

AMENDATORY AGREEMENT

THIS AMENDATORY AGREEMENT is made and entered into by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the "City"), and **POETIC KINETICS INC.**, a Colorado corporation, whose address is 12060 Woodlake Road, Elbert, CO 80106 (the "Artist").

WITNESSETH:

WHEREAS, the City and the Artist previously entered into an Agreement dated May 25, 2023 (the "Agreement") to design, execute, fabricate, deliver and install a work of art consisting of three kinetic steel and acrylic sculptural Aspen Trees (the "Work"), such Work to be integrated into the 16th Street Mall (the "Site"), after consultation with Denver Arts and Venues (DAV), Site designers, and Department of Transportation and Infrastructure personnel; and

WHEREAS, The parties have determined to amend the Scope of Work to add a second related artwork consisting of an acrylic and steel cable art canopy at that portion of the Site known as Glenarm Plaza and additional funds are needed to accomplish the additional Work; and

WHEREAS, the ultimate design of Phase 2 may require cable attachment to private property controlled by Gart Properties, Inc. ("Gart")

WHEREAS, additional time will be needed to complete the additional Work;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and obligations herein set forth, the parties agree as follows:

1. The additional Scope of Work is attached hereto and incorporated herein as **Exhibit A-1** and all references to "Exhibit A" are hereby amended to read "**Exhibits A and A-1**".

2. Subparagraph 1.4(b) of Article 1 of the Agreement entitled "Work to Be Performed" is amended to read:

b. The submission shall also include a budget, for Phase 1 of the Work as described in **Exhibit A** not to exceed Seven Hundred Fifty Thousand Dollars (\$750,000.00), as described herein, that includes all costs for design, engineering, execution, fabrication, transportation, delivery, installation, insurance, contingencies, consultant fees, fees and permits, and any other costs associated with the Phase 1 Work, and the Artist's fee and the second submission

shall also include a budget, for Phase 2 of the Work as described in **Exhibit A-1** not to exceed Eight Hundred Eighty Six Thousand Three Hundred Twenty Dollars (\$886,320.00), as described herein, that includes all costs for design, engineering, execution, fabrication, transportation, delivery, installation, insurance, contingencies, consultant fees, fees and permits (except for an encumbrance permit and, if necessary, a right-of-way construction permit and a traffic permit, relating to Onsite Infrastructure preparation for installation that the City will pay for but that the Artist will provide the necessary information for the City to obtain such permits), and any other costs associated with the Phase 2 Work for which Artist is responsible, and the Artist's fee. The combined budget, for both Phases of the Works as described in **Exhibit A and A-1** shall not exceed One Million Six Hundred Thirty-Six Thousand Three Hundred Twenty Dollars (\$1,636,320.00).

3. Paragraph 2 of the Agreement, entitled "Coordination and Liaison," is amended to read as follows:

2. **COORDINATION AND LIAISON:** The Artist shall fully cooperate in the coordination of all services under the Agreement with Director of the Division of Denver Arts and Venues (the "Director"). The Director may from time to time direct, in writing, with copy to the Artist, that the authority to coordinate certain day-to-day matters shall be exercised by other City employees, including but not limited to those in the Department of Transportation and Infrastructure and for Phase 2 of the Work as described in Exhibit A-1, shall additionally coordinate with Gart to ensure any attachment of the Work to the private property is approved by the private property owner, meets or exceeds the capacity requirements specified in the Work's engineering report provided by Artist, and is within the area of the easement granted to the City. The Artist agrees that during the term of this Agreement, the City and Artist shall fully cooperate and coordinate all work hereunder as directed by the City, including coordination with the City's Department of Transportation and Infrastructure, other City agencies or departments and other consultants or contractors to the City and additionally for the Phase 2 Work with Gart Properties for any portion of the Phase 2 Work done on the private property.

4. Subparagraph 3.1 of the Agreement, entitled "Term," is amended to read as follows:

3.1 **TERM.** The term of the Agreement shall commence May 25, 2023 (the "Effective Date") and terminate on completion of the services to be performed by the Artist hereunder, or on December 31, 2027, whichever is earlier.

5. That subparagraph 4.1 of Article 4 of the Agreement entitled "Payment" is amended to read:

4. **PAYMENT:**

4.1 Fee. The Artist agrees to accept, and the City agrees to pay, as full and complete compensation for completion of all the items of work contained in this Agreement a fixed fee for all of the work in Phases 1 and 2 of One Million Six Hundred Thirty Six Thousand Three Hundred Twenty Dollars (\$1,636,320.00), which shall constitute full compensation for all services and materials whatsoever to be performed and furnished by the Artist under this Agreement. It is agreed that the City has no obligations regarding commission, or any agreements with galleries or agents with whom the Artist may have contracted. **The fee shall be paid in the following installments, subject to receipt by the City of acceptable periodic invoices and supporting documentation from the Artist, each installment to represent full and final payment for all services and materials provided by the Artist prior to the submittal of such periodic invoice for the specific phase of performance:**

