



AGENDA REPORT

Meeting Date: October 7, 2014
Item Number: D-7
To: Honorable Mayor & City Council
From: Nancy Hunt-Coffey, Assistant Director of Community Services
Subject: APPROVAL OF AN AGREEMENT BETWEEN THE CITY OF BEVERLY HILLS AND DAVID ZWIRNER INC., AS AGENT FOR CAROL BOVE, FOR THE CREATION, SALE AND ASSIGNMENT OF CERTAIN RIGHTS IN THE ARTISTIC WORK ENTITLED "IO," FROM THE WHITE STEEL GLYPH SERIES; AND,

APPROVAL OF A PURCHASE ORDER AND APPROPRIATION OF \$235,000 FROM THE FINE ART FUND FOR THIS PURPOSE AND FOR INSTALLATION COSTS

Attachments: 1. Agreement

RECOMMENDATION

Based on recommendations by the City Council and Fine Arts Commission, staff requests approval of an agreement with David Zwirner Gallery for the purchase of artist Carol Bove's steel glyph sculpture, entitled *Io*, in the amount of \$200,000 to be paid from the Fine Art Fund. Additionally, staff recommends that City Council appropriate and approve a purchase order for \$235,000 from the Fine Art Fund to pay for the piece as well as costs related to transportation, site preparation and installation. The fund is exclusively used in support of the City's public art program.

INTRODUCTION

This report asks the City Council to approve the agreement and a purchase order with David Zwirner Gallery which represents artist Carol Bove to create, sell and assign certain rights for a sculpture to be located in Beverly Gardens Park in the block between Rodeo and Beverly Drive. The cost of the piece is \$200,000. Crating, shipping, installation, creation of a base and lighting of the piece will be handled through City contracts apart from the one with the gallery and will not exceed \$35,000.

DISCUSSION

One of the charges of the Fine Arts Commission is to select public art for the City. The Commission recommends the purchase of a spray coated steel glyph entitled *lo* by Carol Bove (b. 1971), a Swiss born, American artist and sculptor whose award winning work has been installed and shown internationally. The piece is made of white spray coated steel and measures approximately 100" x 100." The piece is in the form of a glyph, which is the smallest recognizable unit of a written language. There are a number of things that the name *lo* brings to mind, including the moon of Jupiter, the Greek myth and the computer terminology input-output. This piece was recommended unanimously by the Fine Arts Commission and the Council liaison (Mayor Bosse and Vice Mayor Gold). Additionally, the full City Council at the April 22, 2014 study session reviewed this proposal and approved the acquisition of this piece.

The City Council and the Fine Arts Commission have recommended the placement of the piece in Beverly Gardens Park, along Beverly Drive. At its meeting the Recreation and Parks Commission endorsed the Beverly Drive location, and subsequently at the April 22nd study session, the full Council approved this location. The residents along Park Way were notified via mail of the possible acquisition and placement of the piece on March 27th, 2014. Staff has spoken with one of the Park Way residents who expressed some concerns regarding the piece.

This report asks the City Council to formally approve the agreement between the City and the gallery that represents artist in order to initiate the process of commissioning the piece.

Business Issues

Neogtiations regarding the contract for acquisition of this piece were more extensive than most of the City's art acquisition negotiations. The artist and gallery requested numerous changes to the City's standard form that were ultimately agreed to by the City. However, several business issues are worth noting for the City Council's consideration.

First, it should be noted that as with most pieces of art, *lo* by Carol Bove does not come with a warranty. The only piece of art in the City's collection that has a warranty is Kusama's *Hymn of Life*. In that case, the City contracted directly with the fabricator, as well as the artist. The warranty provision for the Hymn of Life was exercised when there was substantial fading and chipping to the piece, and it was restored by the manufacturer without cost to the City. This experience highlighted for the City the value of obtaining a warranty, even though these types of warranties are generally not common with other such works of art. In this case, the City requested that the artist or the fabricator (who has not previously been used by this artist) provide a warranty to the City, however neither party has been willing to provide such a warranty.

Furthermore, the artist has insisted that language be included in the contract which indemnifies her and her representatives from any losses. In previous contracts regarding the acquisition of artwork, the indemnity issue has been silent. By indemnifying the artist and her representatives, the City would defend them and pay any damages assessed against them resulting from any act of negligence, recklessness or willful misconduct by the City related to (i) the installation and maintenance of the piece, (ii) the governance and maintenance of the site at which the piece is installed, and (iii) the de-installation or transportation of the piece if it is ever relocated by City. The City will not be indemnifying the fabricator of the piece in connection with its fabrication.

