

ART IN PUBLIC PLACES CONSTRUCTION AGREEMENT Transformer Cabinet Murals – River Rock Commons

THIS AGREEMENT is made and entered into this 19th day of December, 2018, by and between THE CITY OF FORT COLLINS, COLORADO, a municipal corporation (hereinafter referred to as “the City”), and Gale Whitman (hereinafter referred to as “Artist.”)

In consideration of the mutual covenants and obligations herein expressed, the parties agree as follows:

1. Scope of the Work. The Artist must furnish all of the materials and perform all of the work for the Transformer Cabinet Mural Project as shown on the drawings and described in the specifications attached as Exhibit “A” and incorporated by reference into this Agreement (the “Project”). The Project consists in general terms of the design, signage and installation of painted murals on two transformer cabinet. The Artist’s work must be of high quality, in compliance with generally accepted standards of workmanship, and in conformity with this Agreement.
2. Time of Completion. The City will issue a Notice to Proceed. Artist must begin the Project promptly upon receipt of the Notice to Proceed and must fully complete the Project by June 28, 2019. Any extensions of this time limit must be agreed upon in writing by the parties. The City will grant the Artist a reasonable extension of time if there is a delay on the part of the City in performing its obligations under this Agreement or if conditions beyond the Artist’s control or Acts of God render timely performance of the Artist’s services impossible.
3. Capital Project Management Control System. In order to ensure that the Project is consistent with its authorized scope and schedule, the Artist must provide an approximate schedule for the completion of all unit work items covered by the Agreement. The Artist must submit the initial schedule to the City prior to beginning the work.
4. City Representative. On or before the date the City issues its Notice to Proceed the City will designate its project representative who will make all necessary and proper decisions with reference to the Project within the scope of his or her authority. The Artist must direct all requests for contract interpretations, change orders, or other clarification or instruction to the City representative.
5. Changes to Scope of Work.
 - A. Changes by Artist. The Artist cannot change the Project specifications and drawings in Exhibit “A” without advance written approval from the City.
 - B. Changes by the City. The City may request changes in the design and construction of the Project through written Change Order Requests. The Artist and the City will then negotiate in good faith to reach agreement on any necessary changes in price or scheduling requirements. Once the parties have reached agreement, the City will issue a written Change Order documenting the agreed upon terms. The Artist must not proceed with work related to the requested change until the City issues the Change Order.

6. Formal Acceptance and Ownership of the Project. The Artist must notify the City when the Project is fully installed and complete. No more than thirty (30) days after receiving such notice, the City will provide the Artist a verbal or written response, informing the Artist that either:

- (1) the City agrees that the Project is fully installed and is complete consistent with the terms of this Agreement, all other related work is completed in accordance with this Agreement, and the City formally accepts the Project as completed ("Letter of Acceptance"); or
- (2) the City does not consider the Project to be completed due to unresolved issues or defects that remain, and describing the outstanding issues or defects which the Artist must then cure before the City will issue a Letter of Acceptance.

The Project is not finally complete for purposes of this Agreement until the City has issued a Letter of Acceptance. Once the City has issued a Letter of Acceptance the City will be the sole owner of the Project, and the Artist will have no further obligations under this Agreement, except as set forth in paragraphs 8, 9, 12, and 26.

7. Ownership of Works Created.

A. Assignment of Copyright. The Artist hereby assigns, transfers, and conveys to the City all right, title and interest in and to the Project together with the copyright therein and the right to secure copyright registration therefore, in accordance with Sections 101, 204, and 205 of Title 17 of the United States Code, the Copyright Law of the United States. This assignment, transfer and conveyance includes, without limitation, any and all features, sections, and components of the Project, any and all works derived therefrom, the United States and worldwide copyrights therein, and any renewals or extensions thereof, and any and all other rights that the Artist now has or to which the Artist may become entitled under existing or subsequently enacted federal, state, or foreign laws, including, but not limited to the following rights: to reproduce, publish, and display the Project publicly, to prepare derivative works of and from the Project, to combine the Project with other materials, and to otherwise exploit and control the use of the Project. As additional consideration for this assignment, the City agrees that all reproductions of the Project by the City shall credit the Artist.

B. License Back to Artist of Certain Rights. The City hereby grants to Artist the following rights in and to the Project:

- (i) the non-exclusive right to make two-dimensional reproductions of the Project for non-commercial, promotional purposes, provided that any such reproduction clearly states the location of the Project, acknowledges the City and the Art in Public Places Program, and contains a copyright notice; and
- (ii) the exclusive right to create and reproduce derivative artworks depicting characters, images and/or themes that are similar, but not identical, to those depicted in the

Project, in any form and for any purpose except to the extent prohibited by paragraph 12, below.

