RESOLUTION AUTHORIZING A CONTRACT WITH MARK WHITE TO DESIGN, FABRICATE, AND INSTALL A GROUP OF KINETIC SCULPTURES FOR THE SOUTH POINT OF THE JOAN DARRAH PROMENADE PROJECT

The Public Art Advisory Committee recommends that the City Council approve a contract with Mark White to design, fabricate, and install a group of kinetic sculptures for the south point of the Joan Darrah promenade project; and

Stockton Municipal Code section 3-105 allows for an exception to the competitive bidding process where the City Council has approved findings, which support and justify exceptions to the competitive bidding process; now, therefore,

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF STOCKTON, AS FOLLOWS:

1. Pursuant to Stockton Municipal Code section 3-105, the City Council approves the following findings, which support and justify an exception to the competitive bidding process for artist services for the Joan Darrah Promenade Project:
   a. The artist has been pre-approved by the Public Art Advisory Committee.
   b. It is in the best interest of the City to have the best possible and most appropriate art selection.
   c. The artist has provided a budget and scope of work that works within the parameters of the project.
   d. The project involves a very specialized field and its success requires an experienced professional who has successfully implemented and performed such projects.
   e. That a competitive bidding process requiring detailed specifications would not afford the City the ability to obtain the services, quality, and unique expertise required for this work and would therefore not be in the best interest of the City.

2. That the selection of Mark White to design, fabricate, and install a group of kinetic sculptures for the south point of the Joan Darrah promenade project is hereby accepted.
3. That the City Manager of the City of Stockton is hereby authorized to execute the agreement between the City of Stockton and Mark White to design, fabricate, and install a group of kinetic sculptures for the south point of the Joan Darrah promenade project in the amount of $48,000, on behalf of the City of Stockton, a copy of which is attached hereto as Exhibit "A" and by reference made a part hereof.

4. That the City Manager is hereby authorized to take all other actions that are appropriate to carry out the intent and purpose of this Resolution.

PASSED, APPROVED, and ADOPTED February 17, 2009.

ANN JOHNSON
Mayor of the City of Stockton

ATTEST:

KATHERINE GONG MEJISNER
City Clerk of the City of Stockton
AGREEMENT BETWEEN THE CITY OF STOCKTON AND MARK WHITE FOR COMMISSIONED ARTWORK – JOAN DARRAH PROMENADE ON THE STOCKTON WATERFRONT

This Agreement is made and entered into on , by and between the CITY OF STOCKTON, a municipal corporation, hereinafter referred to as the "CITY," and MARK WHITE, an individual, hereinafter referred to as the "ARTIST."

NOW, IN CONSIDERATION of the mutual terms, conditions, promises, covenants and payments hereinafter set forth, CITY and ARTIST agree as follows:

ARTICLE 1. DEFINITIONS AND IDENTIFICATIONS

For the purposes of this Agreement and the various covenants, conditions, terms and provisions which follow, the definitions and identifications set forth below are assumed to be true and correct and are agreed upon by the parties.

1.1 COUNCIL: The City Council of the City of Stockton, California, which is the governing body of the Stockton City government created by the Stockton City Charter.

1.2 ARTIST: Mark White, the individual selected to perform services pursuant to this Agreement.

1.3 CONTRACT ADMINISTRATOR: The Contract Administrator shall be the Public Art Manager of the City of Stockton. In the administration of this Agreement, as contrasted with matters of policy, all parties may rely upon instructions or determinations made by the Contract Administrator.

1.4 CITY: The City of Stockton, a municipal corporation in the State of California.

1.5 NOTICE TO PROCEED: A written notice directing ARTIST to proceed with performance of the scope of work describing the Project, issued by the Contract Administrator.

1.6 PROJECT: Dream Arabesque, Dream Orb, Jellyfish, Ripples, Wing Rhythms: a grouping of five kinetic sculptures to be placed at the south point of the Joan Darrah Promenade, as outlined in Exhibit "A."

1.7 WORK or ARTWORK: The completed form of artwork created by ARTIST, including all activities undertaken to complete the performance of the scope of work for the Project, in conformity with the design of the proposed WORK as submitted by ARTIST and selected by CITY, a graphic representation of which is attached as Exhibit "A" and incorporated by this reference.
ARTICLE 2. PREAMBLE

ARTIST was selected pursuant to the Request for Qualifications ("RFQ") process as approved by the City Council on April 8, 2003. The RFQ and ARTIST's response, including the design selected for this Project, copies of which are on file with the City Clerk, are incorporated by this reference. Negotiations pertaining to the services to be performed by ARTIST were undertaken between ARTIST and a committee pursuant to Chapter 3, sections 3-095 through 3-099, of the Stockton Municipal Code and this Agreement incorporates the understandings arrived at during such negotiation.

