

**THE STATE OF TEXAS §
 § Professional Services Agreement
COUNTY OF COLLIN §**

This Agreement ("Agreement") is made by and between May and Watkins Design, LLC, a New York limited liability company ("Artist") and City of Allen, Texas, ("City"), acting by and through their respective authorized officers.

WITNESSETH:

WHEREAS, City desires to engage the services of Artist as an independent contractor and not as an employee in accordance with the terms and conditions set forth in this; and

WHEREAS, Artist desires to render professional services for City in accordance with the terms and conditions set forth in this Agreement;

NOW THEREFORE, in exchange for the mutual covenants set forth herein and other valuable consideration, the sufficiency and receipt of which are hereby acknowledged, the parties agree as follows:

**Article I
Definitions**

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.

"Artist" shall mean May and Watkins Design, LLC, a New York limited liability company.

"Contract Administrator" shall mean the Landscape Architect of City of Allen.

"City" shall mean the City of Allen, a municipal corporation in the State of Texas.

"Force Majeure" shall mean any contingency or cause beyond the reasonable control of a party including, without limitation, acts of God or the public enemy, war, riot, civil commotion, insurrection, City delay of permits or other approvals, government or de facto governmental action (unless caused by acts of omissions of the party), fires, explosions or floods, strikes, slowdowns or work stoppages.

"Notice to Proceed" shall mean a written notice directing Artist to proceed with performance of the Scope of Work issued by the Contract Administrator.

"Project" shall mean the final design, implementation, fabrication and installation of the Artwork for Spirit Park, outlined in Exhibit "A", including artwork of appropriate durable,

weather resistant materials that meets the design intent and scope of the project, including professional services required for a complete turn-key system.

“Work” or “Artwork” shall mean 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 shall be provided for review and approval to the Public Art Committee and Contract Administrator during the design phase.

Article II Scope of Work

2.1 Artist shall furnish all services as described in Exhibit “A” of this Agreement, as the “Scope of Work” for the Project, subject to the provisions of Article 3, below.

2.2 City shall issue a notice to proceed to Artist prior to Artist initiating any work on the phases set out in Exhibit “A.”

2.3 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.

2.3 Artist shall provide progress monthly reports and/or deliverables, as provided in the Scope of Work, to Contract Administrator. Photos of fabrication work in progress is an acceptable deliverable.

Article III Changes in Scope and Additional Work

3.1 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 Change 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.

3.2 No services for which additional compensation will be charged shall be provided by Artist without the prior written authorization by City.

3.3 Upon completion of the Design Phase, 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 contemplated by Artist. 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.

Article IV

Responsibilities of Artist

4.1 Artist agrees that an essential element of this Agreement is his artistic skill and creativity. 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.

4.2 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.

4.3 In the event the services of Artist are integrated into, combined, or otherwise coordinated with services by third parties not within Artist's control, 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 her 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 shall constitute an acceptance of 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. 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 a third party on the project.

4.4 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.

4.5 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 Artist's performance, Artist shall have the right to renegotiate this Agreement to compensate him for any reasonable costs or expenses incurred by the delay.

Article V

Responsibilities of City

5.1 City shall assist Artist by placing at Artist's disposal all public information it has available pertaining to the Project.

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

5.3 City shall:

- (a) Arrange for access so that Artist may enter upon public property as required for Artist to perform the services under this Agreement;
- (b) 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; and
- (c) Arrange appointments, meetings, and/or consultations as needed for Artist to fulfill his obligations under this Agreement.
- (d) Provide all concrete footings for all the elements
- (e) Provide all copy for the ID signs and Entry Panels no later than October 15, 2017

Article VI Warranties/Standards

6.1 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; unless the Work is destroyed or modified while in City's control or custody.

6.2 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 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.