However, the gallery and artist refuse to indemnify the City for damage that arises from their acts or omissions.

The City Attorney's Office and the Risk Manager have not expressed significant concern with the City indemnifying the artist and gallery for damages which result from the installation, de-installation, transportation of the piece or the failure to maintain the site. These are within City's control and not within the control of the artist or gallery.

However, the refusal of the gallery and artist's to indemnify the City for issues within their control, such as design and construction defects, do create a concern by the City Attorney and the Risk Manager that the contract does not treat the City fairly as only the City, and not the artist or gallery, is agreeing to indemnify for the risks within its control.

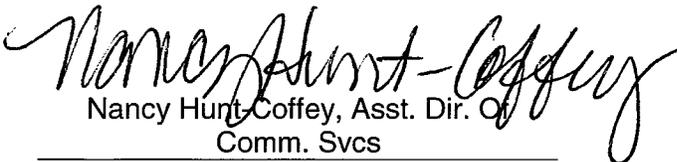
Finally, while the City owns the piece, the artist has insisted on maintaining the copyright to the piece. Thus, there are limitations on how the image of the piece can be used by the City. The City may use two dimensional depictions of the image for advertising, brochures, and media publications for the benefit of the City. However, the artist's consent is required for other uses. The artist will have no restrictions regarding the use of the image of the piece as long as she credits the City with commissioning the piece. However, the artist agrees not to use the image of the piece "for any poster or other similar product that is intended for retail sale". Typically, the City acquires the copyright with the piece. The exception to this practice was the acquisition of the *Endless V* by Jaume Plensa. Mr. Plensa maintained the copyright for his piece *Endless V*, but the contract limited his use of images of the piece to photographs of the piece for self promotional purposes.

It should be noted that these contractual issues were discussed with the Fine Art Commission at its meeting on September 18, 2014 and the Commission unanimously voted to proceed with acquiring the piece under the provisions described above.

FISCAL IMPACT

The cost to commission *lo* by Carol Bove is \$200,000. Additionally, the cost to transport and install the piece is approximately \$35,000. It should be noted that the balance of the Fine Arts fund as of September 2014 was \$2,285,494. As a result, there are sufficient funds to purchase and install the piece. City Council is asked to appropriate the funds necessary to commission, ship and install the Carol Bove piece as indicated below. Additionally, staff recommends that City Council approve a contract and purchase order with the David Zwirner Gallery.

	From	To
\$235,000	180 850108	18004004-850600-E-00558-000-000-850600
	Fine Art Fund Balance	Fine Art Purchases


 Nancy Hunt Coffey, Asst. Dir. of
 Comm. Svcs

Approved By

Council will be advised if
 agreement is not signed by
 Tuesday.

Attachment 1

AGREEMENT BETWEEN THE CITY OF BEVERLY HILLS
AND DAVID ZWIRNER, INC., AS AGENT FOR CAROL
BOVE, FOR THE CREATION, SALE AND ASSIGNMENT OF
CERTAIN RIGHTS IN THE ARTISTIC WORK ENTITLED
"IO," FROM THE WHITE STEEL GLYPH SERIES.

THIS AGREEMENT FOR THE SALE AND ASSIGNMENT OF ALL RIGHTS
IN AN ARTISTIC WORK (the "Agreement") is made and entered into as of this ____ day of
_____, 2014 ("Commencement Date"), by and between the City of Beverly Hills, a municipal
corporation ("City") and David Zwirner, Inc., an agent for Carol Bove ("Artist").

Section 1. **Description of Work.** Carol Bove ("Artist") is hereby
commissioned by the City to design and oversee the creation of an original work of art of a white
spray coated steel glyph ("Work") as set forth in Exhibit A, attached hereto and incorporated
herein by this reference. The Work shall be consistent with the approved rendering of the Work
set forth in Exhibit A and shall result in a white spray coated steel sculpture measuring
approximately 100 inches deep by 100 inches wide x 4 feet 6 inches in height. The Work shall
stand on a concrete base.

Section 2. **Artist's Work Schedule.** The Artist shall complete the Work in
accordance with the work schedule agreed upon in writing by the City and the Artist, which is
estimated to be six months from receipt by the Artist of the first payment, as specified in Exhibit
B, attached hereto and incorporated herein by this reference.

