



# City of Palo Alto

## City Council Staff Report

(ID # 7850)

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**Report Type: Consent Calendar**

**Meeting Date: 3/27/2017**

**Summary Title: Public Art Contract Approval**

**Title: Approval of a Contract With Artist Mary Lucking in the Not-to-Exceed Amount of \$100,000 for the Design Development, Fabrication and Installation of Artwork Associated With the Highway 101 Bike and Pedestrian Bridge**

**From: City Manager**

**Lead Department: Community Services**

### **Recommendation**

Staff recommends that Council approve a contract with artist Mary Lucking for the design, fabrication and installation of artwork associated with the Highway 101 Bike and Pedestrian Bridge project (Attachment A).

### **Background**

The City of Palo Alto's Public Art Program manages the process for incorporating public art into municipal projects. (Palo Alto Municipal Code section 2.26.070, Public Art for Municipal Projects.) The Highway 101 Bike and Pedestrian Bridge Project is a high visibility public works project, with multiple opportunities to incorporate artwork. Staff initiated the artist selection process in November 2016. After reviewing the qualified artists in the Public Art pre-qualified pool, staff presented the work of twenty three different artists to a selection panel composed of the project Architect Claudia Guadagne, Assistant Director of Community Services Rhyena Halpern who oversees the Arts & Science Division, Public Art Commission (PAC) member Mila Zelkha, Bike Bridge Competition panelist and former ARB member Judith Wasserman, Cubberley Artist Studio Program artist Mel Day, Palo Alto Art Center Curator Selene Foster, Environmental Advocate Jerry Hearn, and former ARB member and cyclist Lee Lippert. From that selection panel, five artists were selected for an interview. Once the interviews were completed, Mary Lucking was selected as the artist for the project. The Public Art Commission approved Mary Lucking as the project artist at its February 16, 2017 meeting. The panel and the PAC selected Lucking because of her artistic excellence and extensive experience integrating artwork into bike and pedestrian bridges, transportation hubs and other high traffic public spaces utilizing durable materials. With nearly twenty years of experience in the field of public art, three of

Lucking's projects have been recognized for artistic excellence by the Americans for the Arts Public Art Network, and her artworks can be seen across the country. Lucking's gift for using industrial materials in a manner that feels light and organic made her an ideal candidate for this project adjacent to the Baylands. . . .

The Highway 101 Pedestrian Overpass Project at Adobe Creek will replace an existing underpass that is available only half the year (on average) due to seasonal flooding. It would also complement an existing, overpass that is 1.25 miles north. The new overcrossing will also include a 0.13 mile Class I trail connection along an existing Santa Clara Valley Water District maintenance road.

In the heart of Silicon Valley, Palo Alto (along with its neighbor to the south, Mountain View) is home to hundreds of technology and research-based companies, including a number of major employers such as Google, Intuit, and Space Systems Loral that have clustered in close proximity to Highway 101 and the Bay Trail. To better link these growing job centers with regional trails and bicycle facilities, and improve access to superb recreation opportunities like the Baylands, Palo Alto has prioritized the funding and construction of a new, year-round bicycle and pedestrian overcrossing over Highway 101 at Adobe Creek near the City's southern border.

The City is under contract with Biggs Cardosa and Associates (BCA) for design of the Bridge. In November 2016, Council approved a preliminary (15%) Bowstring Truss Bridge concept design, with an estimated construction budget of \$10 million. The public art allocation will be \$100,000.

## **Discussion**

The public art goals for the project as described in the artist Request For Qualifications will guide the design process. Those goals are:

- The original artwork will be well-integrated into the design of the new bridge.
- The artwork should serve as a gateway between Palo Alto and the Baylands.
- The artwork should activate the bridge and have a strong day and night presence to enhance commuter experience for pedestrians, cyclists and highway commuters.
- The artwork should communicate the unique character of the surrounding areas, especially Baylands Nature Preserve.
- The artwork may be functional and may incorporate such elements as seating, wayfinding, information communication, or other functional elements.
- The artwork should be fabricated using durable materials that require minimal maintenance and upkeep.

The artist will visit Palo Alto in April to meet with the design team to explore potential options for art integration into the bridge, tour the site of the future bridge, and gather all of the materials and community input gathered about the project and site she needs to begin the design process. Lucking will share with staff and the design team some initial concepts for art integration. Once a concept is agreed to by the design team, and the team agrees to how the artwork will be integrated into the bridge construction, the art concept will go to the Public Art Commission at a public meeting for approval. The Council has a longstanding policy, codified in the Municipal Code, of refraining from direct involvement in selection of artists and approval of artwork designs and plans. The Council refers these matters to Public Art staff and the Public Art Commission. (Municipal Code - section 2.26.060.)

Once approved by the public art commission, the artwork conceptual design will be integrated into future public meetings for input as the design process moves forward. Detailed design of the bridge and how the artwork is integrated into the construction is developed in close partnership with Public Works and BCA.

### **Timeline**

Getting the artist integrated with the design team early in the process is essential to have better integration of the public art as well as for identifying opportunities to leverage construction dollars to maximize impact of the artwork. Mary Lucking will likely come to Palo Alto to meet with the design team in late March to early April, and begin her design process during the 35% design. The project construction will begin early 2019 and is scheduled to be completed in 2020.

### **Resource Impact**

The funds in the amount of \$100,000 for the contract will come from the pooled art funds in the Art in Public Spaces CIP (AC-86017). The Public Art for Municipal Projects Ordinance (Ordinance Number 5301, Municipal Code 2.26.070) requires that 1% of the CIP budget for municipal projects is allocated for the commission of public art. The Highway 101 Pedestrian/Bicycle Overpass Project CIP (PE-11011) contributed 1% of the project's funding to the Art in Public Spaces CIP in order to fund the public art component of this project recommended in this memorandum.