With the exception of the rights granted above, the Artist must not make or knowingly permit others to make reproductions of the Project for any purposes without the written permission of the City.

- C. Rights under the Visual Artists' Rights Act. To the extent the uses or removal of the Project under this Contract affect any rights Artist may have under the provisions of federal or state law, including the 1990 Visual Artists' Rights Act, the Artist hereby knowingly waives any rights of preservation of the Project provided by those laws.
8. Guarantee of Workmanship and Material. For a period of three (3) years from the date of the City's Letter of Acceptance, Artist agrees to replace or correct any material defects in the Project, whether caused by defects in the design, workmanship or materials used in the Project. If Artist fails to replace or correct any such defects, or to make arrangements to do so within a reasonable time satisfactory to the City, the City has the right to arrange for such replacement or correction, and Artist must reimburse the City for the costs of any such replacement or correction. If the City asks Artist to repair damage caused to the Project by vandalism, collision, extreme environmental conditions, or other unforeseeable causes, the City will reimburse Artist for reasonable material and labor costs for such repairs, except to the extent such damage is due to a defect in design, workmanship or materials used in the Project.
9. Maintenance. Artist must provide to the City a disk of digital images depicting a total of at least eight views of the completed Project. Artist also agrees to provide continuing advice to the City regarding the operation, care, maintenance and repair of the Project at no charge to the City, unless otherwise agreed to by both parties in writing.
10. Contract Sum. The City will pay Artist for the performance of this Contract, subject to additions and deletions provided herein, the sum of One Thousand, Four Hundred and Thirteen Dollars (\$1,413) on the following schedule:
- A. \$100. upon full execution of this Agreement;
 - B. \$525. upon APP approval of final design of the cabinet mural;
 - C. \$788. or any remaining amounts due under this Agreement, upon the City's final approval and acceptance of the Project as complete. The City will not make final payment until it has received satisfactory maintenance instructions and digital photographs as described in Section 9 and a lien waiver from the Artist in substantially the form shown in Exhibit "B", and comparable lien waivers from any and all subcontractors that have performed work or provided materials in connection with the Project.
11. Failure to Complete. If Artist becomes ill, dies, or is otherwise unable or unwilling to complete the Project in accordance with the Agreement, any work already done on the Project will be the City's property. The City will be entitled to withhold any sums not yet paid

to Artist, and may use any such sums toward completion of the Project in any manner the City deems appropriate.

12. Project as Unique. Artist represents and warrants that the Project is artistically unique, and agrees not to create or be involved in the creation of an identical artwork, or a substantially similar artwork that will be displayed within 100 miles of Fort Collins, Colorado.
13. Liquidated Damages. The parties agree that the City will suffer certain unspecified damages in the event the Project is not completed within the time set forth above, as adjusted for any delays agreed upon by the parties pursuant to Section 2, above. In recognition of the difficulty of ascertaining the actual damages sustained by the City, the parties agree that the assessment of liquidated damages is appropriate. In the event the Project is not completed within the specified time, Artist authorizes the City to retain from any monies due the Artist, the sum of Fifty Dollars (\$50) per day for each and every calendar day the Project remains unfinished. In no event will liquidated damages exceed Four Hundred Dollars (\$400).
14. Governing Law. This Agreement is governed by the laws of the State of Colorado.
15. Notice. Any notice or other communication given by either party to the other related to this Agreement must be hand delivered; sent by a commercial carrier; or sent by mail, addressed to the party at its address as set forth below. The notice or other communication will be effective on the date it is delivered or on the third business day after being sent, whichever comes first.

If to the Artist:
Gale Whitman
311 East Plum St.
Fort Collins, CO 80524

If to the City:
Ellen Martin
Lincoln Center
417 West Magnolia
Fort Collins, CO 80521

16. Termination/Default.
 - A. Termination. The City may terminate this Agreement on no less than seven (7) days written notice to the Artist. In such event the City will compensate Artist for all services performed to the date Artist receives the notice of termination, together with reasonable expenses then due, unless the parties agree otherwise in writing.
 - B. Default. Each and every term and condition of this Agreement is deemed to be a material element of this Agreement. If either party fails or refuses to perform according to the terms of this Agreement; it may be declared in default thereof. If Artist defaults or neglects to carry out the work in accordance with this Agreement, the City may elect to make good such deficiencies and charge Artist therefor.
 - C. Remedies Upon Default. If one party declares the other in default of this Agreement and performance is possible within the completion time established herein, the defaulting party has a period of five (5) days within which to cure the default. If the defaulting party fails to correct the default (or timely performance is not possible), the party declaring default may elect to: (1) immediately terminate the Agreement; (2) treat the Agreement

as continuing and require specific performance; and/or (3) avail itself of any other remedy at law or equity. If either party elects to terminate the agreement for default, termination will be effective upon the mailing, by the terminating party, of written notice of termination to the defaulting party.

