

## **DONATION AGREEMENT**

**THIS DONATION 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 **DENVER URBAN GARDENS**, a Colorado nonprofit corporation, with an address of 1031 33<sup>rd</sup> St., Ste. 100, Denver, CO 80205 and **THE TRUST FOR PUBLIC LAND**, a California nonprofit public benefit corporation, doing business at 1410 Grant Street, Suite D210, Denver, CO 80203, hereinafter referred to as the "Donors."

### **RECITALS:**

1. The Donors have procured a work of art for inclusion in the permanent collection of the City, in cooperation with the Denver Department of Parks and Recreation and Denver Arts and Venues (DAV).

2. The Donors entered into an agreement with Tully Artworks LLC (the "Artist") to create a proposed public art piece consisting of a sculpture entitled "For The Children" (the "Work") which the City and the Donors have installed at the identified site ("Site") of the City's New Freedom Park in Denver, Colorado (the "Project").

3. The Artist has completed the Work and the Donors and the City have reviewed and accepted the Work as installed on the Site.

4. In accordance with the terms and conditions of the gift specified herein, the City is willing to accept the donation of the Work.

**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. **THE PROJECT:** The term "Project" or "Work" shall mean the public work of art as depicted on **Exhibit A** attached hereto and incorporated herein in the form of a sculpture as ultimately conceived, designed, fabricated, executed, stored, transported and installed at the site by the Artist.

2. **DONORS' GIFT AND RELATED PROJECT RESPONSIBILITIES:** The Donors hereby make a gift to the City of the Work for which it has paid with privately raised funds by: The Denver Foundation-ArtTank 2018, Gates Family Foundation, National Endowment for the Arts-ArtWorks Grant, and Kathryn & Gary Dudley. The Donors hereby

donate, grant, convey, assign and deliver to the City for the use and benefit of the people of Denver, all of the Donors' rights, title and interest in and to the Work as depicted on **Exhibit A**, and any contractual rights held by the Donors, as shown in **Exhibit B** including any rights held by the Donors 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." The City has determined that the Work shall not require a major repair or rehabilitation and does not require Donors to provide any additional funds to maintain the donated Work under §2-258 of the Denver Revised Municipal Code ("DRMC"). The City shall amend the agreement with the Artist concurrently with acceptance of the Donation Agreement.

3. **COORDINATION AND LIAISON:** The Donors agree that during performance under this Donation Agreement it shall fully coordinate all services hereunder with the City, including the City's Director of DAV and the Manager of the Department of Parks and Recreation, or as otherwise directed by the City. The Donors further understand that the Director of DAV is the City's representative under this Donation Agreement through whom contractual services performed hereunder shall be coordinated, except for installation work which shall be coordinated with Manager of the Department of Parks and Recreation.

4. **TERM OF DONATION AGREEMENT:** The term of the Donation Agreement shall commence on the date of execution and remain in effect for so long as the City owns the Work.

5. **APPROPRIATION:** It is understood and agreed that any payment obligation of the City associated with this donation, whether direct or contingent, shall extend only to funds appropriated annually by the Denver City Council for the purpose of this Donation Agreement, and paid into the Treasury of the City, and encumbered for the purpose of the Agreement. The City does not by the 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 DONORS:** It is understood and agreed by and between the parties that the status of the Donors shall be that of an independent contractor and it is not intended, nor shall it be construed, that the Donors 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. **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 Donors, 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 Agreement shall be construed as a waiver of any succeeding or other breach.

8. **EXAMINATION OF RECORDS AND AUDIT:** Any authorized agent of the City, including the City Auditor or his or her representative, has the right to access, and the right to examine, copy and retain copies, at City's election in paper or electronic form, any pertinent books, documents, papers and records related to Donors' performance pursuant to this Agreement, provision of any goods or services to the City, and any other transactions related to this Agreement. Donors shall cooperate with City representatives and City representatives shall be granted access to the foregoing documents and information during reasonable business hours and until the latter of three (3) years after the final payment under the Agreement or expiration of the applicable statute of limitations. When conducting an audit of this Agreement, the City Auditor shall be subject to government auditing standards issued by the United States Government Accountability Office by the Comptroller General of the United States, including with respect to disclosure of information acquired during the course of an audit. No examination of records and audits pursuant to this paragraph shall require Donors to make disclosures in violation of state or federal privacy laws. Donors shall at all times comply with D.R.M.C. 20-276.

9. **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. 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.

10. **USE, POSSESSION OR SALE OF ALCOHOL OR DRUGS:** The Donors, their officers, agents, and employees shall cooperate and comply with the provisions of Executive Order 94 and Attachment A thereto concerning the use, possession or sale of alcohol or drugs. Violation of these provisions or refusal to cooperate with implementation of the policy can result in the City barring the Donors from City facilities or participating in City operations.

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

12. **NO DISCRIMINATION IN EMPLOYMENT:** In connection with the performance of work under this Donation Agreement, the Donors may 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, ethnicity, citizenship, immigration status, gender, age, military status, gender identity or gender expression, sexual orientation, marital status, source of income, protective hairstyle, or physical or mental disability; and further agree to insert the foregoing provision in all subcontracts hereunder..