### **Environmental Review**

Staff plans to integrate the work of the artist into the 35% bridge design for purposes of environmental review.

#### **Attachments:**

- ATTACHMENT A: Draft Contract
- ATTACHMENT A: Mary Lucking Draft Contract

**CITY OF PALO ALTO CONTRACT NO: S17167868**

**AGREEMENT BETWEEN THE CITY OF PALO ALTO AND ARTIST MARY LUCKING FOR PROFESSIONAL SERVICES (CONCEPT AND DESIGN DEVELOPMENT, FABRICATION AND INSTALLATION)**

This Agreement is entered into on this 17th of March, 2017, ("Agreement") by and between the CITY OF PALO ALTO, a California chartered municipal corporation ("CITY"), and Mary Katherine Lucking, located at 530 E McDowell Rd #107-284, Phoenix, AZ 85004 ("ARTIST").

**RECITALS**

The following recitals are a substantive portion of this Agreement.

- A. CITY intends to place and provide a work of art for the new Adobe Creek / Highway 101 Pedestrian and Bicycle Bridge connecting Palo Alto and the Baylands Nature Preserve ("Art Work") and desires to engage an ARTIST to provide research, concept and design development, fabrication and installation in connection with the Art Work (the "Services").
- B. ARTIST has represented that it has the necessary professional expertise, qualifications, and capability, and all required licenses and/or certifications to provide the Art Work and Services.
- C. ARTIST was selected by a panel of art professionals and stakeholders from a pool of applicants, as the most qualified to design and fabricate the Art Work.
- D. The source of funds for the Art Work and Services derives from funds made available from the City of Palo Alto's CIP funds identified through the Municipal Percent for Art Ordinance #5301.
- E. CITY in reliance on these representations desires to engage ARTIST to provide the Art Work and Services as more fully described in Exhibit "A", attached to and made a part of this Agreement.
- F. The Art Work is considered a permanent installation. "Permanent Installation" means a work of art in a public place intended to remain or remaining for one year or more after its completion by ARTIST, and has an expected lifespan for 20 years, provided, however, CITY may remove the Art Work in a accordance with CITY's De-Accessioning Policy or as described in Section 16 of this Agreement. Should any damage or impairment occur, CITY will attempt to contact ARTIST before taking further action.
- G. CITY, through City's Public Art Program will accession the Art Work into the City's Collection of Public Art and own all right, title and interest in the Art Work.

NOW, THEREFORE, in consideration of the recitals, covenants, terms, and conditions, in this Agreement, the parties agree:

## **AGREEMENT**

**SECTION 1. SCOPE OF SERVICES.** ARTIST shall perform the Services and provide the Art Work as described in Exhibit "A" in accordance with the terms and conditions contained in this Agreement. The performance of all Services and provision of the Art Work shall be to the reasonable satisfaction of CITY.

### **SECTION 2. TERM.**

The term of this Agreement shall be from the date of its full execution through December 30, 2020 unless terminated earlier pursuant to Section 23 of this Agreement.

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**SECTION 3. SCHEDULE OF PERFORMANCE.** Time is of the essence in the performance of Services and provision of the Art Work under this Agreement. ARTIST shall complete the Services and provide the Art Work within the term of this Agreement and in accordance with the schedule set forth in Exhibit “B”, attached to and made a part of this Agreement. Any Services for which times for performance are not specified in this Agreement shall be commenced and completed by ARTIST in a reasonably prompt and timely manner based upon the circumstances and direction communicated to the ARTIST. CITY’s agreement to extend the term or the schedule for performance shall not preclude recovery of damages for delay if the extension is required due to the fault of ARTIST.

**SECTION 4. NOT TO EXCEED COMPENSATION.** The compensation to be paid to ARTIST for performance of the Services and provision of the Art Work described in Exhibit “C”, including both payment for professional services and reimbursable expenses, shall not exceed Ninety Thousand Dollars (\$90,000.00).

In the event Additional Services are authorized, the total compensation for services and reimbursable expenses shall come out of contingency fund and not exceed 10% (\$10,000). Any work performed or expenses incurred for which payment would result in a total exceeding the maximum amount of compensation set forth herein shall be at no cost to the CITY.

The applicable rates and schedule of payment are set out in Exhibit “C”, entitled “COMPENSATION SCHEDULE”, which is attached to and made a part of this Agreement.

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Additional Services, if any, shall be authorized in accordance with and subject to the provisions of Exhibit “C”. ARTIST shall not receive any compensation for Additional Services performed without the prior written authorization of CITY. Additional Services shall mean any work that is determined by CITY to be necessary for the proper completion of the Art Work, but which is not included within the Scope of Services, described in Exhibit “A”.

ARTIST acknowledges that CITY desires that the Art Work, including its conceptual design and content be unique. ARTIST agrees to not duplicate the Art Work without the express written consent of CITY.

**SECTION 5. INVOICES.** In order to request payment, ARTIST shall submit invoices to the CITY describing the services performed and the applicable charges (including an identification of personnel who performed the services, hours worked, hourly rates, and reimbursable expenses), based upon the ARTIST’s payment schedule (set forth in Exhibit “C-1”). If applicable, the invoice shall also describe the percentage of completion of each task. The information in ARTIST’s payment requests shall be subject to verification by CITY. ARTIST shall send all invoices to the City’s project manager at the address specified in Section 13 below. The City will generally process and pay invoices within thirty (30) days of receipt.

