

Art & About Commissioning Agreement

The Council of the City of Sydney ABN 22 636 550 790

and [*Artist name*] ABN [*insert*]

For [*insert year/s*] Art & About Project [*insert Project name*]

Reference: [*insert TRIM number*]



ART & ABOUT COMMISSIONING AGREEMENT

THIS AGREEMENT is made on the date set out in **Item 1** of Schedule 1.

PARTIES

- (1) **THE COUNCIL OF THE CITY OF SYDNEY** (ABN 22 636 550 790) of Town Hall House, 456 Kent Street, Sydney, NSW, 2000 (**City**), and
- (2) **THE PARTY** set out in Item 2 of Schedule 1 (**Artist**).

BACKGROUND

- A. The Artist submitted an expression of interest to the City for a Project to produce as part of Art & About.
- B. The City shortlisted the Artist's expression of interest and engaged the Artist to develop the proposed Project as part of stage 2 of the expression of interest.
- C. Based on the Artist's expression of interest submission, and development work in stage 2, the City wishes to produce the Project for Art & About.
- D. The Artist has warranted that it has the skill and ability to create and deliver the Project and, in reliance on that warranty, the City has agreed to commission the Artist to create and deliver the Project.
- E. The Artist has agreed to create and deliver the Project for Art & About on the terms and conditions of this Agreement.

THE PARTIES AGREE AS FOLLOWS:

1 INTERPRETATION

1.1 In this Agreement, unless the context otherwise requires:

Agreement means this Art & About Commissioning Agreement and all schedules, attachments and annexures.

Art & About means the annual program of new public art installations, exhibitions and events within the City of Sydney's local government area that is produced and curated by the City.

Authorisation means:

- (a) an approval, authorisation, consent, declaration, exemption, permit, licence, notarisation or waiver, however it is described, and including any condition attached to it; and
- (b) in relation to anything that could be prohibited or restricted by law if a government agency acts in any way within a specified period, the expiry of that period without that action being taken,

including any renewal or amendment.

Budget means the budget for the Project and performance of the Commission provided by the Artist as part of the EOI Material, at Attachment B, as updated from time to time.

Business Day means a day (not being a public holiday or weekend) on which banks are generally open for business in Sydney.

City Contribution means the items and support, including any Site and/or Authorisations, to be provided by the City in relation to the Project specified in Item 12 of Schedule 1.

Commencement Date means the date specified in Item 4(a) of Schedule 1 or, if this is not specified, the date on which this Agreement is signed by the City's authorised officer.

Commission means the design, creation and delivery of the Project by the Artist for Art & About, including all associated works and services.

COVID-19 Pandemic means the pandemic caused by the disease known as Novel Coronavirus (COVID-19) classified as a pandemic by the World Health Organization on 11 March 2020.

End Date means the date specified in Item 4(b) of Schedule 1.

EOI Material means the documents, plans, descriptions, images, impressions, concept designs, sketches, mock-ups, descriptions, photographs, video, footage and other material in any media or format in relation to the Project, provided by the Artist to the City as part of the Art & About Expression of Interest (EOI) process that resulted in this Agreement.

Exhibition Period means the period the Project will be on public exhibition at the Site, as set out in Item 7 of Schedule 1.

Fee means the fee payable to the Artist for the Commission and the Project as specified in Item 10 of Schedule 1.

Force Majeure Event means in relation to a party an act, omission or circumstance which:

- (a) is beyond the reasonable control of that party; and
- (a) constitutes a fire, flood, earthquake, terrorism, riot, explosion or war, communicable disease for which the World Health Organisation or Department of Foreign Affairs and Trade have issued affected area or travel warnings, pandemic, state-wide or national strike or other state-wide wide or national industrial action (except where caused by the Artist or the Artist's Personnel),

but does not include an act, omission or circumstances that was taking place at the time of the Commencement Date. The COVID-19 Pandemic and Public Health Orders are not a Force Majeure Event.

GST means the same as in the GST Act.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Indigenous Cultural and Intellectual Property (ICIP) Rights means the rights of Australian Aboriginal and Torres Strait Islander peoples to protect their traditional arts and culture and includes, but is not limited to, rights to protect traditional knowledge and sacred cultural material, ensure traditional laws and customary obligations are respected, full and proper attribution or naming of the community connected with the ICIP, and prevent insulting, offensive and misleading uses of ICIP.

Intellectual Property Rights means all industrial and intellectual property rights throughout the world, present or future including copyright in sketches, plans, maps, drawings, reports, computer programs, data bases, models and any designs, trademarks or other intellectual property rights but does not include ICIP Rights.

Moral Rights means all present and future rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed and rights of a similar nature conferred by statute anywhere in the world.

Key Dates means the dates set out in Item 9 of Schedule 1.

Payment Milestones means the dates the Fee will be progressively paid to the Artist as specified in Item 11 of Schedule 1.

Personnel means the officers, employees, agents, contractors or subcontractors of a party to this Agreement.

Post-Event Report means a written report about the Project that includes a detailed description of the artistic process and outcomes, technical specifications and supporting documentation relating to the Project, detailed instructions for the installation, dismantling and storage of the Project (if applicable), outline of the successes and challenges associated with the Project and a financial statement of income and expenditure for the Project.

Project means the public art commissioned by the City, described in Item 5 of Schedule 1 and as further developed in the course of this Agreement.

Project Artefacts means materials, in any format or media, produced by, for or on behalf of the Artist in connection with the Project and that reproduce, reflect, comprise or adapt the Project (in whole or in part) including ephemera, collateral, components, pieces, or legacy items of the exhibited Project, items inspired by the creative process of developing the Project, models or sculptures of the Project, and artistic prints or photographs of the Project.

Project Materials means documents, plans, descriptions, images, impressions, concept designs, sketches, mock-ups, descriptions, photographs, video, footage, and audio or visual recordings of the Project in any media or format provided by the Artist under or in connection with this Agreement.

Public Health Order means an order made by the Minister for Health and Medical Research (or equivalent) under section 7 of the *Public Health Act 2010* (NSW), as amended, updated, replaced or superseded.

Site means the location for the exhibition of the Project specified in Item 6 of Schedule 1.

Site Owner means the registered proprietor of the Site.

Specification means the documentation that details the Project and the methodology to perform the Commission provided by the Artist as part of the EOI Material, at Attachment A, as updated from time to time.

