

CITY OF SANTA FE
PUBLIC ART PURCHASE AGREEMENT

THIS AGREEMENT is made and entered into by and between the City of Santa Fe (the "City") and Joerael Elliott (the "Contractor"). The date of this Agreement shall be the date when it is executed by the City.

RECITALS

The Contractor has been selected and recommended by the project selection committee, the Art in Public Places Committee and the Arts Commission to provide the artwork described in Exhibit A of this agreement (the "Art") for installation at the Santa Fe Municipal Airport (the "Site").

1. SCOPE OF SERVICES

The Contractor shall provide the following services to the City:

- A. Deliver the Art to the agreed upon location, within the agreed upon timeline at a guaranteed cost.
- B. Provide all service necessary to deliver the Art to the designation location.
- C. Supply a written description of the art with written instructions for the appropriate maintenance and preservation of the art.

2. STANDARD OF PERFORMANCE; LICENSES

- A. The Contractor represents that it possesses the experience and knowledge necessary to perform the services described under this Agreement.
- B. The Contractor agrees to obtain and maintain throughout the term of this Agreement, all applicable professional and business licenses required by law, for itself, its employees, agents, representatives and subcontractors.

3. COMPENSATION

A. The City shall pay to the Contractor in full payment for services rendered a sum not to exceed eight-thousand dollars (\$8,000), inclusive of applicable gross receipts taxes.

B. The Contractor shall be responsible for payment of gross receipts taxes levied by the State of New Mexico on the sums paid under this Agreement.

C. Payment shall be made upon receipt and approval by the City of detailed statements containing a report of services completed. Compensation shall be paid only for services actually performed.

D. Payment shall be made as follows:

(1) Eight hundred dollars (\$800) upon signing this Agreement for costs associated with preparing the work for delivery.

(2) Four-thousand eight hundred dollars (\$4,800) upon delivery of the Art to the designated location.

(3) Four hundred dollars (\$400) delivery of maintenance instructions and photographs of the Art.

(4) One-thousand six hundred dollars (\$1,600) upon acceptance of the Art by the City

(5) Four hundred dollars (\$400) payable upon the City's issuance of a Notice of Acceptance. Under Ordinance 6-1.4 Section D Number 6 which states "Progress payments may be made to the artist for works of art which have been approved by the governing body. Such payments may reimburse the artist for the cost of materials or for services which have already been performed. At least twenty-five percent (25%) of the total amount to be paid to the artist shall not be disbursed to the artist until the work of art is formally accepted by the Arts Commission."

(5) Two-thousand dollars (\$2,000) until one (1) year after the issuance of the Notice of Acceptance pending satisfactory workmanship guarantee by the City.

4. APPROPRIATIONS

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the City for the performance of this Agreement. If sufficient appropriations and authorization are not made by the City, this Agreement shall terminate upon written notice being given by the City to the Contractor. The City's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final.

5. TERM AND EFFECTIVE DATE

This Agreement shall be effective when signed by the City and terminate on June 30, 2019, unless sooner pursuant to Article 6 below.

6. TIME OF PERFORMANCE

A. The services to be performed by the Contractor set forth in Article 1 of this Agreement shall be completed as agreed to by the Contractor and the City in Article 1.A and in accordance with the termination date set forward in Article 5 of this Agreement. Failure to fulfill the obligations of this Agreement within the term shall be considered a breach of this Agreement.

B. The City shall grant a reasonable extension of the term to the Contractor in the event that there is a reasonable delay on the part of the Contractor, of it conditions beyond the Contractor's control or Acts of God render timely performance of the Contractor's service impossible.

C. All requests by the Contractor for term extensions shall be made in writing to the City at least ninety (90) days prior to the term described in Article 5 of this Agreement. The City's determination as to whether a delay is "reasonable" shall bind the Contractor. In the event a term extension is granted this Agreement shall be amended in accordance with Article 19.

7. TERMINATION

A. This Agreement may be terminated by the City upon 10 days written notice to the Contractor.

(1) The Contractor shall render a final report of the services performed up to the date of termination and shall turn over to the City original copies of all work product, research or papers prepared under this Agreement.

B. If the Contractor fails to fulfill any of the Contractor's obligations under this Agreement in a timely and proper manner, or if the Contractor violates any other term of this Agreement, the City thereupon will have the right to terminate this Agreement by giving the Contractor written notice of termination no less than ten (10) days before the effective date of termination as stated in the notice.

