

**DR. MARTIN LUTHER KING, JR. MEMORIAL COMMISSION:
AGREEMENT FOR COMMISSION OF PUBLIC ART WORK**

THIS AGREEMENT, is entered into this ____ day of _____, 20____, by and between Commonwealth of Virginia, Dr. Martin Luther King, Jr. Memorial Commission, with offices at 201 North 9th Street, Richmond, Virginia 23219 (hereinafter "MLKMC"), c/o Brenda Edwards, the Commonwealth of Virginia, Division of Legislative Services, General Assembly Building, 2nd Floor, 201 North Ninth Street, Richmond, Virginia 23219, and Thomas Jay Warren (hereinafter, "Artist" or "Warren") with offices at 7225 West Evans Creek Road, Rogue River, Oregon 97537.

WHEREAS, MLKMC requires the services of the Artist to create, conceive and design a "turn key" monument (hereinafter the "Artwork") in a public space on Browns Island, located at South 7th St., Richmond, Virginia 23210 (hereinafter the "Site" or "Monument"); and

WHEREAS, the Artist is a professional artist whose work and qualifications make the Artist uniquely qualified to create the Artwork;

WHEREAS, MLKMC has selected the Artist based upon the Artist's work and qualifications; and

WHEREAS, the Artist and MLKMC wish to perform under the terms and conditions of this Agreement;

NOW, THEREFORE, in consideration of the above-stated premises and subject to the conditions hereinafter set forth, the parties agree as follows:

b. "Artist" shall mean Thomas Jay Warren or other individual, firm, provider, organization, or entity performing services under this contract, and shall include all employees, subcontractors, and/or agents of the Artist. Where there is more than one Artist, all Artists shall be referred to collectively as "Artist." If Artist is comprised of two or more individual persons or entities, each individual person or entity shall be jointly and severally responsible for satisfying Artist's obligations under this Agreement, and each individual person or entity shall be liable for the acts and omissions of every other individual person or entity comprising Artist.

c. "Artwork" shall mean the work of art designed by Artist for the Site under the terms of this Agreement, as described and defined in Artist Proposal, to be attached as *Appendix A, of the services to be provided by Artist.

Article 1 Phase I: Design

1.1 Artist's Services

- a. Artist shall perform all services and furnish all supplies, material and/or work equipment as necessary for the design, fabrication, transportation and installation of the Artwork. Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.
- b. Artist shall determine the artistic expression, scope, design, color, size, texture, dimensions, materials of the Artwork, location on the Site of the Artwork, subject to review and acceptance by MLKMC and any regulatory agencies with project oversight, as set forth in this Agreement. The Artist will do so in a manner that ensures that the Artwork as installed shall not interfere with the intended use of the Site, pedestrian and other traffic flow, parking, safety devices and procedures, and other needs and functions of the site as defined by MLKMC and/or ordinance prior to the development of a design by the Artist. On the Monument's completion, Artist shall issue a certificate of authenticity to acknowledge that the Monument as installed is faithful to the Artist's artistic intent as set forth in the construction documents.
- c. The Artist shall procure all suitable legal ownership rights necessary for all aspects of the Monument, and any and all required licenses, permits and similar legal authorizations at the Artist's expense as may be necessary and advised by MLKMC for the installation of the Artwork at the Site.
- d. Artist shall create construction documents (i.e., 100% design) and implementation schedule and obtain all necessary approvals (including approval of the construction documents) and permits for pre-construction.
- e. Artist shall develop construction/implementation budget to fall within the designated cost in this Agreement.
- f. Artist shall provide required insurance in amounts and limits specified in this Agreement.
- g. Artist shall supervise and manage third party consultants and subcontractors, and provide a list of all subcontractors along with a copy of the agreement between the Artist and each subcontractor.
- h. Artist shall provide a maintenance manual with a description of all materials, processes and products utilized in the Artwork and the required care and upkeep involved, as well as recommended procedures in the event of necessary conservation.
- i. Artist shall provide monthly updates to MLKMC.
- j. Artist shall provide a set of "as built" drawings if there is significant deviation from approved and permitted construction documents.
- k. Artist shall conduct interviews, establish design criteria, develop preliminary design, and be available for a reasonable number of meetings required to coordinate design and project implementation, ceremonies and the like, as necessary.
- l. Artist shall deliver Artwork for use for MLKMC fundraising needs.

1.2 MLKMC's Services

- a. MLKMC shall perform all obligations in strict compliance with all terms and conditions in this Agreement.
- b. MLKMC shall be responsible for providing the Artist, at no expense to the Artist, copies of existing designs, drawings, reports, list of required permits, and other existing relevant data, if any, which is needed by Artist in order to perform.

