

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: 8

SUBJECT:

A resolution that the City Manager be authorized to sign a Service Agreement by and Between the City of El Paso and artist Saxe - Patterson, Inc. to design, fabricate and install public art to be known as the Downtown Transit Terminal Public Art Project, in the amount of SEVENTY FIVE THOUSAND AND 00/100 DOLLARS (\$75,000.00). (District 8)

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 new Downtown Transit Terminal to encourage the integration of art into the architecture of municipal structures for the City of El Paso. Artists Saxe - Patterson, Inc. have been selected and approved to create and integrate a public artwork in the new Downtown Transit Terminal located at Sante Fe and Third Street.

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 11680

Account # 508011

Dept 60600011

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 artist Saxe-Patterson, Inc., to design, fabricate and install public art to be known as the Downtown Transfer Terminal Public Art Project, in the amount of SEVENTY FIVE THOUSAND AND 00/100 DOLLARS (\$75,000.00).

ADOPTED this ___ day of _____, 2009.

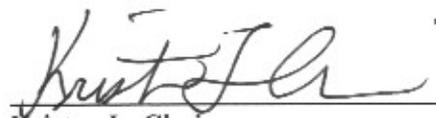
CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Kristen L. Choi
Assistant City Attorney

APPROVED AS TO CONTENT:



Sean P. McGlynn, Director
Museums and Cultural Affairs Department

STATE OF TEXAS §
§
COUNTY OF EL PASO §

SERVICE AGREEMENT

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: Saxe-Patterson, Inc.

RECITALS

WHEREAS, the City has determined that it requires the assistance of Artist to design, fabricate and install public art to be known as the Downtown Transfer Terminal Public Art Project (the “Artwork”) at 601 Third Ave. and Santa Fe Street in El Paso, El Paso County, Texas, in District 8 more specifically described in EXHIBIT “A”, and referenced herein as the “Site”; and

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

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 Saxe-Patterson, Inc., 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, transportation and installation of the Artwork at the Site in accordance with the specified schedule and as further described hereinbelow and in EXHIBIT "B" including collaboration with the City Engineering Department, Sun Metro and the Museums and Cultural Affairs Department ("MCAD"). Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.
- 2.1.2 Artist shall determine the expression, design, dimensions and materials of the Artwork, subject to review and acceptance by the City, by and through MCAD, Sun Metro and the City Engineering Department 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, Sun Metro, general contractor, landscape architect and other parties, as appropriate, to communicate about the Artwork and to ensure appropriate integration and/or installation of the Artwork. Artist may participate in meetings by telephone except for pre-installation site visit and visit for actual installation and the reception.
- 2.1.5 Artist shall complete the fabrication of the Artwork by the scheduled installation phase as provided in Section 2.5 of this Agreement.
- 2.1.6 Artist shall secure any and all required licenses, permits and similar legal authorizations at Artist's expense as may be necessary for the installation of the Artwork at the Site.
- 2.1.7 Artist shall arrange the transportation and installation of the Artwork in consultation with MCAD. If Artist does not install the Artwork, Artist shall supervise and approve the installation by Artist's subcontractor.

- 2.1.8 Artist shall provide a list of all subcontractors along with a copy of the agreement between the Artist and each subcontractor, prior to each subcontractor commencing work on the Artwork. As described in Section 4.2.5, final payment from the City for the Artwork shall be contingent upon Artist providing to MCAD a copy of the release of lien from Artist and add subcontractors to ensure that full payment has been made by Artist to each subcontractor.
- 2.1.9 Artist shall provide photographic documentation of the Artwork upon completion of same as per Section 2.7.4.
- 2.1.10 Artist shall be available with reasonable advance notice for meetings, ceremonies and the like, as necessary.
- 2.1.11 Artist shall be responsible for compliance with all applicable laws and regulations, including but not limited to zoning or environmental regulations.
- 2.1.12 The Artist shall provide and install a plaque on or 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 in conjunction with installation as referenced in Section 2.7.3.