PHASE 1:

a.	Execution of Contract	(10%)	\$ 75,000.00
b.	Preliminary Design Review	(25%)	\$ 187,500.00
c.	Final Design Review	(25%)	\$ 187,500.00
d.	Mid-Point Fabrication	(25%)	\$ 187,500.00
e.	Post-Installation	(10%)	\$ 75,000.00
f.	Final Acceptance	<u>(5%)</u>	<u>\$ 37,500.00</u>

Total Phase 1 Amount Not to Exceed (100%) \$750,000.00

PHASE 2:

a.	Immediate Payment upon Execution of Amendment	(15%)	\$ 132,948.00
b.	Preliminary Design Review	(20%)	\$ 177,264.00
c.	Final Design Review	(25%)	\$ 221,580.00
d.	Mid-Point Fabrication	(25%)	\$ 221,580.00
e.	Post-Installation	(10%)	\$ 88,632.00
f.	Final Acceptance	<u>(5%)</u>	<u>\$ 44,316.00</u>

Total Phase 2 Amount Not to Exceed (100%) \$886,320.00

Total Contract Amount Not to Exceed (100%) \$1,636,320.00

The Artist shall be responsible for the payment of all mailing or shipping charges on submissions to the City, the cost of all travel by the Artist and

the Artist's agents and employees necessary for the proper performance of the services required under this Agreement and for all other miscellaneous charges hereunder. Nothing contained in this Agreement shall entitle the Artist to retain funds paid by the City hereunder in the event that the Artist fails to fabricate, transport and install a satisfactory Work in accordance with this Agreement, and nothing contained in this Agreement shall prevent or prohibit the City from seeking damages or reimbursement from the Artist in the event of the Artist's breach or default of this Agreement.

6. That subparagraph 4.3 of Article 4 of the Agreement entitled "Payment" is amended to read:

4.3 Maximum Amount Payable. The maximum amount payable by the City under this Agreement shall not exceed One Million Six Hundred Thirty Six Thousand Three Hundred Twenty Dollars (\$1,636,320.00).

7. Paragraph 15 of the Agreement, entitled "No Employment Of Workers Without Authorization To Perform Work Under The Agreement," is amended to read as follows:

15. Reserved.

8. Paragraph 23 of the Agreement, entitled "Notices" is amended to read as follows:

23. **NOTICES:** All notices, requests, demands, and other communications which are required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon the delivery or receipt thereof, as the case may be, if delivered personally or sent by certified mail, return receipt requested, postage prepaid, as follows:

If to the City: Denver Arts and Venues
1345 Champa Street
Denver, Colorado 80204

Email: publicart@denvergov.org

If to Gart Properties, Inc.: Mark Sidell, President
Gart Properties
299 Milwaukee St, Suite 50
Denver, CO
D: 303 270 0328 – M:303 877 3238
msidell@gartproperties.com

If to the Artist: The address first above written.

9. Except as herein amended, the Agreement is revived, affirmed and ratified in each and every particular.

Remainder of page left intentionally blank.

Contract Control Number:
Contractor Name:

THTRS-202477517-01/THTRS-202266109-01
POETIC KINETICS INC

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at
Denver, Colorado as of:

SEAL**CITY AND COUNTY OF DENVER:**

ATTEST:

By: _____

APPROVED AS TO FORM:

Attorney for the City and County of Denver

By: _____

REGISTERED AND COUNTERSIGNED:

By: _____

By: _____

Contract Control Number:
Contractor Name:

THTRS-202477517-01/THTRS-202266109-01
POETIC KINETICS INC

By:

DocuSigned by:

Desiree Barlow

8005704268904D2...

Name:

Desiree Barlow

(please print)

Title:

Chief operating officer

(please print)

ATTEST: [if required]

By:

Name:

(please print)

Title:

(please print)

EXHIBIT A-1

PHASE 2 SOW

The **Artist** shall be responsible for providing the following services and deliverables:

- **Conceptual and Technical Design:**
 - Naming of the Work with City approval
 - Creative and technical design development
 - Detailed budgeting
 - Production as required by Section 1.1 of the Agreement
- **Timely Response from Artist:** Provision of responses to questions or requests for information on a reasonable basis.
- **Materials Procurement:** Acquisition of necessary materials as described in by Section 1.1 of the Agreement
- **Fabrication:** as described in by Section 1.1 of the Agreement
- **The Work's Engineered Force Loads:** Provide to the City and, if private property is needed to be used to Gart, the Work's engineered force loads to identified Onsite Infrastructure anchor points as generally described in Agreement. If private property is needed to be used, the Artist will require its engineer's warranties, indemnity and insurance to run to the owner of any private property used as well as to the City. The Artist's engineer may rely on information provided by the City or any private property owner.
- **Onsite Infrastructure:** The term "**Onsite Infrastructure**" refers to any and all support structures or structural modifications required for the rigging and attachment of the Work for Display, including but not limited to, temporary or permanent physical structures, mounting points, and necessary adjustments to existing structures. The City will pay the costs for an encumbrance permit and, if necessary, a right-of-way construction permit and traffic permit, relating to Onsite Infrastructure preparation for installation. The Artist will provide necessary information for the City to obtain such permits.
- **On-Site Installation Planning:** As described in 1.1(a) of the Agreement, coordination with the City's designated project manager for the planning and execution of all work to be performed at the Site and, for any work on the private property, with Gart so as to limit interference with the use of Gart's property or that of their tenants or invitees.
- **Traffic Control and Engineering.** Artist will not be responsible for traffic control or for engineering provided to the Artist by the City or if private property is used by Gart Properties for Onsite Infrastructure.
- **Lighting.** Artist is not responsible for lighting the Work. Artist will cooperate and provide creative input for any lighting of the Work procured by the City.
- **Travel:** Arrangement and management of all travel accommodations for Artist crew members.
- **Pre-Installation Walkthrough.** City and Artist agree to jointly conduct a pre-installation walkthrough of the designated installation area a reasonable time before the scheduled