- D. Attorneys Fees. If the non-defaulting party must commence legal or equitable action against the defaulting party to enforce the terms of this Agreement, the defaulting party is liable to the non-defaulting party for the non-defaulting party's reasonable legal fees, including attorney's fees, incurred because of the default.
17. Assignment. Artist understands that the City enters into this Agreement based on the special abilities of Artist and that the City considers this Agreement to be an agreement for personal services. Accordingly, Artist must neither assign any responsibilities nor delegate any duties arising under this Agreement without the prior written consent of the City.
18. Artist -- Independent Agent. The Artist performs all work under this Agreement as an independent agent and is not an agent of the City, nor are the Artist's Subcontractors or employees subagents of the City.
19. License and Business. The Artist must hold, in the Artist's name, all necessary licenses and permits to perform the work. The Artist must have full authority to do business in the State of Colorado, and have a designated place of business for making and accepting communications with or from the City. The Artist must maintain a current address and telephone number with the City throughout the term of this Agreement.
20. Superintendence. Before starting work the Artist must designate an authorized representative who has complete authority to represent and act for the Artist. The Artist must keep competent supervisory personnel on the work during its progress and provide efficient supervision of the work, using Artist's best skill and attention. The Artist is solely responsible for all construction means, methods, techniques, and procedures, and for providing adequate safety precautions and coordinating all portions of the work.
21. Employees. The Artist must employ only competent, skillful workers to do the work. Whenever any person employed by the Artist appears to be incompetent or acts in a disorderly or improper manner, the Artist must promptly remove such person from the work.
22. Subcontractors. The Artist may use subcontractors to complete the fabrication, transportation and/or installation of the Project, under Artist's direction and supervision. The Artist must, within fifteen (15) days of the effective date of this Agreement, submit to the City the names of all subcontractors Artist intends to use for the work. The Artist must not employ any subcontractors that the City, in its discretion, objects to as lacking the capability to properly perform work of the type and scope intended for the Project. The Artist is as fully responsible to the City for the acts and omissions of Artist's subcontractors and of persons either directly or indirectly employed by them as for the acts and omissions of persons directly employed by Artist. Nothing contained in the contract documents creates any contractual relation between any subcontractor and the City, except to the extent the City is indemnified or insured through requirements upon said subcontractor. If subcontractors are used, the City may, in its discretion, require the submission of lien waivers in a form

reasonably acceptable to the City by any such subcontractors prior to final payment to the Artist.

23. Prosecution of the Work. The time of beginning, rate of progress, and time of completion of the work are the essence of this Agreement. The Artist must do the work at such time, and in such order, as will result in successful completion of the Project during the time specified in the Agreement and the approved construction schedule. The Artist must furnish tools and equipment for the Project in sufficient quantity and of a capacity and type that will safely perform the work specified without delay in the progress of the work.
24. Safety. The Artist is solely responsible for maintaining a safe work area and protecting the safety and welfare of Artist's employees and subcontractors, and the general public, including without limitation area residents, motorists, bicyclists, pedestrians, and children, from work area hazards. The Artist must provide all work area safety control devices, at Artist's cost, including, for example, barricades and safety fences around excavations and drop-offs. The Artist's safety precautions must be in compliance with all applicable laws, rules and regulations.
25. Work and Property. The Artist must use best efforts at all times to safely guard the Project, the City's property and adjacent property, including underground utilities, from damage, injury or loss in connection with the Project. The Artist must provide and maintain all passageways, guard fences, lights, and other facilities required for property protection by state or municipal laws and regulations and location conditions.

The Artist must protect the Project and related materials from damage due to the nature of the work, the elements, carelessness of the Artist, or from any foreseeable cause whatever until the completion and acceptance of the Project by the City. The Artist assumes all risk of loss or damages arising out of the nature of the work to be done under this Agreement, or from any unforeseen obstructions or defects which may be encountered in the prosecution of the work, or from the action of the elements or other damage, except damage proximately caused by the City, its employees, agents or other contractors, until final acceptance of the Project by the City


26. Indemnity. The Artist indemnifies and holds harmless the City, its officers, agents and employees, from and against all claims, damages, losses, expenses, and legal fees including attorney's fees, arising out of or resulting from the Artist's performance under this Agreement.