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.
- 2.2.2 The City shall inform Artist of any limitations, of which the City is aware, to the Artwork, during any stage of its design, fabrication or installation at the Site, imposed by zoning or environmental laws and/or regulations.
- 2.2.3 The City, through a contractor, will prepare the Site in accordance with the specifications detailed in the approved design concept in Section 2.3.2 of this Agreement. Such Site preparation shall include clearing, grubbing, excavation, backfill, compaction and subsurface infrastructure. The City shall be responsible for all expenses, labor and equipment to prepare the Site for the timely transportation and 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 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. The Pre-Design Concept is attached hereto as Exhibit "C".
- 2.3.1.2 During the conceptual phase of the Artwork's Design, Artist shall also consult with the City Engineering Department, Sun Metro, and representatives of the community and consider 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 installed; 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 proposed 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. Proposed site preparations are subject to City's approval.
- 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, fabrication and installation of the Artwork, as described in EXHIBIT "B" of this Agreement.

2.3.2 Approval

- 2.3.2.1 Within 30 days after the Artist submits the Design, MCAD shall notify Artist whether it approves or disapproves of the Design. MCAD shall have 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 disapproves of or requires 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 30 days after the 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 send Artist a written notice regarding 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 notice under 2.3.2.3 of 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.

2.3.3 Final/Construction Documents

- 2.3.3.1 Within 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, as well as any third party subcontractor needed to work on the project.
- 2.3.3.2 Where City's Development Services department deems appropriate according to the Code or Regulations, 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.

2.4 Budget, Construction Schedule and Progress Reports.

2.4.1 Budget

- 2.4.1.1 Artist shall prepare a budget that includes 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 shall not exceed \$75,000.00. 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 pertaining directly to the design, fabrication and installation of the Artwork, and City shall have the discretion to review those 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 prior written approval for such costs from the City, if Artist incurs costs in excess of the amount listed in the budget, Artist shall not seek additional funds from the City.

2.4.1.5 Artist will make its books and other records related to the Artwork available 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 and installation of the Artwork, including a schedule for the submission of progress reports and inspections if any (the "Schedule"). 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.

2.5 Fabrication Stage.

2.5.1 Artist shall fabricate and install 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.

2.5.2 Artist shall take reasonable measures to protect or preserve the integrity of the Artwork such as the application of protective or anti-graffiti coatings, unless waived by the City. If the Artwork is being constructed on-site, Artist shall avoid creating nuisance conditions arising out of Artist's operations. Prior to requesting authorization to transport and install the Artwork, Artist is required to provide MCAD 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.

2.5.3 The City shall have the right to review the Artwork at reasonable times during the fabrication thereof upon reasonable notice to Artist.

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- 2.5.4 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 (“Deficiency Notice”).
- 2.5.5 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.
- 2.5.6 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.
- 2.5.7 The City shall inspect the Artwork within ten (10) days after receiving notification pursuant to Section 2.5.6, prior to installation, to determine that the Artwork conforms with the Design and to 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 a notice of the reasons in writing within ten (10) days of examining the fabricated Artwork. Artist shall then have thirty (30) days from the date of MCAD’s notice to make the necessary adjustments to the fabricated Artwork in accordance with the writing. Artist shall then be held responsible for any expenses incurred in correcting the deviation.
- 2.5.8 MCAD shall promptly notify Artist of any delays at the Site impacting installation of the Artwork. Artist shall be required to inspect the Site prior to the transportation and installation of the Artwork and shall notify the MCAD of any adverse Site conditions that will impact the installation of the Artwork that are in need of correction. Any additional storage fees incurred as a result of delays caused by the City, third parties or the Artist are the responsibility of the Artist. Artist will be entitled to additional time to perform this Agreement if there are delays caused by the City, but will not be entitled to additional compensation for such delays.

2.6 Changes to Design.

- 2.6.1 Prior to the execution of any change in the approved design, Artist will present proposed changes in writing to the City, through MCAD, for further review and approval. 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, installation, scheduling, site preparation or maintenance.

