

DONATION AND WAIVER AGREEMENT

THIS DONATION AND WAIVER AGREEMENT is made and entered into by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, hereinafter referred to as the "CITY", and **CHRISTOPHER M. LAVERY**, with an address of 100 North 18th Street, Murray, KY, 42071, hereinafter referred to as the "GRANTOR".

W I T N E S S E T H:

WHEREAS, the City desires to accept a grant from the Grantor of a work of art consisting of a steel and plastic sculpture and related components (the "Work"), by Christopher Lavery as the artist (the "Artist"), for inclusion in the City's collection of public art, and currently intended to be displayed in the vicinity of the Denver Children's Museum upon its removal from its current location; and

WHEREAS, the City believes that the grant is appropriate and serves a public purpose, has established an account for such grant pursuant to D.R.M.C. 20-55 and 2-257, and wishes to accept such grant on the conditions specified herein;

NOW, THEREFORE, in consideration of the mutual agreements herein contained, and subject to the terms and conditions hereinafter stated, the parties hereto agree as follows:

1. **GRANTOR PERFORMANCE:** The Grantor shall grant and donate the Work as described on **Exhibit A** hereto to the City. The parties represent to the City that title to the Work is vested in the Grantor and not subject to the rights of any third party. The City shall accept the Work, subject to the terms and conditions set out herein.

2. **GRANTOR DEDICATION AND WAIVER OF RIGHTS:** Except as otherwise provided herein, the Grantor does hereby donate, grant, convey, assign and deliver to the City for the use and benefit of the people of Denver, all of Grantor's rights, title and interest in and to the Work which Grantor now owns or may hereafter acquire for the purposes of this Donation and Waiver Agreement or otherwise. Grantor agrees to assign, donate, and forever relinquish to the City all right, title and interest in the Work including, but not limited to, any rights under the Visual Artists Rights Act of 1990, 17 U.S.C. §106A and §113 et. seq., as amended, or otherwise in the nature of "Droit Moral" under which artists claim a continuing interest in their products and in the maintenance or modification of their products. It is understood and agreed by Grantor that the City

may display, store, move, relocate, dismantle, remove from public display, deaccession or demolish the Work, at its sole discretion, and the Grantor disclaims any right or interest in the Work in that event. The City agrees that it will not intentionally damage, alter, modify or change the work. The City shall notify the Grantor as the Artist of any proposed deaccession of the Work.

The parties understand that the Grantor in his capacity as the Artist has retained and does not donate copyright in the Work and, with respect to such Artist's retained rights under the Copyright Act of 1976, the Grantor hereby grants a license for the duration of Artist's said retained copyright to make two-dimensional reproductions of the Work for non-commercial purposes, in the sole discretion of the City and its assigns, including but not limited to reproductions used in advertising brochures, media publicity, and catalogues or other similar publications about City facilities or attractions, or where the Work is part of a panoramic depiction of the City or a portion thereof. Such license is granted upon the condition that it is exercised in a manner that does not violate the integrity of the Work and that all reproductions by the Grantor shall contain a credit to the Artist and a copyright notice substantially in the following form: "Christopher M. Lavery, © 2010", except where the Work is a part of a panoramic depiction of the City or a portion thereof. The Grantor hereby grants such license to the City, subject to the above-stated conditions.

If the City shall at any time decide to destroy the Work, it shall by notice to the Grantor offer a reasonable opportunity to recover the work at no cost to the Grantor, except for an obligation of the Grantor to indemnify and reimburse the City for the amount by which the cost to the City of such recovery exceeds the costs to the City of the proposed destruction as determined solely by the City. The cost for any storage fees, necessitated by the time allotment for recovery of the Work, will be borne by the Grantor. The Grantor shall make arrangements to recover the work within thirty (30) days following notice of the City's offer of recovery. The City may, in its sole discretion, appropriate and provide funds annually for the operation and maintenance of the Work, or not so appropriate and provide funds annually for the operation and maintenance of the Work. With respect to the license Grantor herein granted to the City, the City will be subject to the reproduction restrictions set out in this Article 2.

3. **COORDINATION AND LIAISON:** With the expressed consent of the Manager of General Services, the Grantor shall fully coordinate all services under the Agreement with the

Director of Denver Arts and Venues, (“Director”) or, the Director’s Designee. The Grantor understands that the Directors are the City's representatives under this Donation and Waiver Agreement through whom contractual services performed hereunder shall be coordinated.

