AGREEMENT BETWEEN THE CITY OF PALO ALTO AND THE PALO ALTO ART CENTER FOUNDATION FOR THE DESIGN OF CAPITAL IMPROVEMENTS RELATING TO THE RENOVATION OF THE PALO ALTO ART CENTER

Dated as March __, 2008
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AGREEMENT BETWEEN THE CITY OF PALO ALTO AND THE PALO ALTO ART CENTER FOUNDATION FOR THE DESIGN OF CAPITAL IMPROVEMENTS RELATING TO THE RENOVATION OF THE PALO ALTO ART CENTER

This DESIGN OF CAPITAL IMPROVEMENTS RELATING TO THE RENOVATION OF THE PALO ALTO ART CENTER AGREEMENT (the “Design Agreement”), dated, for convenience, March __, 2008 (the “Effective Date”), is entered into by and between the CITY OF PALO ALTO, a California chartered municipal corporation (the “City”) and the PALO ALTO ART CENTER FOUNDATION, a corporation organized under the Nonprofit Public Benefit Corporation Law of the State of California (the “Foundation”) (individually, a “Party” and, collectively, the “Parties”), in reference to the following facts and circumstances:

RECITALS:

1. The City owns and operates the Palo Alto Art Center (the “Center”), an approximately 28,000-square foot building and surrounding premises, located at 1313 Newell Road, Palo Alto, California (the “Facility”). A description and map of the Facility is attached to this Design Agreement as Exhibit “A.”

2. In furtherance of the Foundation’s mission, the Foundation has retained Mark Cavagnero Associates (the “Architect”) to design certain improvements to the Facility, including, but not limited to, the creation of a new children’s wing, the addition of classrooms and activity spaces, the construction of improvements to existing gallery space, and the replacement of mechanical and electrical systems serving the Facility (the “Project”). The Project is more specifically described in the schematic drawings, attached to this Design Agreement as Exhibit “B.” The Parties acknowledge that the renovation and other construction work necessary to carry out the Project has not commenced as of the Effective Date.

3. The Architect has begun the preparation of plans and drawings for the Project through the schematic design and design planning and development phase. In connection with these planning and design activities, the Parties acknowledge that (a) the successful completion of the Project will require the Parties’ evaluation of various issues, including, but not limited to, compliance with City and other applicable law requirements regarding LEED, accessibility upgrades, seismic upgrades, hazardous materials removal and electrical service upgrades that have not yet been completed, (b) the costs of addressing the issues referred to in (a) cannot be accurately determined until the design process has proceeded further, (c) the Parties have not yet resolved a number of policy issues relative to, among other things, cost sharing and risk allocation of the renovation work required to complete construction of the Project, and (d) the completion of the renovation work may be infeasible if the Parties cannot resolve these policy issues and execute and deliver a mutually acceptable contract pertaining to this work. Pending the full resolution of these issues, the Parties nonetheless desire to establish the terms and
conditions upon which the Foundation will cause the Architect to continue the preparation of construction plans, drawings and specifications for the Project.

4. The City intends to reimburse the Foundation for a portion of these design and design-related costs by this Design Agreement, notwithstanding that a portion of these costs (approximately 25% of such costs) are attributable to bid and construction administration work that will be completed later during the renovation and construction phase of the Project. The Foundation acknowledges that the City will not be obligated to pay for any additional amount for design costs and design, bid or construction administration work under this Design Agreement or the Renovation Agreement; provided, however, as to any additional design costs that are attributable to necessary additional design services relating to the Project and arising after the Effective Date, the Parties may agree to share in such additional design costs that will be addressed in the Renovation Agreement. Although the Parties wish to reach an agreement on the completion of the renovation and construction phase work for the Project, this Design Agreement pertains only to the schematic design and design development and construction documents phase of the Project. If the Parties agree to mutually acceptable terms and conditions for the continuation of the Project through the renovation and construction phase, then the Parties will execute a separate written agreement, setting forth such terms and conditions (the “Renovation Agreement”).

5. Based on the foregoing, this Design Agreement establishes the terms and conditions under which the City will reimburse the Foundation an amount of funds for the design and consultant services not to exceed two hundred ninety thousand dollars ($290,000.00). The City has appropriated these funds and will draw these funds (the “Design Funds”) from its General Fund’s Capital Improvement Program Project – PF07000 (Art Center Electrical & Mechanical Upgrades), to reimburse the Foundation for the Project costs as noted in Recitals 4 and 5. Disbursement of the Design Funds to the Foundation will be made in accordance with the Palo Alto Municipal Code (“PAMC”), applicable generally accepted accounting principles, and the covenants, terms, conditions and provisions of this Design Agreement and the Exhibits, in particular, the payment procedures, as described in and attached to this Design Agreement as Exhibit “C.”

NOW, THEREFORE, in consideration of the foregoing recitals and the following covenants, terms, conditions and provisions, the Parties agree:

AGREEMENT:

SECTION 1. PURPOSES

1.1 The purposes of this Design Agreement are to: (A) grant the Foundation temporary access to the Facility, as needed, during the Term in order that the Foundation may cause the preparation of design documents for the Project; (B) provide for the preparation by the Foundation’s architect, and the review and approval by the City, of such plans, drawings and specifications for the Project; and (C) permit the Foundation to accomplish through its architect all related work that is required in order to complete the design phase of the Project, including, without limitation, to comply with the City’s site and design approval process, or as established by any City department, including the
City’s Department of Planning and Community Environment (the "Planning Department"), exercising the duty to review and/or approve the design of the Project, in whole or in part.

SECTION 2. TERM

2.1 The term of this Design Agreement is one (1) year (the "Term"), commencing on the Effective Date; provided, however, the Term will not extend after March 31, 2009, unless and until the City’s City Council approves of the renewal of this Design Agreement. If the completion of the design and plan development phase of the Project is delayed for any reason beyond the reasonable control of the Foundation, then subject to the preceding sentence, the Parties may agree, in writing, to extend the Term on a month-to-month basis, in order to permit the Foundation to complete the design phase of the Project.

