

**CONTRACT BETWEEN THE CITY OF MCKINNEY, TEXAS AND MISTY OLIVER-FOSTER
FOR THE MCKINNEY OUTDOOR PUBLIC ART MURAL PROJECT**

This Contract ("Contract") is made and entered into effective the 16 day of February, 2016 ("Effective Date"), by and between the City of McKinney, Texas ("City"), a Texas municipal home-rule corporation, and Misty Oliver-Foster ("Artist").

Whereas, in accordance with the terms and conditions of the Memorandum of Understanding Between the City of McKinney, Texas and Misty Oliver-Foster, dated January 22, 2014, the Artist submitted a concept design ("the Concept Design") to the City for the commission of an original outdoor public art mural ("Artwork") related to the City-sponsored, 2014 "Call to Artists McKinney Mural Project" competition; and

Whereas, the City's Arts Commission Selection Panel selected the Artist as the winner of the competition and has agreed and authorized that this Contract be awarded to the Artist, commissioning her to undertake and complete the Artwork using reasonable skill, care, and diligence, subject to and in accordance with the terms and conditions herein stated.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the City and the Artist agree as follows:

1. The Concept Design. The Concept Design, submitted by the Artist and selected by the City's Arts Commission Selection Panel as the approved image for the Artwork to be portrayed by the Artist, is the property of the City and may be chosen by the City for implementation and use in future projects. A copy of the Concept Design is attached hereto as Exhibit A. The City reserves the right to modify the Concept Design, with the Artist's approval.

2. Location of the Artwork. The Artwork will be painted on the exterior of the southern-facing wall of the building located at 112. S. Kentucky in McKinney, Texas ("Site"), as more specifically depicted on Exhibit A, attached hereto.

3. Acceptance and Completion of the Artwork. The Artist agrees to complete the Artwork on or before April 9, 2016, unless the City, in its sole discretion, establishes a later date based on intervening circumstances. The Artist shall use her best aesthetic judgment to create the Artwork and to determine when the Artwork is completed. The Artist will notify the City once the Artwork is completed and the City shall have the right to inspect the work and request reasonable changes to be made. The City agrees that it will accept the completed Artwork unless in the City's reasonable opinion the Artwork was not executed substantially in accordance with the image depicted in the Concept Design. The City will notify the Artist in writing on the date it formally accepts the completed Artwork ("Completion Date").

4. Responsibilities of the City.

- a) Installation of the Artwork. The City shall be responsible at its own cost for carrying out, or causing to be carried out, the preparatory site works for the installation of the Artwork. The City will afford the Artist and her authorized employees, agents or subcontractors access, or will arrange for such access, at all reasonable times to the Site in connection with the installation of the Artwork. The City will be responsible for ensuring that all necessary consents and approvals of any statutory authority and any other licenses or permissions are obtained in good time for the siting and installation of the Artwork and for all costs associated therewith.

- b) Maintenance and Repair/Restoration of the Artwork. The City shall be responsible, at its cost, for adequately maintaining and if necessary repairing the Artwork, subject to the Artist's one-year warranty set forth in Paragraph 7, below. If the Artwork needs repair or restoration within ten (10) years after the Completion Date, the City may, in its reasonable opinion and to the extent practicable, give the Artist the option to conduct or supervise such work subject to the suitable payment terms being agreed to with the Artist. All repairs or restoration should be made in accordance with recognized conservation standards.

5. Responsibilities of the Artist. The responsibilities of the Artist are set forth in this Contract and in the City of McKinney Public Art Administrative Guidelines.

6. Installation. The Artist and her authorized employees, agents or subcontractors at all times shall take such precautions as are necessary to protect the health and safety of the Artist and all other persons, and shall comply with the requirements of all state and federal laws and local ordinances.

7. Warranties.

- a) Original Artwork; Reasonable Skill, Care, and Diligence. The Artist represents to the City that the Concept Design and the Artwork are and will be original and will not infringe the copyright or other rights belonging to any third party. The Artist shall exercise all reasonable skill, care, and diligence in undertaking and carrying out the work and satisfactorily completing the Artwork.
- b) One-Year Warranty Against Defects in Workmanship or Quality. The Artist warrants that the Artwork will be properly prepared with materials of sufficient quality such that, should the City (with the Artist's input) reasonably determine within one year from the Completion Date that the Artwork has noticeably deteriorated due to the use of materials that are of insufficient quality or that have been inadequately applied, the Artist will promptly remedy that deterioration, at her cost and at no cost to the City, consistent with the City's standard of acceptance as set forth in Paragraph 3, above. It is understood by the Artist and the City, however, that the Artwork is an outdoor public art mural and that noticeable deterioration does not include fair wear and tear, ordinary exposure to light or the elements, vandalism or wilful misuse, graffiti, or other events that are not within the control of the Artist.