4. **TERM OF DONATION AND WAIVER AGREEMENT:** The term of the Donation and Waiver Agreement shall commence on the date of execution, and remain in effect perpetually, unless and until the City shall determine at a later date, to rescind such grant or to deaccession the Work.

5. **PAYMENT:** The City’s payment obligation, whether direct or contingent, extends only to funds appropriated annually by the Denver City Council, paid into the Treasury of the City, and encumbered for the purpose of the Agreement. The City does not by this Agreement irrevocably pledge present cash reserves for payment or performance in future fiscal years. The Agreement does not and is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of the City.

6. **STATUS OF GRANTOR:** It is understood and agreed by and between the parties that the status of the Grantor shall be that of an independent contractor and it is not intended, nor shall it be construed, that the Seller or any employee or sub-consultant is an employee, officer, or agent of the City under Chapter 18 of the Denver Revised Municipal Code for purposes of unemployment compensation, workers' compensation, or for any purpose whatsoever.

7. **TERMINATION OF DONATION AND WAIVER AGREEMENT:** The City may terminate the grant without cause or deaccession the Work for its convenience upon thirty (30) days' notice to the Grantor. The City shall have no obligation to give notice to the Artist other than as specified in Article 2 hereof. Upon termination or deaccession, the City may, but shall have no obligation to, sell, transfer, move or otherwise dispose of the Work.

8. **WHEN RIGHTS AND REMEDIES NOT WAIVED:** In no event shall any acceptance by the City hereunder constitute or be construed to be a waiver by the City of any breach of term, covenant, or condition or any default which may then exist on the part of the Grantor, and the rendering of any such acceptance when any such breach or default shall exist shall not impair or prejudice any right or remedy available to the City with respect to such breach or default; and no assent, expressed or implied, to any breach of any one or more terms, covenants, or conditions of the

Donation and Waiver Agreement shall be construed as a waiver of any succeeding or other breach.

9. **EXAMINATION OF RECORDS:** The Grantor agrees that any duly authorized representative of the City, including the City Auditor or his representative, shall, at any time after the commencement of this grant, have access to and the right to examine any directly pertinent books, documents, papers and records of the Grantor, involving transactions related to this Donation and Waiver Agreement.

10. **VENUE, GOVERNING LAW:** Each and every term, condition, or covenant herein is subject to and shall be construed in accordance with the provisions of Colorado law, the Charter of the City and County of Denver and the ordinances, regulations, and Executive Orders enacted and/or promulgated pursuant thereto, including without limitation D.R.M.C. 20-76 et. seq. regarding prevailing wages and the provisions of Chapter 49, D.R.M.C. The Charter and Revised Municipal Code of the City and County of Denver, as the same may be amended from time to time, are hereby expressly incorporated into this grant as if fully set out herein by this reference. Venue for any action arising hereunder shall be in the Denver County or Denver District Court in the City and County of Denver, Colorado.

11. **ASSIGNMENT AND SUBCONTRACTING:** The City is not obligated or liable under this Donation and Waiver Agreement to any party other than the Grantor named herein.

12. **NO DISCRIMINATION IN EMPLOYMENT:** In connection with the performance of work under this Donation and Waiver Agreement, the Grantor agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and the Grantor further agrees to insert the foregoing provision in all subcontracts hereunder.

13. **INDEMNIFICATION:** will further indemnify, defend and hold the City harmless from and against any claims, losses, damages, liabilities or expenses (including reasonable attorneys' fees and expenses) arising out of or resulting from any third party claim that the Work, when used by City the in accordance with this Agreement, infringes, misappropriates or violates any United States patent issued as of the date hereof, copyright, trademark, trade secret or other intellectual or proprietary right of any third party. If an injunction or order is obtained against the City's use of the

Works by reason of a claim of the type described above, or if in Grantor's opinion, the Work is likely to become the subject of such a claim, Grantor shall take all necessary action to correct any such infringement or misappropriation to give the City the right to continue using the Work. This indemnity clause shall also cover the City's defense costs, in the event that the City, in its sole discretion, elects to provide its own defense. The Grantor shall procure and maintain, at its own expense and cost, any insurance that, in its judgment, may be necessary for its proper protection in the prosecution of the services hereunder.