ARTICLE 3. SCOPE OF WORK

3.1 ARTIST shall furnish all services as described in Exhibit "A" of this Agreement, attached and incorporated by this reference, as the "Scope of Work" for the project, subject to the provisions of Article 4, below.

3.2 CITY shall be responsible for providing ARTIST, without cost, copies of designs, drawings, reports, and other relevant data needed by ARTIST in order to design and execute the Work.

3.3 ARTIST shall provide monthly progress reports and/or deliverables, as provided in the Scope of Work, to Contract Administrator, in a manner acceptable to the Contract Administrator.

ARTICLE 4. CHANGES IN SCOPE AND ADDITIONAL WORK

4.1 ARTIST shall, whenever required during the term of this Agreement by the terms of this agreement or at the request of the Contract Administrator, present to CITY in writing, drawing or other appropriate media for further review and approval, any significant changes in the scope, design, color, size, material, utility and support requirements, texture, or location of the site or of the Work. A significant change is any change which affects the installation, scheduling, site preparation or maintenance of the Work, or the concept of the Work as represented in the original approved design.

4.2 ARTIST shall perform the services called for in Exhibit "A." ARTIST and CITY agree that ARTIST shall retain artistic control of his services in the performance of the services under this Agreement, subject to the limitations imposed in Exhibit "B" and this Agreement.

4.3 Notwithstanding the provision of Section 4.2 immediately above, CITY may, at any time, request ARTIST in writing to: revise portions of the services that he has previously completed in a satisfactory manner; delete portions of the Scope of Work which have yet to be performed; perform additional work beyond the Scope of Work provided in Exhibit "A"; or make other changes within the general Scope of Work to be

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performed under this Agreement. In the event of such a written request, the ARTIST may, but shall not be obligated to agree to any such request.

4.3.1. In the event the request for change is agreed to by ARTIST, this Agreement shall be amended, in writing, specifying the agreed changes, including, but not limited to, a description of services, addition or reduction of budget, payment schedule and timetable.

4.3.2. In the event that ARTIST does not agree to the request, CITY shall be entitled, in CITY’s sole discretion, to terminate the Agreement for cause pursuant to Article 12 and neither party shall thereafter be obligated to perform pursuant to this Agreement.

4.4 No services for which additional compensation will be charged shall be provided by ARTIST without the prior written authorization by CITY.

4.5 CITY reserves the right to make such alterations as may be deemed necessary or advisable and to require such extra work as may be required for the proper completion of the Project as originally contemplated by ARTIST, pursuant to Section 4.3.1 or 4.3.2. Any such changes will be set forth in an amendment which will specify, in addition to the work done in connection with the change made, adjustments of contract time, if any, and the basis of compensation for such work. An amendment shall not become effective until approved by the City Manager or the City Council and ARTIST. Individual and cumulative amendments which exceed $29,685 plus ten percent (10%) of the initial contract price over $100,000 require City Council approval. Amendments not meeting the above criteria require approval by the City Manager. CITY shall make no alterations to the WORK solely except upon written approval of ARTIST as set forth in this Agreement.

ARTICLE 5. RESPONSIBILITIES OF ARTIST

5.1 ARTIST agrees that an essential element of this Agreement is the skill and creativity of ARTIST. ARTIST shall not assign the creative or artistic portions of the Work to another party for the production of the Work without the written consent of CITY. Failure to conform to this provision may be cause for termination of this Agreement, at the sole discretion of CITY. Subject to section 5.3, below, any other person or entity utilized by ARTIST as a subcontractor must be identified in Exhibit “B.”

5.2 ARTIST shall be responsible for providing services described in Exhibit “A” including, but not limited to, the quality and timely completion of the services. ARTIST shall be responsible for designing the Artwork so that it can be fabricated and installed without exceeding the approved overall budget for the Project. ARTIST shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in his Work.
5.3 In the event the services of ARTIST are integrated into, combined, or otherwise coordinated with services by third parties not within the control of ARTIST, ARTIST shall not be responsible for such third party services. If any part of ARTIST's Work depends for proper execution or results upon the work of CITY, or a third party responsible to CITY, ARTIST shall, prior to proceeding with his or his Work, promptly report to CITY any apparent discrepancies or other defects in such other work which renders it unsuitable for proper execution and results by ARTIST. ARTIST shall not be responsible for any liability or failure to fulfill his obligations because of such discrepancies or defects, subject to confirmation by the Contract Administrator and timely notice provided by ARTIST. Failure of ARTIST to report a discrepancy or defect discovered by ARTIST shall constitute an acceptance of the CITY'S or third party's work as fit and proper to receive ARTIST's Work. Any costs caused by defective or ill-timed work shall be borne by the party responsible therefore; provided that ARTIST shall not be responsible for any defect or ill-timed work by hired, separately contracted or reasonably controlled agent of CITY. Nothing in this section shall limit the responsibility of ARTIST to take all reasonable steps to coordinate his Work with the work of CITY or of a third party on the project.