2.2 This Design Agreement is subject to the fiscal provisions of the Charter of the City of Palo Alto (the "Charter") and the PAMC. Subject to the Foundation’s rights and remedies as may be available under this Design Agreement and applicable laws, this Design Agreement will terminate without penalty: (A) at the end of any fiscal year in the event that funds are not appropriated for the following fiscal year; or (B) at any time within a fiscal year in the event that funds are appropriated for a portion of the fiscal year and funds for this Design Agreement are no longer available. This Section 2.2 will take precedence in the event of a conflict with any other covenant, term, condition or provision of this Design Agreement and the Exhibits. Nothing in this Section 2.2 is intended to affect the Foundation’s rights and remedies as may be available under applicable laws.

2.3 Notwithstanding anything in this Design Agreement to the contrary, if the Parties fail to agree upon and execute and deliver the Renovation Agreement on or before March 31, 2008, then either Party will have the right to terminate this Design Agreement by delivering thirty (30) days’ prior written notice to the other Party. In the event of termination, the City will reimburse the Foundation for design services in the amount as contemplated in Section 4.2.

SECTION 3. USE; ACCESS TO THE FACILITY; PLAN APPROVAL

3.1 Subject to the covenants, terms, conditions and provisions of this Design Agreement, the City hereby grants to the Foundation, its directors, officers, employees, contractors, agents and representatives the nonexclusive right to enter upon the Facility at reasonable times during the Term for the purposes of conducting, at the Foundation's own cost and expense, in connection with the design and plan development phase of the Project, soil, geologic, and engineering or other investigations, as may be required to enable the Foundation and to prepare schematic plans, development plans, construction drawings and other similar design-related documents, take measurements, and inspect the Facility. No other rights, title or interests, including, but not limited to, any estate, fee, leasehold, easement or other real property interest, in the Facility is granted or intended to be granted to the Foundation by this Design Agreement. The Foundation will use the Facility without unnecessary and undue interference or interruption of the public’s use
and enjoyment of the Facility, while the Foundation has the nonexclusive possession of the Facility and the Facility is not yet closed to the public.

3.2 Nothing in this Design Agreement will be construed to limit the City’s right to temporarily suspend or revoke the Foundation’s access to the Facility in the event of default and a breach of this Design Agreement by the Foundation or in the interest of the public health, safety and welfare.

3.3 The City acknowledges that it has received and approved the schematic plans (the "Schematic Plans"). The Parties acknowledge that the Architect is currently preparing design development plans (the "Design Development Plans") and, following completion of the Design Development Plans, so long as this Design Agreement remains in effect, the Architect will prepare construction drawings and specifications (collectively, the "Construction Documents"). The Foundation acknowledges that the City has the right (as a part of its site and design review process) to review and approve the Design Development Plans and the Construction Documents (and any applicable iterations thereof). The City will approve or disapprove the Design Development Plans and the Construction Documents within the customary period of time for such review and approval arising during the site and design review process, and, if disapproved, the City will return the applicable plans to the Foundation with specific comments regarding changes that are required to obtain the City’s approval. The Foundation will then instruct the Architect to make all necessary revisions within ten (10) days after the Foundation's receipt of such requested revisions. The City hereby appoints Karen Smith as its representative to review and approve the Design Development Plans and the Construction Documents.

SECTION 4. CONSIDERATION

4.1 In consideration of the funding (or reimbursement of funds to be provided) by the City, as described in Section 4.2, subject to the terms of this Design Agreement the Foundation will: (A) solicit and otherwise use good faith efforts to obtain financial contributions from the Palo Alto community and other sources to defray substantially all of the costs and expenses of the design and planning phase of the Project; and (B) use good faith efforts to undertake a community outreach program in regard to the Project, and, if requested, provide reasonable information to the Facility’s surrounding neighborhood residents and use good faith efforts to address any reasonable questions arising concerning the Project for the purpose of soliciting their input and support for the design and planning (and subsequent construction) of the Project.

4.2 As set forth in Recitals 4 and 5, the City will contribute to the Project's design consultant's (Architect's) costs from a part of the City's General Fund that is allocated to the Capital Improvement Program Project PF-07000 (Art Center Electrical & Mechanical Upgrades) in an amount not to exceed two hundred ninety thousand dollars ($290,000.00). The City will provide City staff support and other assistance, as practicable, to the Foundation, upon request and at no cost or expense to the Foundation, in connection with the commencement and completion of the design and planning phase of the Project.
(A) The City represents that the Design Funds referred to in Recitals 4 and 5 and Section 4.2 have been budgeted and appropriated in fiscal year 2007-08, and such funds will be disbursed to the Foundation in accordance with Section 4.3 and Exhibit “C.”

4.3 The City will administer and coordinate the receipt and disbursement of the funds referred to in Section 4.2, as follows:

(A) The City will disburse the City’s share of the full Architect’s costs and expenses, including the bid and construction administration costs and expenses, not to exceed two hundred ninety thousand dollars ($290,000.00) in the aggregate, as follows: (1) within ten (10) days after the execution and delivery of this Design Agreement, the first installment of forty-three thousand five hundred dollars ($43,500.00) for schematic design costs and expenses, previously incurred by the Foundation for the design of the Project; (2) the second installment of fifty-eight thousand dollars ($58,000.00) will be paid upon the City’s determination that the Project has attained the thirty-five percent (35%) schematic design phase and design development phase completion milestone; (3) the third installment of ninety-four thousand two hundred fifty dollars ($94,250.00) will be paid upon the City’s determination that the Project has attained the fifty percent (50%) Construction Documents phase completion milestone; and (4) the fourth installment of ninety-four thousand two hundred fifty dollars ($94,250.00) will be paid upon the City’s determination that the Project has attained the one hundred percent (100%) Construction Documents phase completion milestone. The City will make payment in accordance with the payment procedures, as described in Exhibit “C.” The City’s City Manager (the “City Manager”), or designee, will make the determination regarding the percentage completion milestones referred to in the preceding sentence.