Term means the period commencing on the Commencement Date and ending on the End Date, unless terminated earlier in accordance with clause 21.

WHS Law means the *Work Health and Safety Act 2011* (NSW), regulations and other instruments under it, codes of practice, and Australian Standards, and any consolidations, amendments, re-enactments or replacements.

WHS Returnable Documents means the work health and safety documentation listed in Item 14 of Schedule 1.

1.2 In this Agreement, except where the context otherwise requires:

- (a) clause and subclause headings shall not be used in the interpretation of this Agreement;
- (b) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context;
- (c) words importing a gender include every gender;
- (d) a reference to \$ or dollars is to Australian dollars;
- (e) the words "including", "include" and "included" are deemed to be followed by the words "without limitation";
- (f) a reference to legislation or a provision of legislation is to that provision or legislation as amended, re-enacted or replaced from time to time;

- (g) a reference to a body which ceases to exist is a reference to a body that the parties agree to substitute for the named body or, failing agreement, to a body having substantially the same objects as the named body;
- (h) where the Artist comprises of more than one person, each of the persons comprising the Artist will be jointly and severally liable under this Agreement.
- (i) words defined in the GST Act have the same meaning in clauses in this Agreement about GST; and
- (j) this Agreement is not to be interpreted against the interests of a party merely because that party proposed this document or some provision in it or because that party relies on a provision of this document to protect itself.

1.3 In the event of any inconsistency, ambiguity or discrepancy between any document forming this Agreement, the following order of precedence will apply to the extent of any inconsistency, ambiguity or discrepancy:

- (a) this document;
- (b) Schedule 1 (Reference Schedule);
- (c) any other schedules; and
- (d) any attachments to this document.

2 TERM

2.1 The rights and obligations under this Agreement begin on the Commencement Date and end on the earlier of:

- (a) termination under clause 21; or
- (b) the End Date,

unless the parties agree in writing to extend the End Date by way of variation in accordance with clause 23.

3 RELATIONSHIP BETWEEN THE PARTIES

3.1 The Artist acknowledges and agrees that the Artist is an independent contractor of the City, and neither the Artist nor any of the Artist's Personnel are employees of the City.

3.2 The Artist must not represent itself and must ensure that its Personnel do not represent themselves as being partners, employees or agents of the City.

3.3 The Artist must not make any representation, statement or warranty that it has the authority to bind the City, whether by entering into contracts or otherwise.

3.4 The Artist must not assign, mortgage or charge any of the Artist's rights and interests under this Agreement.

4 THE COMMISSION

4.1 The Artist must perform the Commission and exhibit the Project for the Exhibition Period at the Site for Art & About in accordance with this Agreement.

4.2 In performing the Commission and its obligations under this Agreement, the Artist must:

- (a) comply with the Specification;
- (b) ensure the costs of the Project remain within the Budget;
- (c) adhere to the Key Dates;

- (d) with the exception of those items listed in the City Contribution, supply everything necessary (including equipment, materials, services, consumables) which are necessary or desirable for the performance of the Commission and delivery and exhibition of the Project;
- (e) exhibit the Project at the Site for the Exhibition Period;
- (f) remove the Project and any associated materials (including signage) from the Site at the conclusion of the Exhibition Period and make good the Site where required by the terms of use of the Site;
- (g) ensure all equipment, parts and materials used in the Commission and the Project are of high quality and free from defects, in good working order and condition, kept in good repair at all times, and fit for their intended purpose;
- (h) with the exception of any Site listed in the City Contribution, source and secure use of the Site for the Commission and exhibition of the Project for the Exhibition Period including obtaining any required Authorisations (including where Authorisations must be obtained from the City), meeting the requirements of the Site Owner, and ensuring the Site remains clean, tidy and safe for the Exhibition Period and whilst the Project remains on the Site;
- (i) with the exception of any signage listed in the City Contribution, provide all promotional, acknowledgement and interpretation signage (including signage content) for the Project at the Site, and signage relating to the safe operation or viewing of the Project, the design and content for which must be approved by the City before display;
- (j) with the exception of any Authorisation listed in the City Contribution, obtain and keep in full force all Authorisations which are necessary or desirable for the performance of the Commission and exhibition of the Project;
- (k) promptly provide to the City copies of any Authorisations on request;
- (l) where the City is providing the Artist with access to or use of a Site as part of the City Contribution, comply with the obligations in clause 6;
- (m) ensure the Commission and the Project are delivered in accordance with all applicable laws, regulations, industry codes and standards, including WHS Law;
- (n) comply with all the City's applicable policies, procedures and codes of conduct which apply to the Commission or the Project or are notified to the Artist by the City;
- (o) carry out all obligations in a highly professional and ethical manner and with the level of due care and skill which may be expected of a skilled professional artist experienced in commissions of the type the subject of this Agreement;
- (p) ensure the Commission and Project are fit for the purposes for which deliverables of that type are commonly acquired and for any other purposes which have been notified to the Artist by the City;
- (q) comply with the requirements of any Site Owner in its access to or use of any Site;
- (r) act reasonably and cooperate with the City and any other third parties engaged by the City associated with the Commission, the Project and/or Art & About;
- (s) be available on reasonable notice for discussions with the City, or such other persons nominated by the City;
- (t) comply with the directions made or given by the City; and
- (u) provide the City a Post-Event Report, in the form required by the City, in accordance with the Key Dates.

4.3 The Artist warrants that the Artist has the skill and ability to undertake the Commission and deliver the Project in accordance with the requirements of this Agreement and acknowledges that the City has entered into this Agreement in reliance on this warranty.

4.4 Failure by the Artist to perform the Commission or deliver the Project in accordance with clause 4.2 is a breach of this Agreement entitling the City to terminate this Agreement.

5 MAINTENANCE DURING THE EXHIBITION PERIOD

5.1 The Artist agrees, at the Artist's expense, to take all practicable steps to maintain the Project in good condition during the Exhibition Period, and will undertake repairs or conservation treatment to the Project during the Exhibition Period in consultation with the City.

5.2 The Artist consents to the City carrying out urgent repairs to the Project required for reasons of public safety, without further consultation with the Artist. If the City exercises this right, the Artist is not relieved of the Artist's obligation to maintain and repair under clause 5.1.