6.3 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 VII Compensation and Time of Performance

7.1 City shall compensate Artist for the services performed under this Agreement pursuant to the Payment Schedule set forth in Exhibit "B" in an amount not to exceed the fixed

sum of **One Hundred Twenty Two Thousand, Seven Hundred Forty Three Dollars (\$122,743.00).**

7.2 When all of the Work is finally complete and Artist is ready for a final inspection, Artist shall notify City thereof in writing. Thereupon, City will make final inspection of the Work and, if the Work is complete in accordance with this Agreement and this Agreement has been fully performed, City will promptly issue a final Certificate for Payment certifying that the Work is complete and Artist is entitled to the remainder of the unpaid Contract Price, less any amount withheld pursuant to this Agreement.

7.3 Any costs incurred by Artist in excess of the Contract Price shall be the sole responsibility of Artist.

7.4 Artist shall submit invoices and receipts to City for payment in accordance with the schedule set forth in Exhibit "B" in a form reasonably requested by City. City shall compensate Artist within thirty (30) days after receiving Artist's invoice, provided there are no errors or discrepancies and that all work noted on the invoice has been completed.

7.5 In the event City determines that the portion of the Work for which it has been invoiced does not meet the contract specifications and that it intends to withhold payment, 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.

7.6 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.

7.7 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 of 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 of time provided in the schedule for commencement of installation to the date upon which the Site is made available to Artist for installation of the Work.

7.8 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.

7.9 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 for events of Force Majeure. 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 such occurrence.

Article XIII

Artist's Rights

8.1 City shall, at its expense, prepare and install at appropriate locations, after consultation with Artist, a plaque or sign, identifying 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.

8.2 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 the Artist.

8.3 City agrees that it shall not commit or authorize the intentional commission of any physical defacement, mutilation, alteration, destruction, damage, modification, change or 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. City reserves the right to remove the Work of Artist in the event such work has been substantially altered or such Work becomes an immediate safety hazard to the public due to its condition or location.

8.4 Notwithstanding Section 8.3, City, in its sole discretion, shall have the right to remove any Work of Art providing the following terms and conditions are met.

- (a) The removal proposal shall first be submitted to and considered by the Public Art Committee. Following review and consideration of the removal proposal by the Public Art Committee, a recommendation on removal shall be submitted to City Council.
- (b) City Council shall have the right to remove a Work of Art after recommendation from the Public Art Committee.
- (c) In the event that City Council shall decide to remove the Work, Artist shall have the right of first 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 8.1.

8.5 City shall have the right to determine, after consultation with a professional conservator, when and if repairs and restorations to the Work shall be made. During Artist's lifetime, Artist shall have the right to review all major repairs and restorations. In the event that City makes repairs or restorations not reviewed and approved by Artist, Artist shall have the

right to have Artist's name and association with the Work severed. To the extent practical, Artist, during Artist's lifetime, may be given the reasonable opportunity to make or supervise significant repairs and restorations, and be paid a mutually agreed fee for any such services.

8.6 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 IX Copyrights

9.1 Artist shall retain all copyrights 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.

9.2 If, for any reason, the approved design is not implemented, all rights to the proposed Artwork shall be retained by Artist.

9.3 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 Texas 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.

9.4 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 a court has determined infringes upon any patent, trademark or copyright.

Article X Time for Performance

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

10.2 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.

10.3 City requires that the Scope of Work outlined in Exhibit "A" be completed within **240 calendar days** of the date of written Notice to Proceed.

Article XI Termination

11.1 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.

11.2 In the event that the Agreement is terminated by City, City shall pay Artist for all Work performed and services rendered up to the effective date of the termination. City shall have no rights to Artist's creative Work, designs or unfinished Artwork(s).

11.3 In the event that this Agreement is terminated by Artist without cause, Artist shall promptly reimburse City for all payments made under this Agreement prior to the termination by Artist.

11.4 In the event that City determines that Artist has substantially failed to fulfill his obligations as provided under this Agreement, City shall provide Artist with written notice detailing the specific obligations which City claims Artist has failed to fulfill and notifying Artist that he is deemed to be in 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 ten (10) days from the date of issuance of the notice. In the event that this Agreement is so terminated by City, Artist shall promptly reimburse City for payments of any amount attributable to the alleged breached work only, made under this Agreement prior to the termination by City.