(B) The City will waive its right to collect from the Foundation any and all permit- and permit-related fees and charges (including plan check fees, inspection fees, and building permit fees) that otherwise would be due and payable by the Foundation to the City with respect to its design and plan development of the Project at the Facility and any other related work costs in connection therewith; provided, however, the City cannot waive its right to collect from the Foundation any and all rates, fees and charges that are due and payable by the Foundation in consideration of the receipt of utility services to the extent such services are provided and billed directly to the Foundation at the Facility.

SECTION 5. INSURANCE

5.1 The Foundation will cause the Architect to carry insurance of the types and with limits in the amounts set forth in the insurance certificate attached to this Design Agreement as Exhibit “D.” The Foundation will ensure that the Architect will name the City as an additional insured under the Architect’s commercial general liability policy. The limits will not be less than one million dollars ($1,000,000.00) each for commercial general liability and professional liability. The additional insurance coverage provisions of the Indemnity and Insurance paragraph of the amended Attachment B to the A1A Agreement, referred to in Section 6.2 below, are hereby made a part of this Design Agreement. The Foundation will ensure that the City receives the certificate of insurance from the Architect on or before the Effective Date and any updated certificate, within
thirty (30) days after any material change in coverage is made; provided, however, the Foundation will cause the Architect to send the most current insurance certificate to the City’s insurance risk manager or other designated City employee not more than once a year during the Term.

SECTION 6. INDEMNITY

6.1 Subject to Section 6.2, the Foundation will protect, defend, indemnify and hold harmless the City, its officials, officers, employees and representatives, from any and all demands, claims, damage, loss or liability for death of or injury to persons, property damage caused by or arising out of its negligence or willful misconduct, in connection with the performance of its obligations under this Design Agreement.

6.2 The Parties acknowledge that (a) the Foundation has retained the Architect in its capacity as a professional licensed architect to provide the architectural (design) services contemplated by this Design Agreement and (b) the City desires to be indemnified from any and all demands, claims, damage, loss or liability arising from the Architect’s provision of design services and, in particular, its negligence in designing the Project, referred to in recital number 3 of this Design Agreement. Accordingly, in lieu of an indemnity, similar in form as set forth in Section 6.1 hereof, that the City otherwise would require the Foundation to give to the City with respect to the Architect’s negligence in its provision of design services, on or before the Effective Date, the Foundation will secure an amendment to Attachment B to its AIA Document B151 – 1997 Abbreviated Standard Form of Agreement between Owner and Architect, dated as of September 24, 2007, between the Foundation, as Owner, and Mark Cavagnero Associates, as Architect (the “AIA Agreement”), whereby the Architect will indemnify the City for its negligence in rendering the design services to the Foundation and, with respect to such indemnity, the City will be declared or deemed an express third party beneficiary of the AIA Agreement, Attachment B. The executed amendment to Attachment B will be attached to this Design Agreement as Exhibit “F.” Notwithstanding the foregoing or anything else in this Design Agreement to the contrary, provided the Foundation and the Architect enter into an amendment to the AIA Agreement as provided in this Section 6.2, the Foundation will not be liable to the City for and it will not be required to protect, indemnify, defend and hold harmless the City, its officials, officers, employees and representatives in connection with (c) any acts or omissions of the Architect or its officers, employees, agents, contractors or representatives (collectively, the “Architect’s Parties”) in connection with the design and other related services provided by the Architect or the Architect’s Parties in connection with the Project, including, without limitation, any defective or negligent design or the negligent hiring or supervision of the Architect or the Architect’s Parties.

SECTION 7. WAIVER

7.1 The waiver by either Party of any breach or violation of any covenant, term, or condition of this Design Agreement or of the provisions of the PAMC or other City law, rule or regulation, will not be deemed to be a waiver of any such covenant, term, condition, or provision or of any subsequent breach or violation of the same or any other covenant, term, condition, or provision. The subsequent acceptance by either Party of any consideration which may become due or payable hereunder will not be deemed to
be a waiver of any preceding breach or violation by the other Party of any other covenant, term, condition or provision.

SECTION 8. ASSIGNMENT

8.1 The Foundation will not assign, transfer, or convey this Design Agreement and the Exhibits without the express written approval of the City, and any such assignment, transfer or conveyance without the approval of the City will be void and, in such event, at the City’s option, this Design Agreement may be terminated upon reasonable notice to the Foundation. Notwithstanding the foregoing, the Foundation may delegate to the Architect or other design professional, if any, the responsibility for compliance with the Foundation’s obligations, covenants, terms and conditions of this Design Agreement, provided such delegation will not relieve the Foundation of its obligations under this Design Agreement.

SECTION 9. NONDISCRIMINATION

9.1 The PAMC prohibits discrimination in the employment of any individual under this Design Agreement because of race, skin color, gender, age, religion, disability, national origin, ancestry, sexual orientation, housing status, marital status, familial status, weight or height of that person. The Foundation acknowledges that it has read and understands the provisions of PAMC Chapter 2.30 relating to nondiscrimination in employment and the penalties for violations thereof, and it agrees to comply with all requirements of PAMC Chapter 2.30 pertaining to nondiscrimination in employment, including the completion, execution and submission to the City of the Certification of Nondiscrimination, as described in and attached to this Design Agreement as Exhibit “E.”

SECTION 10. FORCE MAJEURE

10.1 A Party will be temporarily excused from the performance or further performance of any of its covenants or agreements or any terms or conditions that it is obligated to fulfill hereunder and such Party’s nonperformance shall not be deemed an event of default under this Design Agreement for any period to the extent that such Party is prevented, hindered or delayed for any period of time from performing any of its covenants or agreements, in whole or in part, or any term or condition it is required to perform or satisfy as a result of an act of God, war, civil disturbance, court order, or other cause beyond that Party’s reasonable control. The Parties hereby agree to use reasonable efforts to remedy the effects caused by the occurrence of the event giving rise to a Party’s temporary nonperformance of its covenants or agreements or any terms or conditions that it is obligated to fulfill hereunder. A Party will provide notice promptly to the other Party to the extent that such Party relies on the provisions of this Section to temporarily excuse its failure to perform any of its covenants or agreements or any terms or conditions hereunder.