5.3 If, during the Exhibition Period, the City is of the opinion that the condition of the Project has deteriorated or it is no longer suitable for the Site the City may direct the Artist to remove the Project, at the Artist's cost.

5.4 Where the Artist fails to comply with clause 5.1 or 5.3, the City may step in and undertake any maintenance, repairs or conservation treatment it deems is required, or remove the Project. The Artist is responsible for any costs incurred by the City in performing such works and such costs will be recoverable by the City from any outstanding Fees due to the Artist. Where the Fee has already been paid, such costs will be a debt due and owing to the City by the Artist.

5.5 Notwithstanding clause 5.2 and 5.4, the City may remove from public display or modify the Project at any time for reasons of public safety or where circumstances such as substantial damage or deterioration compromise the condition or integrity of the Project. The City will use best efforts to consult with the Artist as soon as practicable where such action is necessary.

6 SITE PROVIDED AS CITY CONTRIBUTION

6.1 The City grants the Artist access to and non-exclusive use of the Site listed in the City Contribution for the performance of the Commission and/or exhibition of the Project for the period specified by the City to the Artist.

6.2 The Artist's occupation and use of any Site provided as part of the City Contribution will be at its own risk.

6.3 The Artist is responsible for the care of any Site provided as part of the City Contribution during the performance of the Commission and for the acts and omissions of the Artist's Personnel whilst on the Site.

6.4 Where the City Contribution includes providing the Artist with access to or use of a Site under this Agreement, the Artist must:

- (a) not use the Site for any purpose other than the purposes relating to the performance of the Commission;
- (b) provide any information, plans or documents required by the City in relation to the Artist's proposed use of the Site;
- (c) comply with any Authorisations applicable to the Site, the Project, and/or the use of the Site for the Commission;
- (d) keep the Site (or that part of the Site to which the Artist has access) clean and tidy for so long as the Artist has access to and use of the Site;

- (e) not modify or damage any part of the Site, including puncturing any holes in the walls, without the prior written consent of the City and the relevant Site Owner;
- (f) not bring onto the Site any object that may result in overloading or straining any floor, wall or other structure forming part of the Site;
- (g) not change the materials, method of installation and/or removal, or maintenance activities of the Project without the prior written approval of the City;
- (h) upon vacating the Site, leave it free from rubbish and in good order and condition;
- (i) make good to the standard required by the City and the relevant Site Owner any damage to the Site caused by the Artist or the Artist's Personnel; and
- (j) comply with any direction given by the City or the Site Owner about the Site.

6.5 The Artist agrees that it has carried out its own enquiries about the adequacy and suitability for use of each Site provided as part of the City Contribution for the performance of the Commission and/or exhibition of the Project.

6.6 If the Artist does not comply with this clause, the City may engage third parties to restore the Site and the Artist will be responsible for the costs of restoration. If the Artist fails to pay such costs, the City may deduct the third party restoration costs from the Fee.

6.7 The Artist acknowledges that the City is only obliged to provide use of a Site where this is expressly listed as part of the City Contribution. Use by the Artist of any other land or buildings owned or managed by the City that are not listed as part of the City Contribution must be procured by the Artist and may require the Artist to pay fees and/or obtain additional Authorisations, including to/from the City in its capacity as a public authority.

7 WORK HEALTH AND SAFETY

7.1 The Artist must comply with, and ensure that its Personnel, workers (as that term is defined by WHS Law), and any other persons whose activities in relation to the Commission are influenced or directed by the Artist, comply with WHS Law, the City's WHS requirements and any other directions to the Artist regarding health, safety or the environment issued by the City from time to time.

7.2 The Artist must:

- (a) accurately complete and provide to the City the WHS Returnable Documents by the Key Dates; and
- (b) comply with the WHS Returnable Documents.

7.3 The City may, but is not obliged to, review and provide comments to the Artist on the WHS Returnable Documents. The Artist must incorporate any comments provided by the City in accordance with the Artist's WHS Legislative Obligations. The Artist acknowledges that the City's review and commentary with respect to any WHS Returnable Documents in no way derogates from the Artist's sole responsibility to comply with all WHS Law relevant to the Commission.

7.4 The Artist acknowledges and agrees that:

- (a) the City may carry out periodic inspections of the Artist's compliance with WHS Law and this Agreement (and the Artist agrees to provide the City with reasonable access to all Sites and/or information to enable such monitoring to be carried out); and
- (b) by exercising its right of access, or conducting any monitoring, under this clause 7.4(a) or otherwise, the City is not assuming any management or control of the Commission and is only accessing the Site or receiving information to monitor the Artist's compliance with its obligations under this Agreement and/or WHS Law.

8 CHAIN OF RESPONSIBILITY

8.1 In this clause:

- (a) **Chain of Responsibility** means legislation that extends liability for Road Law offences to all parties whose actions, inactions or demands influence conduct on the road particularly in relation to speed, fatigue, vehicle standards, vehicle roadworthiness, load restraint, and mass and dimension.
- (b) **HVNL** means the *Heavy Vehicle National Law (NSW)*, regulations and other instruments under it including any codes of practice and any consolidations, amendments, re-enactments or replacements.
- (c) **Heavy Vehicle** has the meaning given to it in the HVNL.
- (d) **Road Law** means any law, regulation or rule relating to the use of a road, restrictions on driving hours (in whichever legislative instrument those requirements may appear), mass, load and restraint requirements for the carriage of goods, dangerous goods, environmental impacts and speed and traffic requirements and includes the HVNL.

8.2 The Artist must in connection with any activity carried out under or in relation to this Agreement:

- (a) comply with all Chain of Responsibility legislation and must ensure that any activity relating to a Heavy Vehicle used in connection with this Agreement is undertaken in accordance with all applicable Chain of Responsibility obligations (including any fatigue, speed, mass, dimension or load restraint requirements);
- (b) not ask, direct or require (directly or indirectly) the driver of a Heavy Vehicle or a party in the Chain of Responsibility to do or not do something the Artist knows, or ought reasonably to know, would have the effect of causing the driver to contravene their Chain of Responsibility obligations, including to breach any fatigue, speed, mass, dimension or load restraint requirements;
- (c) ensure that any subcontractors (where any Heavy Vehicle activities are sub-contracted under this Agreement) are contractually bound by similar Chain of Responsibility obligations to those set out in this clause 8.2

8.3 The Artist will ensure that it has proper processes in place to manage its Chain of Responsibility obligations.

8.4 The Artist must provide the City, upon request, with all information and documentation reasonably required by the City to monitor or audit compliance with this clause (including permitting inspections of vehicles and business premises).