2.6.2 If the City approves the changes, the City will notify Artist in writing within thirty (30) days of Artist's presentation to City of proposed changes. MCAD will also make the required presentations to the PAC and the CAAB. If the City disapproves of the changes, MCAD shall notify Artist in writing within thirty (30) days 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 Installation.

2.7.1 Upon the City's approval of the fabricated Artwork as being in conformity with the Design, Artist will deliver and install the completed Artwork to the Site in accordance with the schedule provided for in Section 2.4. Transportation and installation fees will be paid by Artist.

2.7.2 Artist will 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. Artist is responsible for timely installation of the Artwork. 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 MCAD.

2.7.3 Artist must be present to supervise the installation of the Artwork. Artist shall not interfere with the City's periodic Site visits to verify the percent completion and to inspect the plaque.

2.7.4 Within fifteen (15) days after installation of the Artwork, Artist shall furnish MCAD with the following photographs and narrative description of the Artwork as installed: 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.

2.7.5 Within fifteen (15) days completion of the installation of the Artwork, 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

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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.

2.8 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 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 of MCAD's 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 installation, 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 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 notification under 2.8.3. 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 time(s) mutually agreed upon by MCAD and Artist to attend public meetings and/or community outreach functions, as well as inauguration or presentation ceremonies relating to the dedication of the Artwork, including but not limited to the reception after installation.
- 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. This Agreement will be in effect until December 31, 2009, 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 will be 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 hereinbelow 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.

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.

ARTICLE FOUR Fees and Expenses

4.1 Fee. Artist agrees to perform the Services contemplated hereunder for a total fee of SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$75,000.00). Artist shall be paid in accordance with the Payment Schedule described herein.

4.2 Payment Schedule.

4.2.1 Within thirty (30) City working days of receipt by MCAD of an itemized statement from the Artist to include but not be limited to the purchase of materials or labor, the City shall pay to Artist an amount not to exceed FIFTEEN THOUSAND AND NO/100 DOLLARS (\$15,000.00), for the purchase of material or labor, representing 20% of the total cost of the project.

4.2.2 The City agrees to pay Artist an additional FIFTEEN THOUSAND AND NO/100 DOLLARS (\$15,000.00), which represents an additional 20% of the total cost, within

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thirty (30) City working days of the City's acceptance of the Artist's completed Design or Revised Design.

- 4.2.3 The City agrees to pay Artist an additional FIFTEEN THOUSAND AND NO/100 DOLLARS (\$15,000.00), which represents an additional 20% of the total cost, within thirty (30) days of receipt by the City of an invoice from Artist for the completion of 50% of the fabrication of the Artwork, subject to MCAD's acceptance of that percentage of completion of the Artwork and said Services.
- 4.2.4 The City agrees to pay Artist an additional ELEVEN THOUSAND TWO HUNDRED FIFTY AND NO/100 DOLLARS (\$11,250.00), which represents an additional 15% of the total cost, within thirty (30) days of receipt by the City of an invoice from Artist for the completion of 80% of the project of the Artwork, subject to MCAD's acceptance of that percent completion of the Artwork and said Services.
- 4.2.5 The City agrees to pay Artist an additional EIGHTEEN THOUSAND SEVEN HUNDRED FIFTY AND NO/100 DOLLARS (\$18,750.00), which represents the final 25% of the total cost, within thirty (30) days of receipt by the City of an invoice from Artist for the completion of 100% of the Services, including, but not limited to, installation, rendered under this Agreement, 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 required in paragraph 2.1.8 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 public liability insurance for personal injuries and death growing 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 on behalf of the City or, alternatively, may name the City as an additional insured on the policy of general liability insurance referenced above. Such insurance shall provide coverage for any alleged acts or omissions of the City, its agents, employees or independent contractors, alleged or asserted by any individual, in connection with the performance of this Agreement.

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- 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 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.
- 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 and MCAD. 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. 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 APPLY EVEN 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. Should the City 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. The Artist may retain copyright and other intellectual property rights in and to the final design and the final artistic work itself. 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 Downtown Transfer Terminal Public Art Project, or other public facility to which the Artwork may be moved in the future, which encourages the use of said facility or highlights its services, and includes any image of the Artwork, shall not be considered to be a commercial purpose, as the facility serves a governmental function.

