistic effort;
- 8.1.2 Except as otherwise disclosed in writing to the City, the Artwork is unique, original and to the best of Artist's knowledge, does not infringe upon any copyright; and
- 8.1.3 The Artwork, or a duplicate thereof, has not been accepted for sale elsewhere.
- 8.2 **Warranties of Quality and Conditions.** Artist represents and warrants that:
- 8.2.1 The execution and fabrication of the Artwork shall be performed in a workmanlike manner;
- 8.2.2 The Artwork, as fabricated and delivered, will be free of defects in material and workmanship, including any defects consisting of qualities which cause or accelerate deterioration of the Artwork, but excluding any defects (such as small bubbles, clear seams where colors come together and inconsistent rounded edges) arising out of the inherent nature of the material; and

- 8.2.3 Reasonable maintenance of the Artwork will not require procedures substantially in excess of those described in the final maintenance recommendations to those submitted by Artist to the City under Subsection 2.7.4.

8.3 The warranties described in this Article 8 shall survive for a period of one (1) year after final acceptance of the Artwork. The City shall give notice to Artist of any observed breach with reasonable promptness. Artist shall, at the request of the City, and at no cost to the City, reasonably and promptly cure the breach of any such warranty which is curable by Artist and which cure is consistent with professional conservation standards, including, but not limited to, cure by means of repair or replacement of the Artwork, or any portion thereof. City acknowledges that the Artwork is made out of glass, which carries with it the inherent risk of breakage that is not due to any defect in material or workmanship. Even with proper care during installation and maintenance, it is possible that the Artwork could suffer chips or cracks or damage for which Artist will not be responsible.

ARTICLE NINE

General Administrative Provisions

9.1 Governmental Function. Artist expressly agrees that, in all things relating to this Agreement, the City is performing a governmental function, as defined by the Texas Tort Claims Act. The Parties hereby agree that the City enters into this Agreement in its capacity as a governmental entity for the purpose of performing a governmental function.

9.2 City Not Obligated to Third Parties. The City shall not be obligated or liable hereunder to any person other than Artist.

9.3 Waiver/Modification of Agreement. Except as expressly noted herein, no waiver or modification of this Agreement or of any covenant, condition, or limitation herein contained shall be valid unless provided as a written amendment hereto signed and approved as provided herein. No evidence of any waiver or modification shall be offered or received in evidence of any proceeding arising between the Parties out of or affecting this Agreement, or the rights or obligations of the Parties under this Agreement, unless such waiver or modification is in writing as hereinabove described. The Parties further agree that the provisions of this Section 9.3 cannot be waived.

9.4 Complete Agreement. This Agreement constitutes and expresses the entire agreement between the parties hereto in reference to the Services described herein, and in reference to any of the matters or things herein provided for, or hereinbefore discussed or mentioned in reference to such Services, all promises, representations and understanding relative thereto herein being merged.

9.5 Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the Agreement.

9.6 Choice of Law. It is the intention of the Parties that this Agreement be construed in accordance with and under the laws of the State of Texas.

9.7 Venue. Venue shall be in the County of El Paso, Texas.

9.8 Compliance with Law. Artist shall comply with all Federal, State and local laws and ordinances applicable to the Services described herein.

9.9 Place of Performance. The place where such Services are to be performed is in the City and County of El Paso, Texas.

9.10 Notice. Any notices required under this Agreement shall be sufficient if sent by Certified Mail, Return Receipt Requested, postage prepaid, to the City or Artist at the following addresses:

CITY: City of El Paso
ATTN: City Manager
2 Civic Center Plaza
El Paso, Texas 79901-1196

CITY: City of El Paso
Director, Museums and Cultural Affairs Department
2 Civic Center Plaza
El Paso, Texas 79901-1196

ARTIST: Mahaffey Fine Art LLC
Attn: Rae Mahaffey
2134 NW Hoyt Street
Portland, OR 97210-3215

Changes may be made to the names and addresses noted herein through timely written notice to the other party.

9.11 Successor and Assigns. This Agreement shall be binding on the City and Artist, their successors and assigns. Neither party may assign, sublet or transfer its interest in this Agreement without the prior written consent of the other party. Nothing herein shall be construed as creating any personal liability on the part of any principal or agent of the City.

9.12 Captions. The captions of this Agreement are for informational purposes only and shall in no way affect the substantive terms or conditions of this Agreement.

9.13 Warranty of Capacity to Execute Agreement. The people signing this Agreement on behalf of the parties warrants that he or she has the authority to do so and to bind the party for which he or she has authority to sign this Agreement and all the terms and conditions contained herein.