- c. MLKMC shall be responsible for compliance with all applicable laws and regulations, including but not limited to zoning or environmental regulations.
- d. MLKMC shall prepare the Site in accordance with the specifications detailed in the approved design concept in Section 1.3 of this Agreement. MLKMC shall be responsible for [all expenses, labor and equipment] to prepare the Site for the timely transportation and installation of the Artwork. MLKMC shall complete the Site preparations by the scheduled installation date as provided in Article 2 of this Agreement or shall contact the Artist in writing informing him or her of any delays.
- e. MLKMC shall, at its expense and discretion and upon approval of the appropriate entities, prepare and install a discreet plaque identifying the Artist, the title of the Monument and the year of completion.

1.3 Design Development

a. Schematic Design Delivery

- i. The Artist shall visit, examine, research and consider the Site and surrounding area. If applicable, the Artist shall also consult with representatives of the community and collaborate with the project design team to consider their input and concerns.

b. Design Development Documents

- i. Artist and Artist's structural engineer and fabricator shall review all Design Development drawings, materials and documents for consistency and constructability, and report any engineering, structural concerns, or constructability concerns to MLKMC. Modifications to the design necessitated by this review shall be submitted and approved by MLKMC prior to beginning the production of Construction Documents and incorporated therein.

c. Final/Construction Documents:

- i. Construction Documents for construction and/or installation of the proposed Artwork as approved, which must be signed and stamped by design professionals licensed in the State of Virginia. These drawings and supplementary documents shall indicate any issues or coordination involved in the construction, integration and operation of the Artwork as well as any third party subcontractors needed to work on the project.
- ii. Artist shall deliver mock-ups and samples, as required by MLKMC
- iii. Artist shall review Architect's Design Development and/or Construction Documents for accuracy of the integration of Artist's Proposal within the Site and provide MLKMC and Architect with written comments and/or corrections.
- iv. Where appropriate, the Artist shall present the Design to a qualified conservator, who will make recommendations on the maintenance of the Artwork and the Artist shall provide a written copy of the conservator's recommendations to MLKMC. The conservator's report will indicate future maintenance and conservation needs and anticipated costs and may reflect issues such as the longevity of the materials used
- v. Artist shall deliver a schedule describing Artist's specific timelines for completing the Artwork.

1.4 Ownership of Design/Work Made for Hire

- a. Artist acknowledges, agrees and undertakes that the results of Artist's past, present and future services hereunder and of each party rendering services and/or supplying equipment, facilities, goods or services in connection with the Artwork, including without

limitation parties rendering services or supplying equipment, facilities, goods or services pursuant to agreements or other arrangements entered into as contemplated in Section 1.1 above, are being specifically ordered by MLKMC as part of the Artwork and shall be considered a "work made for hire" for MLKMC and therefore MLKMC shall be the creator, MLKMC and copyright proprietor thereof.

If and to the extent that any or all of the provisions of this Section 1.1 set forth above do not operate so as to vest fully and effectively in MLKMC any or all of the rights referred to therein, Artist hereby grants and assigns to MLKMC all rights not so vested, and all such rights shall immediately vest in MLKMC from their inception.

Article 2 Phase II: Construction/Installation

2.1 Artist's Services

- a. Artist shall notify MLKMC in writing when construction of the Artwork has been completed, and that the Artwork is ready for delivery and installation at the Site if the Artwork was constructed off-site.
- b. Upon MLKMC's final approval of the constructed Artwork as being in conformity with the Design, the Artist shall deliver and install the completed Artwork to the Site in accordance with the schedule provided as set forth in Exhibit D "The Schedule of Deliverables." The Artist may not deviate from the approved design without written approval of MLKMC.
- c. Artist shall advise MLKMC regarding the solicitation and work done for commencement and installation of the Tribute with final decision authority on such issues to be held by MLKMC.
- d. Artist shall complete the construction, transportation and installation of the Artwork by the scheduled dates as provided in this Agreement.
- e. Artist shall consult, as MLKMC deems necessary, for the construction to proceed so as to result in an Artwork faithful to Artist's intent or if it is not, to inform MLKMC that it is not, and identify the ways in which the construction is not faithful to the Artwork. MLKMC will have final oversight and approval.
- f. If the Artwork is being constructed on site, the Artist shall avoid creating nuisance conditions arising out of the Artist's operations.
- g. Artist shall advise MLKMC and all contractors as to the construction and implementation for the Monument based on the construction documents and budget accepted by MLKMC.
- h. Artist will coordinate closely with MLKMC to ascertain that the Site is prepared to receive the Artwork. Artist must notify MLKMC of any adverse conditions at the Site that would effect or impede the installation of the Artwork.
- i. Artist is responsible for timely installation of the Artwork. Artist may not install the Artwork until authorized to do so by MLKMC.
- j. Artist shall arrange for the transportation and installation of the Artwork in coordination with MLKMC. If the Artist does not install the Artwork, Artist shall supervise and approve the installation. Prior to the installation of the Artwork, Artist shall inspect site to ensure that it is ready to accept the Artwork and compliant with the specifications provided by the Artist. Artist shall notify MLKMC of any perceived conflict, defect or