In any and all claims against the City, or any of its officers, agents, or employees by any employee, subcontractor or agent of the Artist, the Artist's indemnification obligation are not limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Artist or any subcontractor under Workmen's Compensation laws, Disability Benefit laws, or other employee benefit laws.


The Artist is responsible for any liability directly or indirectly arising out of the work performed under this Agreement by a subcontractor, to the extent that liability is not covered by the Subcontractor's insurance.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

THE CITY OF FORT COLLINS, COLORADO,
A Municipal Corporation

DocuSigned by:

BY: _____
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Gerry Paul
Purchasing Director

ATTEST:

DocuSigned by:


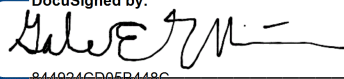
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City Clerk

APPROVED AS TO FORM:

DocuSigned by:


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Senior Assistant City Attorney

ARTIST:

DocuSigned by:


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Gale Whitman

EXHIBIT A SCOPE OF SERVICES

Transformer Cabinet Mural Project 2018
Artist: Gale Whitman
Location: 520 N. Sherwood St.



Cabinet Mural concept based on vegetables planted in the garden site. Artist met with residents who planned and planted at the site to determine types of vegetables to include on the mural.



TOP



SIDES



Artist is required to update APP Project Manager with images and their progress weekly while painting cabinet(s).

- Mural concept will depict all sides of the cabinet(s)
- **Artist is required to create a busy, active surface with either composition, or paint layering, with strong contrast to deter graffiti. Artist will need to minimize white areas.**
- Flat areas of color or inactive spaces within the designs should not exceed 5” square area.
- Artist is required to keep the working area clean from any paint splatters, or will clean area immediately
- Artist will update APP Project Managers with images and their progress weekly while painting cabinet.
- Utility stickers will be added to the cabinet.
- Artist will need to work with APP and Utilities on any concerns for solar gain (is the mural too dark)

**EXHIBIT B
SAMPLE LIEN WAIVER RELEASE
(ARTIST)**

TO: City of Fort Collins, Colorado (OWNER)
FROM: Gale Whitman (ARTIST)
PROJECT: Transformer Cabinet

1. The ARTIST acknowledges having received payment, except final payment, from the OWNER for all work, labor, skill and material furnished, delivered and performed by the ARTIST for the OWNER or for anyone in the construction, design, improvement, alteration, addition or repair of the above described project.
2. In consideration of such payment and this good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the ARTIST voluntarily waives all rights, claims and liens, including but not limited to, mechanic's notices, equitable liens and labor and material bond rights which the ARTIST may now or may afterward have, claim or assert for all and any work, labor, skill or materials furnished, delivered or performed for the construction, design, improvement, alteration, addition or repair of the above described project, against the OWNER or its officers, agents, employees or assigns, against any fund of or in the possession or control of the OWNER, against the project or against all land and the buildings on and appurtenances to the land improved by the project.
3. The ARTIST affirms that all work, labor and materials, furnished, delivered or performed to or for the construction, design, improvement, alteration, addition or repair of the project were furnished, delivered or performed by the ARTIST or ARTIST's agents, employees, and servants, or by and through the ARTIST by various Subcontractors or material men or their agents, employees and servants and further affirms the same have been paid in full and have released in full any and all existing or possible future mechanic's liens or rights or claims against the project or any funds in the OWNER'S rights or control concerning the project or against the OWNER or its officers, agents, employees or assigns arising out of the project.
4. The ARTIST agrees to defend and hold harmless the OWNER, the lender, if any, and the Surety on the project against and from any claim hereinafter made by the ARTIST'S Subcontractors, material men, employees, servants agents or assigns against the project or against the OWNER or its officers, employees, agents or assigns arising out of the project for all loss, damage and costs, including reasonable attorneys fees, incurred as a result of such claims.
5. The parties acknowledge that the description of the project set forth above constitutes an adequate description of the property and improvements to which this Lien Waiver Release pertains. It is further acknowledged that this Lien Waiver Release is for the benefit of and may be relied upon by the OWNER, the LENDER, if any, and Surety on any labor and material bonds for the project.

Signed this _____ day of _____, 20__.

Gale Whitman