SECTION 11. AUDITS; INSPECTION OF RECORDS

11.1 The Foundation will maintain, or caused to be maintained by its Architect or other design professional, if any, books and records relating to the design and plan development of the Project during the Term and for three (3) years thereafter. It will
permit the City to inspect, audit and copy, upon thirty (30) days’ prior written notice from the City at any reasonable time during the Term and for three (3) years after the expiration or earlier termination of the Design Agreement, the Foundation’s books and records pertaining to its obligations imposed by this Design Agreement. The Foundation will retain such books and records at accessible locations and for at least thee (3) years after the expiration or earlier termination of this Design Agreement, whichever occurs later. This provision will survive the expiration or earlier termination of this Design Agreement.

SECTION 12. INDEPENDENT CONTRACTOR

12.1 In the design and plan development of the Project and the performance of other duties imposed upon it by this Design Agreement, the Foundation acts at all times as an independent contractor and not as an employee of the City. Nothing in this Design Agreement will be construed to establish a partnership, joint venture, group, pool, syndicate or agency between the Parties. No provision contained herein will be construed as authorizing or empowering either Party to assume or create any obligation or responsibility whatsoever, express or implied, on behalf, or in the name of, the other Party in any manner, or to make any representation, warranty or commitment on behalf of the other Party. In no event will either Party be liable for (a) any loss incurred by the other Party in the course of its performance hereunder, or (b) any debts, obligations or liabilities of the other Party, whether due or to become due.

SECTION 13. REPRESENTATIONS AND WARRANTIES

13.1 On the Effective Date, each Party represents and warrants to the other Party that: (A) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; (B) the execution, delivery and performance of this Design Agreement and the Exhibits are within its powers, have been duly authorized by all necessary action and do not violate any of its governing documents, any contracts to which it is a party or any law, rule, regulation, or order; (C) this Design Agreement and the Exhibits and any other document executed and/or delivered in accordance with this Design Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its covenants, terms, conditions and provisions, subject to any laws relating to bankruptcy, insolvency, and reorganization; (D) it has not filed and it is not now contemplating the filing for bankruptcy protection and, to its knowledge, there is not an involuntary proceeding threatened against it which would result in it being or becoming a debtor under any bankruptcy law; (E) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Design Agreement and the Exhibits; and (F) no event of default or potential event of default with respect to it has occurred and is continuing under this Design Agreement and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Design Agreement and the Exhibits.
SECTION 14. NOTICES

14.1 All notices, requests and approvals by a Party will be given, in writing, and delivered by personal service, the United States Postal Service, express delivery service, or facsimile transmission, as follows:

TO CITY:

   City of Palo Alto
   City Clerk
   P.O. Box 10250
   250 Hamilton Avenue
   Palo Alto, CA 94303

With a copy to each of:

   City of Palo Alto
   P.O. Box 10250
   250 Hamilton Avenue
   Palo Alto, CA 94303
   ATTN: Real Property Manager;
   and the Facilities Manager

TO FOUNDATION:

   Palo Alto Art Center Foundation
   1313 Newell Road
   Palo Alto, CA 94303
   ATTN: Louise Carroll, Chief Operating Officer

SECTION 15. EVENT OF DEFAULT; REMEDIES FOR DEFAULT

15.1 This Design Agreement may be terminated upon the occurrence of an “event of default” by a Party (the “Defaulting Party”). An “event of default,” which will constitute a material breach of this Design Agreement if it is not cured in a timely manner, means the occurrence of any of the following: (A) a representation or warranty made by a Party is false or misleading in any material respect when made or deemed made or repeated; (B) the failure to perform any material covenant, or obligation set forth in this Design Agreement or any Exhibit if such failure is not remedied within thirty (30) days after written notice of default is given; (C) a Party files a petition or otherwise commences or acquiesces in the commencement of a proceeding under any bankruptcy, insolvency, reorganization or similar law, makes an assignment for the benefit of its creditors, has an administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or is generally unable to pay its debts as they fall due; (D) a Party consolidates with, merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, merger or transfer, the surviving entity fails to assume all of the obligations of the Party under this Design Agreement and the Exhibits to which it was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party; (E) the transfer of this Design Agreement and the Exhibits or any material obligation arising under this Design Agreement and the Exhibits, whether voluntarily or by operation of law, without the consent of the other Party; and (F) the failure to make, when due, any payment required by this Design Agreement if such failure is not remedied within five (5) business days after written notice of default is given.
15.2 If an event of default occurs and is continuing with respect to the Defaulting Party, the other Party (the "Non-Defaulting Party") will have an election of rights and remedies, in addition to all other rights and remedies afforded or provided by law or in equity or as otherwise provided in this Design Agreement, to which the non-defaulting Party may resort cumulatively, or in the alternative: (A) the right to terminate this Design Agreement by giving thirty (30) days' prior notice of termination, in which event this Design Agreement will terminate on the date set forth in the notice of termination; (B) the right to demand performance of an act which otherwise cure the violation or any breach; and (C) the right to suspend performance of any of its material obligations, including, without limitation, the right to withhold any payments due to the Defaulting Party under this Design Agreement.

15.3 In the event of default which cannot reasonably be cured within sixty (60) days, the Foundation may, at the City’s sole and exclusive option, have an additional period of time specified by the City to cure the default. The remedies given to the City hereunder, or by any law now or hereafter enacted, are cumulative and the exercise of one right or remedy will not impair the right of the City to exercise any or all other remedies. In case any suit, action or proceeding to enforce any right or exercise any remedy shall be brought or taken and then discontinued or abandoned, then, and in every such case, the Parties will be restored to their former positions, rights and remedies as if no such suit, action or proceedings had been brought or taken.