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**SECTION 6. QUALIFICATIONS/STANDARD OF CARE.** All of the Services and the provision of Art Work shall be performed by ARTIST or under ARTIST's supervision. ARTIST represents that it possesses the professional and technical personnel necessary to perform the Services and provide the Art Work required by this Agreement and that the personnel have sufficient skill and experience to perform the Services assigned to them. ARTIST represents that it, its employees and subcontractors, if permitted, have and shall maintain during the term of this Agreement all licenses, permits, qualifications, insurance and approvals of whatever nature that are legally required to perform the Services.

All of the Services and the Art Work to be furnished by ARTIST under this agreement shall meet the professional standard and quality that prevail among professionals in the same discipline and of similar knowledge and skill engaged in related work throughout California under the same or similar circumstances.

**SECTION 7. COMPLIANCE WITH LAWS.** ARTIST shall keep itself informed of and in compliance with all federal, state and local laws, ordinances, regulations, and orders that may affect in any manner the performance of the Services and the provision of Art Work or those engaged to perform Services under this Agreement. ARTIST shall procure all permits and licenses, pay all charges and fees, and give all notices required by law in the performance of the Services and provision of the Art Work.

**SECTION 8. ERRORS/OMISSIONS.** ARTIST shall correct, at no cost to CITY, any and all errors, omissions, or ambiguities in the work product submitted to CITY, provided CITY gives notice to ARTIST. If ARTIST has prepared plans and specifications or other design documents to construct and install the Art Work, ARTIST shall be obligated to correct any and all errors, omissions or ambiguities discovered prior to and during the course of construction and installation of the Art Work. This obligation shall survive termination of the Agreement.

**SECTION 9.** *Left blank by agreement of the parties.*

**SECTION 10. INDEPENDENT CONTRACTOR.** It is understood and agreed that in performing the Services under this Agreement ARTIST, and any person employed by or contracted with ARTIST to furnish labor and/or materials under this Agreement, shall act as and be an independent contractor and not an agent or employee of the CITY.

**SECTION 11. ASSIGNMENT.** The parties agree that the expertise and experience of ARTIST are material considerations for this Agreement. ARTIST shall not assign or transfer any interest in this Agreement nor the performance of any of ARTIST's obligations hereunder without the prior written consent of the city manager. Consent to one assignment will not be deemed to be consent to any subsequent assignment. Any assignment made without the approval of the city manager will be void.

**SECTION 12. SUBCONTRACTING**

ARTIST shall not subcontract any portion of the work to be performed under this Agreement without the prior written authorization of the city manager or designee.

ARTIST shall be responsible for directing the work of any sub-CONTRACTORS and for any compensation due to sub-CONTRACTORS. CITY assumes no responsibility whatsoever concerning compensation. ARTIST shall be fully responsible to CITY for all acts and omissions of a sub-CONTRACTOR. ARTIST shall change or add sub-CONTRACTORS only with the prior approval of the city manager or his designee.

**SECTION 13. PROJECT MANAGEMENT.** ARTIST will serve as the project manager with supervisory responsibility for the performance, progress, and execution of the Services and provision of the Art Work. If circumstances cause the substitution of key personnel for any reason, the appointment of substitute personnel will be subject to the prior written approval of the CITY's project manager. ARTIST, at CITY's request, shall promptly remove personnel who CITY finds do not perform the Services in an acceptable manner, are uncooperative, or present a threat to the adequate or timely completion of the Project or a threat to the safety of persons or property.

The City's Project Manager is Elise DeMarzo, Public Art Program Director, Division of Arts & Sciences, Community Services Department, 1313 Newell Road, Palo Alto, CA 94303, phone: 650-617-3517. The CITY may designate an alternate project manager from time to time.

**SECTION 14. PROPERTY RIGHTS IN ART WORK; VARA WAIVER.**

14.1. CITY commissions ARTIST to design and create a work of art (the "Art Work") to be displayed at a location in Palo Alto, as determined by CITY, acting in its sole discretion. Subject to the rights granted by ARTIST to CITY, as described below, and in consideration of the substantial compensation that CITY will pay to ARTIST for the Art Work, CITY acquires all right, title an interest in the Art Work, and ARTIST retains all copyrights in the Art Work that ARTIST will deliver to CITY under this Agreement.

14.2. ARTIST grants to CITY a non-exclusive, royalty-free, irrevocable license to do the following with respect to the Art Work, in whatever media, including, without limitation, digital and electronic media, that now or hereafter are known: (A) use and display the Art Work; (B) make and distribute, and authorize the making and distribution of, two-dimensional images and reproductions of the Art Work; (C) use any images and reproductions for City-related purposes, including, without limitation, advertising-, branding-, education-, information-, promotion- and publicity-related materials; and (D) sublicense the rights granted herein to third parties to fulfill the public art purposes of the City's commissioning of the Art Work.

CITY will make reasonable efforts to include ARTIST's name and the name of the Art Work on all reproductions, including, without limitation, electronic or digital reproduction.

14.3. With respect to the Art Work, ARTIST waives any and all claims, arising at any time against CITY, its elected and appointed officials, officers, employees, agents and representatives, that may be grounded in any federal law, including, without limitation, the Visual Artists Rights Act (17 U.S.C. §106A). California law, including, without limitation, the California Art Preservation Act (Cal. Civil Code §987 *et seq.*), or local law that may relate to the moral rights of ARTIST or protection of the integrity of the Art Work.

**SECTION 15. ARTIST'S WARRANTY**

ARTIST represents and warrants that:

15.1. Prior to transfer of title of the Art Work to the City, ARTIST is the sole and absolute owner of the Art Work, the copyrights pertaining to the Art Work, and all the rights associated or relating to it.