9.14. Binding Effect. Each person signing below represents that he or she has read this Agreement in its entirety; understands its terms; and agrees on behalf of such party that such party will be bound by those terms.

IN WITNESS WHEREOF the parties hereto have executed this Agreement at El Paso,

Texas effective as of the first date appearing heretofore.

SIGNED this _____ day of _____, 2009.

CITY OF EL PASO

Joyce A. Wilson
City Manager

MAHAFFEY FINE ART LLC:



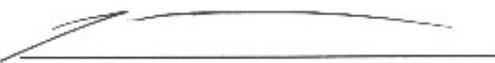
By: RAE MAHAFFEY
Title: DIRECTOR

APPROVED AS TO FORM:



Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:



Sean P. McGlynn, Director
Museums and Cultural Affairs Department

CITY CLERK DEPT.

09 MAR -3 PM 1:13

EXHIBIT "A"

EL PASO INTERNATIONAL AIRPORT PUBLIC ART PROJECT

LEGAL DESCRIPTION OF THE SITE

Lot 4-A El Paso International Airport

TRSRPL All of block (903906 sqft)

CITY CLERK DEPT.

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EXHIBIT "B"

EL PASO INTERNATIONAL AIRPORT PUBLIC ART PROJECT

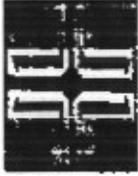
**DESCRIPTION OF ARTIST'S PROPOSED SERVICES,
SUPPLIES, MATERIALS and EQUIPMENT
(See Attached)**

09 MAR -3 PM 1:13

**Proposal for El Paso International Airport
January 18, 2006**

*Prepared for the City of El Paso
Museums and Cultural Affairs Department*

Preview



Successful public artworks add to a site's character and the overall sense of place. Recognizing the significance of El Paso's International Airport, the artwork in it should work as an identifying emblem and introduce the traveling public to the region's unique heritage. Therefore, my proposal is for a suspended glass artwork that helps to welcome travelers and represents El Paso's cultural tradition.

Design Scheme



For this project I propose suspending arrangements of glass panels that function as glistening cultural banners. Derived from the Indian motifs already in use at the airport, the vibrantly colored panels will be placed to take advantage of the expanse of windows at either site, the Holding Room or WiFi Lounge. Natural light in combination with light from fixtures will illuminate the panels during the day, and the interior lights will make the colors glow from the concourse most predominantly after sundown.

Details



Overall, there will be thirty fused glass panels hung from the ceiling in a cluster of various heights. They will be positioned to take advantage of site lines at either of the installation locations. The exact placement of the piece is best determined by examining the public's traffic and use patterns. One large cluster of all the panels would be dramatic, or two smaller groupings, one at each site, could be effective in creating a sense of artistic continuity at the airport.

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Hardware



The larger grouping would be approximately 40 feet long by 5 feet high and 7 feet deep, the two smaller groupings could be 32 feet long by 4 feet high and 3 1/2 feet deep. The bottom of the lowest panel will hang no lower than 10 feet off the ground. The intention is to hang them well out of reach of travelers, yet within easy visual range.

Each panel will vary in size and proportion with dimensions ranging from 20 x 28 inches per side. Individually they will weigh between 25-30 pounds and be about 3/8 inches thick. The cables and brackets that support them are made of stainless steel and have been specifically engineered for this type of permanent display. The 150 pounds capacity aircraft cables used on each panel are secured and clamped in six places. They will be suspended from a grid in the ceiling, the specifics of which will be fabricated after consulting with the architects, or building engineer.

The designs for the glass will be in a wide range of vivid colors. I am receptive to color suggestions from the building designers, but left to my own discretion will select colors that maximize the artwork's impact.

The piece will be low maintenance and durable. Glass hung this way has the positive aspect of not being harmed by sunlight, temperature, or humidity. The panels will also be hung high enough as to be out of reach of fingerprints, or thoughtless vandalism. Periodic dusting and occasional cleaning with ordinary glass cleaner is all the maintenance the artwork will need.

I find that in a piece of art, it is the color and the way light effects it that the general public responds to first. Consequently, vibrant, light-transmitting colors that can radiate are key to my work.

Additionally, a successful public artwork must be site specific so that it is significant to the region and distinctive to the people who view it. It is my intention that the panels celebrate El Paso's unique cultural traditions while enhancing the physical aspects of the airport environment.