9 SUSTAINABILITY

9.1 In performing the Commission, the Artist must:

- (a) comply with all relevant national and local environmental protection laws, regulations and standards;
- (b) prevent pollution and ensure the safe storage, transportation and disposal of hazardous materials, and avoid the use of toxic and persistent chemicals; and
- (c) minimise the negative environmental impacts of the Commission and the Project throughout its lifecycle by assessing and mitigating risks in the design, production, construction, installation, maintenance and removal of the Project and associated operations, transport and supply chains.

10 SUB-CONTRACTORS

10.1 The Artist must not appoint any sub-contractors other than those listed in Item 8 of Schedule 1 without the City's prior written approval.

10.2 The appointment of sub-contractors by the Artist does not relieve the Artist of the Artist's obligations under this Agreement.

10.3 The Artist agrees that the Artist:

- (a) will ensure that its sub-contractor's hold the required insurances set out in clause 12.1;
- (b) will, at the Artist's cost, comply with its obligations to pay superannuation contributions in respect of any sub-contractors that are sole traders where required by the *Superannuation Guarantee (Administration) Act 1992* (Cth);
- (c) is responsible for the performance of each sub-contractor;
- (d) will ensure the quality and timeliness of the Artist's sub-contractors' performance to meet the requirements of this Agreement; and
- (e) is liable to the City for the acts and omissions of the Artist's sub-contractors as if they were acts or omissions of the Artist.

10.4 The Artist acknowledges and agrees that:

- (a) the City may direct the Artist to remove, from performing any part of the Commission, any sub-contractors:
 - (i) for misconduct;
 - (ii) for incompetence or negligence in the performance of their services;
 - (iii) whom the City reasonably considers is undesirable to perform the Commission or part of it;
 - (iv) whom the City reasonably considers is not suitably qualified to perform the work;
 - (v) whom the City reasonably considers is unable to complete the work to the expected standard within the required timeframe;
- (b) the Artist must comply with a direction given in accordance with clause 10.4(a) within the period specified by the City;
- (c) the Artist or anyone claiming through the Artist has no claim against the City where the City acts in accordance with this clause 10.4.

11 PAYMENT AND GST

11.1 Subject to:

- (a) the satisfactory performance of the Artist's obligations under this Agreement; and
- (b) receipt of a valid tax invoice from the Artist,

the City will on a periodic and progressive basis pay the Artist the Fee in accordance with the Payment Milestones.

11.2 The Fee is the maximum amount payable by the City to the Artist for the performance of the Commission and the Artist's obligations under this Agreement irrespective of the Budget.

- 11.3** If the Artist is a sole trader and superannuation contributions are payable by the City pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth), the City will pay the superannuation contribution for the benefit of the Artist in addition to the Fee. Any such obligation, or payment of the superannuation contribution, does not change the nature of the engagement between the City and Artist as set out in clause 3.1, nor render the Artist an employee of the City at common law.
- 11.4** If one party (Supplying Party) makes a taxable supply and the consideration for that supply does not expressly include GST, the party that is liable to provide the consideration (Receiving Party) must also pay an amount (GST Amount) equal to the GST payable in respect of that supply.
- 11.5** Subject to first receiving a tax invoice or adjustment note as appropriate, the Receiving Party must pay the GST Amount when it is liable to provide the consideration.
- 11.6** If one party must indemnify or reimburse another party (Payee) for any loss or expense incurred by the Payee, the required payment does not include any amount which the Payee (or an entity that is in the same GST group as the Payee) is entitled to claim as an input tax credit, but will be increased under clause 11.4 if the payment is consideration for a taxable supply.
- 11.7** If an adjustment event arises in respect of a taxable supply made by a Supplying Party, the GST Amount payable by the Receiving Party under clause 11.4 will be recalculated to reflect the adjustment event and a payment will be made by the Receiving Party to the Supplying Party, or by the Supplying Party to the Receiving Party, as the case requires.

12 INSURANCE

- 12.1** The Artist must effect and maintain the following insurance policies from the Commencement Date:
- (a) public liability insurance on an occurrence basis that is not less than the amount specified in Item 13 of Schedule 1;
 - (b) professional indemnity insurance that is not less than the amount specified in Item 13 of Schedule 1; and
 - (c) workers compensation as required by law.
- 12.2** The Artist must:
- (a) effect the insurance policies with an insurer licensed by APRA to operate as an insurer in Australia or with an investment grade security rating from an industry recognised rating agency;
 - (b) effect the public liability insurance policy showing the City as an interested party; and
 - (c) produce to the City a certificate of currency for the insurances set out at in clause 12.1 before execution of this Agreement and at any other time at the City's request.
- 12.3** The insurance which the Artist is required to effect under clause 12.1 must be maintained:
- (a) in the case of public liability insurance and workers compensation insurance, until the End Date or the earlier termination of this Agreement; and
 - (b) in the case of professional indemnity insurance, seven years following the End Date or the earlier termination of this Agreement.

13 TITLE AND INTELLECTUAL PROPERTY

- 13.1** The City acknowledges that:

- (a) the title and Intellectual Property Rights in the Project, Project Materials and EOI Material remains the Artist's property at all times; and
- (b) nothing in this Agreement, or as a result of the Commission or the Project, affects the ownership of any ICIP and ICIP Rights in the Project, Project Materials or EOI Materials.

13.2 Except where contemplated with this Agreement, the Artist agrees that it will not exercise or licence its rights to publish, or communicate to the public, the Project, Project Materials, or EOI Materials prior to the conclusion of the Exhibition Period.

13.3 The Artist grants to the City an irrevocable, royalty free and non-exclusive license to use and reproduce the Project, Project Materials and EOI Materials, including:

- (a) the right to retain a digital copy for archival purposes; and
- (b) the right to reproduce, publish, or communicate to the public, or engage a third party to reproduce, publish, or communicate to the public in annual or other City reports, on the City's or the Art & About website, in any print media, social media or other promotional publications. Wherever possible, the City will ensure that the Artist is credited as creator of the Project.