15.2. ARTIST has not previously sold, assigned, licensed, granted, encumbered, or utilized the Art Work or any element thereof, in any manner which may affect or impair the rights granted pursuant to this Agreement including without limited to, inhibiting the CITY's ability to show the work, reproduce the Art Work as defined in Section 22, or maintain/conservate the work into the future.

15.3. All Art Work created by ARTIST under this Agreement, whether created by ARTIST alone or in collaboration with others, is wholly original and does not infringe upon or violate the rights of any third party.

15.4. ARTIST has acquired all rights to any third party software or other component of the Art Work necessary for the operation and display of the Art Work.

15.5. ARTIST has the full power to enter into and perform this Agreement and to grant the rights contained in this Agreement.

15.6. ARTIST warrants that the Art Work is the result of the artistic efforts of ARTIST and that it will be delivered full and clear of any liens, claims and encumbrances of any type.

15.7. These representations and warranties shall survive the termination or other extinction of this Agreement.

#### **SECTION 16. FUTURE MODIFICATION OR RELOCATION**

16.1. CITY has the right to remove the Art Work from the Site at any time. In addition, in the event that any element of the Art Work constitutes a public safety hazard, CITY has the right to remove the element posing the public safety hazard.

16.2. Except to the extent permitted by subsection A above, CITY agrees not to intentionally modify the Art Work without first obtaining ARTIST's written consent.

16.3. CITY shall have the right to donate or sell the Art Work at any time. Before exercising this right, CITY, by written notice to ARTIST at ARTIST's last known address, agrees to give ARTIST the opportunity to purchase the Art Work for the greater of the Total Not to Exceed Compensation in Section 4 above or the amount of any offer which CITY has received for the purchase of the Art Work, plus all costs associated with the removal of the Art Work from the Site, clean-up of the Site and delivery to ARTIST. ARTIST shall have thirty (30) days from the date of CITY's notice to exercise the option to purchase the Art Work.

16.4. Without limitation of CITY's rights under Section 16 it is CITY's practice to notify and consult with the ARTIST before intentionally moving, relocating or removing artwork. If, after the initial discussion, ARTIST and CITY do not reach a mutually agreeable decision regarding relocation or modification of the Art Work, or do not agree upon compensation to ARTIST for providing ARTIST's input on proposed relocation or modification, CITY may take such actions as CITY deems necessary in management of the Art Work, and no further agreement or compensation is due to ARTIST.

16.5. Notwithstanding the foregoing, whether or not CITY notified or consulted with ARTIST, if CITY removes, relocates, or modifies the Art Work without ARTIST's prior written consent, CITY shall not be liable to ARTIST for damages. Under such circumstances, if ARTIST objects to the modification or new location, then (i) CITY may restore the Art Work or replace the Art

Work to its original location, or (ii) if the CITY does not restore the Art Work or to relocate the Art Work to the original location, ARTIST may request that ARTIST's association with Art Work be severed. In either event, CITY shall have no further obligation or liability to ARTIST.

16.6. If CITY moves the Art Work from its originally installed location without ARTIST's oversight, ARTIST shall not be held responsible for the structural integrity or safety of the Art Work to the extent that CITY's action impaired the structural integrity or safety of the Art Work, nor shall ARTIST be held responsible for code compliance of the Art Work in the new location.

16.7. ARTIST's rights under this Agreement cease with ARTIST's death and do not extend to ARTIST's heirs, successors or assigns.

## **SECTION 17. MAINTENANCE**

### **17.1. MAINTENANCE, REPAIRS AND RESTORATION**

As a condition of and prior to final acceptance of the Art Work, ARTIST shall supply CITY with written maintenance instructions. During ARTIST's lifetime, ARTIST shall supply, at no charge, advice as to problems arising in relation to maintenance of the Art Work.

CITY shall have the right to determine, after consultation with ARTIST and a professional conservator, when and if repairs and restorations to the Art Work will be made. It is the policy of CITY to consult with ARTIST regarding repairs and restoration which are undertaken during ARTIST's lifetime when that is practicable. CITY shall make every reasonable effort to consult with ARTIST and a professional conservator in all matters concerning repairs and restoration of the work. In the event that CITY makes repairs or restoration not approved by ARTIST, ARTIST shall have the right, at ARTIST's sole option, to have ARTIST's association with Art Work severed.

### **17.2. STANDARDS OF REPAIRS AND RESTORATION**

All repairs and restorations, whether performed by ARTIST, CITY, or by third parties responsible to ARTIST or CITY, shall be made in accordance with professionally recognized principles of conservation of artworks and in accordance with the maintenance instructions provided to CITY by ARTIST.

**SECTION 18. OWNERSHIP OF MATERIALS.** Upon delivery, all work products, including without limitation, all writings, drawings, plans, reports, specifications, calculations, documents, other materials developed under this Agreement shall be and remain the exclusive property of CITY without restriction or limitation upon their use.

**SECTION 19. AUDITS.** ARTIST will permit CITY to audit, at any reasonable time during the term of this Agreement and for three (3) years thereafter, ARTIST's records pertaining to matters covered by this Agreement. ARTIST further agrees to maintain and retain such records for at least three (3) years after the expiration or earlier termination of this Agreement.

**SECTION 20. INDEMNITY.** 20.1. To the fullest extent permitted by law, ARTIST shall protect, indemnify, defend and hold harmless CITY, its Council members, officers, employees and agents (each an "Indemnified Party") from and against any and all demands, claims, or liability of any nature, including death or injury to any person, property damage or any other loss, including all costs and expenses of whatever nature including attorneys fees, experts fees, court costs and disbursements ("Claims") resulting from, arising out of or in any manner related to performance or nonperformance by ARTIST, its officers, employees, agents or contractors under this Agreement, regardless of whether or not it is caused in part by an Indemnified Party.