11.5 If, because of the death of Artist, or any other catastrophic occurrence, Artist's estate and/or employees will complete the Project. If it becomes impossible for Artist's estate and employees to render services or perform under this Agreement, the Agreement shall be terminated, upon written notice to City and with the concurrence of City.

Article XII Insurance

Insurance.

- (a) Artist shall during the term hereof maintain in full force and effect the following insurance: (i) a comprehensive general liability policy of insurance for bodily injury, death and property damage insuring against all claims, demands or actions relating to Artist's performance of services pursuant to this Agreement with a minimum combined single limit of not less than \$1,000,000.00 per occurrence for injury to persons (including death), and for property damage;(iii) statutory

Worker's Compensation Insurance at the statutory limits and Employers Liability covering all of Artist's employees involved in the provision of services under this Agreement with policy limit of not less than \$500,000.00; and (iv) Professional Liability covering negligent acts, errors and omissions in the performance of professional services with policy limit of not less than \$1,000,000.00 per claim and \$100,000.00 in the aggregate.

- (b) All insurance and certificate(s) of insurance shall contain the following provisions: (1) name City, its officers, and employees as additional insureds as to all applicable coverage with the exception of Workers Compensation Insurance and Professional Liability; (2) provide for at least thirty (30) days prior written notice to City for cancellation or non-renewal of the insurance; (3) provide for a waiver of subrogation against City for injuries, including death, property damage, or any other loss to the extent the same is covered by the proceeds of insurance, except for Professional Liability Insurance. Artist shall provide written notice to City of any material change of or to the insurance required herein.
- (c) All insurance companies providing the required insurance shall be authorized to transact business in Texas and rated at least "A" by AM Best or other equivalent rating service.
- (d) A certificate of insurance evidencing the required insurance shall be submitted prior to commencement of services.

Article XIII Indemnification

CITY SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE, OR INJURY OF ANY KIND OR CHARACTER TO ANY PERSON OR PROPERTY ARISING FROM THE SERVICES OF ARTIST PURSUANT TO THIS AGREEMENT. ARTIST HEREBY WAIVES ALL CLAIMS AGAINST CITY, ITS OFFICERS, AGENTS AND EMPLOYEES (COLLECTIVELY REFERRED TO IN THIS SECTION AS THE "CITY") FOR DAMAGE TO ANY PROPERTY OR INJURY TO, OR DEATH OF, ANY PERSON ARISING AT ANY TIME AND FROM ANY CAUSE OTHER THAN THE NEGLIGENCE OR WILLFUL MISCONDUCT OF CITY. ARTIST AGREES TO INDEMNIFY AND SAVE HARMLESS CITY FROM AND AGAINST ANY AND ALL LIABILITIES, DAMAGES, CLAIMS, SUITS, COSTS (INCLUDING COURT COSTS, ATTORNEYS' FEES AND COSTS OF INVESTIGATION) AND ACTIONS BY REASON OF INJURY TO OR DEATH OF ANY PERSON OR DAMAGE TO OR LOSS OF PROPERTY TO THE EXTENT CAUSED BY ARTIST'S NEGLIGENCE PERFORMANCE OF SERVICES UNDER THIS AGREEMENT OR BY REASON OF ANY ACT OR OMISSION ON THE PART OF ARTIST, ITS OFFICERS, DIRECTORS, SERVANTS, AGENTS, EMPLOYEES, REPRESENTATIVES, CONTRACTORS, SUBCONTRACTORS, LICENSEES, SUCCESSORS OR PERMITTED ASSIGNS (EXCEPT WHEN SUCH LIABILITY, CLAIMS, SUITS, COSTS, INJURIES, DEATHS OR DAMAGES ARISE FROM OR ARE ATTRIBUTED TO SOLE OR PARTIAL OR ANY NEGLIGENCE OF CITY).