- non-compliance with specifications. All work shall be performed by qualified professionals and by licensed contractors as required by law.
- k. Artist shall be required to inspect the Site prior to the transportation and installation of the Artwork and shall notify MLKMC of any adverse Site conditions that will impact the installation of the Artwork and which are in need of correction. Failure to do so by the Artist shall be deemed as an acceptance of the Site conditions.
 - l. Upon completion of the installation of the Artwork, the Artist shall provide MLKMC with written instructions for the future maintenance and preservation of the Artwork. MLKMC is responsible for the proper care and maintenance of the Artwork.
 - m. Artist shall take reasonable measures to protect or preserve the integrity of the Artwork with the application of a protective sealant, patina or anti-graffiti coating, if applicable, unless MLKMC specifically disapproves of such.
 - n. Upon installation, the Artwork shall be deemed to be in the custody of MLKMC for purposes of Article 7 and Article 9 of this Agreement; MLKMC assumes liability for any damage to the Artwork or injury to persons or property caused by the Artwork or any activity related to the Artwork.

2.2 MLKMC's Services

- a. MLKMC shall have the right to review the Artwork at reasonable times during the construction thereof upon reasonable notice.
- b. If MLKMC, upon review of the Artwork, determines that the Artwork does not conform to the approved Final/Construction Documents, MLKMC reserves the right to notify the Artist in writing of the deficiencies and that MLKMC intends to withhold the next budget installment within [] days of the determination as in paragraph (d) below.
- c. Artist will have thirty (30) days to cure MLKMC's objections and will notify MLKMC in writing of completion of the cure. MLKMC shall promptly review the Artwork, and upon approval shall release the next budget installment. If the Artist disputes MLKMC's determination that the Artwork does not conform, the Artist shall promptly submit reasons in writing to MLKMC within [] days of MLKMC's prior notification to the contrary. MLKMC shall make reasonable efforts to resolve the dispute with the Artist in good faith. However, final determination as to whether the Artist has complied with the terms of this Agreement shall remain with MLKMC.
- d. Prior to the transportation and installation of the Artwork, MLKMC shall inspect the Artwork within [] days after receiving notification to determine that the Artwork conforms with the Final/Construction Documents: give final approval of the constructed Artwork and; authorize the installation of the Artwork at the site. MLKMC shall not unreasonably withhold final approval of the constructed Artwork. In the event that MLKMC does withhold final approval, MLKMC shall submit the reasons for such disapproval in writing within [] days of examining the constructed Artwork. The Artist shall then have [] days from the date of MLKMC's notice of the disapproval to make the necessary adjustments to the constructed Artwork in accordance with such writing. The Artist shall not be penalized for any delay in the delivery and installation of the Artwork to the Site unless the Artist has willfully and substantially deviated from the Design without the prior approval of MLKMC. The Artist shall then be held responsible for any expenses incurred in correcting such deviation.

- e. MLKMC shall promptly notify the Artist of any delays impacting installation of the Artwork. Any additional storage and insurance costs incurred by the Artist shall be borne by MLKMC in the event that the delay is caused by MLKMC.

Article 3 Budget, Payment and Deliverables Schedule

3.1 Budget

The Budget, previously prepared by the Artist to include all goods, services and materials with such costs itemized, shall be attached to this Agreement as Exhibit B.

ii. Budget shall mean a specific and detailed document identifying the cost of completion of all work under this Agreement, including all modifications. The Budget shall include the costs for all design fees and costs; preliminary and final engineering requirements; materials and labor for fabrication, including Artist and subcontractors' costs; consultants, including engineers and specifications writers; transportation of Artwork; installation of Artwork, including any necessary permits; permits and licenses; required insurance; any sales tax; and a 5% to 10% contingency allowance. Calculation of the budget will take into consideration the possible inflation of service and material costs between the date of execution of this Agreement and the anticipated completion date.

iii. If the Artist incurs costs in excess of the amount listed in the budget, the Artist shall pay such excess from the Artist's own funds unless the Artist obtains approval in writing for such additional costs from MLKMC (or such costs were the result of actions or inaction of MLKMC).

3.2 Payment Schedule

Artist's completion milestones and payment schedule is as set forth in Exhibit B, Payment Schedule, which is incorporated herein by reference.

Article 4 Terms of Agreement

4.1 Duration

This Agreement shall be effective on the date that this contract has been signed by both parties, and, unless terminated earlier pursuant to such provisions in the Agreement, shall extend until final acceptance by MLKMC under Section 6.2 or submission of final payment to the Artist by MLKMC under Exhibit B, whichever is later. Extension of time of performance hereunder may be granted upon the request of one party and the consent of the other thereto, which consent shall not be unreasonably withheld. Such extension shall be in writing, signed by both parties, and attached to Exhibit B.

4.2 Force Majeure

MLKMC shall grant to the Artist a reasonable extension of time in the event that conditions beyond the Artist's control render timely performance of the Artist's services impossible or unduly burdensome. All such performance obligations shall be suspended for the duration of the condition. Both Artist and MLKMC (hereinafter "Party" or "Parties") shall take all reasonable steps during the existence of the condition to assure performance of their contractual obligations when the condition no longer exists. Failure to fulfill contractual obligations due to conditions beyond either Party's reasonable

control will not be considered a breach of contract, provided that such obligations shall be suspended only for the duration of such conditions.

