



PUBLIC ART

Design and Commission Agreement

City of Palmerston

And

[insert Artist name]

FOR

Commission: Palmerston Recreation Centre Wall Mural

DATE: ** July 2020

PUBLIC ART DESIGN AND COMMISSION AGREEMENT

THIS IS AN AGREEMENT BETWEEN:

City of Palmerston (ABN 42 050 176 900)
of 1 Chung Wah Terrace, Palmerston NT 0830 (**Council**)

AND

[NAME, ABN]

of *[ADDRESS]* (**Artist**)

BACKGROUND

- A. Council made a public Request for Proposal for the provision of public artwork to the Palmerston Recreation Centre external wall, a copy of which is attached to this agreement as Annexure 1 (**Brief**).
- B. The Artist made a proposal in response to the Brief, which Council has accepted.
- C. Based on the Brief, the Artist has prepared a preliminary design for the public artwork, a copy of which is attached to this agreement as Annexure 2 (**Preliminary Design**).
- D. Council wishes to commission the Artist to produce a more detailed design based on the Brief and Preliminary Design, and to create and install the public artwork.
- E. The Artist has agreed to produce a more detailed design based on the Brief and Preliminary Design, and to create and install the public artwork on the terms of this agreement.

THE PARTIES AGREE AS FOLLOWS:

1. Definitions

1.1. In this agreement, unless the context requires otherwise:

Acceptance Date means the date on which Council accepts a notice of completion from the Artist and takes over legal ownership of the artwork.

Artwork means the public art described in the design documentation.

Commission means the commissioning of the Artist to undertake the Public Artwork in accordance with this Agreement.

Commission Fee means the total fee payable by Council to the Artist for the Commission and payable in the amounts and at the times set out in the Schedule.

Date of agreement means the date when this agreement has been signed by all of the parties.

Design Documentation means the design documents including the Brief and the Preliminary Design, in Annexure 1 and 2.

Maintenance Manual means the manuals, guides or instructions regarding the maintenance of the Artwork.

Site means the location or building where the Artwork will be installed as identified in Annexure 3.

THE WORK

2. Scope of Work

- 2.1. The Artist must furnish all of the materials and perform all the work to carry out and complete the Commission.
- 2.2. The Artist must ensure that the Artwork is created by the Artist in a proper manner and be of a standard of high skill, quality and craftsmanship, in compliance with accepted standards of workmanship, and in conformity with this agreement.

3. Materials

The Artist must use high quality materials which are free from defects and suitable for the purpose of the Artwork.

4. Council Representative

- 4.1. Council will designate its project representative who will make all necessary and proper decisions with reference to the Commission within the scope of his or her authority. The Artist must direct all requests for clarification or instruction to the Council representative.

- 4.2. Council's representative is the person or officeholder specified in the Schedule or such other person or officeholder as is notified from time to time in writing to the Artist.
- 4.3. Council's representative will be available on reasonable notice to the Artist to discuss the Artwork as required.
- 4.4. The Artist must be available for discussions with Council's representative or other such persons nominated by Council upon being given reasonable notice.

5. Commission Timeline

The Artist must complete the Commission in accordance with the timeline set out in the Schedule (**Timeline**), subject to clause 6.

6. Delay

- 6.1. If the Artist is unable to carry out the Commission in accordance with the Timeline because of circumstances beyond the Artist's control, including but not limited to non-availability of necessary materials, shipping delays, labour strikes or natural disasters, the Artist may by notice in writing to Council request an extension of the Timeline.
- 6.2. Any request made by the Artist in accordance with this clause must specify the cause of the delay and must propose amendments to the Timeline.
- 6.3. Acting reasonably, and taking account of the Artist's request for an extension of time, Council may amend the Timeline as requested by the Artist or otherwise, and notify the Artist in writing of the amended Timeline, which shall then apply.

STAGE 1: DESIGN DEVELOPMENT

7. Council Confirmation

Council confirms and agrees that:

- 7.1. the Preliminary Design conforms to, and is consistent with, the Brief;
- 7.2. the Brief contains all relevant information relating to:
 - (a) the intended life and use of the Artwork;

- (b) the proposed Site and the environment where the Artwork will be located including any occupational health and safety and disability access considerations.