20.2. Notwithstanding the above, nothing in this Section 20 shall be construed to require ARTIST to indemnify an Indemnified Party from Claims arising from the active negligence, sole negligence or willful misconduct of an Indemnified Party.

20.3. The acceptance of ARTIST's services and duties by CITY shall not operate as a waiver of the right of indemnification. The provisions of this Section 20 shall survive the expiration or early termination of this Agreement.

**SECTION 21. WAIVERS.**

The waiver by either party of any breach or violation of any covenant, term, condition or provision of this Agreement, or of the provisions of any ordinance or law, will not be deemed to be a waiver of any other term, covenant, condition, provisions, ordinance or law, or of any subsequent breach or violation of the same or of any other term, covenant, condition, provision, ordinance or law.

**SECTION 22. INSURANCE.**

22.1. ARTIST, at its sole cost and expense, shall obtain and maintain, in full force and effect during the term of this Agreement, the insurance coverage described in Exhibit "D". ARTIST and its contractors, if any, shall obtain a policy endorsement naming CITY as an additional insured under any general liability or automobile policy or policies.

22.2. All insurance coverage required hereunder shall be provided through carriers with AM Best's Key Rating Guide ratings of A-:VII or higher which are licensed or authorized to transact insurance business in the State of California. Any and all contractors of ARTIST retained to perform Services under this Agreement will obtain and maintain, in full force and effect during the term of this Agreement, identical insurance coverage, naming CITY as an additional insured under such policies as required above.

22.3. Certificates evidencing such insurance shall be filed with 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 that the insurance is primary coverage and will not be canceled, or materially reduced in coverage or limits, by the insurer except after filing with the Purchasing Manager thirty (30) days' prior written notice of the cancellation or modification. If the insurer cancels or modifies the insurance and provides less than thirty (30) days' notice to ARTIST, ARTIST shall provide the Purchasing Manager written notice of the cancellation or modification within two (2) business days of the ARTIST's receipt of such notice. ARTIST shall be responsible for ensuring that current certificates evidencing the insurance are provided to CITY's Purchasing Manager during the entire term of this Agreement.

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

### **SECTION 23. TERMINATION OR SUSPENSION OF AGREEMENT OR SERVICES.**

23.1. The City Manager may suspend the performance of the Agreement, in whole or in part, or terminate this Agreement, with or without cause, by giving ten (10) days prior written notice thereof to ARTIST. Upon receipt of such notice, ARTIST will immediately discontinue its performance of the Agreement.

23.2. ARTIST may terminate this Agreement or suspend its performance by giving thirty (30) days prior written notice thereof to CITY, but only in the event of a substantial failure of performance by CITY.

23.3. Upon such suspension or termination, ARTIST shall deliver to the City Manager immediately any and all copies of studies, sketches, drawings, computations, and other data, whether or not completed, prepared by ARTIST or its contractors, if any, or given to ARTIST or its contractors, if any, in connection with this Agreement. Such materials will become the property of CITY. Except to the extent authorized in writing by ARTIST, CITY shall not fabricate or install a work of art based on ARTIST's studies, sketches, drawings, computations or other data.

23.4. Upon such suspension or termination by CITY, ARTIST will be paid for the Services rendered or materials delivered to CITY in accordance with the scope of services on or before the effective date (i.e., 10 days after giving notice) of suspension or termination; provided, however, if this Agreement is suspended or terminated on account of a default by ARTIST, CITY will be obligated to compensate ARTIST only for that portion of ARTIST's services which are of direct and immediate benefit to CITY as such determination may be made by the City Manager acting in the reasonable exercise of his/her discretion.

23.5. No payment, partial payment, acceptance, or partial acceptance by CITY will operate as a waiver on the part of CITY of any of its rights under this Agreement.

### **SECTION 24. NOTICES.**

All notices hereunder will be given in writing and mailed, postage prepaid, by certified mail,

addressed as follows:

To CITY: Office of the City Clerk  
City of Palo Alto  
Post Office Box 10250  
Palo Alto, CA 94303

With a copy to the Public Art Program Manager

Public Art Program  
City of Palo Alto  
1313 Newell Road  
Palo Alto, CA 94303

To ARTIST: Attention of the project director  
at the address of ARTIST recited above

**SECTION 25. CONFLICT OF INTEREST.**

25.1. In accepting this Agreement, ARTIST covenants that it presently has no interest, and will not acquire any interest, direct or indirect, financial or otherwise, which would conflict in any manner or degree with the performance of the Services.

25.2. ARTIST further covenants that, in the performance of this Agreement, it will not employ sub-ARTISTS, contractors or persons having such an interest. ARTIST certifies that no person who has or will have any financial interest under this Agreement is an officer or employee of CITY; this provision will be interpreted in accordance with the applicable provisions of the Palo Alto Municipal Code and the Government Code of the State of California.

**SECTION 26. NONDISCRIMINATION.** As set forth in Palo Alto Municipal Code section 2.30.510, ARTIST certifies that in the performance of this Agreement, it shall not discriminate in the employment of any person because of the race, skin color, gender, age, religion, disability, national origin, ancestry, sexual orientation, housing status, marital status, familial status, weight or height of such person. ARTIST acknowledges that it has read and understands the provisions of Section 2.30.510 of the Palo Alto Municipal Code relating to Nondiscrimination Requirements and the penalties for violation thereof, and agrees to meet all requirements of Section 2.30.510 pertaining to nondiscrimination in employment.