5.4 ARTIST is responsible for the design, transportation, and inspection of all Artwork, in which the following provisions shall apply:

5.4.1. ARTIST shall, if and when working on CITY property, supervise such clean-up as may be reasonably requested by CITY. At the close of ARTIST's Work, ARTIST shall remove his equipment, excess materials, etc., promptly and as requested by CITY.

5.4.2. CITY and any third party contractor on the project shall notify ARTIST of their operation, construction and maintenance schedules in and around the area where ARTIST's Work is to be performed. ARTIST shall perform his services in a manner and time so as not to cause interference with any of the operations, construction, or maintenance of CITY or third party contractor. In the event of a conflict between the schedules of the contractor and/or CITY and ARTIST, the conflict will be resolved by CITY. If the resolution of the conflict results in a significant delay of the performance of ARTIST, ARTIST shall have the right to renegotiate this Agreement to compensate him for any additional costs or expenses caused by the delay.

5.4.3. ARTIST shall complete the design of the Work in substantial conformity with the attached Exhibit "A," Scope of Work.

5.5 ARTIST shall supply CITY with (a) his current professional resume; (b) photographic renderings of the completed work; (c) four black and white or color 8" x 10" glossy photographic prints of the Work or digital imagery of same; (d) detailed information concerning the materials used in the creation of the Work; and (e) a detailed maintenance program and schedule for the Work.
ARTICLE 6. RESPONSIBILITIES OF CITY

6.1 CITY shall assist ARTIST by placing at ARTIST's disposal all public information it has available pertaining to the Project.

6.2 CITY shall perform in a timely way each and every activity as set forth in the Scope of Services. If delays occur when deliverables of ARTIST are dependent upon the CITY's timeliness, ARTIST's schedule of performance shall be adjusted accordingly.

6.3 CITY shall:

6.3.1. Arrange for access so that ARTIST may enter upon public property as required for ARTIST to perform the services under this Agreement;

6.3.2. Give prompt written notice to ARTIST whenever CITY observes or otherwise becomes aware of any development that affects the scope or timing of ARTIST's services;

6.3.3. Arrange appointments, meetings, and/or consultations as needed for ARTIST to fulfill his obligations under this Agreement.

ARTICLE 7. WARRANTIES/STANDARDS

7.1 ARTIST warrants that: (a) the design or Work being commissioned is the original product of his own creative efforts; (b) that the Work is original; and (c) that ARTIST shall not sell or reproduce the Work, or allow others to do so without the prior written consent of CITY.

7.2 ARTIST shall guarantee his Work to be free from faults of material and workmanship for a period of one (1) year after installation and final acceptance by the CITY. ARTIST shall deliver the Work to CITY free and clear of any liens from any source whatsoever. These guarantees shall apply only to that Work which is entirely that of ARTIST or persons responsible to ARTIST, as installed, and shall not apply to materials or workmanship of projects in which the Work of ARTIST is integrated or combined, or to materials purchased, acquired, or installed by a person or entity not responsible to ARTIST. In the event of a breach of the guarantee of the WORK to be free from faults of material and workmanship, if ARTIST and CITY agree, ARTIST, at no additional cost to CITY, may first attempt to promptly correct or repair the WORK if reasonably possible provided CITY has notified ARTIST of any discovered fault of material or workmanship promptly upon CITY discovery, and provided notice within the time period of the guarantee.

7.3 ARTIST shall faithfully perform the Work required under this Agreement in accordance with standards of care, skill, training, diligence and judgment provided by
highly competent professionals who perform work of a similar nature to the Work described in this Agreement.

ARTICLE 8. COMPENSATION AND TIME OF PERFORMANCE

8.1 ARTIST shall be paid for completion of services satisfactorily rendered pursuant to this Agreement in accordance with the terms herein, Exhibits "A" and "B" and subsequent adjustments, changes or additions as specifically provided for in this Agreement. Such payment shall be full compensation for Work performed and services rendered, by ARTIST and all subcontractors of ARTIST, including without limitation, for all supervision, labor, supplies, materials, equipment or use thereof, taxes, and for all other necessary incidentals including transportation of the Work to the designated site. CITY shall review all deliverables of WORK prior to payment of ARTIST and payment to ARTIST shall manifest acceptance of all WORK or portions thereof delivered up to and including date of receipt of payment to ARTIST. Unless CITY notifies ARTIST of a failure to comply with any provision of this Agreement following fifteen (15) calendar days following installation of WORK on CITY premises, CITY shall have manifested installation and acceptance of WORK.

8.2 The amount and schedule of payments to ARTIST are contained in the attached Exhibit "B", Compensation and Schedule of Payments, provided that such payments shall not exceed a maximum amount of Forty Eight Thousand Four Hundred Dollars ($48,400), subject only to adjustments, changes or additions as specifically provided for in this Agreement ("Total Price").