13.4 The City will:

- (a) respect any ICIP and ICIP Rights in the Project, Project Materials and EOI Materials;
- (b) not use the Project, Project Materials or EOI Materials in a materially different context, or edit, enhance, distort or alter the Project, Project Materials or EOI Materials in a way, that would objectively adversely affect the ICIP or owners of the ICIP Rights; and
- (c) ensure any signage or attribution of the Project includes full and proper attribution or naming of the community connected with the ICIP, with such information to be provided by the Artist.

13.5 The Artist warrants that:

- (a) the Artist has the authority to enter into and to perform the Artist's obligations under this Agreement;
- (b) the Artist owns or is licensed to use all Intellectual Property Rights provided under or in connection with this Agreement;
- (c) the Project will be an original work and will not infringe the Intellectual Property Rights or Moral Rights of any person;
- (d) where the Project contains third party material, the Artist has obtained all consents and licenses necessary to permit the lawful inclusion of the material in the Project; and
- (e) where the Project Materials or EOI Materials contain third party material or have been authored, created or produced by a third party, the Artist has obtained all consents and licenses necessary to grant the City the licence in clause 13.3.

13.6 The Artist indemnifies and holds the City harmless from any loss, damage, expense or liability incurring from a claim that the City's use of the Project, Project Materials or EOI Materials infringes the Intellectual Property Rights of any person.

13.7 The City will take all care to ensure that the Artist is appropriately acknowledged in any publication of the Project. However, in the event of any error, act or omission of the City the Artist agrees that it will not hold the City liable where the Artist has not been properly identified, is incorrectly attributed, or the Project is altered or otherwise dealt with in a way that may otherwise constitute an infringement of the Artist's Moral Rights.

- 13.8** The Artist agrees and must procure all necessary consents (on terms acceptable to the City) from the Artist's Personnel to any act or omissions that might otherwise infringe the Artist's Personnel's Moral Rights in relation to the Commission or the Project.
- 13.9** The City warrants that it will not exploit the Project commercially.
- 13.10** This clause does not merge on termination of this Agreement.

14 ACKNOWLEDGMENTS

- 14.1** The City will ensure that the Artist is credited as creator of the Project in any promotional material created by the City for Art & About.
- 14.2** The Artist must ensure that all promotional materials or messaging for or in relation to the Project created by the Artist or the Artist's Personnel, including press releases, social media posts, website pages and printed material, acknowledge that the Project has been commissioned by the City as part of Art & About and the City is the producer of the Project and Art & About.
- 14.3** All promotional materials, message or any other public statements or materials about the Project created by the Artist or the Artist's Personnel are subject to prior written approval by the City.
- 14.4** The City acknowledges that the Artist may have existing funding or sponsorship arrangements. The Artist must inform the City prior to execution of this Agreement of all funding or sponsorship arrangements that the Artist has entered into or proposes to enter into in relation to the Project including the value of those arrangements and the obligations of the Artist under the arrangements.
- 14.5** The City will decide on the suitability of funding or sponsorship arrangements in relation to the Project at its absolute discretion. The Artist must ensure that there is no contribution to the Commission or the Project from any funding or sponsorship arrangement that has not been approved in writing by the City.
- 14.6** Where the City has approved a funding or sponsorship arrangement in relation to the Project, the Artist must obtain prior written approval from the City for any acknowledgement of these funding or sponsorship arrangements, and for the content of any promotional materials, messaging or public statements by the parties providing the funding or sponsorship in relation to the Project. The City may require any such promotional materials, messaging or public statements include acknowledgement of the City.
- 14.7** The Artist warrants that at no time will the Artist's obligations to parties under funding or sponsorship arrangements conflict or impede the performance of the Artist's obligations under this Agreement.
- 14.8** If the City and the Artist agree that it would be beneficial to secure funding or sponsorship for the Project (whether cash or value in kind support) the City and the Artist will agree as to the parties that may be able to provide such funding or sponsorship, the nature of any approach, and any such acknowledgements that may be provided.

15 MARKETING AND PROMOTION

- 15.1** The Artist must refer all enquiries from any media concerning the Commission, the Project or Art & About to the City.
- 15.2** The Artist acknowledges that the City, as the producer of the Project and Art & About, will determine the marketing and promotional strategy for the Project, and all marketing and promotional content including press releases, social media posts, website pages and printed material is subject to the City's approval.
- 15.3** The Artist agrees to work with the City to formally announce the exhibition of the Project and coordinate these announcements across the Artist's and City's digital and social media platforms.

- 15.4** Where the Artist or the Artist's Personnel produces marketing or promotional material in relation to the Project or Art & About with the City's consent, the Artist must:
- (a) adhere to the City's design specifications and style guides;
 - (b) ensure social media posts include @-mentions or tag the City;
 - (c) include the acknowledgements set out in clause 14.2; and
 - (d) ensure the material is approved in writing by the City prior to publication.
- 15.5** The Artist must provide appropriate marketing material to the City for use in any marketing campaign or promotional strategy by the City in accordance with the Key Dates or where otherwise reasonably requested by the City. This material includes, but is not restricted to, high resolution digital images, video files, biographies, Artist statements, audio files and online links.
- 15.6** Where reasonably requested by the City, the Artist must participate in the creation of content about the Project and the Commission, including filming of Project installation or an interview about the Project, for use in any marketing campaign or promotional strategy by the City.
- 15.7** The Artist consents to the City using the Artist's name and likeness in any acknowledgements, media, promotional and marketing material relating to the Project or Art and About.
- 15.8** The parties acknowledge that, with the exception of content created by the Artist or the Artist' Personnel in accordance clause 15.5, the City will, upon creation, own all Intellectual Property Rights in all marketing or promotional material and content created under this clause 15 and the City is entitled in its absolute discretion to use and adapt such material and content as it deems appropriate.

16 BROADCAST AND SPONSORSHIP

- 16.1** The City has the exclusive right to enter into arrangements with third parties in relation to:
- (a) broadcast or transmission in any media of any kind for Art & About on a live and delayed basis;
 - (b) obtaining sponsorship (including naming rights) for Art & About.
- 16.2** The Artist must not, and must ensure that its Personnel and any Site Owner do not, do or omit to do any act which may prejudice the broadcast rights or sponsorship for Art & About.
- 16.3** The Artist must assist the City in providing advice and information about the Project and must co-operate generally with, and provide such assistance as may be required by, sponsors and broadcasters of Art & About.