(1) All finished or unfinished drawings, specifications, models, portions of the Art, supplies or other objects which have been prepared by the Contractor under this Agreement, will become the City's property and the City will be entitled to have the Art completed and displayed, but the Contractor will no longer be represented as the author of the Art.

(2) The City shall pay the Contractor for the reasonable value of services satisfactorily performed through the date Contractor receives notice of such termination, and for which compensation has not already been paid.

(3) The City shall have the option of either owning and keeping the Art as it exists on the date of termination, or requiring the Contractor to remove the Art, at the Contractor's expense, by the deadline stated in a written notice to the Contractor given by the City.

8. STATUS OF CONTRACTOR; RESPONSIBILITY FOR PAYMENT OF EMPLOYEES AND SUBCONTRACTORS

A. The Contractor and its agents and employees are independent contractors performing professional services for the City and are not employees of the City. The Contractor, and its agents and employees, shall not accrue leave, retirement, insurance, bonding, use of City vehicles, or any other benefits afforded to employees of the City as a result of this Agreement.

B. Contractor shall be solely responsible for payment of wages, salaries and benefits to any and all employees or subcontractors retained by Contractor in the performance of the services under this Agreement.

C. The Contractor shall comply with City of Santa Fe Minimum Wage Ordinance No. 2003-8, passed by the Santa Fe City Council on February 26, 2003, as well as any subsequent changes to the ordinance throughout the term of this contract.

9. CONFIDENTIALITY

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the City.

10. CONFLICT OF INTEREST

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement. Contractor further agrees that in the performance of this Agreement no persons having any such interests shall be employed.

11. ASSIGNMENT; SUBCONTRACTING

The Contractor shall not assign or transfer any rights, privileges, obligations or other

interest under this Agreement, including any claims for money due, without the prior written consent of the City. The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the City.

12. RELEASE

The Contractor, upon acceptance of final payment of the amount due under this Agreement, releases the City, its officers and employees, from all liabilities, claims and obligations whatsoever arising from or under this Agreement. The Contractor agrees not to purport to bind the City to any obligation not assumed herein by the City unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

13. INSURANCE

A. The Contractor, at its own cost and expense, shall carry and maintain in full force and effect during the term of this Agreement, comprehensive general liability insurance covering bodily injury and property damage liability, in a form and with an insurance company acceptable to the City, with limits of coverage in the maximum amount which the City could be held liable under the New Mexico Tort Claims Act for each person injured and for each accident resulting in damage to property. Such insurance shall provide that the City is named as an additional insured and that the City is notified no less than 30 days in advance of cancellation for any reason. The Contractor shall furnish the City with a copy of a Certificate of Insurance or other evidence of Contractor's compliance with the provisions of this section as a condition prior to performing services under this Agreement.

B. Contractor shall also obtain and maintain Workers' Compensation insurance, required by law, to provide coverage for Contractor's employees throughout the term of this Agreement. Contractor shall provide the City with evidence of its compliance with such requirement.

C. Contractor shall maintain professional liability insurance throughout the term of this Agreement providing a minimum coverage in the amount required under the New Mexico Tort Claims Act. The Contractor shall furnish the City with proof of insurance of Contractor's compliance with the provisions of this section as a condition prior to performing services under this Agreement.

14. INDEMNIFICATION

The Contractor shall indemnify, hold harmless and defend the City from all losses, damages, claims or judgments, including payments of all attorneys' fees and costs on account of any suit, judgment, execution, claim, action or demand whatsoever arising from Contractor's performance under this Agreement as well as the performance of Contractor's employees, agents, representatives and subcontractors.

15. NEW MEXICO TORT CLAIMS ACT

Any liability incurred by the City of Santa Fe in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The City and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

16. THIRD PARTY BENEFICIARIES

By entering into this Agreement, the parties do not intend to create any right, title or interest in or for the benefit of any person other than the City and the Contractor. No person shall claim any right, title or interest under this Agreement or seek to enforce this agreement as a third party beneficiary of this agreement.

17. RECORDS AND AUDIT

The Contractor shall maintain, throughout the term of this Agreement and for a period of three years thereafter, detailed records that indicate the date, time and nature of services rendered. These records shall be subject to inspection by the City, the Department of Finance and Administration, and the State Auditor. The City shall have the right to audit the billing both before and after payment. Payment under this Agreement shall not foreclose the right of the City to recover excessive or illegal payments.

18. APPLICABLE LAW; CHOICE OF LAW; VENUE

Contractor shall abide by all applicable federal and state laws and regulations, and all ordinances, rules and regulations of the City of Santa Fe. In any action, suit or legal dispute arising from this Agreement, the Contractor agrees that the laws of the State of New Mexico shall govern. The parties agree that any action or suit arising from this Agreement shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

19. AMENDMENT

This Agreement shall not be altered, changed or modified except by an amendment in writing executed by the parties hereto.

