

**Agreement for Artistic Services
For Further Design Development,
Working Drawings and Implementation
of the Artwork**

THIS AGREEMENT is made this 4th day of April, 1994 by and between the Edmundson Art Foundation, Inc., Des Moines Art Center, hereinafter referred to as the "Art Center" and Mary Miss hereinafter referred to as the "Artist."

WHEREAS, the Art Center is commissioning artwork for its permanent collections and allocating funds for the establishment of site specific art in public spaces adjacent to the Art Center and making payments for the design, execution, and placement of art work; and

WHEREAS, the Artist was selected by the Art Center to develop a concept plan designating in general, areas and elements to be developed for an environmental sculpture for the Art Center permanent collection (hereinafter referred to as the "Work"), and this concept has been approved through procedures duly adopted by the Board of Trustees; and

WHEREAS, the Art Center and the Artist have mutually agreed upon a site south of the Art Center, east of 45th Street, west of Park Drive and the surrounding lagoon area, as the site for the work (hereinafter the "Site") subject to approval procedures with Des Moines Art Center and City of Des Moines; and

WHEREAS, by further agreement the Artist has completed the Design Development Phase and the Art Center has approved Design Development Documentation;

WHEREAS, both parties wish the integrity and clarity of the Artist's ideas and statements in the Work to be maintained;

WHEREAS, both parties wish the Artist to proceed to preparation of working drawings, development of construction documents, and negotiation and bidding and as feasible to implementation of the Artwork;

NOW THEREFORE, the parties mutually agree as follows:

1. During the preparation of the working drawings, the Artist shall:

1.1 General

- (i) further define the form and placement of elements and landscaping,
- (ii) refine material selections
- (iii) prepare a final budget as set forth below.
- (iv) develop such documentation as the Artist in her sole discretion considers necessary to fix and describe the final character of the Work. ("Artist's Working Drawings")
- (v) prepare an updated project budget.
- (vi) present the Artist Working Drawings and updated project Budget to the Art Center for its approval. If the Artist Working Drawings are disapproved, the Artist shall be afforded an opportunity to make revisions to the Artist Working Drawings and re-submit it for approval. If disapproved, this agreement shall terminate.

1.2 Artist Working Drawings

(i) During the development of the Artist Working Drawings, the Artist shall work with engineering or architectural consultants to be hired by the Art Center to confirm structural and dimensional criteria and to permit said consultants to certify, to the consultants' knowledge, the work's compliance with applicable statutes and ordinances as well as structural requirements.

(ii) The Artist shall work cooperatively with the Art Center's consultants to permit said consultants to prepare Construction Documents based on the Artist's Working Drawings.

(iii) In order to ensure that the Project conforms to the Artist's aesthetic intent, no changes from the Artist's Working Drawings may be made in the Construction Documents without the Artist's prior written approval. The Artist shall review and approve all Construction Documents to ensure conformance with the approved Proposal and Artist Working Drawings.

1.3 Construction Documents.

After consultation with the Artist, the Park and Recreation Department or the appropriate official designated by the Art Center or the Park and Recreation Department shall prepare Construction documents for site elements and elements related to general upgrading of the area. The Artist shall have the right to

review and to approve the Construction Documents in order to ensure that the site elements and elements related to general upgrading of the area conform to her specific aesthetic intent as expressed in the Working Drawings and general aesthetic intent.

1.4 Project Budgeting.

(i) The Artist together with the Park and Recreation Department and the Art Center shall prepare a final budget for the work based on estimates solicited based on the Working Drawings and Construction Documents.

(ii) The Budget shall be presented for approval of the Art Center with the submission of the Working Drawings and Construction Documents.

(iii) The Art Center may either approve the proposed Budget and the Working Drawings or alternatively in consultation with the Artist determine which elements of the Work to implement if the implementation of the entire Work would exceed the financial capabilities of the Art Center.

(iv) In the event that the Art Center wishes to redesign the Work to accommodate a revised budget, then the Artist shall be paid an additional fee based on the amount of time to redesign and the extent of the revision.