8.3 In the event ARTIST incurs costs in excess of the Total Price, ARTIST shall pay such excess from his own funds, and CITY shall not be required to pay any part of such excess, and ARTIST shall have no claim against CITY on account thereof.

8.4 ARTIST shall submit invoices and receipts to CITY according to the schedule provided for in Exhibit "B," to be in the form requested by CITY.

8.5 In the event CITY determines that the Work for which it has been invoiced does not meet the contract specifications and that it intends to withhold payment, the CITY shall provide detailed written notice to ARTIST within fifteen (15) days after receipt of invoice, specifying the failure of performance for which CITY intends to withhold payment. ARTIST shall thereafter meet contract standards to the satisfaction of CITY or advise CITY that he disputes CITY's determination that the specifications have not been met. CITY shall provide information to ARTIST sufficient for ARTIST to understand the failure of WORK to meet contract specifications. CITY shall not withhold approval of WORK as delivered unreasonably.

8.6 CITY shall pay all invoices that meet contract specifications within thirty (30) days after receipt of invoice.
8.7 No payment to ARTIST for any work performed or services rendered shall constitute a waiver or release by CITY of any claims, rights or remedies it may have against ARTIST under this Agreement or by law, nor shall such payment constitute a waiver, remission, or discharge by CITY of any failure or fault of ARTIST to satisfactorily perform the Work as required under this Agreement.

8.8 The services to be required of ARTIST under this Agreement shall be completed in accordance with the schedule for completion of the Work as proposed by ARTIST and approved by CITY, provided that such time limits may be extended or otherwise modified by written agreement between ARTIST and CITY.

8.9 If, when ARTIST completes fabrication or procurement of the Work in accordance with the approved schedule and notifies CITY that the Work is ready for installation, ARTIST is delayed from supervising the installation the Work within the time specified in the schedule as a result of the construction on the Site not being sufficiently complete to reasonably permit installation of the Work, or CITY otherwise does not make the Site available to ARTIST in accordance with the approved schedule, CITY shall promptly reimburse ARTIST for reasonable transportation and storage costs incurred for the period between the time provided in the schedule for commencement of installation and the date upon which the Site is made available to ARTIST for installation of the Work.

8.10 Except as provided in section 8.9, ARTIST shall bear any transportation and storage costs resulting from the completion of the Work prior to the time provided in the schedule for installation of the Work.

8.11 CITY shall grant a reasonable extension of time to ARTIST in the event that there is a delay on the part of CITY in performing its obligations under this Agreement or in completing the underlying capital project, or if conditions beyond ARTIST's control or due solely to Acts of God render timely performance of ARTIST's services impossible or unduly burdensome. 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 and providing notice of the existence of any such circumstance is provided to the other party not less than ten (10) days after the initiation of such circumstance.

8.12 For any delay in the installation of the Work beyond the schedule provided for under this Agreement caused by factors reasonably under ARTIST's control, CITY agrees to accept one hundred dollars ($100.00) per day as liquidated damages for such delay as actual damages would be suffered by City but the exact amount of such damage is uncertain and difficult to ascertain. Therefore, the parties agree said amount reasonable and is compensation in full for any such delay.

[Artists Initials]
ARTICLE 9. ARTIST’S RIGHTS

9.1 CITY shall, at its expense, prepare and install at appropriate locations, after consultation with ARTIST, a plaque or sign, identifying the ARTIST, the title of the Work and the year of completion, and any other information agreed to between the parties and shall reasonably maintain such notice in good repair against damages due to normal wear and tear over time, vandalism, and the elements.

9.2 CITY recognizes that maintenance of the Work on a regular basis is essential to the integrity of the Work. CITY shall reasonably assure that the Work is properly maintained and protected, taking into account the recommendations of ARTIST as stated in the maintenance program provided by ARTIST.

9.3 CITY agrees that it shall not intentionally damage, alter, modify, change or substantially relocate the Work of ARTIST without first conferring with ARTIST and taking reasonable measures to obtain the prior written approval of ARTIST to the proposed modification, change or substantial relocation.

9.4 Notwithstanding ARTIST’s refusal to provide (or CITY’s failure for any reason to otherwise obtain) ARTIST’s written approval provided for in Section 9.3 above, CITY, in its sole discretion, shall have the right to remove any Work of art providing the following terms and conditions are met.

9.4.1. The removal proposal shall first be submitted to and considered by the Public Art Advisory Committee and the Stockton Arts Commission. Following review and consideration of the removal proposal by the Public Art Advisory Committee and the Arts Commission, a recommendation on removal shall be submitted to the City Council.

9.4.2. The City Council shall have the right to decide that a Work of art shall be removed. The decision to remove shall not be made by the City Council until the recommendation required in Section 9.4.1 is received and considered by the City Council.