20. SCOPE OF AGREEMENT

This Agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the services to be performed hereunder, and all such agreements, covenants and understandings have been merged into this Agreement. This Agreement expresses the entire Agreement and understanding between the parties with respect to said services.

No prior agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

21. NON-DISCRIMINATION

During the term of this Agreement, Contractor shall not discriminate against any employee or applicant for an employment position to be used in the performance of services by Contractor hereunder, on the basis of ethnicity, race, age, religion, creed, color, national origin, ancestry, sex, gender, sexual orientation, physical or mental disability, medical condition, or citizenship status.

22. SEVERABILITY

In case any one or more of the provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

23. CHANGE IN DESIGN

A. The Contractor shall deliver the Art in substantial conformity with Exhibit "A" of this Agreement.

B. The Contractor may make minor adjustments to the as aesthetically and structurally necessary.

C. Prior to implementing any substantial change in the design of the Art, the Contractor shall provide written notice of such change to the City. The Contractor must receive the City's written approval of the change before the Contractor may continue completing the Art or be entitled to additional compensation.

D. The City's determination as to whether a change is "minor" or "substantial" shall bind the Contractor.

24. REVIEW, PROGRESS REPORTS AND STUDIO VISITS

The City shall have the right to see the Art and to require and receive weekly progress reports from the Contractor. The City shall have the right to visit the Contractor's studio or other locations where the Art is located for the purposes of inspecting the work upon twenty four (24) hours notice.

25. COPYRIGHT AND REPRODUCTION RIGHTS

A. The Contractor certifies that the Art created pursuant to this Agreement is a creative work of art especially designed for the City that has the possibility, and with consideration can be duplicated in part or in its entirety by the Contractor. The design concept shall not be duplicated within of City limits for the period of two years without the expressed written consent of the City.

B. The Contractor expressly reserves every right available to the Contractor, in common law or under the Federal Copyright Act except the rights which are limited by this Agreement.

C. The City shall not make any commercial use of the design of the Art, without the Contractor's written consent.

D. The City expressly retains the rights to publish and distribute photographs or drawings of the Art as installed and formally accepted by the City for noncommercial purposes, including but not limited to use in City-related advertising, brochures, media publicity, catalogues or other similar publications.

26. FORMAL ACCEPTANCE AND OWNERSHIP OF THE ART

A. The Contractor shall notify the City in writing of the completion of the Art. The City shall send notice informing the Contractor in writing that either:

(1) The Art has been received according to the terms of the Agreement and the City formally accepts the Art ("Notice of Acceptance"); or

(2) Issues remain which prevent the City's issuance of a Notice of Acceptance, in which case the issues shall be described and the Contractor shall make adjustments to the Art as necessary within thirty (30) days to address the issues raised by the City at no additional cost to the City unless otherwise agreed upon by the parties in writing.

B. Upon the City's giving Notice of Acceptance the City shall become the sole owner of the Art.

27. RISK TO THE CONTRACTOR

The Contractor understands and agrees that, until the Art is delivered to the designated location, any injury to or loss of the Art and any injury to property or persons caused by the Art or any services related to this Agreement is the sole liability of the Contractor. The City will not provide the Contractor with any insurance coverage against such risks.

28. GUARANTEE OF WORKMANSHIP AND MATERIALS

For the period of one (1) year from the date of Notice of Acceptance, the Contractor warrants and guarantees all workmanship and materials used on the Art as installed on the Site.

29. IDENTIFICATION PLAQUE

The City shall be responsible for the selection, fabrication and installation of all associated identification plaque. All identification plaques will credit the Contractor with the creation of the Art.

30. EXPECTED LIFE OF THE ART

The City and the Contractor agree that the expected life of the Art is ten (10) years after the Notice of Acceptance.

31. MAINTENANCE

A. The City, with the intention of protecting the value, integrity and authenticity of the Art, shall be responsible for all maintenance of the Art.

B. The City will use reasonable efforts to maintain the Art in accordance with the written recommendations provided by the Contractor. The City shall have the exclusive right to determine whether repairs to, or restoration of the Art will be made. Such determination will take into account the expected life of the Art as defined in Article 30 of this Agreement.

C. During the Contractor's lifetime, the Contractor shall supply, at no charge to the City, advice concerning problems relating to the maintenance of the Art, unless agreed upon in writing by the City and the Contractor. To the extent practical, the Contractor shall be given the opportunity to perform any repairs and restoration of the Art.