1.5 Fabrication and Construction of the Project.

(i) Prior to bidding and construction, the Artist and the Art Center will mutually decide which elements if any will be built by the General Contractor and which elements if any will be fabricated by the Artist's fabricator, and, the budget amount for each element. The Artist shall arrange for and supervise the fabrication of the elements to be fabricated by the Artist's fabricator, if any.

(ii) The Artist shall advise and consult with the Art Center and the person or persons designated from time to time as the project coordinator, during the construction and installation phase.

(iii) Since the Artist does not have direct control over construction costs, such as labor, material, insurance and related overhead items, Artist cannot guarantee, or be responsible

for, the total cost of construction. Artist shall endeavor to provide accurate cost estimates and effective cost control to the best of Artist's ability, but payment of Artist's fee is not predicated upon the accuracy of the subject estimates. However, the Artist will redesign the Artwork, without any increase in the Artist's fee calculated under Article 3, after fabrication and installation bids are received, if necessary, to come within the approved budget.

(iv) The Artist shall visit the Site at intervals approved by the Art Center and appropriate to the state of construction to become generally familiar with the process and quality of the Project completed and to determine in general if the Project is being performed in a manner indicating that the Project when completed will be in accordance with the Proposal and the Working Drawings.

2. SCOPE OF ART CENTER'S RESPONSIBILITIES.

(2.1) The Art Center shall:

(i) Contract with Architect, landscape Architect and other consultants to assist Artist in carrying out further design development and to prepare Construction Documents. Unless otherwise indicated, these services shall be performed by licensed professional consultants who shall affix their seals on the appropriate documentation. The Artist shall have no liability for the components of the Project, if any, designed by the Art Center's consultants. The Art Center's consultants will be responsible for securing all applicable permits, licenses and government approvals required in connection with the installation of the Project. The fees of such consultants shall be included in the Project budget.

(ii) Advise on changes or modifications in design which may be required because of engineering or environmental considerations or because of health, safety, welfare or engineering codes and standards of the Art Center during the Design Proposal and Design Development Phases.

(iii) Arrange for the landscape architect, and relevant other consultants to consult with the Artist and provide such technical information and support services as are necessary to permit the Artist to carry out Further Design Development including such information as is relevant to preparation of a final budget. Specifically, Parks Department and the Staff of the Art Center shall assist Artist in identifying budget elements devoted to the Work and budget elements devoted to the Site and the costs of general upgrading of the area.

(iv) Designate a project coordinator (which designation may be changed from time to time) who will represent the Art Center in coordinating all work with the Artist and the City of Des Moines. The costs of the project coordinator(s) are not a part of the project budget.

(v) Pay directly on submission of invoice, fabrication costs, if any, consistent with section 1.5 (i).

(vi) Prepare the Site and construction and install the Project in accordance with the Working Drawings.

(vii) Pay all costs and expenses in connection with the above responsibilities.

(viii) Develop in consultation with Artist and The Science Center of Iowa signage and didactic material.

3. **Payment Schedule.** The Art Center shall pay to the Artist for her services in connection with this agreement fee of the hundred twenty five thousand (\$125,000). Such fee shall be payable in the following installments, each installment to be provided prior to due date:

(i) Twenty Thousand (\$20,000) on signing the agreement,

(ii) Thirty Thousand (\$30,000) on submission of the Artist's Working Drawings,

(iii) Ten Thousand (\$10,000) following completion and approval of Construction Documents,

(iv) Twenty Thousand (\$20,000) on completion of construction negotiation and bidding,

(v) Ten Thousand (\$10,000) when Artist determines project is 25% complete,

(vi) Ten Thousand (\$10,000) when Artist determines project is 50% complete,

(vii) Twenty-Five Thousand (\$25,000) when the project is completed and accepted.

In Addition, the Art Center shall reimburse the Artist on submission of invoice for the following costs and expenses incurred in furtherance of the Work:

(viii) Travel costs, including, air fare to and from Iowa,

(ix) presentation models and other models and renderings requested by the Art Center,

(x) reproductions,

(xi) postage and handling of Drawings and Specifications.