14. **CONFLICT OF INTEREST:**

a. No employee of the City shall have any personal or beneficial interest in the services or property described in the Agreement; and the Grantor shall not hire, or contract for services with, any employee or officer of the City that would be in violation of the City's Code of Ethics, D.R.M.C. §2-51, et seq. or the Charter §§ 1.2.8, 1.2.9, and 1.2.12.

b. The Grantor shall not engage in any transaction, activity or conduct that would result in a conflict of interest under the Agreement. The Grantor represents that it has disclosed any and all current or potential conflicts of interest, including transactions, activities or conduct that would affect the judgment, actions or work of the Grantor by placing the Grantor's own interests, or the interests of any party with whom the Grantor has a contractual arrangement, in conflict with those of the City. The City, in its sole discretion, will determine the existence of a conflict of interest and may terminate the Agreement in the event it determines a conflict exists, after it has given the Grantor written notice describing the conflict.

16. **NO THIRD PARTY BENEFICIARY:** It is expressly understood and agreed that enforcement of the terms and conditions of this Donation and Waiver Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the Grantor, and nothing contained in this grant shall give or allow any such claim or right of action by any other or third person on such grant, including but not limited to subcontractors, subconsultants, and suppliers. It is the express intention of the City and the Grantor that any person other than the City the Grantor receiving services or benefits under this grant shall be deemed to be an incidental beneficiary only.

17. **DISPUTES:** All disputes of whatsoever nature between the City and Grantor regarding this Donation and Waiver Agreement shall be resolved by administrative hearings pursuant

to the procedure established by Denver Revised Municipal Code 56-106. For the purposes of that procedure, the City official rendering a final determination shall be the Director.

18. **TAXES, CHARGES AND PENALTIES:** The City shall not pay or be liable for any claimed interest, late charges, fees, taxes or penalties of any nature, except as required by the City's Revised Municipal Code. The City is a governmental entity to which donations may be income tax deductible under the Internal Revenue Code of 1986 as amended and rules and regulations promulgated thereunder. While the donation to the City may qualify for a federal income tax deduction, the City makes no representation and expresses no opinion as to the methods or determination of the Grantor in seeking a federal income tax deduction. Donation of the Work to the City is not contingent upon the ability of the Grantor to obtain any benefit, including a tax deduction. Grantor has sought advice of Grantor's attorney or tax advisor to the extent the Grantor deemed necessary prior to execution of this Donation Agreement.

19. **PARAGRAPH HEADINGS:** The captions and headings set forth herein are for convenience of reference only, and shall not be construed so as to define or limit the terms and provisions hereof.

20. **SEVERABILITY:** It is understood and agreed by the parties hereto that if any part, term, or provision of this Donation and Waiver Agreement is by the courts held to be illegal or in conflict with any law of the State of Colorado, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the grant did not contain the particular part, term, or provision held to be invalid.

21. **DONATION AND WAIVER AGREEMENT AS COMPLETE INTEGRATION-AMENDMENTS:** This Donation and Waiver Agreement is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written amendatory or other Donation and Waiver Agreement properly executed by the parties. This Donation and Waiver Agreement and any amendments shall be binding upon the parties, their successors and assigns.

22. **LEGAL AUTHORITY:**

A. The Grantor assures and guarantees that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Donation and Waiver Agreement.

B. The person or persons signing and executing this Donation and Waiver Agreement on behalf of Grantor do hereby warrant and guarantee that he/she or they have been fully authorized by the Grantor, as applicable, to execute this Donation and Waiver Agreement on behalf of the Grantor and to validly and legally bind the Grantor to all the terms, performances and provisions herein set forth.

23. **ELECTRONIC SIGNATURES AND ELECTRONIC RECORDS:** Grantor consents to the use of electronic signatures by the City. The Agreement, and any other documents requiring a signature hereunder, may be signed electronically by the City in the manner specified by the City. The Parties agree not to deny the legal effect or enforceability of the Agreement solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

24. **COUNTERPARTS OF THE DONATION AND WAIVER AGREEMENT:** The Agreement may be executed in counterparts, each of which is an original and constitute the same instrument.

Remainder of page left intentionally blank.

Contract Control Number:

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:

REGISTERED AND COUNTERSIGNED:

By _____

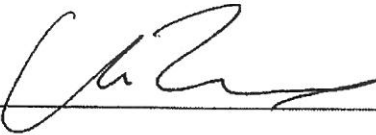
By _____

By _____



Contract Control Number: MOACF-201414781-00

Contractor Name: LAVERY, CHRISTOPHER M

By: 

Name: CHRISTOPHER M. LAVERY
(please print)

Title: ARTIST
(please print)

ATTEST: [if required]

By: _____

Name: _____
(please print)

Title: _____
(please print)



EXHIBIT A

(exhibit follows)

**ARTS & VENUES DENVER
CONTRACT / AMENDMENT REQUEST**

Requested by: Michael Chavez

Type of Service Required (e.g. Graphic Design):

An agreement to accept a donated public artwork titled, "Cloudscape," by Christopher Lavery to the City & County of Denver's public art collection.