Article 5 Schedule and Progress Reports

- 5.1** The parties will agree on a mutually agreeable schedule (as set forth in Exhibit D “The Schedule of Deliverables”) for Artist’s deliverables and MLKMC approvals. The Artist shall notify MLKMC of the anticipated schedule for the fabrication, transportation and installation of the Artwork, including a schedule for the submission of progress reports and inspections if any required by MLKMC or permitting agency.
- 5.2** The Artist shall deliver and complete installation of the Artwork no later than _____ (hereinafter the “Completion Date”). All arrangements for, and costs of insurance and transportation of the Artwork to the Site are the responsibility of the Artist.
- 5.3** In the event that, through the fault of the Artist (as determined by MLKMC), the Artwork is not completed and installed by the Completion Date, the amount of 10% of the balance due shall be deducted every fourteen (14) calendar days until the installation is completed. The Artist may request an extension of the Completion Date from MLKMC. Requests for extensions must be in writing and be submitted within 10 days of Artist’s knowledge of a delay, but no later than fourteen calendar days prior to the Completion Date. If the extension is granted, a new Completion Date shall be agreed upon in writing and such change shall not affect any other provisions of this Agreement. In recognition of the significant engineering and infrastructure components involved in the Artwork, requests for extensions of time shall not be unreasonably refused.
- 5.4** In the event that MLKMC or its contractors cause delay, then MLKMC shall pay for any additional direct Artist’s costs incurred as a result of such delay.
- 5.5** The Parties may amend the schedule by written agreement and Artist must provide a minimum of thirty (30) days written notice of any changes to the schedule.
- 5.6** The Artist shall inform MLKMC of the progress of each phase of work completed under the Agreement.

Article 6 Approval and Acceptance

- 6.1** The Artist shall notify MLKMC in writing when all services as required of both Parties by this Agreement have been completed in substantial conformity with the Design and contract documents.
- 6.2** MLKMC shall promptly notify the Artist in writing of its final acceptance of the Artwork within ____ days after the Artist submitted written notice pursuant to paragraph 6.1 above. The effective date of final acceptance shall be the date MLKMC submits written notice to the Artist of its final acceptance of the Artwork. The final acceptance shall be understood to mean that MLKMC acknowledges completion of the Artwork in substantial conformity with the Design, and that MLKMC confirms that all services as required of both Parties by this Agreement prior to paragraph 6.3 of this section have

been completed. Title to the Artwork to MLKMC passes upon final acceptance of the Artwork and final payment by MLKMC to Artist. If a regulatory agency must approve the completed Artwork, MLKMC should move promptly to gain such approval as it will be a precondition to MLKMC's ability to accept and approve the finished Artwork from the Artist.

- 6.3 If MLKMC disputes that all the services have been performed, MLKMC shall notify the Artist in writing of those services the Artist has failed to perform within ____ days after the Artist submitted written notice pursuant to 6.1 above. The Artist shall promptly perform those services indicated by MLKMC.
- 6.4 If the Artist disputes MLKMC's determination that not all services have been performed, the Artist shall submit reasons in writing to MLKMC within ____ days of MLKMC's prior notification to the contrary. MLKMC shall make reasonable efforts to resolve the dispute with the Artist in good faith. However, final determination as to whether all services have been performed shall remain with MLKMC.
- 6.5 Upon the resolution of any disputes that arise under paragraphs 6.3 and 6.4 of this Section, MLKMC shall notify the Artist of its final acceptance of the Artwork pursuant to paragraph 6.2.

Article 7 Risk of Loss

The Artist shall bear the risk of loss or damage to the Artwork until the installation of the Artwork. The Artist shall take such measures as are reasonably necessary to protect the Artwork from loss or damage. MLKMC shall bear the risk of loss or damage to the Artwork prior to final acceptance only if, during such time, the partially or wholly completed Artwork is in the custody, control or supervision of MLKMC or its agent(s) for the purposes of transporting, storing, installing or performing other services to the Artwork.

Article 8 Artist's Representations and Warranties

8.1 Warranties of Title

The Artist represents and warrants that:

- a. The Artwork is solely the result of the artistic effort of the Artist.
- b. Except as otherwise disclosed in writing to MLKMC, the Artwork is unique and original and does not infringe upon any copyright or the rights of any person.
- c. The Artwork (or duplicate thereof) has not been accepted for sale elsewhere.
- d. The Artist has not sold, assigned, transferred, licensed, granted, encumbered or utilized the Artwork or any element thereof or any copyright related thereto which may affect or impair the rights granted pursuant to this Agreement.
- e. The Artwork is free and clear of any liens from any source whatsoever.
- f. All Artwork created by the Artist under this Agreement, whether created by the Artist alone or in collaboration with others shall be wholly original with the Artist and shall not infringe upon or violate the rights of any third party.
- g. The Artist has the full power to enter into and perform this Agreement and to make the grant of rights contained in this Agreement.