Such expenses shall be in addition to the Artist's Design fee and shall not exceed Ten Thousand Dollars (\$10,000) without the prior written approval of the Art Center.

4. **Artist Warranties.** The Artist warrants that the Work is unique and original and does not infringe upon any copyright; that the Work, or a duplicate thereof, has not been accepted for sale elsewhere; and the Work is free and clear of any source whatever.

5. **Reproduction Rights.** The Artist retains all rights under the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq., and all other rights in and to the Work except as such rights may be modified by further agreement. If the working drawings are not approved, the Art Center agrees that it will not use the original ideas proposed in the Design Development Documents.

6. **Term.** The Artist shall commence the work contemplated by this agreement upon the execution of this Agreement and mutually agree upon a schedule for the work. This date may be changed by mutual agreement of the parties or if circumstances beyond the Artist's control prevent performance in a timely manner.

The parties will mutually agree upon a time table for payments and amendments to agreement prior to commencement of the implementation phase of the project. Such further agreement will be provided in more detail at acceptance of the parties with respect to installation and provide for such installation and other requests.

8. **Title and Ownership** - Upon completion of the Project and upon final payment to the Artist by the ART CENTER, title to the Project shall pass to the ART CENTER.

8.1 The Artist shall own all studies, drawings, designs, models and photographs produced by the Artist pursuant to this Agreement.

8.2 Alteration of the Work or of the Site.

(i) Art Center agrees that it will not intentionally damage, alter, relocate, modify or change the Work without the prior written approval of the Artist.

(ii) Art Center shall notify the Artist of any proposed alteration of the Site that would affect the intended character and appearance of the Work and shall consult with the Artist in the planning and execution of any such alteration and shall make a reasonable effort to maintain the integrity of the Work.

8.3 Moral Right. Art Center will not use the Work in any manner which would reflect discredit on the Artist's name or reputation as an Artist or which would violate the spirit of the Work.

8.4 Surviving Covenants. The covenants and obligations set forth in this Article shall be binding upon the parties, their heirs, legatees, executors, administrators, assigns, transferee and all their successors in interest, and Art Center's covenants do attach and run with the Work and shall be binding to and until twenty (20) years after the death of the Artist. However, the obligation imposed upon the Center by sections 9.3 (1) shall terminate on the death of the Artist. Art Center shall give any subsequent owner of the Work notice in writing and of the covenants herein, and shall cause each such owner to be bound thereby.

8.7 Additional Rights and Remedies. Nothing contained in this Article 9 shall be construed as a limitation on such other rights and remedies available to the Artist under the Visual Arts Rights Act of 1990 or under any other law which may now or in the future be applicable.

9. ARTIST'S RIGHTS

9.1 Signage. ART CENTER agrees to use its best efforts to incorporate the Artist's rights in this Article as a condition of any transfer of the Project. The Artist retains the right to disapprove any transfer which fails to incorporate the Artist's rights of this Article. The Artist's name, copyright notice, title, and date of the Project are to be displayed near or on the Project at all times in a mutually acceptable location.

9.2 Maintenance. ART CENTER recognized that maintenance of the Project on a regular basis is essential to the integrity of the Project. ART CENTER shall reasonably assure that the Project is properly maintained and protected; taking into account any instructions provided by the Artist, and shall reasonably protect and maintain the Project against the ravages of time, vandalism and the elements.

9.3 Repairs and Restoration.

(i) ART CENTER shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Project will be made. During the Artist's lifetime, the Artist shall have the right to approve all repairs and restorations, provided, however, that the Artist shall be paid a reasonable fee for any such services, provided that the ART CENTER and the Artist shall agree in writing, prior to the commencement of any significant repairs or restorations, upon the Artist's fee for such services.