Section 3. **Artist's Fee.** Artist agrees to sell, and City agrees to purchase the
Work under the terms and conditions set forth in this Agreement and Exhibit A. The price for
this work shall be Two Hundred Thousand Dollars (\$200,000), inclusive of a Twenty Thousand
Dollar (\$20,000) nonrefundable design fee to the Artist ("Artist's Fee"). Payments shall be made
in accordance with the payment schedule set forth in Exhibit B. Artist will be acting as an
independent contractor, and City shall not withhold applicable federal or state payroll or any
other required taxes, or other authorized deduction from each payment made to the Artist. Upon
payment, Artist shall sign a written acknowledgement of receipt of said monies and such
document shall be incorporated in this Agreement.

Section 4. **Fabrication, Transportation and Installation.**

(a) Fabrication. Artist will be responsible for all costs of fabrication,
including but not limited to the preparation of all construction documents, the purchase and
transportation of materials, and the cost of the actual fabrication. The Work will be fabricated in
Los Angeles, California.

(b) Transportation. City shall be responsible for all costs of transportation of
the Work from the place of fabrication to the site where it will be installed (the "Site"), including
but not limited to, all costs of pick-up, crating, preparation for transportation, and actual
transportation.

(c) Preparation of the Site. City shall be responsible for preparing the Site for the installation of the work, including without limitation constructing the base and providing lighting for the Work, as specified by Artist in Attachment 2 to Exhibit A and for all associated costs.

(d) Permits. City shall be responsible for obtaining all necessary approvals and permits and for complying with all applicable laws and regulations relating to the preparation of the Site and the installation of the Work. Artist agrees to cooperate with City in this process, and to provide City with all necessary information requested by City.

(e) Installation of the Work. City shall be responsible for the installation of the Work at the Site, including all costs associated with such installation. Artist agrees that she will be present to assist during the installation.

Section 5. Personnel. Artist agrees that she will be responsible for completing all services in the Scope of Services and providing the personnel necessary for such services. Artist shall be responsible for the satisfactory performance of the personnel engaged in performing services required by this Agreement.

Section 6. Term. This Agreement is effective as of the Commencement Date.

Section 7. Right to Display. Artist hereby grants to City the right to publicly display the Work at a location selected by City.

Section 8. Transfer of Rights of Reproduction. Artist hereby grants the City the right to reproduce the Work as discussed in Section 11(b)(i).

Section 9. Waiver of Certain Moral Rights. Artist acknowledges and agrees that City, in its sole and exclusive discretion, may abandon, dismantle or destroy the Work. City shall, however, provide notice to the Artist prior to any destruction of the Work and shall offer in writing to return the Work to Artist at Artist's sole expense. Artist shall have sixty (60) days from the dates of such offer to notify the City in writing of her desire to accept return of the Work, or if Artist does not so notify City, then City may destroy the Work. City may not permanently modify, alter, or change the Work except for conservation of the Work for structural or aesthetic purposes. Artist hereby waives his/her rights arising under the federal Visual Artist Rights Act, 17 U.S.C. sections 106A and 113 (d) ("VARA") and the California Art Preservation Act (Cal. Civil Code section 987 et seq.) "CAPA" and any other state, federal or international law to the extent, and only to the extent that such laws conflict with the provision of this section. Artist waives no other rights arising under VARA, CAPA and any other state, federal or international law relating to an artist's moral rights.

Section 10. Replication of Work. The Artist acknowledges that the Work is unique and Artist shall not reproduce the Work in identical form for commercial or non-commercial purposes.

Section 11. City's Sole and Exclusive Ownership Rights.

(a) Artist shall not retain ownership of or title to the Work. The parties agree that the title to the Work belongs to and is being sold and assigned to City for whatever use it desires, and that City does and shall at all times own, solely and exclusively, complete and unencumbered, all title in and to the Work.

(b) Artist and City may make and use reproductions of the image of the Work as set forth in this paragraph (b).