9.4.3. In the event that the City Council shall decide to remove the Work, ARTIST shall have: the first right of refusal to purchase his Work, providing it stands alone and is not integrated into a larger artwork, building or structure and can be removed without expense to CITY; the right to have his name removed from the Work; and, the election to keep the plaque installed pursuant to Section 9.1.

9.5 CITY shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Work will be made. CITY shall monitor the condition of the WORK and propose, within a reasonable period of time, that repairs are made if any when any damage to the WORK occurs from any source. ARTIST shall have the right to approve all major repairs and restorations, provided, however, that ARTIST shall not unreasonably delay, withhold or condition
approval for any repair or restoration of the Work. If ARTIST unreasonably fails, delays or conditions to approve any repair or restoration, CITY shall have the right to make or supervise significant repairs and restorations. In the event that CITY makes repairs or restorations not approved by ARTIST, ARTIST shall have the right, at his sole election, to have ARTIST’s name and association with the Work severed. To the extent practical, ARTIST shall be given the reasonable opportunity to make or supervise significant repairs and restorations and shall be paid a reasonable fee for any such services, provided that CITY and ARTIST shall agree, in writing, prior to the commencement of any significant repairs or restorations, upon ARTIST’s fee for such services.

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

**ARTICLE 10. COPYRIGHTS**

10.1 ARTIST shall retain all copyright and all other rights in and to any Artwork(s) created under this Agreement, provided that ARTIST hereby grants to CITY an irrevocable license to graphically depict the Artwork for any non-commercial purpose whatsoever. For the purposes of this limitation, the graphic depiction of the Artwork(s) on materials designed to promote CITY shall be deemed to be a non-commercial use. CITY shall not be responsible for any third party infringement of ARTIST’s copyright; provided the CITY shall promptly notify ARTIST of any infringement reasonably known to CITY.

10.2 All rights to the proposed Artwork, not expressly granted to CITY, shall be retained by ARTIST.

10.3 ARTIST agrees that all Work performed under this Agreement shall comply with all applicable patent, trademark and copyright laws, rules, regulations and codes of the State of California and the United States. ARTIST hereby represents and warrants that the Work does not, and ARTIST has not and will not, utilize any protected patent, trademark or copyright in performance under this Agreement unless and until ARTIST has obtained proper permission and all releases and other necessary documents. If ARTIST specifies any material, equipment, process or procedure which is protected, ARTIST shall disclose such patents, trademarks and copyrights in the construction drawings and technical specifications, such listing to be appended to this Agreement and shall be incorporated by this reference.

10.4 ARTIST agrees to release, indemnify, defend and save harmless CITY, its officers and employees from any and all claims, damages, suits, costs, expenses, liabilities, actions or proceedings of any kind resulting from the performance under this Agreement which infringes upon any patent, trademark or copyright or other right protected by law.

**ARTICLE 11. TIME FOR PERFORMANCE**

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11.1 The provisions of this Agreement and the compensation for ARTIST's services provided for in this Agreement have been agreed to in anticipation of the orderly and continuous progress of the Project.

11.2 Prior to beginning the performance of the services under this Agreement, ARTIST must receive a written Notice to Proceed.

11.3 In the event ARTIST is unable to complete the above services because of delays resulting from untimely issuance of a "Notice to Proceed", or from untimely review and approval by CITY, and such delays are not the fault of ARTIST, CITY shall grant a reasonable extension of time for completion.

11.4 ARTIST shall complete the services required in Exhibit "A" within eighteen months from the date of approval of the contract by City Council unless such time is extended in writing by the parties.

ARTICLE 12. TERMINATION

12.1 Either party may terminate this Agreement with cause by providing thirty (30) days notice, in writing, to the other party. Upon the expiration date of said notice, this Agreement shall become of no further force or effect whatsoever and each of the parties shall be relieved and discharged from all rights and further duties and responsibilities under this Agreement. Cause shall mean that the ARTIST or CITY has materially breached a material term of this Agreement and has not remedied the material breach within the remediation period of 60 days as set forth in Section 12.4.

12.2 In the event that the Agreement is terminated by CITY without cause, CITY shall pay the ARTIST for all Work performed and services rendered up to the effective date of the termination. CITY shall have no rights to the ARTIST's creative Work, designs or unfinished Artwork(s).

12.3 In the event that this Agreement is terminated by ARTIST without cause, ARTIST shall promptly reimburse CITY for all payments made under this Agreement, Exhibit A, on a pro-rata basis up to the effective date of termination.