- h. All services performed hereunder shall be performed in accordance with all applicable laws, regulations, ordinances, etc. and with all necessary care, skill, and diligence.
- i. These representations and warranties shall survive the termination or other extinction of this Agreement.

8.2 Warranties of Quality and Condition

- a. The Artist represents and warrants that all work will be performed in accordance with professional “workmanlike” standards and free from defective or inferior materials and workmanship (including any defects consisting of “inherent vice,” or qualities that cause or accelerate deterioration of the Artwork) for year after the date of final acceptance by MLKMC under Section 6.2.
- b. The Artist represents and warrants that the Artwork and the materials used are not currently known to be harmful to public health and safety.
- c. The Artist represents and warrants that reasonable maintenance of the Artwork will not require procedures substantially in excess of those described in the maintenance and preservation recommendations submitted by the Artist pursuant to Section 2.1(l).
- d. If within three years MLKMC observes any breach of warranty described in this Section 8.2, the Artist shall cure the breach promptly, satisfactorily and consistent with professional conservation standards, at no expense to MLKMC. MLKMC shall give notice to the Artist of such breach with reasonable promptness. However, if Artist did not disclose this risk of breach in the Proposal and Maintenance and Conservation Manual, and if breach is not curable by Artist, the Artist is responsible for reimbursing MLKMC for damages, expense and loss incurred by MLKMC as a result of the breach of warranty. However, if the Artist disclosed the risk of this breach in the Proposal and Maintenance and Conservation Manual and MLKMC accepted that it may occur, as indicated by the written final acceptance of the Artwork, it shall not be deemed a breach for purposes of this Section 8.2 of this Agreement.
- e. If after three years MLKMC observes any breach of warranty described in this Section 8.2 that is curable by the Artist, MLKMC shall contact the Artist to make or supervise repairs or restorations at a reasonable fee during the Artist’s lifetime. The Artist shall have the right of first refusal to make or supervise repairs or restorations. Should the Artist be unavailable or unwilling to accept reasonable compensation under the industry standard, MLKMC may seek the services of a qualified restorative conservator and maintenance expert.
- f. The foregoing warranties are conditional, and shall be voided by the failure of MLKMC to maintain the Artwork in accordance with the Artist’s specifications and the applicable conservation standards. If MLKMC fails to maintain the Artwork in good condition, the Artist, in addition to other rights or remedies the Artist may have in equity or at law, shall have the right to disown the Artwork as the Artist’s creation and request that all credits be removed from the Artwork and reproductions thereof until the Artwork’s condition is satisfactorily repaired.

Article 9 Insurance

9.1 General

- a. The Artist acknowledges that until installation of the Artwork under Article 2, any injury to property or persons caused by the Artist’s Artwork or any damage to, theft of,

vandalism to, or acts of God affecting the Artist's Artwork are the sole responsibility of the Artist, including, but not limited to, any loss occurring during the creation, storage, transportation or delivery of the Artist's Artwork, regardless of where such loss occurs.

- b. Terms for the procurement and duration of insurance are provided in Exhibit C.
- c. Required insurance policies are described in Exhibit C.

9.2 Indemnity

- a. The Artist shall indemnify MLKMC, its respective officers, agents, and employees, from any claims brought arising out of the breach of this Agreement or any negligent occurrence which occurs pursuant to the performance of this Agreement by the Artist, its subcontractors, agents or employees.
- b. MLKMC shall indemnify the Artist, Artist's subcontractors, agents or employees from any claims brought arising out of the breach of this Agreement or any negligent occurrence which occurs pursuant to the performance of this Agreement by MLKMC, its respective officers, agents, and employees.
- c. Each Party shall immediately notify the other of any written claim regarding any matter resulting from or relating to the Party's obligations under this Agreement. Each Party shall cooperate, assist, and consult with the other in the defense or investigation of any such claim arising out of or relating to the performance of this Agreement.
- d. The indemnification shall include reasonable attorneys' fees and costs.
- e. This indemnification shall survive the termination or expiration of this Agreement.
- f. Notwithstanding any provision of this Agreement to the contrary, no Party shall recover from a Party to this Agreement in an action, of whatever nature, in contract or tort, any consequential or incidental damages, lost profits, or any type of expectancy damages.

Article 10 Ownership and Intellectual Property Rights/Work Made for Hire

10.1 Title

Title to the Artwork shall pass to MLKMC upon MLKMC's written final acceptance and payment for the Artwork pursuant to Article 6 and Exhibit B.

10.2 Ownership of Documents

One set of presentation materials prepared by Artist and submitted to MLKMC under this Agreement shall be retained by MLKMC.