17 CONFIDENTIALITY, PRIVACY AND PUBLIC ACCESS TO GOVERNMENT INFORMATION

- 17.1** The Artist must use best endeavours to ensure that any confidential information about the Commission, the Project, or Art & About is not used by, supplied to or conveyed to any other person for any purpose other than for the performance of the Commission, without the prior written approval of the City.
- 17.2** The Artist must not, without the prior written approval of the City, issue any statement, information, publication, document or article for publication in any media concerning the Commission, the Project, or Art & About, except where such disclosure:
- (a) is already in the public domain; or
 - (b) is required to be disclosed by law.

- 17.3** The Artist must not, directly or indirectly, collect, use or disclose any personal information under or in connection with this Agreement except to the extent necessary to perform the Commission and deliver the Project.
- 17.4** The Artist must comply with the *Privacy Act 1988* (Cth), the *Privacy and Personal Information Protection Act 1998* (NSW), and all other applicable privacy legislation and codes, and all reasonable directions of the City.
- 17.5** On termination or expiry of this Agreement, the Artist must promptly return to the City or, if requested by the City, destroy all copies of any such personal information, in which case any right to collect, use or disclose that information ceases.
- 17.6** The Artist acknowledges that the City is subject to the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act), and that the City may disclose information in this Agreement (including the entire Agreement) on its nominated website established for GIPA Act disclosures. The Artist irrevocably consents to the City acting in accordance with this clause 17.6.
- 17.7** The Artist agrees to provide the City with immediate access to information contained in the Artist's records that relate to the Commission and the Project where required by the City in order to comply with section 121 of the GIPA Act.

18 FUTURE DEALINGS WITH THE PROJECT

- 18.1** The Artist acknowledges and agrees that the City is commissioning the Project for Art & About.
- 18.2** If, following the Exhibition Period, the Artist wishes to re-exhibit the Project, the Artist must notify the City of any proposed re-exhibition prior to any agreement for the re-exhibition occurring.
- 18.3** If the City wishes to re-exhibit the Project, the City will first seek written approval from the Artist (such approval not to be unreasonably withheld).
- 18.4** Where the Project is re-exhibited by any party following Art & About, including the Artist, the following statement must be included in any promotional material or signage created in relation to the re-exhibition of the Project: "This Project was originally commissioned and produced by the City of Sydney as part of Art & About".
- 18.5** The party re-exhibiting the Project is responsible for the re-exhibition costs and must ensure that the Project is properly maintained during the re-exhibition period.
- 18.6** The Artist acknowledges that the Project, and/or any Project Artefacts, may be considered for acquisition by the City for inclusion in the civic collection that comprises items of movable cultural heritage and contemporary artworks.
- 18.7** The Artist agrees to provide the City with the right of first refusal to acquire ownership of the Project and any Project Artefacts, and all associated Intellectual Property Rights, prior to any acquisition by any third party.
- 18.8** Where the City wishes to acquire the Project or any Project Artefacts, the parties will, acting reasonably, negotiate a price and terms for the acquisition that reflects:
- (a) the market value of the Project or Project Artefacts at the time of acquisition; and
 - (b) the City's contribution to the Project through its commissioning of the Projection, and support for the initial exhibition of the Project, as part of Art & About.
- 18.9** Where the parties cannot agree a price for the acquisition of the Project or Project Artefacts by the City, the parties agree that the price will be determined by an independent art valuer engaged by the City.

19 NON-CONFORMING WORK AND DEFECTS

19.1 If:

- (a) the Artist does not produce the Project in accordance with the Specification, or
 - (b) the Project has a defect (whether structural or non-structural in nature),
- the Project will be non-conforming.

19.2 If the City considers that the Project is non-conforming, the City may direct the Artist in writing to rectify the Project.

19.3 The Artist must rectify the Project at no cost to the City and within the timeframe specified in the notice issued under clause 19.2. Such rectification work may include removal or replacement.

19.4 If the Artist does not rectify the non-conforming work within the period specified:

- (a) the City may engage others to carry out the rectification work; and
- (b) the Artist will be responsible for the reasonable costs of any rectification work undertaken by others engaged by the City; and
- (c) if the Artist fails to pay the City the rectification costs, the City may deduct those costs from the Fee.

20 FORCE MAJEURE

20.1 If a party to this document is affected, or likely to be affected, by a Force Majeure Event:

- (a) that party must immediately give the other party prompt notice of that fact including:
 - (i) full particulars of the Force Majeure Event;
 - (ii) an estimate of its likely duration;
 - (iii) the obligations affected by it and the extent of its effect on those obligations; and
 - (iv) the steps taken to rectify it; and
- (b) the obligations under this document of the party giving the notice are suspended to the extent to which they are affected by the relevant Force Majeure Event as long as the Force Majeure Event continues.

20.2 A party claiming a Force Majeure Event must use its best endeavours to remove, overcome or minimise the effects of that Force Majeure Event as quickly as possible. This does not require a party to settle any industrial dispute in any way that it considers inappropriate.

20.3 During any period in which the Artist is not performing obligations because of a claimed Force Majeure Event, the City may (but need not) make alternative arrangements for the performance, whether by another person or otherwise, of any obligation which the Artist is not performing without incurring any liability to the Artist.

20.4 If a Force Majeure Event continues for more than 10 Business Days, or for any period of time that will prevent the Commission from proceeding, either party may terminate this document by giving at least one Business Day's written notice to the other party.

- 20.5** Neither party is liable to the other for any liabilities, expenses, losses, damages or costs suffered by the other in connection with a Force Majeure Event.