8. Design

The Artist shall:

- 8.1. Develop an original design for the artwork based on the Brief and the Preliminary Design (**Design**);
- 8.2. create a detailed record of the Design in the form of a drawing, model or plan which includes clear information about:
 - (a) the scale and dimensions of the Artwork;
 - (b) how it is intended to be situated in relation to the Site;
 - (c) the suitability of the materials to be used and their durability given the proposed life, use and location of the Artwork as stated in the Brief;and addresses any other issues identified in the Brief including any particular features of the Site, any occupational health and safety and disability access considerations, and any structural engineering requirements;
- 8.3. deliver the Design to the Council on or before the date specified in the Timeline.

9. Council Response to Design

Within Five (5) business days of receipt of the Design, Council may either:

- (a) request changes to the Design; or
- (b) accept the Design.

10. Council Requested Changes

- 10.1. Council may request a reasonable number of changes to the Design provided that the Council:
 - (a) requests all such changes in a single written notice to the Artist specifying the changes (**First Amendment Notice**) delivered to the Artist on or before the date specified in the Timeline; and

- (b) does not request any change to the Design that is substantially inconsistent with the Brief or the Preliminary Design, other than changes to the Design required in order to comply with structural engineering requirements specified in the Brief.

11. Artist Response to Amendment Notice

Within five (5) business days of receiving the Amendment Notice, the Artist must either:

- 11.1. prepare an **Amended Design** and submit it to the Council; or
- 11.2. notify the Council that the Artist is not prepared to modify the Design and outline the reasons why.

12. Further Council Response

Within five (5) business days of the Artist submitting an Amended Design, the Council may either:

- 12.1. accept the Amended Design; or
- 12.2. request further changes to the Amended Design by issuing a further Amendment Notice to the Artist (**Further Amendment Notice**) provided that:
 - (a) the notice does not request changes that are substantially different from the Brief, the Preliminary Design, or the Design as first submitted;
 - (b) such changes arise solely from the Amended Design and could not reasonably have been requested in the initial Amendment Notice; and
 - (c) such changes do not relate to the artistic merits but exclusively concern engineering or occupational health and safety issues or are otherwise required by law.

13. Artist Response to Further Amended Notice

Within five (5) business days of receiving a Further Amendment Notice, the Artist must:

- 13.1. prepare a further amended design and submit it to Council (**Further Amended Design**);
or
- 13.2. notify the Council that the Artist is not prepared to modify the Amended Design and outline the reasons why.

14. Council Response to Further Amended Design

Within five (5) business days of the Artist submitting a Further Amended Design, Council must:

- 14.1. accept the Further Amended Design; or
- 14.2. reject the Further Amended Design.

15. Acceptance by Council

- 15.1. Council may accept the Design, the Amended Design or the Further Amended Design by notifying the Artist in writing.
- 15.2. Council is deemed to accept the Design, the Amended Design, or the Further Amended Design if the Council does not, within the periods specified in this agreement, either:
 - (a) expressly accept the Design, the Amended Design or the Further Amended Design in accordance with this clause;
 - (b) request changes to the Design, the Amended Design or the Further Amended Design; or
 - (c) reject the Design, the Amended Design and/or the Further Amended Design.
- 15.3. By accepting the Design (or any amended design), Council agrees that the Design or Amended Design or Further Amended Design is suitable given the intended life of the Artwork and the environment where the Artwork will be located.

16. Rejection by Council

- 16.1. Council may reject the Design, the Amended Design or the Further Amended Design by notifying the Artist in writing, in which event the agreement is terminated.

STAGE 2: CREATION OF THE WORK

17. The Artwork

- 17.1. On or before the dates set out in the Timeline, the Artist shall:
 - (a) create the Artwork as described in, and in accordance with, the Design, the Amended Design or the Further Amended Design accepted by the Council; and
 - (b) notify Council when the Artwork is completed.
- 17.2. Council will arrange for the Artist and the Artist's employees and agents to have full and free access to the Site at all reasonable times for the purpose of producing the Artwork.

18. Acceptance of the Artwork

18.1. Council may accept the Artwork by notifying the Artist in writing within the time specified in the Timeline.

18.2. Council is deemed to accept the Artwork if the Council does not within the time specified in the Timeline:

(a) expressly accept the Artwork in writing;

or

(b) reject the Artwork.