10.3 Reproduction Rights

- a. In view of the intention that the final Artwork shall be unique, the Artist shall not make any additional exact duplicate three-dimensional reproductions of the final Artwork, nor shall the Artist grant permission to others to do so except with the written permission of MLKMC. However, nothing shall prevent the Artist from creating works in the Artist's manner and style of artistic expression.
- b. The Artist grants to MLKMC and its assignees an irrevocable license to make two-dimensional reproduction of the Artwork for non-commercial purposes, including, but not limited to, reproductions used in brochures, media publicity, and exhibition catalogues or other similar publication provided that these rights are exercised in a tasteful and professional manner.
- c. All reproductions by MLKMC shall contain a credit to the Artist

- d. The Artist shall, in any public showing or resume use of reproductions, to give acknowledgment to MLKMC in substantially the following form: "An original Artwork owned and commissioned by MLKMC."
- e. The Artist shall, at the Artist's expense, cause to be registered with the United States Register of Copyrights, a copyright in the Artwork in MLKMC's name.
- f. If MLKMC wished to make reproductions of the Artwork for commercial purposes including, but not limited to, tee shirts, post cards and posters, the Parties shall execute a separate agreement to address the terms of the license granted by the Artist and the royalty the Artist shall receive.

10.4 Work Made for Hire

Notwithstanding Sections 10.1-10.3, Artist acknowledges, agrees and undertakes that the results of Artist's past, present and future services hereunder and of each party rendering services and/or supplying equipment, facilities, goods or services in connection with the Artwork, including without limitation parties rendering services or supplying equipment, facilities, goods or services pursuant to agreements or other arrangements entered into as contemplated in Section 1.1 above, are being specifically ordered by MLKMC as part of the Artwork and shall be considered a "work made for hire" for MLKMC and therefore MLKMC shall be the creator, MLKMC and copyright proprietor thereof.

If and to the extent that any or all of the provisions of this Section 1.1 set forth above do not operate so as to vest fully and effectively in MLKMC any or all of the rights referred to therein, Artist hereby grants and assigns to MLKMC all rights not so vested, and all such rights shall immediately vest in MLKMC from their inception.

Article 11 Artist as an Independent Contractor

The Artist agrees to perform all work under this Agreement as an independent contractor and not as an employee of MLKMC. The Artist acknowledges and agrees that the Artist shall not hold himself out as an authorized agent of MLKMC with the power to bind in any manner.

The Artist shall provide MLKMC with the Artist's Tax Identification number and any proof of such number as requested by MLKMC.

Article 12 Assignment of Artwork

The work and services required of the Artist are personal and shall not be assigned, sublet or transferred. Any attempt by the Artist to assign this Agreement or any rights, duties or obligations arising hereunder shall be void and of no effect unless prior written consent is given by MLKMC. MLKMC shall have the right to assign or transfer any and all of MLKMC's rights and obligations under this Agreement, subject to the Artist's consent, if ownership of the Site is transferred; if the Artist refuses to give consent, this Agreement shall terminate.

Article 13 Termination

13.1 MLKMC may terminate this Agreement without cause upon [60] days written notice to the Artist. MLKMC shall pay the Artist for services performed and commitments made prior to the date of the termination, consistent with the schedule of payments set forth in Exhibit B of this Agreement. The Artist shall have the right to an equitable adjustment in the fee for services performed and expenses incurred beyond those for which the Artist has been compensated to date under Exhibit B with allowance for documented lost opportunities, unless the parties come

to a settlement otherwise. The Artist shall retain possession and title to the [studies, drawing, designs, maquettes, and models] already prepared and submitted or prepared for submission to MLKMC by the Artist under this Agreement prior to the date of termination.

13.2 The Artist defaults for cause other than death or incapacitation, anything in this Agreement notwithstanding, if:

13.3

- a. Artist fails to make progress so as to endanger performance of this Agreement in accordance with its terms and such progress is not impeded or caused by MLKMC, its employees or contractors, or
- b. Artist fails to comply with any of the schedule deadlines not otherwise modified in accordance with this Agreement for Force Majeure (Section 4.2) or other delays not caused by Artist, or
- c. Artist violates any provisions of this Agreement or commits any act of fraud, negligence or willful misconduct in connection with the services rendered hereunder, or
- d. Artist commences or has commenced against him any proceedings, voluntary or involuntary, in bankruptcy or insolvency, including any reorganizing proceeding, or
- e. An assignee for the benefit of Artist's creditors or a receiver is appointed, with or without Artist's consent, then MLKMC may, without prejudice to any other right or remedy, terminate this Agreement in whole, if upon written notice Artist fails to cure within fifteen (15) business days. In such case, MLKMC may proceed to complete or cause the work to be completed, however, the Monument shall not be represented as that of the Artist without Artist's prior approval. The Artist shall not be entitled to any further payments unless MLKMC's decision to terminate is subsequently determined by a court of law to be in error. In such case, the Artist shall be entitled to recover the remaining payments due under this Agreement.

Article 14 Death or Incapacity

14.1 If the Artist becomes unable to complete this Agreement due to death or incapacity, such death or incapacity will not be deemed a breach of this Agreement or a default on the part of the Artist for purposes of Article 14.