**SECTION 27. ENVIRONMENTALLY PREFERRED PURCHASING AND ZERO WASTE REQUIREMENTS.** ARTIST shall comply with the City's Environmentally Preferred Purchasing policies which are available at the City's Purchasing Department, incorporated by reference and may be amended from time to time. ARTIST shall comply with waste reduction, reuse, recycling and disposal requirements of the City's Zero Waste Program. Zero Waste best practices include first minimizing and reducing waste; second, reusing waste and third, recycling or composting waste. In particular, ARTIST shall comply with the following zero waste requirements:

- All printed materials provided by ARTIST to City generated from a personal computer and printer including but not limited to, proposals, quotes, invoices, reports, and public education materials, shall be double-sided and printed on a minimum of 30% or greater post-consumer content paper, unless otherwise approved by the City's Project Manager. Any submitted materials printed by a professional printing company shall be a minimum of 30% or greater post-consumer material and printed with vegetable based inks.
- Goods purchased by ARTIST on behalf of the City shall be purchased in accordance with the City's Environmental Purchasing Policy including but not limited to Extended Producer Responsibility requirements for products and packaging. A copy of this policy is on file at the Purchasing Office.
- Reusable/returnable pallets shall be taken back by the ARTIST, at no additional cost to the City, for reuse or recycling. ARTIST shall provide documentation from the facility accepting the pallets to verify that pallets are not being disposed.

## **SECTION 28. NON-APPROPRIATION**

28.1. This Agreement is subject to the fiscal provisions of the Charter of the City of Palo Alto and the Palo Alto Municipal Code. This Agreement will terminate without any 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 only appropriated for a portion of the fiscal year and funds for this Agreement are no longer available. This section shall take precedence in the event of a conflict with any other covenant, term, condition, or provision of this Agreement.

## **SECTION 29. MISCELLANEOUS PROVISIONS.**

29.1. This Agreement will be governed by the laws of the State of California.

29.2. 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 in the County of Santa Clara, State of California.

29.3. The prevailing party in any action brought to enforce the provisions of this Agreement may recover its reasonable costs and attorneys' fees expended in connection with that action. The prevailing party shall be entitled to recover an amount equal to the fair market value of legal services provided by attorneys employed by it as well as any attorneys' fees paid to third parties.

29.4. This document represents the entire and integrated agreement between the parties and supersedes all prior negotiations, representations, and contracts, either written or oral. This document may be amended only by a written instrument, which is signed by the parties.

29.5. The covenants, terms, conditions and provisions of this Agreement will apply to, and will bind, ARTIST's heirs, successors, executors, administrators, and assignees.

29.6. If a court of competent jurisdiction finds or rules that any provision of this Agreement or any amendment thereto is void or unenforceable, the unaffected provisions of this Agreement and any amendments thereto will remain in full force and effect.

29.7. All exhibits referred to in this Agreement and any addenda, appendices, attachments, and schedules to this Agreement which, from time to time, may be referred to in any duly executed amendment hereto are by such reference incorporated in this Agreement and will be deemed to be a part of this Agreement.

29.8 If, pursuant to this contract with ARTIST, City shares with ARTIST personal information as defined in California Civil Code section 1798.81.5(d) about a California resident ("Personal Information"), ARTIST shall maintain reasonable and appropriate security procedures to protect that Personal Information, and shall inform City immediately upon learning that there has been a breach in the security of the system or in the security of the Personal Information. ARTIST shall not use Personal Information for direct marketing purposes without City's express written consent.

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29.10 The individuals executing this Agreement represent and warrant that they have the legal capacity and authority to do so on behalf of their respective legal entities.

29.11 This Agreement may be signed in multiple counterparts, which shall, when executed by all the parties, constitute a single binding agreement

IN WITNESS WHEREOF, the parties hereto have by their duly authorized representatives executed this Agreement on the date first above written.

**CITY OF PALO ALTO**

**MARY KATHERINE LUCKING**

\_\_\_\_\_  
Purchasing Manager

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_



- Attachments:  
EXHIBIT "A": SCOPE OF SERVICES  
EXHIBIT "B": SCHEDULE OF PERFORMANCE  
EXHIBIT "C": COMPENSATION  
EXHIBIT "D": INSURANCE REQUIREMENTS

**EXHIBIT "A"**  
**SCOPE OF SERVICES**

DR

## **BACKGROUND**

The purpose of this agreement is to outline the scope of work for the design, fabrication, and installation of original artwork(s) integrated into the new Adobe Creek / Highway 101 Pedestrian and Bicycle Bridge connecting Palo Alto and the Baylands Nature Preserve.

## **PROJECT DESCRIPTION**

The permanent artwork(s) will be well-integrated into the design of the new bridge and should serve as a gateway between Palo Alto and the Baylands. It will activate the bridge and have a strong day and night presence to enhance commuter experience for pedestrians, cyclists and highway commuters. The artwork will communicate the unique character of the surrounding areas, especially Baylands Nature Preserve. The artwork may be stand-alone or functional and should be fabricated using durable materials that require minimal maintenance and upkeep. The lifespan of the artwork is expected to be no less than 20 years.

## **SCOPE OF WORK**

Artist Mary Lucking will create original artwork(s) for the new Adobe Creek / Highway 101 Pedestrian and Bicycle Bridge connecting Palo Alto and the Baylands Nature Preserve. The permanent artwork(s) will be well-integrated into the design of the new bridge and should serve as a gateway between Palo Alto and the Baylands. It will activate the bridge and have a strong day and night presence to enhance commuter experience for pedestrians, cyclists and highway commuters. The artwork will communicate the unique character of the surrounding areas, especially Baylands Nature Preserve. The artwork may be stand-alone or functional and should be fabricated using durable materials that require minimal maintenance and upkeep. The project will include three phases: concept and design development (I), fabrication (II), and installation on site (III). The Artist will work in collaboration with the City staff and design team through all three phases.