SECTION 16. DISPUTE RESOLUTION

16.1 If a dispute arises from or in connection with this Design Agreement, generally, or any Exhibit, in particular (a "Dispute"), the following procedure will govern the resolution of any such Dispute: (A) the Parties will nominate their respective representatives to be responsible for and exercise the appropriate authority to resolve all Disputes hereunder for the respective fourteen-day resolution period of time; and (B) if the Dispute remains unresolved within such fourteen-day period, before either Party may resort to the process described in Section 16.3, either Party may refer the Dispute, in writing, for final settlement to the Foundation’s President and the City Manager, or designee, who will jointly convene within ten (10) days of receipt of a referral request and use reasonable efforts to consider and resolve the Dispute. The Parties will ensure that their respective representatives confer for a period of fourteen (14) days from the date of referral by either Party. If final resolution cannot be achieved, the Parties may resort to the procedures described in Section 16.3 hereunder.

16.2 Nothing contained in this Design Agreement will prevent or otherwise restrict either Party from pursuing its equitable rights, including injunctive relief and specific performance, in the event of a material breach by the other Party.

16.3 In the event of a Dispute between the Parties with respect to this Design Agreement or the enforcement of rights hereunder, either Party may, by notice to the other Party (the "Mediation Notice"), require such dispute to be submitted to non-binding mediation in Palo Alto, California, with a mediator acceptable to the Parties. If such mediation does not result in a settlement of the Dispute within one hundred eighty (180) days from the date of the Mediation Notice, either Party may require such matter to be
submitted to non-binding arbitration in Palo Alto, California, under the rules of the American Arbitration Association. Action of any kind by either Party arising out of this Design Agreement must be commenced within one (1) year from the date the right, claim, demand or cause of action first arises.

SECTION 17. MISCELLANEOUS

17.1 This Design Agreement will be governed by and construed in accordance with the laws of California and, as appropriate, the Charter, and the PAMC. The Parties will comply with applicable laws in the exercise of their rights and the performance of their obligations under this Design Agreement.

17.2 All covenants, terms, conditions and provisions of this Design Agreement, whether covenants or conditions, will be deemed to be both covenants and conditions.

17.3 This Design Agreement represents the entire agreement between the Parties and supersedes all prior negotiations, representations and contracts, written or oral, relating to the subject matter of this Design Agreement. This Design Agreement may be amended by an instrument, in writing, signed by the Parties. This Design Agreement may be executed in any number of counterparts, each of which will be an original, but all of which together will constitute one and the same instrument.

17.4 All exhibits referred to in this Design Agreement are by such references incorporated in this Agreement and made a part hereof. A reference to this Design Agreement will include a reference to the applicable exhibit or exhibits hereto. The following exhibits are made a part of this Agreement:

   - Exhibit “A” - Description and Map of the Facility
   - Exhibit “B” - Schematic Drawings
   - Exhibit “C” - Payment Procedures
   - Exhibit “D” - Insurance Certificate
   - Exhibit “E” - Certification of Nondiscrimination.
   - Exhibit “F” - Attachment B to AIA Agreement, as amended

17.5 At the request of the City, the Foundation will furnish to the City Attorney for review its articles of incorporation.

17.6 The Parties agree that the normal rule of construction to the effect that any ambiguity is to be resolved against the drafting party will not be employed in the interpretation of this Design Agreement and the Exhibits or any amendment thereto.

17.7 In the event that an action is brought, the Parties agree that trial of such action will be vested exclusively in the state courts of California or in the United States District Court for the Northern District of California in the County of Santa Clara, State of California.

17.8 The prevailing Party in any action brought to enforce the provisions of this Design Agreement and the Exhibits may recover its reasonable costs and attorneys' fees expended in connection with that action.
17.9 If a court of competent jurisdiction finds or rules that any provision of this Design Agreement, the Exhibits, or any amendment thereto, is void or unenforceable, the unaffected provisions of this Design Agreement, the Exhibits, or any amendment thereto, will remain in full force and effect.

17.10 The term “day” means a calendar day, unless a “business day” is specified; for the purposes of this Design Agreement, “business day” means a calendar day but it excludes any “Regular Holiday” or “Other Special Day” referred to in PAMC Section 2.08.100 or any Friday that is considered a ‘9/80’ day, when the City does not require employees, electing to work nine (9) business days in a ten-business-days biweekly period, to work on such days.

17.11 Any director, officer or employee of the Foundation will not be liable for the performance of the Foundation’s obligations under this Design Agreement.

IN WITNESS WHEREOF, the Parties by their duly authorized representatives have executed this Design Agreement on the Effective Date.

APPROVED AS TO FORM:  CITY OF PALO ALTO

Senior Asst. City Attorney  Mayor

APPROVED:

City Manager

Director of Administrative Services  President

Director of Community Services  Chief Operating Officer

Director of Public Works
EXHIBIT "A"
DESCRIPTION AND MAP OF THE FACILITY
[to be attached]
EXHIBIT "B"
SCHEMATIC DRAWINGS
[to be attached]
EXHIBIT “C”
PAYMENT PROCEDURES

A. General Procedures:

1. The Foundation will be wholly responsible for paying the Architect in a timely manner in accordance with its contract with that party.

2. The Foundation will deliver to the City all required documentation, specified below, for the design services work payments to:

   City of Palo Alto
   Public Works Division
   Attention: Karen Smith, Facilities Manager
   250 Hamilton Avenue
   P. O. Box 10250
   Palo Alto, CA 94303.

3. The individual referred to in the preceding paragraph (the “PW Manager”) will review and approve the submittals and initiate the process of making payments to the Foundation in a timely manner in accordance with the City’s usual accounts payable procedures. The PW Manager may refer her approval of the Foundation’s invoices to the City’s Real Property Manager, who will forward the approved invoices the City’s accounts payable personnel for reimbursement, directly, to the Foundation. The City will not assure the Foundation that reimbursement will occur within any specified time frame after submittal; provided, however, the City will endeavor to pay the Foundation in a timely manner.

B. Payments for Design Services:

1. The City will contribute the maximum sum of $290,000 for the design consultant services costs of the Project, which sum will be paid to the Foundation in the installments, as outlined in Section 4.3(A) of this Design Agreement, following the receipt of the Foundation’s documentation in support of each installment payment request.