12.4 In the event that CITY determines that ARTIST has substantially failed to fulfill material obligations as provided under this Agreement, CITY shall provide ARTIST with written notice detailing the specific obligations which CITY claims ARTIST has failed to materially fulfill and notifying ARTIST that he is deemed to be in material breach of the Agreement. If the breach is not cured or if CITY and ARTIST cannot agree on a schedule for curing the breach, the Agreement will be deemed terminated on a date specified by CITY which will be no sooner than sixty (60) days from the date of issuance of the notice. The parties shall meet in person in good faith to resolve the claim by CITY, and if the parties are unable to resolve the claim, then either party may initiate non-binding mediation for which each party will bear their own costs and expenses. Following mediation, in the event that this Agreement is so terminated by
CITY, ARTIST shall promptly reimburse CITY for all payments made under this Agreement prior to the termination by CITY.

12.5 If, because of the death, or any other catastrophic occurrence, it becomes impossible for ARTIST to render services or complete performance under this Agreement, the Agreement shall be terminated, upon written notice to CITY and with the concurrence of CITY. Such a termination shall be treated as a termination without cause.

ARTICLE 13. INSURANCE

ARTIST shall at all times during the term of this contract with CITY maintain in force those insurance policies and bonds as designated in the attached Exhibit "C" and will comply with all those requirements as stated herein.

ARTICLE 14. EQUAL OPPORTUNITY EMPLOYMENT

14.1 ARTIST agrees that it will not discriminate against any employee or applicant for employment under this Agreement on the basis of race, color, religion, gender, age, national origin, creed, marital status, or the presence of any sensory, mental or physical handicap or on any other basis prohibited by local, state or federal law, in employment or application for employment or in the administration of this Agreement.

14.2 ARTIST agrees to comply fully with all applicable federal, state, or local laws, ordinances, executive orders and regulations which prohibit discrimination.

14.3 ARTIST shall comply with Title I and Title II of the Americans with Disabilities Act regarding nondiscrimination on the basis of disability in employment and in state and local government services in the course of providing any services funded in whole or in part by CITY.

ARTICLE 15. MISCELLANEOUS

15.1 RECORDS:

ARTIST shall keep such records and accounts and require any and all subcontractors to keep records and accounts as may be necessary in order to record complete and correct entries as to personnel days charged to this engagement and any expenses for which ARTIST is to be reimbursed pursuant to Exhibit "B." Such books and records will be available for examination and audit by CITY and shall be kept for a period of three (3) years after the completion of all Work to be performed pursuant to this Agreement.

15.2 INDEPENDENT CONTRACTOR:
ARTIST is an independent contractor under this Agreement. Personal services provided by ARTIST shall be by ARTIST or employees of ARTIST, and not as officers, employees, or agents of CITY. Personnel policies, tax responsibilities, social security and health insurance, employee benefits, purchasing policies and other similar administrative procedures applicable to the activities of ARTIST under this Agreement shall be those of ARTIST.

15.3 SUBCONTRACTORS:

In the event ARTIST, during the course of performance under this Agreement, requires the service of any subcontractors or other professional associates in connection with services or activities covered by this Agreement, ARTIST has identified in the exhibits to this Agreement, or if changes or additions are requested by ARTIST, ARTIST must secure the prior written approval of CITY's Contract Administrator. ARTIST shall directly pay any such subcontractor and is solely responsible for assuring subcontractor(s) provide proof of insurance and provided in Article 13, above. ARTIST is solely responsible for evaluation of the qualifications, expertise and selection of any subcontractor(s), for supervision of and payment of any and all subcontractors. CITY shall in no way be liable to or responsible for the acts or activities of any subcontractor.

15.4 ASSIGNMENT:

This Agreement, or any interest herein, shall not be assigned, transferred or otherwise encumbered, under any circumstances, by ARTIST, without the prior written consent of CITY.

15.5 MODIFICATIONS:

No modification, amendment or alteration in the terms or conditions contained herein shall be effective unless contained in a written document executed with the same formality and of equal dignity herewith.

15.6 CONFORMITY WITH LAW AND SAFETY:

ARTIST shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including all provisions of the Occupational Safety and Health Act of 1979 and all amendments thereto, and all applicable Federal, State, municipal and local safety regulations. All services performed by ARTIST shall be in accordance with these laws, ordinances, codes and regulations. ARTIST shall indemnify, defend and save CITY harmless from any and all liability, fines, penalties and consequences from any noncompliance or violations of such laws, ordinances, codes and regulations.

Accidents: If death, serious personal injury or substantial property damage occurs in connection with the performance of this Agreement, ARTIST shall immediately notify the City Risk Manager's Office by telephone. ARTIST shall promptly submit to CITY a written report, in such form as may be required by CITY of all accidents or
losses which occur in connection with this Agreement. This report must include the following information: (1) name and address of the injured or deceased person(s); (2) name and address of ARTIST’s employee(s) and/or subcontractors, if any; (3) name and address of ARTIST’s liability insurance carrier; and (4) a detailed description of the incident or accident and whether any of CITY’S equipment, tools, material or staff were involved.