(i) City may, without the prior consent of Artist, make photographs and two dimensional reproductions of the Work for such uses as advertising, brochures, and media publications for the benefit of the City. Any other use of the image of the Work shall be subject to the prior written consent of the Artist and such consent shall not be unreasonably withheld or delayed. Artist agrees to execute, and authorizes her legal representatives to execute, any documents or instruments requested by City to effectuate this grant of rights. In each use of the image of the Work by City, City shall include the following copyright notice: **Copyright 2014 Carol Bove.**

(ii) Artist may use the image of the Work for any reason, provided that; (i) in each use, she shall include the following credit line unless requested by City not to do so in writing: "**Commissioned by the City of Beverly Hills**"; (ii) Artist agrees not to use the image of the Work for any poster or other similar product that is intended for retail sale.

Section 12. Transferability. All rights granted by Artist to City pursuant to this Agreement are fully transferable to others, by license or otherwise without further payment or approval of Artist.

Section 13. City's Responsibility.

(a) City shall be responsible for constructing the base and providing lighting for the Work, as specified by Artist in Attachment 2 to Exhibit A and for all associated costs.

(b) City shall be responsible for overseeing the installation of the Work and for all associated costs of such oversight.

Section 14. Originality of Work. Artist represents and warrants that (i) the Work is and will be original; (ii) at the time of transfer hereunder, Artist is the sole owner of the Work and of all rights therein including copyright, trademark and other proprietary rights therein; (iii) Artist is and will be the sole creator of the Work; (iv) Artist has and will have full and sufficient right to assign all rights granted herein and to waive all rights relinquished herein; (v) Artist is not under any obligation to transfer or sell any of the Work to any third party; (vi) the Work has not been and will not be published under circumstances which have or will cause a loss of any copyright, trademark or other proprietary rights therein; and (vii) the Work does not and will not infringe any patent, copyright, trademark or other proprietary rights, privacy rights or other rights of any third party, nor has any claim (whether or not embodied in a legal action, past or present) of such infringement been threatened or asserted, nor is such a claim pending,

against Artist (or, insofar as Artist is aware, against any entity from which Artist has obtained any rights).

Section 15. Risk of Loss. Artist bears the sole risk of damage to or loss of the Work until such Work is delivered to the custody or control of City for transport to the Site. From that time forward, all risk of loss or damage shall be borne by the City. Each party shall be responsible for procuring adequate insurance to cover the risk of loss or damage to the Work during the periods in which they each, respectively, bear the risk of loss.

Section 16. Artist's Commitment. Artist agrees that Artist shall not make reference to the Work produced under this Agreement in a way that reflects discredit on the City or the Work.

Section 17. Indemnification. City agrees to indemnify and hold Artist and her employees, representatives and agents harmless from any, and all loss, cost, damage and expense (including, without limitation, reasonable attorney's fees and expenses) arising out of or resulting from any act or omission of City (or any of its officers, employees, representatives or agents) constituting negligence, recklessness or willful misconduct in connection with (i) the installation and maintenance of the Work, (ii) the governance and maintenance of the site at which the Work is installed, and (iii) the de-installation or transportation of the Work if it is ever relocated by City. Notwithstanding the above, City shall not indemnify the fabricator of the Work in connection with its fabrication.

Section 18. Integrity of the Work.

(a) Repairs and Maintenance

(1) Artist shall provide City with written instructions on the proper installation and maintenance of the Work.

(2) City undertakes to exercise reasonable care to protect, repair, and maintain the Work in a manner consistent with such instructions.

(3) During Artist's lifetime, Artist agrees to cooperate with and advise City in connection with City's non-routine maintenance of the Work to the extent that she is able to do so.

(b) Relocation of the Work. To the extent that the Work is capable of being relocated, City shall have the right to relocate the Work. If feasible, City shall undertake to consult with Artist concerning any relocation of the Work.

(c) Credit. City agrees, at its own expense, to prepare and install at or near the Site a public notice giving Artist credit for the creation of the Work.

(d) Address of Artist for Purposes of This Section. Artist shall, for the purposes of this section, be responsible for providing City at all times with either her current address or an alternative means of contacting her.

Section 19. Addresses for Notices. Any notice, bills, invoices, demand or document which any party is required or may desire to give or deliver to the other hereunder, shall be in writing and may be delivered personally or given by facsimile or overnight courier service, postage prepaid, addressed as follows:

To Artist:

Carol Bove,
c/o David Zwirner, Inc.
525 West 19th Street
New York, NY 10011
Fax: 212-727-2070

To City:

City of Beverly Hills,
North Rexford Drive
Beverly Hills, California 90210
Attention: City Manager
Fax: (310) 274-3267

With a copy to:

City Attorney
City of Beverly Hills
455 North Rexford Drive
Room 230
Beverly Hills, CA 90210
Fax (310) 285-1056

(a) Either party shall have the right to designate a different address by written notice similarly given. Any notice shall be delivered by hand, overnight courier service, facsimile or email.