2. The required documentation will consist of copies of the Architect’s contract with the Foundation, the Architect’s invoices, as submitted to the Foundation for payment, with documentation of all design and plan development services rendered to that point in time, together with the Foundation’s proof of payment of such invoices.

3. Following its receipt of the documentation submitted by the Foundation, the City will process each of the installment payments to the Foundation, based
upon the Architect’s determination that the design has achieved the completion percentage stages specified in Section 4.3(A) of this Design Agreement.

4. Notwithstanding any other provision in this Section B of Exhibit “C” to the contrary, the City will not be required to make payment of any amount unless and until Exhibit “F” is executed by the Foundation and the Architect and submitted to the City Attorney, who will review it for compliance with the requirements of Section 6.2 of this Design Agreement.
**CERTIFICATE OF LIABILITY INSURANCE**

**PRODUCER**
LIC #0867768
1-925-416-7862
ISO Insurance Services
3875 Hopyard Road, Ste. 240
Pleasanton, CA 94588
Reno Caldwell

**INSURED**
Mark Cavagnero Associates
A California Corporation
1045 Sansome Street, Ste. 200
San Francisco, CA 94111

**DATE (MMD/YY)**
03/05/08

**THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFER NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.**

**INSURERS AFFORDING COVERAGE**

<table>
<thead>
<tr>
<th>INSURER</th>
<th>POLICYHOLDER</th>
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<tbody>
<tr>
<td>A</td>
<td>Travelers Indemnity Company of Connecticut</td>
</tr>
<tr>
<td>B</td>
<td>Travelers Property Casualty Company of America</td>
</tr>
<tr>
<td>C</td>
<td>Endurance RE</td>
</tr>
<tr>
<td>D</td>
<td>Ace American Insurance Company</td>
</tr>
</tbody>
</table>

**COVERAGES**

The policies of insurance listed below have been issued to the insured named above for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies. Aggregate limits shown may have been reduced by paid claims.

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<tr>
<th>INSURER</th>
<th>TYPE OF INSURANCE</th>
<th>POLICY NUMBER</th>
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<td>02/15/09</td>
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<td>BODILY INJURY (Per person) $</td>
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<td>BODILY INJURY (Per accident) $</td>
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<td>09/01/07</td>
<td>09/01/08</td>
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<td>Annual Aggregate $1,000,000</td>
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**DESCRIPTION OF OPERATIONS/Locations/Vehicles/Exclusions Added by Endorsement/Special Provisions**

All operations of the named insured, including the agreement between the Palo Alto Art Center Foundation and Mark Cavagnero Associates for the renovation project of the Palo Alto Art Center.

**GENERAL LIABILITY:** See Additional Insured endorsement attached.

**GENERAL LIABILITY Additional Insured:** The City of Palo Alto, its Council members, officers, employees, and authorized agents and The Palo Alto Art Center Foundation and its officers, directors and employees.

**CERTIFICATE HOLDER**
Director, Palo Alto Art Center
Attn: Linda Craighead
Director, Division of Arts & Sciences
1313 Newell Road
Palo Alto, CA 94303

**ADDITIONAL INSURED: INSURER LETTER:**

**CANCELLATION**

*10 DAYS NOTICE FOR NON-PAYMENT OF PREMIUM*

Should any of the above described policies be cancelled before the expiration date thereof, the issuing insurer will notify the certificate holder at least 30 days written notice to the certificate holder named to the left.

**AUTHORIZED REPRESENTATIVE**

© ACORD CORPORATION 1988
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED
(ARCHITECTS, ENGINEERS AND SURVEYORS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SCHEDULE

NAME OF PERSON(S) OR ORGANIZATION(S):
The City of Palo Alto, its Council members, officers, employees, and authorized agents and the Palo Alto Art Center Foundation and its officers, directors, and employees.

PROJECT/LOCATION OF COVERED OPERATIONS:
The agreement between the Palo Alto Art Center Foundation and Mark Cavagnero Associates for the renovation project of the Palo Alto Art Center

1. WHO IS AN INSURED (Section II) is amended to include the person or organization shown in the Schedule above as an additional insured on this Coverage Part, but:
   a. Only with respect to liability for “bodily injury”, “property damage” or “personal injury”; and
   b. If the injury or damage arises out of the performance, by you or your subcontractor, of “your work” on or for the project, or at the location, shown in the Schedule above. Such person or organization does not qualify as an additional insured with respect to their independent acts or for “bodily injury”, “property damage” or “personal injury” for which that person or organization has assumed liability in a contract or agreement.

2. The insurance provided to the additional insured by this endorsement is limited as follows:
   a. This insurance does not apply to the rendering of or failure to render any “professional services”.
   b. The limits of insurance afforded to the additional insured shall be the limits which you agreed to provide in a “contract or agreement requiring insurance” for that additional insured, or the limits shown in the Declarations for this Coverage Part, whichever are less. This endorsement does not increase the limits of insurance stated in the LIMITS OF INSURANCE (Section III) for this Coverage Part.

3. The following is added to Paragraph a. of

4. Other Insurance in COMMERCIAL
GENERAL LIABILITY CONDITIONS
(Section IV):

However, if you specifically agree in a
"contract or agreement requiring
insurance" that, for the additional
insured shown in the Schedule, the
insurance provided to that additional
insured under this Coverage Part must
apply on a primary basis, or a primary
and non-contributory basis, this
insurance is primary to other
insurance that is available to such
additional insured which covers such
additional insured as a named
insured, and we will not share with the
other insurance, provided that:

(1) The "bodily injury" or "property
damage" for which coverage is
sought occurs; and

(2) The "personal injury" for which
coverage is sought arises out of
an offense committed;

after you have entered into that
"contract or agreement requiring
insurance" for such additional insured.
But this insurance still is excess over
valid and collectible other insurance,
whether primary, excess, contingent
or on any other basis, that is available
to the additional insured when the
additional insured is also an additional
insured under any other insurance.