15.7 CONFLICT OF INTEREST:

No officer, member, or employee of CITY and no member of their governing boards, councils or commissions shall have any pecuniary interest, direct or indirect, in this Agreement or the proceeds thereof. Any violation of these provisions shall be considered a material breach of this Agreement.

15.8 USE OF CITY PROPERTY:

ARTIST shall not use CITY premises, property (including equipment, instruments and supplies) or personnel for any purpose other than the performance of his obligations under this Agreement.

15.9 TIME:

Both parties recognize that time is of the essence in the performance of the provisions of this Agreement.

15.10. RESOLUTION OF DISPUTES, FORUM, ATTORNEYS' FEES:

The laws of the State of California shall govern the interpretation of and the resolution of disputes under this Agreement. Any dispute arising from this Agreement shall be adjudicated in the courts of San Joaquin County in the State of California. If any claim, at law or otherwise, is made by either party to this Agreement, the prevailing party shall be entitled to its costs and reasonable attorneys' fees, including the costs of house counsel.

15.11 NOTICES:

All notices, requests, demands and other communications hereunder shall be deemed given only if in writing signed by an authorized representative of the sender and delivered by personal service, by facsimile with a hard copy mailed first class, postage prepaid, or when sent by a courier or express services guaranteeing overnight delivery to the receiving party with a receipt/signature required, and addressed to the respective party as follows:

To CITY: City of Stockton
Attn: Robyn Burror, Contract Administrator
Parks and Recreation Department
6 E. Lindsay Street
Stockton, California 95202
To: Mark White  
1610 Lena Street, Unit F-1  
Santa Fe, New Mexico 87505  
Telephone: (505) 982-2073

5.12 ALL PRIOR AGREEMENTS SUPERSEDED:

This document incorporates and includes all prior negotiations, correspondence, conversations, agreements or understandings applicable to the matters contained herein; and the parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly, the parties agree that no deviation from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written.

15.13 SEVERABILITY:

In the event any portion of the provisions, or applications thereof, of this Agreement are held to be unenforceable or invalid by any court of competent jurisdiction, the validity and enforceability of the remaining provisions, or applications, shall not be affected.

15.14 AUTHORITY TO EXECUTE:

The undersigned represent and warrant they are each duly authorized by the parties to execute this Agreement.

IN WITNESS THEREOF, the parties have caused this Agreement to be executed as of the date stated above.

CITY OF STOCKTON, a municipal Corporation

ARTIST

By: ________________________________  
J. GORDON PALMER, JR.  
CITY MANAGER  
"CITY"

By: ________________________________  
MARK WHITE  
"ARTIST".

ATTEST:

By: ________________________________  
KATHERINE GONG MEISSNER  
CITY CLERK

-14-
APPROVED AS TO FORM:
RICHARD E. NOSKY, JNR.
CITY ATTORNEY

By [Signature]
LORI S. WHITTAKER
DEPUTY CITY ATTORNEY
EXHIBIT A

SCOPE OF WORK

Group of Five Kinetic Sculptures: Joan Darrah Promenade on the Stockton Waterfront

SCOPE OF WORK

The following represents all the tasks that Mark White will carry out to comply with the City of Stockton's requirements for this Public Art Project.

Artist must get approval of the final design from the Public Art Advisory Committee (PAAC) prior to commencing with fabrication.

Artist will design, and oversee fabrication and installation of proposed artwork for the commissioned amount of $48,400

Artist will provide design, fabrication, installation plans and specifications and site supervision for the installation of the wind powered, kinetic, stainless steel, 17 – 21 foot high sculptures to be placed at the “South Point” of the Joan Darrah Promenade on the Stockton Waterfront. The artwork foundations and lighting will be coordinated by the design build contractors, with the artist who will provide all required engineering calculation documents. The artist will fabricate the sculptures of powder coated surface stainless steel. The installation site will be prepared by the design build contractors.

The City of Stockton will provide any required permits at no cost to the artist. The structure will meet all pertinent uniform building code specifications.

BUDGET: Group of Five Kinetic Sculptures

1. Dream Arabesque
2. Dream Orb 12
3. Jellyfish
4. Ripples
5. Wing Rhythms
Engineering Services
Shipping/Installation oversight

Total Budget: $48,400.00
EXHIBIT B
COMPENSATION

Mark White Kinetic Sculptures: Joan Darrah Promenade at the Stockton Waterfront

1. As consideration and payment for services provided, CITY shall pay to ARTIST a sum of Forty Eight Thousand Four Hundred ($48,400) for completion of all services described in the Scope of Work.

2. Additional services approved by CITY and rendered by ARTIST, if any, shall be compensated as agreed upon by CITY and ARTIST. Payment for such additional services and related expenses shall be made within thirty (30) days of receipt of invoice and after completion and acceptance of said work by CITY.