installed date to confirm the site is prepared for installation of the Work in accordance with the agreed upon specifications.

- **Equipment Package:** As provided in Section 1.1 of the Agreement, provision of equipment and machinery needed for installation.
- **Shipping:**
 - As provided in Section 1.6 of the Agreement, arrangement and payment for shipping of the Work from Poetic Kinetics (Elbert, CO, USA) to the Site.
 - As provided in Section 1.6 of the Agreement, arrangement and payment for return shipping of the Work from the Site to Poetic Kinetics (Elbert, CO, USA) post-Strike.
- **Installation:** Complete installation of the Work at the specified Site as provided in Section 1.6 of the Agreement
- **Procurement and Display of a Plaque/Signage:** As described in Exhibit E of Agreement.
- **Issuance of Acceptance of Work Document:** Upon completion of the Work as provided in Section 1.8 of the Agreement.
- **Maintenance Manual:** Provision of a maintenance manual for routine maintenance of the Work as provided in Section 1.7(d) of the Agreement,

The **City** is responsible for providing the following:

- **Communication:** Provision of responses to questions or requests for information on a reasonable basis.
- **Technical Information:** Provision of all technical information of the Site requested by Artist and in accordance with the Artist's Project Timeline as defined below. The City has provided engineering details of city-owned signal poles proposed for attaching the artwork and access to these attachment points.
- **Onsite Infrastructure:**
 - The City is responsible for City owned Onsite Infrastructure.
Assumption of all costs associated with the City owned Onsite Infrastructure. For the purposes of this agreement, "**Onsite Infrastructure**" shall be defined as any and all support structures or structural modifications required for the rigging and attachment of the Work for Display, including but not limited to temporary or permanent physical structures, mounting points, and necessary adjustments to existing City owned structures. The City will pay the costs for an encumbrance permit and, if necessary, a right-of-way construction permit and traffic permit, relating to Onsite Infrastructure preparation for installation. The Artist must coordinate with the City in order for the City to obtain permits timely for the installation to occur.
 - Coordinate with the Artist and any private property owners on the Site, secure any approvals from property owners relating to the Work and

Onsite Infrastructure, and provide all available information required for any attachment of the Work to the Gart Property (Pavilions building).

- **Installation Coordination:**
 - As provided in Section 1.1 of the Agreement, collaboration with Artist for the installation process.
- **Site Access and Storage:**
 - Provision of timely access to the installation site, for personnel, installation equipment, and Work components during onsite installation and breakdown.
- **Permits:** The City will pay the costs for an encumbrance permit and, if necessary, a right-of-way construction permit and traffic permit, relating to Onsite Infrastructure preparation for installation. The Artist must coordinate with the City in order for the City to obtain permits timely for the installation to occur.
- **Monitoring the Work:** Performance of regular inspections and provision of photographs and video documentation of the Work to Artist upon request.
- **Signature and Timely Return of Acceptance of Work Document:** City agrees to sign the Acceptance of the Work Doc after the installation has been completed and upon mutual agreement by both parties that no further Work is required by the Artist to display the Work to the public, provided that the City will not provide final acceptance of the Phase 2 Work if there is any attachment to the private property until the City receives evidence of approval from Gart.

Pre-Installation Walkthrough: City and Artist agree to jointly conduct a pre-installation walkthrough of the designated installation area a reasonable time before the scheduled installed date.

Any modifications to these responsibilities must be agreed upon by formal amendment to the Agreement in writing by both parties.

The City acknowledges that failure to comply with the aforementioned responsibilities or delays relating to securing of permits and permissions may result in timeline delays. If any delays cause an increase in costs, the City will be notified and a further amendment to the Agreement is required before any cost increase is permissible.

Artist reserves the right to suspend operations in the event of the City's non-compliance with its responsibilities under this Agreement. If any delays cause an increase in costs, the City will be notified and a further amendment to the Agreement is required before any cost increase is permissible.

Canopy Design



An approximately 10,000 sqft aerial canopy of 'Aspen' leaves will be custom designed for the Site according to the attached visualization. Client understands that the design sketch is speculative pending technical review and that the design will be refined and finalized within the Project Timeline.