7.3 The City acknowledges that Artist is retaining the copyright of the Artwork. Artist 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 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: Downtown Transfer Terminal Public Art Project. Artist further agrees to cease and desist from using the project name Downtown Transfer Terminal Public Art Project for future commercial use. The City agrees that Artist may use the name Downtown Transfer Terminal Public Art Project for historical reference and non-commercial purposes.

7.4.1 The non-commercial use of the Downtown Transfer Terminal 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 Downtown Transfer Terminal Public Art Project name and/or reproduce the images of the assets.

- 7.4.2 The parties agree that the current project name "Downtown Transfer Terminal 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 2.3.2.1. 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 "Downtown Transfer Terminal Public Art Project", all provisions of this Agreement related to the name "Downtown Transfer Terminal Public Art Project" shall apply to the new project name, including, but not limited to, this Article Seven.

ARTICLE EIGHT

General Administrative Provisions

8.1 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.

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

8.3 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 8.3 cannot be waived.

8.4 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.

8.5 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.

8.6 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.

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

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

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

8.10 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: Saxe-Patterson, Inc.
P.O. Box 15
Taos, NM 87571

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

8.11 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. Nothing herein shall be construed as creating any personal liability on the part of any principal or agent of the City.

8.12 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.

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

CITY CLERK DEPT.

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8.14. 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.

(SIGNATURES APPEAR ON FOLLOWING PAGE)

SIGNED this _____ day of _____, 2009.

CITY OF EL PASO

Joyce A. Wilson
City Manager

SAXE-PATTERSON, INC.:

By: Frank Saxe
Title: PRES

APPROVED AS TO FORM:

Kristen Choi
Kristen Choi
Assistant City Attorney

APPROVED AS TO CONTENT:

Sean P. McGlynn
Sean P. McGlynn, Director
Museums and Cultural Affairs Department

CITY CLERK DEPT.
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CITY CLERK DEPT.

EXHIBIT "A"

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DOWNTOWN TRANSFER TERMINAL PUBLIC ART PROJECT

LEGAL DESCRIPTION OF THE SITE

All of block and parts of block 99 and 121 and adjacent alleys and closed streets between block 120 (3.1662) acres of El Paso, El Paso County, Texas.

CITY CLERK DEPT.

EXHIBIT "B"

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SCHEDULE

Artist shall perform work according to the following schedule:

-Design Concept - 60 days from Effective Date of Agreement. (*Artist shall not commence Artist's Services until this Agreement is fully executed and City issues a notice to proceed with work.*)

-Final Design - 30 days after receiving MCAD's approval of the Design Concept and MCAD's notice to proceed to Final Design.

-Fabrication - 60 days after receiving MCAD's approval of the Final Design and MCAD's notice to proceed to Fabrication.

-Delivery and Installation - 30 days after receiving MCAD's approval of the Fabrication and MCAD's notice to proceed to Delivery and Installation.

CITY CLERK DEPT.

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EXHIBIT "C"

PRE-DESIGN CONCEPT

DOWNTOWN TRANSFER TERMINAL PUBLIC ART PROJECT

Pre-Design Concept:

Design and development of site-specific elements to serve as a welcoming gateway for all pedestrians and commuters entering the Downtown Transfer Terminal.

DOWNTOWN TRANSFER TERMINAL PUBLIC ART PROJECT

BUDGET OUTLINE

Artist's Fee	_____
Consultation Fees (engineers, etc.)	_____
Materials, Supplies, and Fabrication	_____
Insurance	_____
Travel	_____
Transportation of Artwork	_____
Installation (labor, equipment rental, permits, landscaping, etc)	_____
Administrative Expenses (telephone, etc)	_____
Photographic Documentation (a CD file of the completed work)	_____
Plaque with attribution	_____
Pricing Contingency	_____
Other Expenses	_____
TOTAL BUDGET	\$75,000.00