Article XIV Miscellaneous

14.1 Entire Agreement. This Agreement constitutes the sole and only agreement between the parties and supersedes any prior understandings written or oral agreements between the parties with respect to this subject matter.

14.2 Assignment. Artist may not assign this Agreement in whole or in part without the prior written consent of City. In the event of an assignment by Artist to which City has consented, the assignee shall agree in writing with City to personally assume, perform, and be bound by all the covenants and obligations contained in this Agreement.

14.3 Successors and Assigns. Subject to the provisions regarding assignment, this Agreement shall be binding on and inure to the benefit of the parties to it and their respective heirs, executors, administrators, legal representatives, successors and assigns.

14.4 Governing Law. The laws of the State of Texas shall govern this Agreement; and venue for any action concerning this Agreement shall be in the State District Court of Collin County, Texas. The parties agree to submit to the personal and subject matter jurisdiction of said court.

14.5 Amendments. This Agreement may be amended by the mutual written agreement of the parties.

14.6 Severability. In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions, and the Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in it.

14.7 Independent Contractor. It is understood and agreed by and between the parties that Artist in satisfying the conditions of this Agreement, is acting independently, and that City assumes no responsibility or liabilities to any third party in connection with these actions. All services to be performed by Artist pursuant to this Agreement shall be in the capacity of an independent contractor, and not as an agent or employee of City. Artist shall supervise the performance of its services and shall be entitled to control the manner and means by which its services are to be performed, subject to the terms of this Agreement. There is no intended third party beneficiary to this agreement.

14.8 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 Artist requests changes or additions, 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 12, 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.

14.9 **Right-of-Access.** City will furnish right-of-access on the land for Artist to perform the required assessments, or other necessary investigations. Artist will take reasonable precautions to minimize damage to the land in the performance of such assessments and investigations.

14.10 **Notice.** Any notice required or permitted to be delivered hereunder may be sent by first class mail, overnight courier or by confirmed telefax or facsimile to the address specified below, or to such other party or address as either party may designate in writing, and shall be deemed received three (3) days after delivery set forth herein:

If intended for City:

Peter H. Vargas, City Manager
City of Allen, Texas
305 Century Parkway
Allen, Texas 75013
214-509-4118 Fax

With a copy to:

Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
Attn: Peter G. Smith
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201
214-965-0010 Fax

If intended for Artist:

May and Watkins Design, LLC
Attn: Carol May and Tim Watkins
40 Hoyt Street
Brooklyn, NY 11201
518-945-3037 Office

14.11 **Counterparts.** This Agreement may be executed by the parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute one and the same instrument. Each counterpart may consist of any number of copies hereof each signed by less than all, but together signed by all of the parties hereto.

14.12 **Exhibits.** The exhibits attached hereto are incorporated herein and made a part hereof for all purposes.

14.13 **Audits and Records.** Artist agrees that during the term hereof, City and its representatives may, during normal business hours and as often as deemed necessary, inspect, audit, examine and reproduce any and all of Artist's records relating to the services provided pursuant to this Agreement for a period of one year following the date of completion of services as determined by City or date of termination if sooner.

14.14 **Survival of Obligations.** Any of the representations and obligations of the parties, as well as any rights and benefits of the parties pertaining to a period of time following the termination of this Agreement shall survive termination.

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

14.16 **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.

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

[signature page to follow]

EXECUTED this ____ day of _____, 2017.

CITY OF ALLEN, TEXAS

By: _____
Peter H. Vargas, City Manager

Attest:

By: _____
Shelley B. George, City Secretary

Approved as to Form:

By: _____
Peter G. Smith, City Attorney
(PGS/JJG/06-01-11/49583)

EXECUTED this 18 day of June, 2017.

cp

MAY AND WATKINS DESIGN, L.L.C.

By: Carol May
Carol May, Partner

By: Tim Watkins
Tim Watkins, Partner