21 TERMINATION

- 21.1** The City may terminate this Agreement by notice in writing if:
- (a) at its sole convenience and absolute discretion, and for whatever reason, the City decides not to proceed with the Commission at any point during the Term;
 - (b) the Artist is in breach of this Agreement and the Artist does not remedy such breach within 21 days of receiving written notice from the City requesting remedy of such breach;
 - (c) the Artist becomes bankrupt, insolvent, or enters into an arrangement with the Artist's creditors; or
 - (d) the Artist fails to comply with clause 4.2 or 6.4 or 13.5; or
 - (e) without reasonable cause, the Artist fails to perform the Commission with due diligence and competence or suspends the performance of the Commission for a period which the City, acting reasonably, considers may prevent the completion of the Commission in time for the Exhibition Period.
- 21.2** If this Agreement is terminated pursuant to clauses 21.1(b), 21.1(c), 21.1(d) or 21.1(e) the Artist must refund to the City any milestone payments of the Fee paid for non-completed milestones, and the Artist will not be entitled to any further payment of the Fee or payment of other costs incurred in connection with the Commission. On termination, any payment of the Fee already paid to the Artist for any non-completed milestones (in part or full) will become a debt due and payable by the Artist to the City.
- 21.3** If this Agreement is terminated pursuant to clause 21.1(a), the parties acknowledge and agree that:
- (a) the City (without prejudice to any other rights or remedies it may have) must pay the Artist the unpaid portion of the Fee due for performance of the Commission up to the stage of work requested by the City prior to the date of termination or the date the Artist ceased performance of the Commission;
 - (b) the City may deduct from the portion of the Fee payable in accordance with clause 21.3(a) any costs incurred or likely to be incurred by the City as a result of the termination as well as any other deductions the City may make pursuant to this Agreement;
 - (c) the Artist is not entitled to any other payment or compensation in connection with the termination, including for any indirect or consequential loss (including any loss of opportunity, profit, anticipated profit, business, business opportunities, revenue or loss of reputation) or damages.
- 21.4** The Artist may terminate this Agreement by giving written notice to the City if the City fails to pay a portion of the Fee within 90 days of the date when the payment is due.
- 21.5** The following clauses survive termination or expiry of this Agreement: 1 (Interpretation), 12 (Insurance), 13 (Intellectual Property), 14 (Acknowledgements), 16 (Confidentiality, Privacy and Public Access to Government Information), 18 (Future Dealings with the Project), 22 (Release & Indemnity), 24 (Notices), 25 (Disputes), and 26 (General).
- 21.6** Termination of this Agreement is without prejudice to the accrued rights or remedies of either party. Where termination is due to the fault or default of the Artist, upon termination, the Project, whether complete or incomplete, and all associated Intellectual Property Rights connected with the Project will be vested in the City.

22 RELEASE & INDEMNITY

- 22.1** The Artist's occupation and use of the Site will be at the Artist's own risk.
- 22.2** The Artist is responsible for all risk of damage or theft to the Artist's (or the Artist's Personnel's) property used by the Artist (or the Artist's Personnel) in the performance of the Commission, exhibition of the Project, or use of any Site.
- 22.3** The Artist releases the City (to the extent permitted by law) and indemnifies the City and the City's Personnel from all claims and demands of every kind resulting from any accident, damage or death or injury to any person or property:
- (a) in the performance of the Commission and the installation, exhibition, and/or removal of the Project;
 - (b) in the Artist's (or the Artist's Personnel's) use and occupation of any Site; or
 - (c) in the Artist's (or the Artist's Personnel's) use of any dangerous, defective or faulty equipment in the performance of the Commission.
- 22.4** Each party acknowledges and agrees that:
- (a) the provisions of this clause 22 survives the expiration or earlier termination of this Agreement;
 - (b) without limiting clause 22.4(a):
 - i) each indemnity in the Agreement is a continuing obligation, separately and independent of other obligations and survives termination of this Agreement; and
 - ii) it is not necessary for a party to incur expense or make a payment before enforcing a right of indemnity conferred by this Agreement.

23 VARIATION

- 23.1** The City may give the Artist a written notice directing the Artist to vary the Commission to be performed under this Agreement.
- 23.2** Within 10 Business Days of a notice under clause 24.1, the Artist must provide the City with a written variation proposal specifying the cost of the variation of the Commission.
- 23.3** Where the Artist wishes to request a variation to the Commission, the Artist must provide the City with a written variation proposal specifying the nature of the variation sought, the reasons for the variation, and the cost of the variation.
- 23.4** The decision as to whether to proceed with any variation proposal provided under clause 23.2 and 23.3 will be at the sole discretion of the City.
- 23.5** Where the City wishes to proceed with a variation proposal, the City will issue a variation agreement. When the variation agreement has been executed by both parties, this Agreement will be varied to include the new scope and any changes to the Fee set out in the variation agreement.

24 NOTICES

- 24.1** A notice, consent, demand or other communication under this Agreement is only effective if it is in writing and emailed, posted or delivered to the address of the recipient shown in Items 2 and 3 of Schedule 1.
- 24.2** A notice is taken to be received:
- (a) if hand delivered, on delivery;

- (b) if sent by pre-paid post, five Business Days after the date of posting;
- (c) if sent by email, at the time sent (provided this is a Business Day), unless the sender is notified, by a system or person involved in the delivery of the email, that the email was not successfully sent.

25 DISPUTES

- 25.1** If a dispute arises between the parties about this Agreement then the parties will endeavour to resolve the dispute by negotiation within 10 Business Days.
- 25.2** If the dispute between parties is not resolved by negotiation within that 10 Business Days then both parties must refer the dispute to senior representatives for further negotiation for a period of 10 Business Days.

26 GENERAL

- 26.1** The parties must each bear their own respective costs and expenses of and incidental to the preparing and signing of this Agreement.
- 26.2** This Agreement contain the entire agreement between the parties and any previous negotiations, agreements, representations or warranties relating to the subject matter of this Agreement, and any purchase order terms issued in relation to the Agreement, are of no effect.
- 26.3** The waiver by either party of a particular breach is not a waiver of any other breach.
- 26.4** Nothing in this Agreement in any way restricts or otherwise affects the City's unfettered discretion to exercise its statutory powers as a public authority.
- 26.5** The invalidity, illegality or unenforceability of any provisions of this Agreement will not affect the validity or enforceability of any other provisions.
- 26.6** This Agreement may only be varied in writing by the agreement of the parties.
- 26.7** The City may novate this Agreement to a third party. The Artist must do all things and execute all documents necessary to give effect to the novation, including executing and delivering to the City a deed of novation in the form required by the City.
- 26.8** This Agreement is governed by and construed in accordance with the law of the State of New South Wales.
- 26.9** The parties submit to the non-exclusive jurisdiction of the courts of New South Wales in relation to all matters arising under, or relating to, this Agreement.
- 26.10** The parties acknowledge and agree to this Agreement being executed electronically, and in counterparts, in accordance with the *Electronic Transactions Act 2000* (NSW).