19. Rejection of the Artwork

Council may reject the Artwork by notifying the Artist in writing provided that the Artwork is not produced substantially in accordance with the Design, Amended Design or Further Amended Design accepted by the Council.

20. Maintenance Manual

20.1. Within ten (10) business days of the acceptance of the Artwork by Council the Artist will provide Council with the Maintenance Manual.

20.2. The Maintenance Manual will include:

(a) a description of the materials used;

(b) an inspection, testing and maintenance program detailing the routine required to maintain the Artwork throughout its intended lifespan;

and

(c) a list of recommended suppliers of appropriate materials for maintenance, with appropriate contact details.

20.3. Subject to the defects liability in the following clause, Council will ensure that the Artwork is properly maintained and protected from damage in accordance with the Artist's instructions in the Maintenance Manual.

21. Defects liability

- 21.1. A defects liability period will extend for a period of twelve (12) months from the date of acceptance of the Artwork by Council and its installation on the Site.
- 21.2. The Artist will rectify, without charge to Council, any latent defects in the Artwork that become apparent during this period.
- 21.3. This clause will not apply to damage or deterioration which results from fair wear and tear, the inherent characteristics of the materials used to create the Artwork or the Site's environment.
- 21.4. The rights granted under this clause are in addition to any rights that a party may have at law.

ARTIST PAYMENTS

22. Commission Fees

Council agrees to pay the Artist the total fee specified in the Schedule (**Commission Fee**) in instalments in accordance with the Timeline.

23. Goods and Services Tax

- 23.1. The parties agree that all amounts payable under this agreement are exclusive of Goods and Services Tax (**GST**).
- 23.2. If a party is liable to pay GST in respect of any good or service supplied under this agreement, that party will invoice the other party for the GST amount payable for the good or service and will ensure that the invoice is a GST compliant invoice.
- 23.3. The party who receives the GST compliant invoice must pay the amount of GST invoiced at the same time as the amount payable under this agreement.

INTELLECTUAL PROPERTY

24. Title and copyright

- 24.1. The Artist warrants that the Design and the Artwork:
 - (a) are the Artist's original works;
 - (b) do not to the best of the Artist's knowledge infringe the copyright or moral rights of any third party; and

(c) are unique works of the Artist developed exclusively for the commission under this agreement.

24.2. The Artist is the owner of copyright in the Preliminary Design, the Design, any amended design and the Artwork and all other materials created by the Artist under, or in relation to, this agreement.

24.3. If the Council engages another artist or craftsman to complete the Artwork and the creative contribution of that other artist or craftsman to the final Artwork is such that they are entitled under the *Copyright Act 1968* to joint ownership in the copyright in the Artwork with the Artist or the Artist's estate, then the Artist or the Artist's estate may demand the removal of any notice displayed with the Artwork, which identifies the Artist with the Artwork.

24.4. The Artist grants the Council a non-exclusive royalty free worldwide licence of the copyright in the Artwork for as long as the Artwork remains installed on the Site for the exclusive purpose of making and using images of the Artwork for non-commercial purposes including but not limited to:

(a) the maintenance, promotion and marketing of the Artwork and the Council's public artwork policies and projects;

(b) promoting and marketing the business of the Council generally including in the Council's financial and annual reports, multimedia presentations, website, and advertising materials; and

(c) archival purposes,

and the Council agrees not to reproduce or use images of the Artwork except for the above purposes.

24.5. Council must make all reasonable efforts to ensure that the Artist is attributed in any publication or communication of images of the Artwork by the Council.

25. Attribution

25.1. Council may permanently display a notice in a reasonably prominent position near the installed Artwork, which identifies the Artist and the Artwork as follows:

★[INSERT DETAILS FOR ATTRIBUTION]★

★[IN ADDITION TO CLAUSE 25.1, USE CLAUSE 25.2 IF THE ARTWORK INVOLVES THE USE OF ANY INDIGENOUS CULTURAL INTELLECTUAL PROPERTY. OTHERWISE DELETE CLAUSE 25.2] ★

- 25.2. Council may permanently display a notice in a reasonably prominent position near the installed Artwork, which identifies the custodial interest of the Larrakia Nation Community in the Artwork as follows:

This artwork embodies traditional ritual knowledge of the Larrakia Nation Community. It was created with the consent of the custodians of the Community. Dealing with any part of this artwork for any purpose that has not been authorised by the custodians is a serious breach of the customary laws of the Larrakia Nation Community. For enquiries regarding permitted use of this artwork, contact ★[NAME]★.