4. The following is added to Paragraph 8.
Transfer Of Rights Of Recovery Against
Others To Us in COMMERCIAL
GENERAL LIABILITY CONDITIONS
(Section IV):

We waive any rights of recovery we may
have against the additional insured shown
in the Schedule above because of
payments we make for "bodily injury",
"property damage" or "personal injury"

arising out of "your work" on or for the
project, or at the location, shown in the
Schedule above, performed by you, or on
your behalf, under a "contract or
agreement requiring insurance" with that
additional insured. We waive these rights
only where you have agreed to do so as
part of the "contract or agreement
requiring insurance" with that additional
insured entered into by you before, and in
effect when, the "bodily injury" or "property
damage" occurs, or the "personal injury"
offense is committed.

5. As respects the insurance provided to the
additional insured by this endorsement,
the following definition is added to
DEFINITIONS (Section V):

"contract or agreement requiring
insurance" means that part of any
contract or agreement under which you
are required to include the person or
organization shown in the Schedule as an
additional insured on this Coverage Part,
provided that the "bodily injury" and
"property damage" occurs, and the
"personal injury" is caused by an offense
committed:

a. After you have entered into that
contract or agreement;

b. While that part of the contract or
agreement is in effect; and

c. Before the end of the policy
period.

All other terms of your policy remain the
same.
EXHIBIT "E"
CERTIFICATION OF NONDISCRIMINATION

As suppliers of goods or services to the City of Palo Alto, the firm and individuals listed below certify that they do not discriminate in employment of any person because of race, skin color, gender, age, religion, disability, national origin, ancestry, sexual orientation, housing status, marital status, familial status, weight or height of such person; that they are in compliance with all Federal, State and local directives and executive orders regarding nondiscrimination in employment.

1. If Proposer is INDIVIDUAL, sign here:

   Date: ______________________

   __________________________
   Proposer's Signature

   __________________________
   Proposer's typed name and title

2. If Proposer is PARTNERSHIP or JOINT VENTURE, at least (2) Partners or each of the Joint Venturers shall sign here:

   __________________________
   Partnership or Joint Venture Name (type or print)

   Date: ______________________

   __________________________
   Member of the Partnership or Joint Venture signature

   Date: ______________________

   __________________________
   Member of the Partnership or Joint Venture signature

3. If Proposer is a CORPORATION, the duly authorized officer(s) shall sign as follows:

   The undersigned certify that they are respectively:

   __________________________
   and _______________________
   Title

   Of the corporation named below; that they are designated to sign the Proposal Cost Form by resolution (attach a certified copy, with corporate seal, if applicable, notarized as to its authenticity or Secretary's certificate of authorization) for and on behalf of the below named CORPORATION, and that they are authorized to execute same for and on behalf of said CORPORATION.

   __________________________
   Corporation Name (type or print)

   By: ________________________

   __________________________
   Date: ______________________

   Title: _______________________

   __________________________
   By: ________________________

   __________________________
   Date: ______________________

   Title: _______________________
EXHIBIT “F” – ATTACHMENT B TO AIA AGREEMENT, AS AMENDED

AMENDMENT

This Amendment is entered into this _____ day of_______________, 2008, between Palo Alto Art Center Foundation (the “Owner”), and Mark Cavagnero Associates, a California corporation (the “Architect”).

RECITALS

The Owner and the Architect are parties to an “Abbreviated Standard Form of Agreement Between Owner and Architect” dated effective as of September 24, 2007 (the “Agreement”), concerning certain property located at 1313 Newell Road, Palo Alto, California (the “Property”). Owner and Architect desire to amend the Agreement as provided below.

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto agree to amend the Agreement as follows:

AGREEMENT

Attachment B to the Agreement is hereby deleted in its entirety and is replaced with Attachment B hereto.

IN WITNESS WHEREOF, the parties have executed this Amendment as of the date first written above.

"Owner"
Palo Alto Art Center Foundation, a California non-profit corporation

By:______________________________

Its:______________________________

"Architect"
Mark Cavagnero Associates, a California corporation

By:______________________________

Its:______________________________
Verification of Existing Conditions

Inasmuch as the remodeling and/or rehabilitation of an existing building requires that certain assumptions be made regarding existing conditions, and because some of these assumptions may not be verifiable without expending additional sums of money, or destroying otherwise adequate or serviceable portions of the building, the Owner agrees that except for negligence on the part of the Architect or its consultants, the Architect will have no liability arising out of the reasonable assumptions made regarding existing conditions. This agreement does not include services relative to detailed investigation, surveys, evaluations, inventories or appraisals of existing conditions, facilities, equipment or furnishings, or to make measured drawings thereof, or to verify the accuracy of drawings or other information furnished by others.

INDEMNITY AND INSURANCE

Architect agrees to protect, indemnify, defend, and hold harmless the City of Palo Alto ("City"), its Council member, officers, employees and agents, and the Owner and its directors, officers and employees from any and all demands, claims, or liability of any nature, including death or injury to any person, property damage or any other loss, to the extent caused by Architect's, its officers', agents', or employees' negligent acts, errors, or omissions, or willful misconduct, or conduct for which applicable law may impose liability on Architect in the negligent performance of its obligations under this Agreement. The Owner and the Architect agree that the City shall be an express third party beneficiary of the indemnity of the Architect under this paragraph.

Architect, at its sole cost and expense, will obtain and maintain, in full force and effect during the term of this Agreement, the insurance coverage described in Article 12.5 insuring not only Architect and its consultants, if any, but also, with the exception of the worker’s compensation, employer’s liability and professional liability insurance, naming each of the Owner and City as an additional insured concerning Architect’s performance under this Agreement.

All the insurance coverage required hereunder will be provided through carriers with Best's Key Rating Guide ratings of A: VII or higher which are admitted to transact insurance business in the State of California.