**SCHEDULE 1
REFERENCE SCHEDULE**

Item	Name	Description	
Item 1	Date of Agreement	The date on which the City executes this Agreement.	
Item 2	Artist	Legal name: [INSERT LEGAL NAME, NOT TRADING NAME, OF THE ARTIST, AND THEIR DETAILS BELOW] ABN: Street address: Contact person: Phone: Email:	
Item 3	City	Legal name: The Council of the City of Sydney ABN: 22 636 550 790 Street address: Town Hall House, 456 Kent Street, Sydney NSW 2000 Contact person: [INSERT CONTRACT MANAGER NAME & TITLE, AND CONTACT DETAILS BELOW] Phone: Email:	
Item 4	(a) Commencement Date (b) End Date	(a) Date of Agreement (refer Item 1 of Schedule 1) (b) [INSERT DATE BY WHICH ALL OBLIGATIONS WILL HAVE BEEN COMPLETED, INCLUDING THE POST-EVENT REPORT]	
Item 5	Project	[INSERT THE TITLE AND A BRIEF DESCRIPTION OF THE PROJECT THAT IS BEING COMMISSIONED] Reference images indicative of the Project to be delivered under this Agreement are at Attachment C.	
Item 6	Site	[INSERT ADDRESS OF SITE INCLUDING LOT & DP TITLE REFERENCE]	
Item 7	Exhibition Period	[INSERT DATES AND TOTAL DURATION OF THE EXHIBITION PERIOD]	
Item 8	Approved Sub-contractors	Legal name and ABN	Work to be performed
		[INSERT LEGAL NAME AND ABN OF ANY SUBCONTRACTORS APPROVED BY THE CITY. IF NONE, WRITE "NIL"]	[INSERT WORKS SUBCONTRACTOR HAS BEEN APPROVED BY THE CITY TO DO, e.g. Access equipment, Lighting]

Item	Name	Description		
Item 9	Key Dates	Item	Task/Deliverable	Key Date
		9.1	[INSERT WHAT MUST BE COMPLETED OR PROVIDED]	[INSERT DATE OR BY REFERENCE TO A DEFINED TIME, e.g. X weeks prior to the start of the Exhibition Period]
		9.2		
Item 10	Fee	#[INSERT TOTAL FEE EX GST] (excluding GST) (\$[INSERT TOTAL FEE INC GST] inc. GST)		
Item 11	Payment Milestones	The City will pay the Fee on a periodic and progressive basis as outlined below following satisfactory completion of the relevant milestone and within [INSERT PAYMENT TERM, e.g. 30 days] of receipt of a valid tax invoice for the relevant amount:		
		Item	Milestone	Amount
		11.1	[INSERT TRIGGER FOR MAKING THE PAYMENT, e.g. Completion of the tasks/deliverables set out in Item 9.1 Schedule 1]	#[INSERT] ex GST (\$[INSERT] inc GST)
		11.2		
Item 12	City Contribution	[INSERT ANY SITES, GOODS, SERVICES, SUPPORT THAT THE CITY WILL PROVIDE, e.g. Marketing and communications campaign for the Project (as determined by the City). If no City Contribution, write "NIL"]		
Item 13	Insurance	Insurance Type	Amount	
		Public liability insurance	\$20 million	
		Professional indemnity insurance	\$5 million	
Item 14	WHS Returnable Documents	Document description		
		Risk assessment		
		Safe Work Method Statement and/or Safe Operating Procedures		
		Safety Data Sheets		
		Any other document required by the City relevant to the safe delivery of the Commission and/or the Project		

**ATTACHMENT A
SPECIFICATION**

[INSERT THE SPECIFICATION FOR THE COMMISSION/PROJECT BASED ON THE STAGE 2 RFP RESPONSE FROM THE ARTIST, AND ANY SUBSEQUENT CLARIFICATIONS BETWEEN THE CITY AND THE ARTIST]

**ATTACHMENT B
BUDGET**

[INSERT THE BUDGET FOR THE COMMISSION/PROJECT, PROVIDED IN THE STAGE 2 RFP RESPONSE FROM THE ARTIST]

**ATTACHMENT C
PROPOSED PROJECT IMAGES**

[INSERT THE IMAGES OF THE PROJECT PROVIDED BY THE ARTIST AS PART OF THE EOI PROCESS]

Executed as an Agreement by:

**Signed for and on behalf of THE)
COUNCIL OF THE CITY OF SYDNEY (ABN)
22 636 550 790) by its duly authorised)
officer in the presence of:)**

Signature of witness
Electronic signature of:

Name of witness

Dated signed

Signature of authorised officer
Electronic signature of:

Name of authorised officer

Title of authorised officer

Affixed by me on:

Date signed

This document was signed in counterpart and witnessed over audio visual link in accordance with section 14G of the *Electronic Transactions Act 2000* (NSW).

Select the appropriate execution clause for the legal entity. Delete those that are not applicable.

If other party is an individual:

**SIGNED by [INSERT LEGAL NAME OF)
PERSON] (ABN [INSERT ABN]), in the)
presence of:)**

Signature of witness
Electronic signature of:

Name of witness
Affixed by me on:

Date signed

Signature of Artist
Electronic signature of:

Name of Artist
Affixed by me on:

Date signed

This document was signed in counterpart and witnessed over audio visual link in accordance with section 14G of the *Electronic Transactions Act 2000* (NSW).

If other party is an incorporated company other than a sole director proprietary company:

**SIGNED by [INSERT LEGAL NAME OF)
COMPANY] (ACN [INSERT ACN]), in)
accordance with section 127(1))
Corporations Act 2001 (Cth):)**

Signature of director

Electronic signature of:

Name of director

Affixed by me on:

Date signed

Signature of director/secretary

Electronic signature of:

Name of director/secretary

Affixed by me on:

Date signed

If other party is an incorporated company with a sole director/secretary:

SIGNED by **[INSERT LEGAL NAME OF COMPANY]** (ACN **[INSERT ACN]**), in)
accordance with section 127(1))
Corporations Act 2001 (Cth):)

Signature of sole director/secretary

Electronic signature of:

Name of director/secretary

Affixed by me on:

Date signed