14.2 In the event of incapacity, the Artist shall assign his obligations and services under this Agreement to another artist provided that MLKMC approves of the new artist and so agrees in writing. If MLKMC does not agree, MLKMC may elect to terminate this Agreement. The Artist shall retain all rights under Article 10 and Article 11. The Artwork and any reproductions thereof shall contain a credit to the Artist and a copyright notice in substantially the following form: © [Artist's name, date of publication]. In the event of death, this Agreement shall terminate effective the date of death. The Artist's heirs shall retain rights under Article 10 and Article 11. The Artist's executor shall deliver to MLKMC the Artwork in whatever form or degree of completion it may be in at the time. Title to the Artwork shall then transfer to MLKMC. However, the Artwork shall not be represented to be the completed work of the Artist unless MLKMC is otherwise directed by the Artist's heirs.

Article 15 Notices and Documents

Notices under this Agreement shall be delivered personally or through the [registered or certified mail, return receipt requested] mail, postage prepaid, to the addresses stated below, or to any other address as may be noticed by a Party:

For MLKMC:

The Dr. Martin Luther King, Jr. Memorial Commission
c/o Brenda Edwards
General Assembly Building, 2nd Floor
201 North Ninth Street
Richmond, Virginia 23219

With Copy to:

Kirk T. Schroder, Esq.
Schroder Davis PLC
2310 West Main Street
Richmond, Virginia 23220

For the Artist:

Mr. Thomas Jay Warren
7225 West Evans Creek Road
Rogue River, Oregon 97537

And Copy to:

The Honorable Jennifer L. McClellan
Department of Legislative Services
General Assembly Building, 2nd Floor
201 N. 9th Street
Richmond, Virginia 23219

Notice shall be deemed effective on the date personally delivered or, if mailed, [three (3) days] after the postmarked date.

Article 16 Waiver

The Parties agree that a waiver of any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term or condition.

Article 17 Conflict of Interest

The Artist and MLKMC shall avoid all conflicts of interest or appearance of conflicts of interest in the performance of this Agreement.

Article 18 Arbitration

If, during the creation of the Artwork, its installation and subsequent existence, either Party breaches this Agreement, each Party agrees to submit to arbitration upon the request of the other Party provided that the breach is not cured within a reasonable time. If an ambiguity arises regarding this Agreement upon which the Parties cannot agree or a dispute arises as to the completion of a provision, the Parties shall submit to arbitration.

Each party agrees to be responsible for its own attorney's fees except as otherwise provided by statute.

Article 19 Amendments

No alteration, change or modification of the terms of this Agreement shall be valid unless made in writing and signed by both Parties hereto.

Article 20 Conflict with the Law

If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall be held by a court of competent jurisdiction or arbitration panel to be in conflict with the laws, rules and/or regulations of the Commonwealth of Virginia, invalid, void or unenforceable, the remainder of the terms, covenants, conditions or provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby to the extent the remainder of the terms, covenants, conditions or provisions of this Agreement are capable of execution.

Article 21 Choice of Law

This contract shall be governed by the laws of the Commonwealth of Virginia both as to interpretation and performance.

Article 22 Entire Agreement

This Agreement, including the exhibits, comprises all of the covenants, promises, agreements and conditions between the Parties. No verbal agreements or conversation between the Parties prior to the execution of this Agreement shall affect or modify any of the terms or obligation.

For MLKMC:

Name

Title

Date

For Artist:

Name

Title

Date

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Exhibit A

Description of Project

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Exhibit B

Budget and Payment Schedule

MLKMC shall pay the Artist a fixed fee of \$765,000, which shall constitute full and complete compensation for all the services performed and material furnished by the Artist under this Agreement. Travel and accommodations on visits shall not exceed \$3,000 for reimbursable Artist's expenses during Phase I Design (Article 1), and not to exceed \$2,400 for reimbursable Artist's expenses during Phase II Installation (Article 2). Payment shall be made in accordance with the following scheduled installments, each installment representing full and final payment for all services and material provided prior to payment thereof:

Phase I: Design (Article 1)- Payment to the Artist: \$ _____

- i. \$ _____ upon approval of MLKMC Approval (Section 1.3(c)).
- ii. \$ _____ upon approval of Design Development Documents (Section 1.3(e)).
- iii. \$ _____ upon approval of the Final/Construction Documents (Section 1.3(f))

Phase II:

- i. Installation (Article 2): Payment to the Artist: \$ _____
 - a) \$ _____ upon issuance of a solicitation for construction.
 - b) \$ _____ upon execution of a contract by MLKMC for the construction and implementation of the Monument.
 - c) \$ _____ on final acceptance by MLKMC of the construction and Artist certificate of authenticity. In the event that Artist does not agree with MLKMC's acceptance as in conformance with the construction documents, Artist shall nevertheless be entitled to receive the \$ _____ but shall not be required to give a certificate of authenticity and shall have the right to remove name from the Monument.
- ii. Payment for Construction and Implementation- Artist will create construction documents and a budget for the construction and installation of the Monument that Artist reasonably estimates and targets, with a reasonable basis in doing so, the cost of construction to be \$ _____ (total cost for construction and implementation, including materials, permits, project management fees, etc.) unless MLKMC and Artist agree in writing to a different budget.