8. Commission; Payment Schedule; Proof of Insurance. The Artist shall be paid the amount of Thirteen Thousand Five Hundred and NO/100 Dollars (\$13,500.00) for the satisfactory completion of the Artwork ("Commission"), which the parties agree is a work for hire. This amount will include all designer fees, administrative costs, travel, design, material, equipment, engineering, transportation, and insurance, and excludes the \$500.00 fee the City previously paid the Artist to develop the Concept Design. The City will pay the Commission to the Artist based on the following payment schedule: 50% upon commencement of project, 25% (\$3,750) on completion of "block-in" of mural and the remainder to be paid upon the Completion Date. The Artist shall provide proof of insurance to the City in a form consistent with the attached Exhibit B.

9. Additional Expenses. If the Artist incurs any reasonable additional costs or expenses that are caused as a result of amendments to the agreed Concept Design or other additional requirements or conditions requested by the City, the City will reimburse these upon production by the Artist of receipts or other evidence of the costs or expenses incurred.

10. Ownership. The Artist will retain legal title and ownership of the Artwork, excluding any materials paid for by the City that are owned by and are the property of the City until delivery to the Site, until the Artist's receipt of the final payment, at which time legal title and ownership of the Artwork shall pass to the City.

11. Copyright and Reproduction Rights. Copyright in the Artwork (including the Concept Design) shall remain with the Artist, subject to the following considerations: The Artist hereby grants the City a perpetual license to use her intellectual property rights in the Artwork in accordance with this Contract. The City shall be entitled without payment to the Artist to make (or to authorize others acting on behalf of the City to make) any photograph, film or video of the Artwork and to include this in any advertising, brochures or other publicity material, including the City's official web site, or film, video or television broadcast, or any not-for-profit activity. The Artist may reproduce the image of the Artwork, but only with the advance, written permission of the City, which permission shall not be unreasonably withheld.

12. VARA Waiver. The Artist waives any and all moral rights, including any rights under the Visual Artists Rights Act ("VARA"), as they may pertain to the Artwork. The City undertakes to not intentionally alter, damage or destroy the Artwork, or to knowingly consent to others doing so, and will endeavor to notify the Artist of any proposed alteration of the Site or relocation of the Artwork. In the event the building or structure on which the Artwork is to be placed or displayed is subject to demolition, the City will provide notice to the Artist at least 45 days before such demolition is to occur or as soon as reasonably possible if the City learns demolition is to occur in fewer than 45 days.

13. Termination of Contract.

- a) In the event the Artist is in material default of any obligation under this Contract, the City shall give written notice to the Artist, who shall first be allowed a reasonable period, not to exceed two weeks unless extended by the City, to remedy the default. If the default is not remedied within such period the City may terminate the Contract by written notice of termination and the Artist shall not be entitled to receive any further fees and shall refund all fees paid.
- b) In the event the work is cancelled or other circumstances arise beyond the control of the City which prevent the continuation of the Commission, the City may terminate the Contract by written notice to the Artist, who will be entitled to receive and retain proportionate payment for all work up to and until receipt of such notice.
- c) The Artist may terminate this Contract by notice in writing if the City is more than 15 days late in making any payment due under the Contract and has failed to remedy the breach within five (5) days following receipt of notice specifying said breach, or if the City is in material default of any other obligation under this Contract; provided, however, that the Artist shall give written notice of said default to the City, who shall first be allowed a reasonable period, not to exceed two weeks unless extended by the Artist, to remedy the default. If the default is not remedied within such period the Artist may terminate the Contract by written notice of termination.

14. Artist as Contractor. For purposes of this Contract the Artist is a contractor and not an employee of the City of McKinney.