Certificates of such insurance, preferably on the forms provided by City, will be delivered to Owner and City concurrently with the execution of this Agreement. The certificates will be subject to the approval of City’s risk manager and will contain an endorsement stating the insurance is primary coverage and will not be canceled by the insurer except after filing with the Owner and the City's city clerk thirty (30) days' prior written notice of such cancellation, (10) days' prior written notice for non-payment of premium and that the Owner and the City are each named as an additional insured except in policies of workers’ compensation, employer’s liability, and professional liability insurance. Current certificates of such insurance will be kept on file at all times during this Agreement with the city clerk.

The procuring of such required policy or policies of insurance will not be construed to limit Architect’s liability hereunder nor to fulfill the indemnification provisions of this Agreement. Notwithstanding the policy or policies of insurance, Architect will be obligated for the full and the total amount of any damage, injury, or loss caused by or directly arising as a result of the negligent Services performed under this Agreement, including such damage, injury, or loss arising after the Agreement is terminated or the term has expired.

Assignment.

Notwithstanding anything in the Agreement to the contrary, Owner and Architect acknowledge that the land and buildings comprising the Art Center that is the subject of this Agreement are owned by the City and not by Owner. Accordingly, Owner shall have the right to assign this Agreement to the City without the consent of the Architect.
June 28, 2007

Jeannie Duisenberg, President
Palo Alto Art Center Foundation
c/o Palo Alto Art Center
1313 Newell Road
Palo Alto, CA 94303

RE: Palo Alto Art Center Improvements

Dear Ms. Duisenberg:

The City of Palo Alto (the "City") and the Palo Alto Art Center Foundation (the "Foundation") wish to collaborate in the Phase I construction of new improvements and alterations to the existing improvements (the "Project") at the Palo Alto Art Center (the "Art Center"). The City is interested in providing to the Foundation for a period of time land and facilities which comprise the Art Center (the "Premises") to permit the alteration of the Art Center. The City understands that the Foundation has an interest in signing a contract with the City in regard to the City's and the Foundation's commitment to complete the Project, on mutually acceptable terms and conditions, as follows:

1. The term of any option agreement, lease, license or other contract shall be the construction period, or as otherwise may be agreed to by the parties.

2. The Foundation will contribute significant funds (currently estimated at approximately $4.8 million) over and above the amount to be contributed by the City, as described in paragraph 9 below, to be used to cover the Foundation's administrative expenses in relation to the Project and acquire the services of an architect, a general contractor, a project manager, capital campaign consultants and/or other professional(s) with respect to the fund-raising, design and

070014 gk 0072902
construction of the Project and defray Project-related costs and expenses. The services of contractors shall be procured in accordance with informal competitive selection processes as determined by the Foundation.

3. The Foundation will submit the final plans, specifications and working drawings for the design and construction of the Project to the City’s Departments of Community Services, Planning and Community Environment, and Public Works for review and approval of, as appropriate, the City’s boards and commissions and the Council.

4. The Foundation will obtain and maintain all required City permits and other authorizations and furnish any financial and non-financial security, during the construction, as appropriate and upon request, to the City.

5. The Foundation will furnish a copy of its articles of organization and other information relating to its corporate status to the City for its review and approval.

6. The Foundation will continue and otherwise undertake a community outreach and capital fundraising campaign to garner the community’s input and support for the Project.

7. The Foundation will surrender possession of the Premises and transfer title to the Project, upon completion thereof, to the City.

8. The City will provide staff support and other assistance, upon request, to the Foundation in connection with the execution of the Project.

9. The City has currently earmarked Capital Improvement Program funds in the budget in the amount of $1.75 million as part of its Infrastructure Management Plan for the Art Center, to be applied to the costs referred to in paragraph 2 above.

10. The City will waive the Foundation’s obligation to pay Project-related fees and charges that are due
Palo Alto Art Center Foundation
June 28, 2007
Page 3

and payable to the City's General Fund. However, the Foundation will be obligated to pay all utility services rates, fees and charges that are due and payable to the City's Enterprise Fund in connection with the Project.

11. Any contract between the parties will be subject to the approval of the Council and the approval as to form by the City Attorney.

This letter is not intended to be a contract between the parties with respect to the Project. It is intended to facilitate discussion of the Project and is only an expression of the basis on which the parties would enter into a contract regarding the Project and the rights and obligations of the parties. The City requests the Foundation's acknowledgement of this letter of intent below in order that the City may proceed to develop with the Foundation, a draft contract concerning the Project.

The City does not undertake any obligation or other commitment to a realtor or real estate professional in connection with any services rendered concerning this matter.

Sincerely,

CITY OF PALO ALTO

EMILY HARRISON
Assistant City Manager

The Palo Alto Art Center Foundation hereby acknowledges receipt of the foregoing proposed general terms and conditions of a contract between the parties pertaining to the Project and agrees that a next step is the drafting of a contract agreeable between the parties providing for the development of the Project.

By:
Title: President
ATTACHMENT C

ART CENTER ELECTRICAL & MECHANICAL UPGRADES (PF-07000)

Description: This project will replace original mechanical and electrical equipment and systems to meet current occupant need, provide code compliance, and optimize operation and energy efficiency. This project is proposed to be completed in coordination with a building addition funded by the Art Center Foundation.

Justification: Many components of the mechanical and electrical systems are original and have reached the end of their useful lives.

Consultant Services Scope: See Supplemental Information.

Supplemental Information: Consultant services may include conceptual design, design development, construction documents, and construction administration. Consultant will analyze existing systems and design renovations to meet current code and user need. Consultant services may also include structural engineering, architectural design, mechanical and electrical engineering. Should the Art Foundation funding become available prior to July 1, 2008 this project will be moved forward.

CIP FACTS:
- Continuing
- Project Status: Design
- Timeline: 2008-2009
- Overall Project Completion: 0%
- Percent Spent: 0.00%
- Managing Department: Public Works
- Comprehensive Plan: Policy C-24
- Board/Commission Review: PTC

IMPACT ANALYSIS:
- Environmental: This project is categorically exempt under CEQA Sec 15301.
- Design Elements: Will require ARB review for exterior elements.

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<td>PY Actuals as of 12/31/07</td>
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