Phases II and III will commence only upon the final approval of artwork design and budget by the Public Art Commission.

### **Artist Scope of Work**

- I. Concept Development Phase
  1. Begin meetings with City staff and project architects to develop a concept proposal and identify onsite needs to support the artwork installation and continued use.
  2. The artist may be asked to work with City staff to plan and conduct a community meeting to gather public input to facilitate concept development.
  3. Identify fabrication and installation needs on-site in order to leverage the existing infrastructure and maximize the impact of the identified project budget. Provide final estimates, material samples and revised timeline.
  4. Provide Construction Documentation and stamped S.E. drawings to the City Staff.

5. Provide itemized budget for Phases II and III to City staff.
6. Final approval of artwork design by the Public Art Commission and revision of design if needed.

## II. Fabrication Phase

1. Oversee fabrication process, finishing, and final inspection.
2. Finalize transportation and storage requirements if needed.

## III. Installation Phase

1. Transportation to site, site preparation, installation and testing on site.
2. Provide digital file & As-Built drawings, maintenance and care instructions for staff.

### **Responsibilities of City of Palo Alto**

1. Facilitate meeting arrangements with stakeholder groups, relevant staff and the Public Art Commission.
2. Provide access to construction drawings and plans as necessary for the development of the Public Art design development.
3. Produce and install an identification plaque for the artwork.
4. Provide electrical stubs if artwork requires lighting.

**EXHIBIT “B”  
SCHEDULE OF PERFORMANCE**

ARTIST shall perform the Services so as to complete each milestone within the number of days/weeks specified below. The time to complete each milestone may be increased or decreased by mutual written agreement of the project managers for ARTIST and CITY so long as all work is completed within the term of the Agreement. ARTIST shall provide a detailed schedule of work consistent with the schedule below within 2 weeks of receipt of the notice to proceed.

**TIMELINE - TASK :**

Concept Development Phase

**March 2017** - Contract signed

**March 2017** – Contract approved by City Council

**April 2017**

- Artist to travel to Palo Alto to meet with City staff and design team and become better acquainted with the site.
- Identify onsite needs to support the artwork installation and continued use in order to leverage the existing infrastructure and maximize the impact of the identified project budget.
- If appropriate, participate in a community meeting to gather public input to facilitate concept development.

**April - July 2017** – Concept development

**July 2017 – September 2017** - Concept approval through PAC

Fabrication Phase

**September 2017 – December 2017** – Fabrication

Installation Phase

**TBD 2018 – March 2019**- Installation on-site

Exact timeline for the Design development, Fabrication and Installation is subject to change and to be coordinated with the pedestrian and bicycle bridge construction schedule.

## **EXHIBIT "C" COMPENSATION**

The compensation to be paid to ARTIST under this Agreement for all services described in Exhibit "A" ("Services") and reimbursable expenses shall not exceed \$90,000. ARTIST agrees to complete all Services, including reimbursable expenses, within this amount. In the event Additional Services are authorized, the total compensation for services and reimbursable expenses shall come out of contingency fund and not exceed 10% (\$10,000). Any work performed or expenses incurred for which payment would result in a total exceeding the maximum amount of compensation set forth herein shall be at no cost to the CITY.

### **BUDGET**

\$90,000 inclusive of all artist fees, and exclusive of 10% contingency.

### **COMPENSATION SCHEDULE:**

- 10% upon signing the contract by the ARTIST and CITY
- 20% upon final approval of artwork design the Public Art Commission. Fabrication plan and budget are approved by City staff.
- 60% upon notice to proceed with fabrication
- 10% upon completion of delivery, installation, submission of documentation and acceptance of artwork by City staff.

### **ADDITIONAL SERVICES**

ARTIST shall provide additional services only by advanced, written authorization from the CITY. ARTIST, at CITY's project manager's request, shall submit a detailed written proposal including a description of the scope of services, schedule, level of effort, and ARTIST's proposed maximum compensation, including reimbursable expenses, for such services based on the rates set forth in Exhibit C. The additional services scope, schedule and maximum compensation shall be negotiated and agreed to in writing by CITY's project manager and ARTIST prior to commencement of the services. Payment for additional services is subject to all requirements and restrictions in this Agreement.

## **REIMBURSABLE EXPENSES**

The administrative, overhead, secretarial time or secretarial overtime, word processing, photocopying, in-house printing, insurance and other ordinary business expenses are included within the scope of payment for services and are not reimbursable expenses. CITY shall reimburse ARTIST for the following reimbursable expenses at cost. Expenses for which ARTIST shall be reimbursed are: N/A

A. Travel outside the San Francisco Bay area, including transportation and meals, will be reimbursed at actual cost subject to the City of Palo Alto's policy for reimbursement of travel and meal expenses for City of Palo Alto employees.

B. Long distance telephone service charges, cellular phone service charges, facsimile transmission and postage charges are reimbursable at actual cost.

All requests for payment of expenses shall be accompanied by appropriate backup information. Any expense anticipated to be more than \$0 shall be approved in advance by the CITY's project manager.