15. Indemnification. The Artist hereby assumes all liability and responsibility for and agrees to fully release, indemnify, hold harmless and defend the City and its officials, agents, servants, and employees, and the building owner, from and against any and all claims, suits, judgments, demands,

damages, losses and expenses, including but not limited to attorney's fees, for injury to or death of a person or damage to property, arising out of or in connection with, directly or indirectly, the actions of the Artist and caused by the negligence or intentional act or omission of the Artist, its officers, agents, employees or other third parties from whom the Artist may be legally liable. The provisions of this paragraph are solely for the benefit of the parties hereto and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

16. Notices. All notices or requests required or authorized hereunder shall be in writing and shall be deemed effective upon receipt (or refusal thereof) when (i) delivered in person, (ii) sent by U.S. Postal Service, postage prepaid, as overnight mail or certified mail, return receipt requested, (iii) delivered by a nationally recognized delivery service for same-day or overnight delivery, or (iv) transmitted by facsimile (with proof of confirmed transmission) to the respective parties hereto as follows:

To the Artist: *MISTY OLIVER-FOSTER*
c/o Fresh Paint Studio
7644 Williams Ave.
Frisco, TX 75033

To the City: *CITY OF McKINNEY*
Housing and Community Development Department
PO Box 517
McKinney, TX 75070
Attn: Janay Ticken
or
314 S. Chestnut #101
McKinney, TX 75069
Fax No. 972-547-2681

Either party shall notify the other of any change in its or her address as soon as possible after that change occurs.

17. Assignability. This Contract shall not be assignable by the Artist without the prior written consent of the City, and such consent shall not be unreasonably withheld, conditioned or delayed.

18. Amendments. The City or the Artist may amend this Contract at any time during the term provided for herein, provided such amendments make specific reference to this Contract and are executed in writing, signed by a duly authorized representative of both parties.

19. Invalidity of Particular Provisions. Should any term, provision, condition or other portion of this Contract or the application thereof be held to be inoperative, invalid or unenforceable, the remainder of this Contract or the application of the term or provision to persons or circumstances other than those to which it is held invalid or unenforceable shall not be affected thereby and shall continue in full force and effect.

20. No Waiver. The failure of the City or the Artist to exercise any right given hereunder or to insist upon strict compliance with any term, condition or agreement specified herein, shall not constitute a waiver of either party's right to exercise such right or to demand strict compliance with any such term, condition or agreement under this Contract.

21. No Verbal Agreement. This Contract contains all commitments and agreements of the parties hereto and no verbal or written commitments shall have any force or effect if not contained herein.

22. Dispute Resolution. The parties will use their best efforts to negotiate in good faith and settle any dispute that may arise out of or relate to the Contract. If the dispute is not resolved following a meeting of the Artist and the City, the parties will attempt to settle it by the mediation process with a mediator agreed to and appointed by the parties.

23. Governing Law; Venue. This Contract shall be governed by and construed under the laws of the State of Texas. Venue shall be exclusive in Collin County, Texas.

24. Counterparts. This Contract may be executed in any number of counterparts, each of which will be deemed to be an original, but all of which together will constitute one instrument.

Agreed to and executed this 16 day of February, 2016.

THE ARTIST:

By: _____
Misty Oliver-Foster

CITY OF MCKINNEY, TEXAS:

By: _____
Tom Muehlenbeck, Interim City Manager

EXHIBIT "A"

**EXHIBIT “B”
INSURANCE REQUIREMENTS**

The Agency shall at its own expense procure, pay for and maintain for the duration of the Grant Agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the services performed, or to be performed, hereunder by the Agency, its agents, representatives, employees, volunteers, officers, director, or subcontractors. The following insurance must be written by companies approved by the state of Texas and acceptable to the City of McKinney. The Agency shall furnish to the City of McKinney certificates of insurance executed by the insurer or its authorized agent stating coverages, limits, expiration dates and compliance with all applicable required provisions. Certificate(s) shall be addressed as follows:

City of McKinney
c/o Ebix BPO
212 Kent St.
Portland, MI 48875

Certificates must be emailed to certsonly-portland@ebix.com. **You are also required to forward a copy to the Housing and Community Development Department for documentation.**

- A. Commercial General Liability insurance, including, but not limited to Premises/Operations, Personal & Advertising Injury, Products/Completed Operations, Independent Contractors and Contractual Liability, with minimum combined single limits of \$500,000 per-occurrence, \$1,000,000 Products/Completed Operations Aggregate and \$1,000,000 general aggregate. Coverage must be written on an occurrence form.
- B. With reference to the foregoing required insurance, the vendor shall endorse applicable insurance policies as follows:
1. The City of McKinney, its officials, employees, officers, volunteers, boards and commissions shall be named as additional insureds on the Commercial General Liability policy, by use of an endorsement that includes the completed operations hazard.
 2. All insurance policies shall be endorsed to the effect that City of McKinney will receive at least thirty (30) days notice prior to cancellation, non-renewal, termination, or material change of the policies.
- C. All insurance shall be purchased from an insurance company that meets a financial rating of B+VI or better as assigned by the BEST Rating Company or equivalent.