26. Repairs and restoration

- 26.1. Council will give the Artist, by written notice to the Artist, first option to carry out any repairs or restoration to the Artwork. This option will lapse if the Artist does not signify an intention to carry out such repairs or restoration Artwork within ten (10) business days after receiving the Council's notice.
- 26.2. Council will pay the Artist a fee for repairs and restoration Artwork undertaken by the Artist at the rate specified in the Schedule.
- 26.3. The Artist reserves the right to demand the removal of any notice displayed with the Artwork, which identifies the Artist with the Artwork if the Artist does not perform the Artwork's repairs or restoration.

27. Alteration and deaccessioning of the Artwork

- 27.1. Council may destroy, remove or otherwise deaccession the Artwork if:
- (a) it is damaged or deteriorated beyond reasonable repair or conservation
 - (b) it is no longer consistent with the Council's cultural plan and/or requirements for the Site and

(c) Council complies with the procedures set out in section 195AT of the *Copyright Act 1968* (Cth).

27.2. Council will not alter or modify the Artwork in any way whatsoever without the Artist's prior written consent provided that where such alterations or modifications are required for the proper maintenance of the Artwork, or by law to comply with occupational health and safety standards, such consent will not unreasonably be withheld.

27.3. If the Council alters or modifies the Artwork, Council will, upon written request by the Artist, remove any notice displayed with the Artwork which identifies the Artist with the Artwork. The remedy under this clause is in addition to any other remedies available to the Artist.

LIABILITY AND INSURANCE

28. Risk of loss or damage

28.1. If the Artwork is created on the Site, the Artist will bear the risk of loss of, or damage to, the Artwork until installation is complete and will take out and maintain insurance against loss or damage during that period.

28.2. Council will bear the risk of loss of, or damage to, the Artwork after installation and will take out and maintain insurance against loss or damage for the period until title to the Artwork passes to Council.

29. Workers Compensation

The Artist will be responsible for maintaining worker's compensation insurance in relation to any work or other act associated with the performance of this agreement carried out by the Artist, the Artist's employees or its agents.

30. Insurance policies

30.1. During the term of this agreement, the Artist must provide Council with certificates of currency for all required policies of insurance and copies of the receipts evidencing payment of the current premiums.

30.2. All premiums necessary to maintain current insurance coverage are to be paid by the Artist at least seven (7) days before the renewal of such premiums fall due.

- 30.3. Council may do all things necessary to effect and/or maintain such insurance coverage if the Artist fails to maintain insurance as required under this agreement. This clause is not intended to create any obligation on Council to do so, unless otherwise required by this agreement.
- 30.4. Any moneys expended by Council for that purpose are repayable by the Artist upon demand, or, may be deducted by Council from any moneys payable to the Artist.
- 30.5. The maintenance of insurance as required under this agreement shall not in any way limit the responsibilities and obligations of the Artist.

31. Indemnity and Insurance

- 31.1. The Artist must keep current an insurance policy covering public and product liability insurance for at least \$20 million for each occurrence, in relation to the performance of the Commission.
- 31.2. The Artist cannot make a claim against Council and releases Council from and indemnifies it against all claims for damages, loss, injury or death which arise from the during the production and installation of the Artwork on the Site, except to the extent that it is caused by the wilful act or omission or negligence of Council, its employees or agents.
- 31.3. The Artist indemnifies Council against all losses, liabilities, costs and expenses arising out of or in relation to any breach of the Artist's warranty in clause 24.1.

TERMINATION

32. Termination

- 32.1. If a delay under clause 6 has extended more than six (6) months, either party may terminate this agreement by fourteen (14) business days written notice to the other party, which event the Artist shall be entitled to retain that part of the Commission Fee already paid, but to no further payment..
- 32.2. This agreement is automatically terminated:
 - (a) if the Artist becomes insolvent, is declared bankrupt, has a liquidator appointed or goes into administration, voluntary or otherwise;

(b) following rejection of the Design; or

(c) following rejection of the Artwork.