10. TERMINATION OF THE CONTRACT

If either party to this Agreement shall fail to fulfill in a timely and proper manner, or otherwise violate any of the covenants, agreements or stipulation material to this Agreement, the other party shall thereupon have the right to terminate this Agreement by giving written notice to the defaulting party of it's intent to terminate, specifying the grounds for termination. The defaulting party shall have thirty (30) days after receipt of the notice to cure the default. If it is not cured, then this Agreement shall terminate. In the event of default by ART CENTER, ART CENTER shall promptly compensate Artist for all services performed by the Artist prior to termination. In the event of a substantial and material default by the Artist, all finished and unfinished drawings, sketches, photographs, and other work products prepared and submitted or prepared for submission by the Artist under this Agreement shall at ART CENTER's option become it's property provided that no right to fabricate or execute Project shall pass to ART CENTER. Notwithstanding the foregoing, the Artist and ART CENTER shall not be relieved of liability to the other for damages sustained either by virtue of any breach of this agreement and ART CENTER may reasonably withhold payments to the Artist until such time as the exact amount of such damages due ART CENTER from the Artist is determined. Failure to fulfill contractual obligation due to conditions beyond either party's reasonable control should not be considered a breach of contract, provided that such obligations shall be suspended only during the duration of such conditions.

11. INDEMNITY

Upon transfer of title of the Project, ART CENTER shall indemnify and hold harmless the Artist against any and all claims or liabilities then existing or arising thereafter in connection with the Site, the Project of this Agreement, except claims by ART CENTER against the Artist and claims which may occur as a result of the Artist's breach of the warranties provided in Article 6.

12. **ENTIRE AGREEMENT**

Except as otherwise provided herein, this writing embodies the entire agreement and understanding between the parties hereto, and there are no agreements and understandings oral or written, with reference to the subject matter hereof that are not merged herein and superseded hereby.

13. **NO COPARTNERSHIP, JOINT VENTURE OR AGENCY** - It is understood and agreed that nothing herein contained is intended or shall be construed to in any respect create or establish the relationship of copartners, joint venturers, or agents between ART CENTER and Artist or in any of Artist's assignees, delegates, subcontractors, or Project Directors, or as constituting any of them the general representative of ART CENTER for any purpose except as specifically authorized by separate prior written approval of ART CENTER.

14. **WAIVER** - waiver of performance by either party shall be construed as or operate as a waiver of any subsequent default of any terms, covenants, and conditions of this Agreement. The payment or acceptance of fees for any period after a default shall not be deemed a waiver of any right or acceptance of defective performance.

15. **COOPERATION OF CITY** - The parties acknowledge that the performance of certain aspects of this agreement requires the cooperation of the Parks and Recreation Department or other units of the government of the City of Des Moines. The failure of the City of Des Moines to perform as contemplated by this agreement shall not be deemed a breach of either party of this contract but may constitute an event causing a failure to fulfill the contractual obligations beyond either party's control. The Artist acknowledges this agreement is subject to the terms of the 28E agreement between the City and the Art Center, a copy of which agreement has been supplied to the Artist prior to the execution of this agreement. The terms of this agreement are subject to the terms of the 28E agreement which shall take precedence over conflicting terms, if any, in this agreement.

16. **HEIRS AND ASSIGNS** - This Agreement shall be binding upon and shall inure to the benefit of ART CENTER and the Artist and their respective heirs, personal representatives, successors, and permitted assigns.

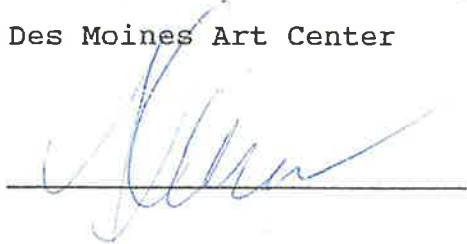
17. The members of the Board of Directors of the ART CENTER FOUNDATION shall have no personal liability for the performance of the terms of this agreement.

18. **MODIFICATION** - No alteration, change or modification of the terms of the Agreement shall be valid unless made in writing and signed by both parties hereto and approved by appropriate action of ART CENTER,

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the date first above written.

Des Moines Art Center

Artist



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