Example

Fire House #11



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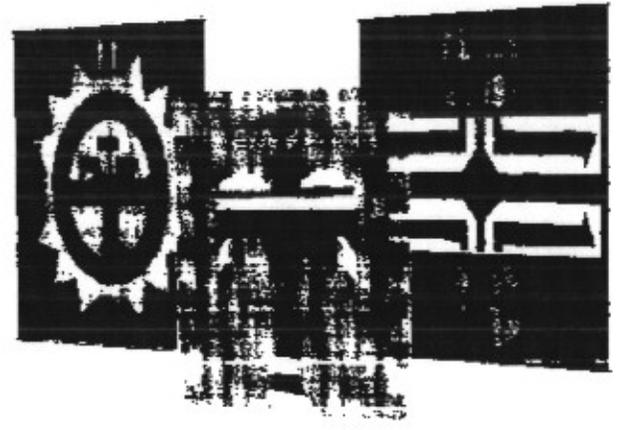
Conclusion



Color and light is key to my proposal, as is creating an art piece that brings pride to the El Paso community. By using a range of colors and adapting the Indian pictographs into the designs, I seek to create a work that distinguishes the airport to travelers and illustrates the wealth of El Paso's cultural tradition.

Thank you for giving me the opportunity to develop my ideas, and for your consideration of my proposal. I look forward to discussing it with you.

Rae Mahaffey



CITY CLERK DEPT.

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EXHIBIT "C"

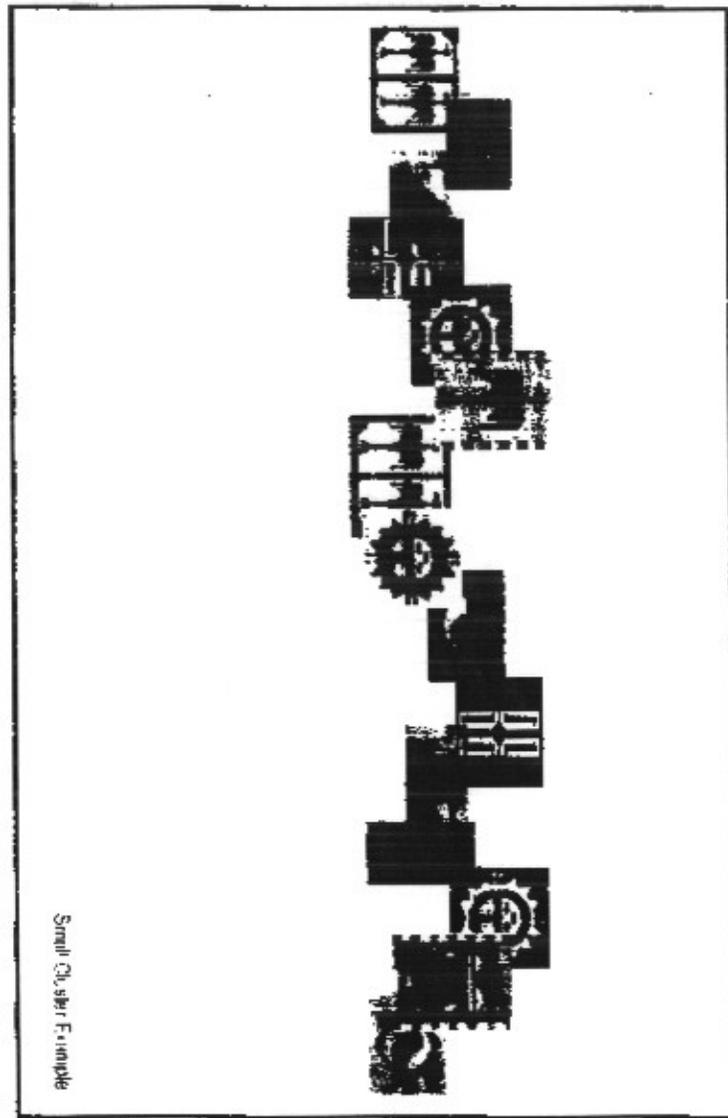
EL PASO INTERNATIONAL AIRPORT PUBLIC ART PROJECT

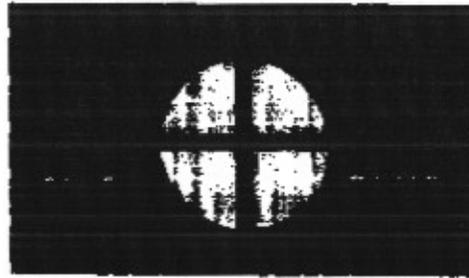
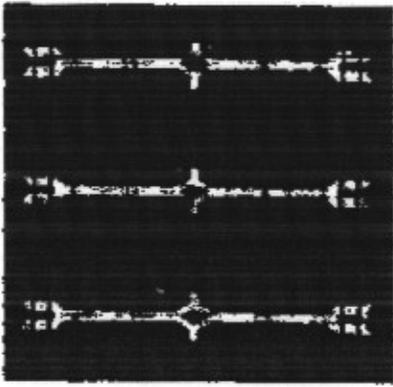
ARTIST'S DESIGN
(See Attached)