32.3. In the event of termination under subclause 2 of this clause, the Artist will reimburse to the Council all amounts paid to the Artist under this agreement other than the Design Development Fee.

33. Disputes

33.1. If a dispute or disagreement (**Dispute**) arises between the parties in connection with this agreement:

(a) one party must notify [each/the] other party in writing about the Dispute (**Notice of Dispute**); and

(b) no party may start any litigation or arbitration in relation to the Dispute until the parties have complied with this clause.

33.2. The parties should meet within fourteen (14) calendar days after receipt of the Notice of Dispute and hold good faith discussions to attempt to resolve the Dispute.

33.3. If the Dispute is not resolved within twenty-eight (28) calendar days after receipt of the Notice of Dispute, the parties agree to submit the Dispute to mediation according to the Arts Law Centre Mediation guidelines current at that time (**Guidelines**). These Guidelines are part of this agreement.

33.4. If the parties are not able to agree to a mediator, the Arts Law Centre must appoint a mediator.

33.5. The parties must continue to perform their respective obligations under this agreement despite the existence of a Dispute.

33.6. Nothing in this clause will impact on either party's rights to terminate this agreement

34. General provisions

34.1. The parties acknowledge that the Artist is an independent contractor and that nothing in this agreement creates any relationship of partnership or employment between the parties.

- 34.2. A notice required to be given under this agreement may be delivered by hand, or sent by pre-paid post or fax to the address of the party indicated at the top of this agreement. Notices are taken to have been served when received, or within two (2) calendar days of having been sent, whichever occurs first.
- 34.3. Neither party may assign, subcontract, novate or otherwise divest this agreement or any of the rights or obligations under this agreement without the other party's prior written consent. This consent must not be unreasonably withheld.
- 34.4. This agreement is the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to this subject matter is replaced by this agreement and has no further effect.
- 34.5. Nothing in this agreement transfers or excludes any applicable cultural rights in favour of Australian Indigenous people that may be implemented under Australian law.
- 34.6. This agreement may only be modified by a written amendment signed by the parties.
- 34.7. Invalidity of any clause of this agreement will not affect the validity on any other clause except to the extent made necessary by the invalidity.
- 34.8. This agreement is governed by the law in force in Northern Territory. The parties submit to the jurisdiction of the courts of this State and any court competent to hear appeals from those courts.
- 34.9. A person signing this agreement on behalf of a party to the agreement warrants, by that signing, that they have all the necessary authority from that party to sign this agreement of their behalf.
- 34.10. The following rules of interpretation apply to this agreement unless the context requires otherwise:
- (a) headings are for convenience only and do not affect interpretation;
 - (b) the singular includes the plural and conversely; and
 - (c) a reference to an agreement or document is to that agreement or document as amended.

EXECUTED AS AN AGREEMENT

Signed by the Artist:

Signature:

Name (PRINT):

Date:

Signed by for and on behalf of City of Palmerston:

Signature:

Name (PRINT):

Date:

ANNEXURE 1: THE BRIEF

[ATTACH A COPY OF THE BRIEF]

ANNEXURE 2: THE PRELIMINARY DESIGN

[ATTACH A COPY OF THE PRELIMINARY DESIGN]

ANNEXURE 3: SITE

[ATTACH A COPY OF THE SITE PLAN]

SCHEDULE

The Site: North-Western Wall of Palmerston Recreation Centre, 11 The Boulevard, Palmerston Northern Territory

Commission Fee: \$***** plus GST if applicable

Repair Work Rate: \$95.00 per hour

Council's Representative:

Timeline:

Commission Event	Due Date	Commission fee
Execution of Agreement		\$***** - 25% of the Commission Fee, payable upon execution.
Delivery of Design		No payment due
Acceptance of Design	See clauses 8-16	\$***** – 25% of the Commission Fee payable upon approved design.
Completion of the Artwork		No payment due
Acceptance of the Artwork		\$***** – 40% of the Commission Fee payable within five business days of acceptance by Council of completed mural.
Delivery of Maintenance Manual		\$***** - 10% of the Commission Fee, payable within five business days of delivery of the Maintenance Manual.
TOTAL:		\$*****