**EXHIBIT “D”  
INSURANCE REQUIREMENTS**

CONTRACTORS TO THE CITY OF PALO ALTO (CITY), AT THEIR SOLE EXPENSE, SHALL FOR THE TERM OF THE CONTRACT OBTAIN AND MAINTAIN INSURANCE IN THE AMOUNTS FOR THE COVERAGE SPECIFIED BELOW, **AFFORDED BY COMPANIES WITH AM BEST’S KEY RATING OF A-:VII, OR HIGHER, LICENSED OR AUTHORIZED TO TRANACT INSURANCE BUSINESS IN THE STATE OF CALIFORNIA.**

AWARD IS CONTINGENT ON COMPLIANCE WITH CITY’S INSURANCE REQUIREMENTS, AS SPECIFIED, BELOW:

REQUIRED	TYPE OF COVERAGE	REQUIREMENT	MINIMUM LIMITS	
			EACH OCCURRENCE	AGGREGATE
YES YES	WORKER’S COMPENSATION EMPLOYER’S LIABILITY	STATUTORY STATUTORY		
YES	GENERAL LIABILITY, INCLUDING PERSONAL INJURY, BROAD FORM PROPERTY DAMAGE BLANKET CONTRACTUAL, AND FIRE LEGAL LIABILITY	BODILY INJURY	\$1,000,000	\$1,000,000
		PROPERTY DAMAGE	\$1,000,000	\$1,000,000
		BODILY INJURY & PROPERTY DAMAGE COMBINED.	\$1,000,000	\$1,000,000
YES	AUTOMOBILE LIABILITY, INCLUDING ALL OWNED, HIRED, NON-OWNED	BODILY INJURY	\$1,000,000	\$1,000,000
		- EACH PERSON	\$1,000,000	\$1,000,000
		- EACH OCCURRENCE	\$1,000,000	\$1,000,000
		PROPERTY DAMAGE	\$1,000,000	\$1,000,000
		BODILY INJURY AND PROPERTY DAMAGE, COMBINED	\$1,000,000	\$1,000,000
YES	PROFESSIONAL LIABILITY, INCLUDING, ERRORS AND OMISSIONS, MALPRACTICE (WHEN APPLICABLE), AND NEGLIGENT PERFORMANCE	ALL DAMAGES	\$1,000,000	
YES	<b>THE CITY OF PALO ALTO IS TO BE NAMED AS AN ADDITIONAL INSURED:</b> CONTRACTOR, AT ITS SOLE COST AND EXPENSE, SHALL OBTAIN AND MAINTAIN, IN FULL FORCE AND EFFECT THROUGHOUT THE ENTIRE TERM OF ANY RESULTANT AGREEMENT, THE INSURANCE COVERAGE HEREIN DESCRIBED, INSURING NOT ONLY CONTRACTOR AND ITS SUBARTISTS, IF ANY, BUT ALSO, WITH THE EXCEPTION OF WORKERS’ COMPENSATION, EMPLOYER’S LIABILITY AND PROFESSIONAL INSURANCE, NAMING AS ADDITIONAL INSUREDS CITY, ITS COUNCIL MEMBERS, OFFICERS, AGENTS, AND EMPLOYEES.			

I. INSURANCE COVERAGE MUST INCLUDE:

- A. A PROVISION FOR A WRITTEN THIRTY (30) DAY ADVANCE NOTICE TO CITY OF CHANGE IN COVERAGE OR OF COVERAGE CANCELLATION; AND
- B. A CONTRACTUAL LIABILITY ENDORSEMENT PROVIDING INSURANCE COVERAGE FOR CONTRACTOR’S AGREEMENT TO INDEMNIFY CITY.
- C. DEDUCTIBLE AMOUNTS IN EXCESS OF \$5,000 REQUIRE CITY’S PRIOR APPROVAL.

II. CONTACTOR MUST SUBMIT CERTIFICATES(S) OF INSURANCE EVIDENCING REQUIRED COVERAGE.

III. ENDORSEMENT PROVISIONS, WITH RESPECT TO THE INSURANCE AFFORDED TO “ADDITIONAL INSUREDS”

A. PRIMARY COVERAGE

WITH RESPECT TO CLAIMS ARISING OUT OF THE OPERATIONS OF THE NAMED INSURED, INSURANCE AS AFFORDED BY THIS POLICY IS PRIMARY AND IS NOT ADDITIONAL TO OR CONTRIBUTING WITH ANY OTHER INSURANCE CARRIED BY OR FOR THE BENEFIT OF THE ADDITIONAL INSUREDS.

B. CROSS LIABILITY

THE NAMING OF MORE THAN ONE PERSON, FIRM, OR CORPORATION AS INSURED UNDER THE POLICY SHALL NOT, FOR THAT REASON ALONE, EXTINGUISH ANY RIGHTS OF THE INSURED AGAINST ANOTHER, BUT THIS ENDORSEMENT, AND THE NAMING OF MULTIPLE INSURED, SHALL NOT INCREASE THE TOTAL LIABILITY OF THE COMPANY UNDER THIS POLICY.

C. NOTICE OF CANCELLATION

1. IF THE POLICY IS CANCELED BEFORE ITS EXPIRATION DATE FOR ANY REASON OTHER THAN THE NON-PAYMENT OF PREMIUM, THE ISSUING COMPANY SHALL PROVIDE CITY AT LEAST A THIRTY (30) DAY WRITTEN NOTICE BEFORE THE EFFECTIVE DATE OF CANCELLATION.
2. IF THE POLICY IS CANCELED BEFORE ITS EXPIRATION DATE FOR THE NON-PAYMENT OF PREMIUM, THE ISSUING COMPANY SHALL PROVIDE CITY AT LEAST A TEN (10) DAY WRITTEN NOTICE BEFORE THE EFFECTIVE DATE OF CANCELLATION.

**NOTICES SHALL BE MAILED TO:**

**PUBLIC ART PROGRAM  
CITY OF PALO ALTO  
1305 MIDDLEFILED RD  
PALO ALTO, CA 94303**

DR