CITY CLERK DEPT.

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Exhibit C

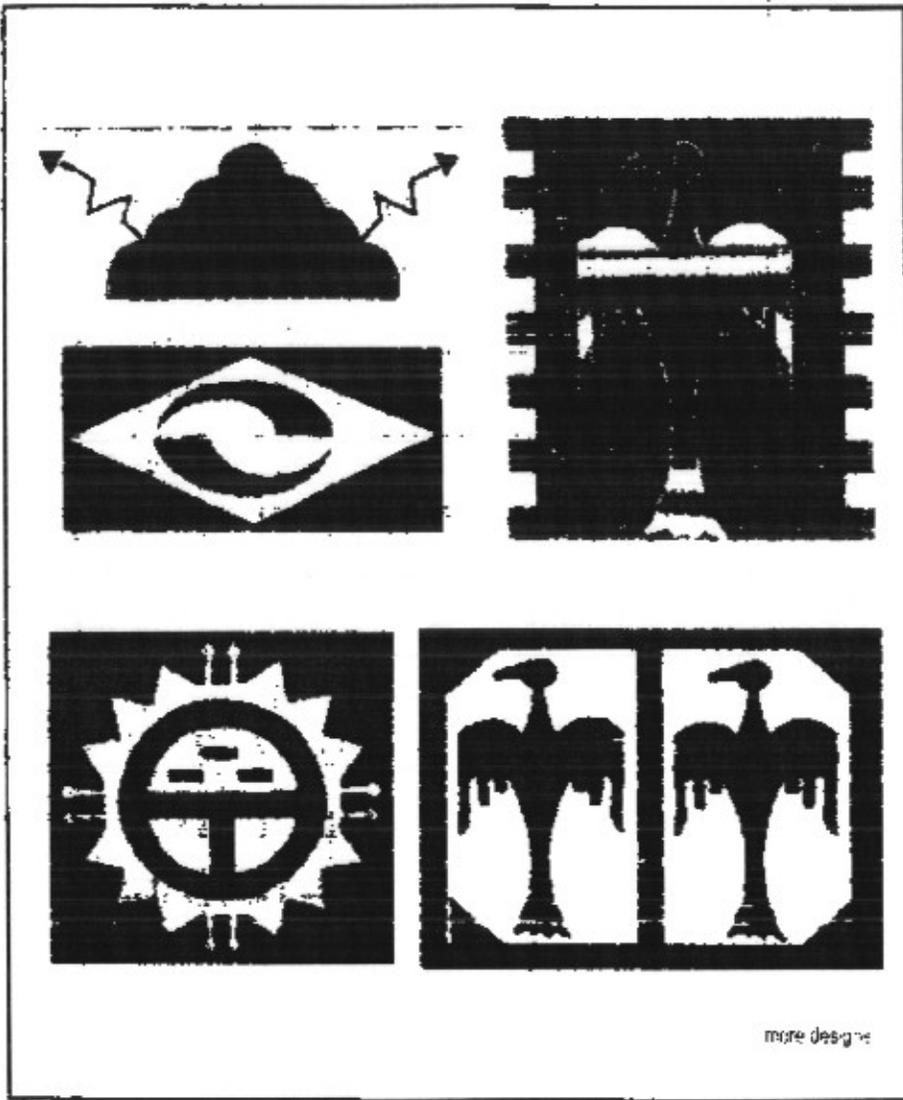




Examples of panel designs

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Exhibit C1



CITY CLERK DEPT.
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Exhibit C2

BUDGET OUTLINE

Artist Fee	\$13,500
Travel	3,500
Materials	
Glass Panels	\$23,000
Fabrication	
Labor	\$24,000
Transportation	
Crating	\$7,500
Shipping	4,500
Overhead	
Rent	9,000
Documentation	3,000
Insurance	2,000
Total	\$90,000