D. If at any point after the Notice of Acceptance is issued, the Contractor believes the Art requires repair and the City does not repair the Art to the satisfaction of the Contractor, the Contractor shall retain any right to disclaim authorship of the Art pursuant to and under the conditions of applicable federal and state laws, including the Visual Artists' Rights Act.

32. REMOVAL OR DESTRUCTION

A. The Contractor acknowledges that by its nature, public art is may be subject to unforeseen or unavoidable damage or destruction.

B. The Contractor therefore agrees that the City shall have the absolute right to alter, change, modify, destroy, remove, relocate, move, replace, transport or transfer, in whole or in part, (such actions as being referred to herein after as "Alterations"), the Art as such time as the City shall deem it necessary. In deciding to perform such Alterations the City shall consider the expected life of the Art as defined in Article 30 of this Agreement and the Contractor agrees

that once the expected life of the Art has expired, the Art may have any such Alterations performed to it.

C. The City shall make a good faith effort to provide the Contractor with prior written notice of the City's intention to undertake any Alterations of the Art.

D. To the extent the provisions of this Article are inconsistent with the provisions of federal and state law, including the Visual Artists' Rights act, the Contractor hereby waives any right to preservation of the Art provided by those laws; provided, however, that the Contractor shall retain any right to disclaim authorship of the Art pursuant to and under the conditions of applicable federal and state laws, including the Visual Artists' Rights Act.

33. PUBLIC HAZARD

A. In the event that the City determines that the Art presents an imminent hazard to the public, the City may remove the Art without the formal approval of the Contractor. The Contractor shall be notified within thirty (30) days of any such action, and the City shall then consider options for the final disposition, repair, reinstallation, maintenance or de-accessioning of the Art.

B. If the Art cannot be removed without being irreparably damaged or destroyed, the Contractor hereby waives any right to preservation of the Art provided by applicable federal and state laws; provided however, that the Contractor shall retain any right to disclaim authorship of the Art pursuant to and under the conditions of applicable federal and state laws, including the Visual Artists' Right Act.

34. FUTURE SITE DEVELOPMENT

A. The City and the Contractor acknowledge that future site development within the immediate vicinity of the Art may change the intended appearance and character of the Art and/or necessitate its removal. Therefore, the City shall attempt to notify the Contractor

in writing of any intended, significant changes in the immediate vicinity of the Art or to the Art itself, and to the extent practical, consult the Contractor in planning the changes.

B. In the event changes to the site significant alter the intent of the Art or the Art itself, the Contractor shall retain any right to disclaim authorship of the Art pursuant to and under the conditions of applicable federal and state laws, including the Visual Artists' Rights Act.

35. AUTHORSHIP

The Contractor agrees to claim authorship of the Art. If the Contractor wishes to exercise the Contractor's right to disclaim authorship of the Art pursuant to the terms of this Agreement the Contractor shall notify the City in writing. The City shall comply by allowing the Contractor to remove the Contractor's name from the Art at the Contractor's own expense.

36. CONTRACTOR'S ADDRESS

The Contractor shall notify the City of changes in the Contractor's address. The failure to do so shall be deemed a waiver by the Contractor of the rights provided in this Agreement which require the express consent or notification of the Contractor, if such failure prevents the City from locating the Contractor.

37. NOTICES

Any notices required to be given under this Agreement shall be in writing and served by personal delivery or by mail, postage prepaid, to the parties at the following addresses:

City of Santa Fe:
PO Box 909
Santa Fe, New Mexico 87504

Contractor:
Joerael Elliott
3365 La Avenida de San Marcos
Santa Fe, New Mexico 87505

IN WITNESS WHEREOF, the parties have executed this Agreement on the date set forth below.

CITY OF SANTA FE:

Renee Martinez for EL
CITY MANAGER

DATE: 8/15/18

CONTRACTOR:

Joerael Elliott
JOERAEL ELLIOTT, ARTIST

DATE: 8-17-18

CRS# 03-406943-00-4
City of Santa Fe Business
Registration # 18-00150760

ATTEST:

Yolanda Y. Vigil
YOLANDA Y. VIGIL
CITY CLERK

APPROVED AS TO FORM:

MDM 3/24
CITY ATTORNEY

APPROVED:

Mary McCoy
FINANCE DIRECTOR

32708.510400
Business Unit/Line Item

Exhibit A
Goyathlay (Geronimo) Borderland Parallelism
40 x 32"
Mixed media