Exhibit C

Insurance

General

- a. The Artist shall procure and maintain for the duration of this Agreement, at the Artist's expense, insurance in the kinds and amounts as provided in this Exhibit with insurance companies authorized to do business in [_____]. Such insurance shall cover the Artist's agents, contractors, subcontractors or employees. MLKMC, its officials, employees, agents and contractors shall be named as additional insureds. The coverage shall contain no special limitations on the scope of protection afforded to MLKMC, its officials, employees, agents and contractors.
- b. The Artist and the Artist's subcontractors' insurance coverage shall be the primary insurance as respects MLKMC, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by MLKMC, its officials, employees, agents and contractors shall be in excess of the Artist's or the Artist's subcontractor's insurance and shall not contribute to the Artist's or the Artist's subcontractor's insurance. The coverage shall state that the Artist's or the Artist's subcontractors' insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- c. Prior to undertaking any work under this Agreement, the Artist, at no expense to MLKMC, shall furnish to MLKMC a certificate of insurance with original endorsements affecting coverage for each of the insurance policies provided in this Exhibit. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates must be current and the Artist must submit replacement or renewal certificates of insurance for all the policies expiring during the term of this Agreement. Each certificate shall clearly indicate that the Artist has obtained insurance in the type, amount and classification as specified in this Exhibit and that no material changes, cancellation, suspension or reduction in limits of insurance shall be effective except after [30] days prior written notice to MLKMC. Each certificate shall indicate that the subcontractors are additional insureds or the Artist shall furnish separate certificates for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated in this Agreement, including, but not limited to, naming the parties as additional insureds.
- d. Any deductibles or self-insured retentions must be declared to, and approved by, MLKMC. At the option of MLKMC, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects MLKMC, its officials, employees, agents and contractors; or the Artist shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in the amount of \$[_____].
- e. Despite any changes to or cancellation of insurance, the Artist remains responsible for maintaining the required insurance coverage for the duration of the Agreement.
- f. Failure of the Artist to comply with any of these terms shall be considered a material breach of this Agreement and cause for its immediate termination.

Insurance Policies

- a. Commercial General Liability insurance policy, written on an occurrence form, including all the usual coverage known as:
 1. premises/operations liability
 2. products/completed operations
 3. personal/advertising injury
 4. contractual liability
 5. [broad-form property damage]
 6. [independent contractor's liability]

Said policy must provide the following minimum coverage:

1. \$[1,000,000] combined single limit per occurrence for bodily injury, personal injury and property damage.
 2. \$[1,000,000] annual aggregate
- b. Automobile liability insurance policy, including coverage for owner, non-owner, leased or hired vehicles, providing the following minimum coverage:
 1. bodily injury liability of \$[50,000] for each person.
 2. \$[300,000] per occurrence,
 3. property damage liability of \$[25,000] for each occurrence.

The Artist agrees to keep in good standing a valid driver's license at all times during the term of this Agreement.

- c. [Transportation/Cartage insurance all risk. Coverage must include loading, transportation and unloading of the Artwork. If the Artwork is to be loaded, transported or unloaded by a person or entity other than the Artist, the insurance coverage must cover that person or entity. The minimum limit shall be the total amount of compensation paid to Artist through the date of loading under Exhibit B.]
- d. [All Risk Installation insurance which covers physical damage to or destruction of the Artwork. If the Artwork is to be installed by a person or entity other than the Artist, the insurance coverage must cover that person or entity. The minimum limit shall be the total amount of compensation paid to the Artist through the date of the beginning of the installation of the Artwork under Exhibit B.]
- e. [Worker's Compensation and Employers' Liability insurance in accordance with the statutory requirements of the State of _____ providing coverage for any and all employees of Artist. The Artist shall require all subcontractors to carry this coverage also. The minimum coverage for the Worker's Compensation and Employers' Liability insurance shall be \$[100,000].
- f. If, however, the Artist does not have any employees as defined by state statutes and regulations and does not wish to cover himself for Worker's Compensation, the Artist shall sign the following statement:

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["I do not have, nor intend to have for the full term of this Agreement, any employees. Furthermore, I do not wish to obtain or be covered under any Worker's Compensation insurance coverage and, therefore, am signing this statement in lieu of providing the above require Worker's Compensation coverage."

(Artist's signature)

(Print Artist's name)]

The requirement for Worker's Compensation and Employers' Liability insurance shall be waived in writing upon submission of this signed statement by the Artist to the Owner.

- g. Artist will be responsible for obtaining Professional Errors and Omissions coverage for services provided by licensed engineers and architects with a general aggregate limit of \$[1,000,000] and for assuring engineers and other experts have appropriate Professional Errors and Omissions coverage or name them as additional insureds to the policy of the Artist.

Exhibit D
The Schedule of Deliverables

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