(b) City assumes no responsibility to search for Artist if she cannot be reached at the address of record.

Section 20. Termination.

(a) City shall have the right to terminate this Agreement, with cause, upon ten calendar day's written notice to Artist. If terminated, Artist agrees to cease all work under this Agreement on or before the effective date of such notice. If such cause is a default by the Artist and upon notice this default is not cured within 15 days, all completed and uncompleted portions of the work up to the date of receipt of written notice of termination shall become the property of the City.

(b) In the event of termination of this Agreement by City, due to no fault or failure of performance by Artist, Artist shall be entitled to the \$20,000 nonrefundable design fee as well as return of the Work (or its component parts) if it has already been released to City.

Section 21. Attorneys' Fees. In the event either party shall commence any action against the other party relating to this Agreement or for the breach of any obligation contained herein, the prevailing party shall be entitled to recover from the losing party reasonable attorneys' fees, expenses, and court costs.

Section 22. Prohibition Against Assignment. Artist shall not delegate, transfer, subcontract or assign his duties or rights hereunder, either in whole or in part, without City's prior written consent, and any attempt to do so shall be void and of no effect. City shall not be obligated or liable under this Agreement to any party other than Artist.

Section 23. Successors and Assigns. The terms of this Agreement shall be binding upon and inure to the benefit of the respective heirs, successors in interest and assigns of the parties hereto.

Section 24. Entire Agreement. This Agreement represents the entire integrated agreement between City and Artist, and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by a written instrument signed by both City and Artist.

Section 25. Severability. Wherever possible, each provision of this Agreement shall be interpreted in such a manner as to be valid under applicable law. If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall nevertheless continue in full force and effect.

Section 26. Headings. The caption headings of the various sections and paragraphs of this Agreement are for convenience and identification only and shall not be deemed to limit, expand, or define the contents of the respective sections or paragraphs.

Section 27. Governing Law; Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of California. In the event of litigation between the parties, venue in State trial courts shall be exclusively in Los Angeles County. In the event of litigation in a United States District Court, exclusive venue shall lie in the Central District of California.

Section 28. Execution. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument. David Zwirner, Inc. represents and warrants that it is authorized under the laws of this State to enter into this Agreement on behalf of Carol Bove.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

“CITY”
CITY OF BEVERLY HILLS, a municipal
corporation

LILI BOSSE
Mayor of the City of Beverly Hills, California

ATTEST:

BYRON POPE
City Clerk

(SEAL)

“ARTIST”
DAVID ZWIRNER, INC., as Agent for Carol Bove

TRACY NOLDER
Managing Director

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

LAURENCE S. WIENER
City Attorney

JEFFREY C. KOLIN
City Manager

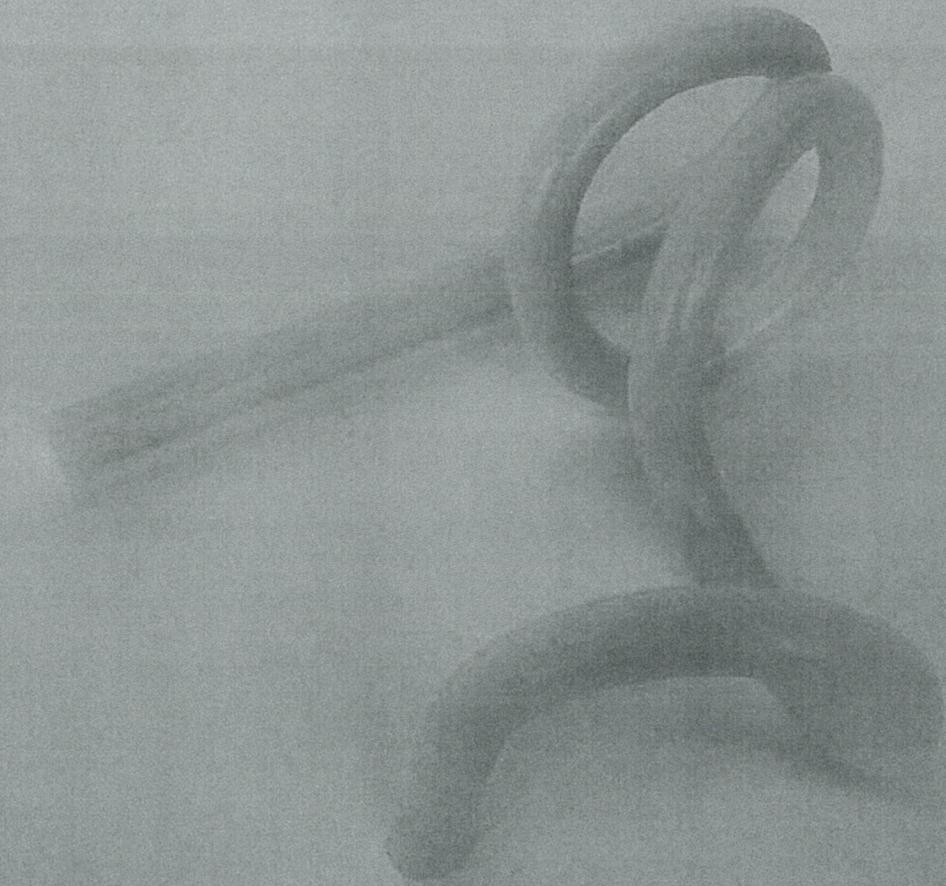
STEVE ZOET
Director of Community Services

