

**CONTRACT BETWEEN THE CITY OF MCKINNEY, TEXAS AND BRIAN KEITH FOR THE
JEFFREY HULL MEMORIAL SCULPTURE BENCH AT PECAN GROVE CEMETERY**

This Contract ("Contract") is made and entered into effective the 21st day of May, 2019 ("Effective Date"), by and between the City of McKinney, Texas ("City"), a Texas municipal home-rule corporation and Brian Keith ("Artist").

WHEREAS, the Artist submitted a concept design ("the Concept Design") to the City for the commission of an original outdoor cast-bronze sculpture bench ("Artwork") related to the City-sponsored, 2017 "Call to Artists Mitchell Park Sculpture" competition; and

WHEREAS, the City's Arts Commission Selection Panel selected the Artist to create and install a sculpture bench in Pecan Grove Memorial Cemetery in memory of Jeffrey Hull, and has agreed and authorized that this Contract be awarded to the Artist, commissioning Artist 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 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 installed at Pecan Grove Memorial Park (Cemetery) located at 1701 S. McDonald 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 January 1, 2020, unless the City, in its sole discretion, establishes a later date based on intervening circumstances. The Artist shall use his 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) 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 6, below. If the Artwork needs repair or restoration within five (5) 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 suitable payment terms being agreed to with the Artist. All repairs or restoration should be made in accordance with recognized conservation standards. The City's obligation(s) to maintain and repair the Artwork are subject to the then availability of properly budgeted funds for such purpose. Notwithstanding anything to the contrary, the City

may in its sole discretion delegate City's obligation(s) to maintain and repair the Artwork to one or more responsible third-parties.

5. Responsibilities of the Artist.

- a) **Installation.** The Artist and his 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. Artist shall also take such precautions as are necessary to protect the Artwork as well as the Cemetery and the Site at which the Artwork is to be installed from any damage or injury; and in the event of damages or injury will promptly restore the same to as near as practicable its pre-damage condition.

6. Warranties.

- a) Original Artwork; Reasonable Skill, Care, and Diligence. The Artist represents and warrants 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 and installing the Artwork.
- b) One-Year Warranty Against Defects in Workmanship or Quality. The Artist represents and 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 Artist's sole 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 mixed-media mosaic and that noticeable deterioration does not include fair wear and tear, ordinary exposure to light or the elements, vandalism or willful misuse, graffiti, or other events that are not within the control of the Artist.

7. Commission; Payment Schedule; Proof of Insurance. The Artist shall be paid the amount of Twenty-Seven Thousand and NO/100 Dollars (\$27,000.00) for the satisfactory completion of the Artwork ("Commission"), plus up to One Thousand Five Hundred and NO/100 Dollars (\$1,500.00) for the installation of the sculpture ("Installation Costs"), which Artwork 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.

The City will pay the Commission to the Artist based on the following payment schedule: fifty percent (50%) upon commencement of work on the Artwork (\$13,500) ("First Installment"); fifty percent (50%) following completion and installation and City's acceptance of the Artwork (\$13,500) ("Second Installment"). The Second Installment will be paid to Artist within 15 days of the acceptance date of the Artwork. Contemporaneously with the payment of the Second Installment, City will pay Artist for its Installation Costs.

The Artist shall provide proof of insurance to the City in a form consistent with the attached Exhibit B prior to commencement of Artist's work on the Artwork.

8. 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 in writing by the City, the City will reimburse these additional costs or expenses upon production by the Artist of receipts or other evidence of the costs or expenses incurred.

9. 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.

10. 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 his 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 any such images, depictions and/or descriptions of the Artwork 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.

11. 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 or within which the Artwork is to be placed or displayed is subject to demolition, the City will provide notice to the Artist at least forty-five (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 forty-five (45) days.

12. 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 (2) 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 that private funds, sufficient to pay for fifty percent (50%) of the total cost of the Artwork, are not raised by January 1, 2020, this contract will be null and void.
- c) In the event the Artwork 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.
- d) 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 (2) 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.

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

14. 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 negligent or intentional act or omission of the Artist, its officers, agents, employees or other third parties for 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.

15. 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) if applicable, transmitted by facsimile (with proof of confirmed transmission) to the respective parties hereto as follows:

To the Artist: BRIAN KEITH
36 Canyon Hills Place
San Ramon, CA. 94582
Email: brian@briankeithfineart.com

To the City: CITY OF MCKINNEY
Housing and Community Development Department
PO Box 517
McKinney, TX 75070
Attn: Janay Tieken
or
406 N. Tennessee
McKinney, TX 75069
Email: jtieken@mckinneytexas.org

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

16. 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. City hereby specifically reserves the right to assign all of City's rights and interests in this Contract with or without Artist's knowledge or consent.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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 effective as of the 21st day of May, 2019.

ARTIST:

Brian Keith

CITY OF MCKINNEY, TEXAS:

By: _____
Paul G. Grimes, City Manager

EXHIBIT "A"



**EXHIBIT “B”
INSURANCE REQUIREMENTS**

The Artist shall at Artist’s own expense procure, pay for and maintain for the duration of this Contract, 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 Artist and Artist’s 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 (“City”). The Artist shall furnish to the City certificates of insurance executed by an approved 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 Purchasing Department
PO Box 517
McKinney, TX 75070

Certificates must also be emailed to litrell@mckinneytexas.org. **The Artist shall also be required to forward a copy of the certificates 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 Artist 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.