3. Payment for services will be made on the following basis:

30% of the compensation will be remitted upon approval by the City Council and upon issuance of the Notice to Proceed.

30% of the compensation will be remitted at the completion of the approved integration of design into construction documents for the Trinity Parkway Bridge Railing, as determined by the Contract Administrator.

30% of the compensation will be remitted upon the completion of fabrication, transportation, installation, and acceptance of the work.

All payments made will be in such sum as shall make the aggregate of payment equal to ninety percent (90%) of the proportional contract price, upon the basis of the progress certificate of the Contract Administrator as to the amount of work done and the proportional amount of the contract price; and all of the remaining part of the contract price shall be paid at the expiration of thirty-five (35) days after the completion of said work and the certification by the Contract Administrator of such completion.

Pursuant to Section 22300 of the Public Contract Code, the ARTIST will be permitted, at his request and sole expense, to substitute securities for any monies withheld by the CITY to ensure performance under the contract. Said securities will be deposited either with the CITY or with a state or federally chartered bank as escrow agent. Securities eligible for this substitution are those listed in Section 16430 of the California Government Code or bank or savings and loan certificates of deposit. The CONTRACTOR shall be the beneficial owner of any securities substituted for monies withheld and shall receive any interest earned.
4. Invoices.

Invoices shall be in the form and level of detail, as required by the Contract Administrator, so as to permit a reasonable evaluation of the work completed.

Invoices shall be sent by ARTIST to the attention of:

Robyn Burror
Program Manager
Parks & Recreation Department
6 E. Lindsay Street
Stockton, California 95202

<table>
<thead>
<tr>
<th>PAYMENT SCHEDULE FOR MARK WHITE</th>
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<tbody>
<tr>
<td><strong>1st payment</strong> *(due at execution of contract (30%)):</td>
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<tr>
<td>Due at execution of contract (30%):</td>
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<tr>
<td><strong>2nd payment</strong> *(due at benchmark identified in the Scope of Work requires Public Art Manager approval (30%)):</td>
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<tr>
<td><strong>3rd payment</strong> *(due after installation and final approval by City of Stockton (30%)):</td>
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<tr>
<td>Retention <em>(10% retention)</em> *(due 35 days after installation and final approval by City of Stockton):</td>
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<td><strong>Total:</strong></td>
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*All payments must be invoiced by the artist in order to be paid.
EXHIBIT C
INSURANCE REQUIREMENTS

Throughout the life of this Contract, the ARTIST shall pay for and maintain in full force and effect with an insurance company(s) (Company) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A":VII in Best Insurance Key Rating Guide, the following policies of insurance:

Minimum Limits of Insurance

ARTIST shall maintain insurance limits not less than:

1. General liability: $1,000,000 per occurrence for bodily injury, personal injury and property damage.

Deductibles and Self-Insured Retention

Any deductibles or self-insured retention must be declared to and approved by CITY.

Other Insurance Provisions: Indemnification

ARTIST agrees to indemnify, including the cost to defend, CITY OF STOCKTON, and its officers, agents and employees from any and all claims, demands, costs or liability that arise out of, or pertain to, or relate to the negligence, recklessness, or willful misconduct of ARTIST and his/her agents in the performance of services under this contract, but this indemnity does not apply to liability for damages for death or bodily injury to persons, injury to property, or other loss, arising from the sole negligence, willful misconduct or defects in design by the CITY OF STOCKTON or the agents, servants, or independent contactors who are directly responsible to the CITY OF STOCKTON, or arising from the active negligence of the CITY OF STOCKTON.

1. CITY, its officers, officials, employees, and volunteers are to be covered as additional insured on general liability and automobile liability policies as respects: liability out of activities performed by or on behalf of ARTIST; premises owned, occupied or used by ARTIST; and automobiles owned, leased, hired or borrowed by ARTIST. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, officials, employees or volunteers.

2. For any claims related to the project, ARTIST's insurance coverage shall be primary insurance as respects CITY, its officers, officials, employees and volunteers.
3. Any insurance or self-insurance maintained by CITY, its officers, officials, employees or volunteers shall be excess of ARTIST's insurance and shall not contribute with it.

4. Any failure to comply with the reporting or other provisions of the policies shall not affect coverage provided to CITY, its officers, officials, employees or volunteers.

5. ARTIST's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

6. Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to CITY.

Verification of Coverage

ARTIST shall furnish CITY with original endorsements of effective coverage for policies on which CITY is included as an additional insured as required by this Exhibit, and shall furnish original certificates of insurance for all other required policies. The endorsements are to be signed by the person authorized by the insurer to bind coverage on its behalf. All endorsements and certificates are to be received and approved by CITY before work commences.

Upon request, ARTIST shall furnish CITY a certified copy of any or all policies of insurance covering the work required under this Agreement.