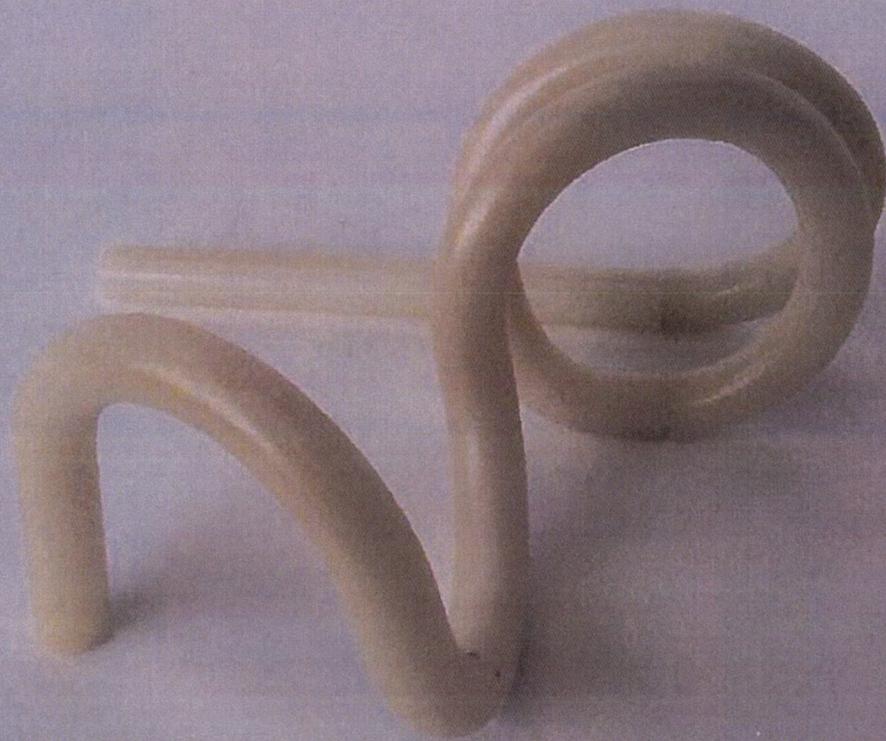
KARL KIRKMAN
Risk Manager

EXHIBIT A

Artist shall provide City with the Work from the White Steel Glyph Series, in substantially similar design to a mockup of the Work, a photograph of which is attached as Attachment 1 to this Exhibit A.

EXHIBIT A
ATTACHMENT 1





ATTACHMENT 1-2

ATTACHMENT 1-3

EXHIBIT B
PAYMENT AND PAYMENT SCHEDULE

The City shall pay Artist \$200,000 for the Work pursuant to the terms and conditions of this Agreement.

Payment schedule:

- A. Upon execution of this Agreement, City shall pay Artist \$80,000 as a deposit to begin Artist's work, \$20,000 of which is a non-refundable design fee for the Artist.
- B. Upon completion of Work at fabricator's studio and prior to transportation, City shall pay Artist \$80,000.
- C. Within thirty days of the delivery and acceptance of the Work by City, City shall pay the remaining balance of \$40,000.