Contract Summary:

Artist Christopher Lavery would like to donate "Cloudscape" to the City & County of Denver. It was originally commissioned by Denver International Airport in 2010 for \$120,000. It is currently installed along Peña Boulevard at approximately 70th Ave. It was commissioned on a temporary basis and is slated to be removed. Denver Arts & Venues will be responsible hiring a contractor to refurbish parts of "Cloudscape" before it is transported and installed at The Children's Museum of Denver located at 2121 Children's Museum Drive, Denver, CO 80211.

The Children's Museum has agreed to be responsible for the daily upkeep and maintenance of "Cloudscape" after its completed installation on their property site.

Summary of Competitive Process Used to Select the Contractor:

No competitive process was necessary for this art donation

Vendor Name / Address:

Christopher Lavery
100 North 18th Street
Murray, KY 42071

Contact Information:

Name: Christopher Lavery
Telephone: (303) 877-4768
Fax:
E-mail Address: godzillalaughs@gmail.com

Federal Identification Number (FID) – W9 form is required:

ON FILE

Contract Term:

January 15, 2014

Revised Contract Term (Amendment):

Proposed Scope of Work:
Attach a Separate SOW from Vendor

Artist Christopher Lavery would like to donate "Cloudscape" to the City & County of Denver. "Cloudscape" was originally created and commissioned for \$120,000.00 in 2010 by Denver International Airport (DIA) as a part of their Emerging Artist Program. DIA has agreed to hire a contractor and pay for de-installation and transport to its new proposed location outside The Children's Museum of Denver. Denver Arts & Venues will be responsible for hiring a contractor to refurbish parts of "Cloudscape" before it is reinstalled on site at The Children's Museum of Denver, 2121 Children's Museum Drive, Denver, CO 80211. The Children's Museum has agreed to pay for re-installation on their site and be responsible for the daily upkeep and maintenance of "Cloudscape."

Materials: corrugated sheet metal, painted steel, LED panels. Please see the attached **Fact Sheet** provided by Christopher Lavery to include images of such artwork. Following installation of "Cloudscape" the City and County of Denver, Denver Arts & Venues, Public Art Program will insure artworks for the value of \$120,000.

Roles & Responsibilities:

Facility Requirements:

Financial Requirements:

Fee Schedule: (see attached)

Please attach a separate document of the pricing schedule.

NONE - This is a ZERO DONATION contract

Marketing Requirement:

NONE

Certificate of Insurance Requirements:

NONE – City and County of Denver will insure artworks after work has been fully accepted into the City's Public Art Collection

Project/Grant Information:

Project/Grant Number =34050
Project/Grant Contract Number =ZZ40109_001
Project/Grant Number =ZZ40109_001
Grant/Fund Org =34050/0116102

Funding Information (to be completed by Finance Dept):

Fund = 34050
Org =0116102
Account =604600
Program code =X8040

Vendor Number:

75324

CONTRACT DESCRIPTION COMMENTS:

- Name of vendor/contractor – Christopher Lavery
- Type of services being provided – Public art donation of “Cloudscape” by artist Christopher Lavery
- Location – The Children’s Museum of Denver, 2121 Children’s Museum Drive, Denver, CO 80211
- Amount - **\$0 ZERO DOLLAR** CONTRACT
- Chartfield –ZZ40109_001 34050 /0116102 604500 X8040
- Who is making request – Michael Chavez

Denver International Airport Art & Culture Program

FACT SHEET: *CLOUDSCAPE* BY CHRISTOPHER LAVERY

Artist: Christopher Lavery
Residence: Farmington, Maine
Website: <http://www.christopherlavery.com/>

Installed: 2010
Materials: Cellular Plastic, Corrugated Sheet Metal, Painted Steel
Lighting: LED Panels, Solar Power System
Foundation: Cement Caissons

Size: Site Geometry = appx. 5,625 sq. feet (75' x 75')
Large Cloud = 28'6" wide x 11' deep x 40'8" high
Medium Cloud = 18'5" wide x 8'5" deep x 24'6" high
Small Cloud = 14'10" wide x 7'6" deep x 15'10" high

Site: Peña Boulevard at approximately 70th Avenue.
+39° 49' 25.64", -104° 47' 13.19"



Commission: \$120,000.00

 DENVER INTERNATIONAL AIRPORT
TOGETHER WE SOAR



Photographs on this page appear courtesy of the artist.