13. **INSURANCE:** As of the date of acceptance of the Work by the City which requires approval of City Council, the City will add the Work to its fine arts policy and will be responsible for risk associated with ownership of the Work. Donors agree that they are responsible for risks related to installation of the Work and shall provide insurance coverage as each Donor deems appropriate for protection of the City and its appointed and elected officials, agents and employees for, from and against all liabilities, claims, judgments, suits or demands for damages to persons or property arising out of, resulting from, or relating to the installation of the Work performed under this Agreement (“Claims”), unless such Claims have been specifically determined by the trier of fact to be the sole negligence or willful misconduct of the City. This insurance obligation shall survive the expiration or termination of this Agreement until the running of all applicable

statutes of limitation.

14. **CONFLICT OF INTEREST**: No employee of the City shall have any personal or beneficial interest in the services or property described in the Agreement; and the Donors 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.

15. **NO THIRD PARTY BENEFICIARY**: It is expressly understood and agreed that enforcement of the terms and conditions of this Donation Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the Donors, 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, sub-consultants, and suppliers. It is the express intention of the City and the Donors that any person (other than the City and the Donors) receiving services or benefits under this grant shall be deemed to be an incidental beneficiary only.

16. **DISPUTES**: All disputes of whatsoever nature between the City and Donors regarding this Donation Agreement shall be resolved by administrative hearings pursuant to Denver Revised Municipal Code 56-106, with the DAV Director acting in the place of the referenced agency head.

17. **NOTICES**: All notices required by the terms of the Agreement must be hand delivered, sent by overnight courier service, mailed by certified mail, return receipt requested, or mailed via United States mail, postage prepaid, if to Donors at the addresses first above written, and if to the City at:

Director of Denver Arts and Venues  
144 West Colfax Avenue  
Denver, Colorado 80202

With a copy of any such notice to:

Denver City Attorney's Office  
1437 Bannock St., Room 353  
Denver, Colorado 80202

Notices hand delivered or sent by overnight courier are effective upon delivery. Notices sent by certified mail are effective upon receipt. Notices sent by mail are effective upon deposit with the U.S. Postal Service. The parties may designate substitute addresses where or persons to whom notices are to be mailed or delivered. However, these substitutions will not become effective until actual receipt of written notification.

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.

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 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. **AGREEMENT AS COMPLETE INTEGRATION; AMENDMENTS:** This 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 notation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written amendatory or other agreement properly executed by the parties. This Agreement and any amendments shall be binding upon the parties, their successors and assigns.

22. **SUPPLEMENTAL DOCUMENTS:** The following documents are attached and/or incorporated herein and made a part of this Agreement:

- A. Exhibit "A" Depiction of the Work
- B. Exhibit "B" Artist Contract (Incorporated by reference only)

The terms and conditions contained in this Agreement shall control over any contradictory or inconsistent terms and conditions which may be found or contained in the above referenced attached Exhibits.

23. **LEGAL AUTHORITY:**

A. The Donors assure and guarantee that each possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Donation Agreement.

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

24. **ELECTRONIC SIGNATURES AND ELECTRONIC RECORDS:** Donors consent 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.

*Remainder of page left intentionally blank.  
Signatures follow.*

**Contract Control Number:** THTRS-202160912-00  
**Contractor Name:** DENVER URBAN GARDENS and THE TRUST FOR PUBLIC LAND

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:**

Attorney for the City and County of Denver

By:

By:

\_\_\_\_\_

\_\_\_\_\_

By:

\_\_\_\_\_

**Contract Control Number:** THTRS-202160912-00

**Contractor Name:** DENVER URBAN GARDENS and THE TRUST FOR PUBLIC LAND

**DENVER URBAN GARDENS**

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)

ATTEST: [if required]

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)

**THE TRUST FOR PUBLIC LAND**

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)

ATTEST: [if required]

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)

**Contract Control Number:** THTRS-202160912-00

**Contractor Name:** DENVER URBAN GARDENS and THE TRUST FOR PUBLIC LAND

**DENVER URBAN GARDENS**

By:  \_\_\_\_\_

Name: Linda Appel Lipsius  
(please print)

Title: Executive Director  
(please print)

ATTEST: [if required]

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)

**THE TRUST FOR PUBLIC LAND**

By:  \_\_\_\_\_

Name: James R. Petterson

(please print)

Title: Vice President, Mountain West Region

Colorado & Southwest Director  
(please print)

ATTEST: [if required]

By:

\_\_\_\_\_

Name: (please print)

\_\_\_\_\_

(please print)

Title:

\_\_\_\_\_

**EXHIBIT A**

(exhibit follows)



**EXHIBIT B**

(exhibit follows)

**PROFESSIONAL SERVICES AGREEMENT  
New Freedom Park Art Installation**

This Professional Services Agreement is made and entered into between Denver Urban Gardens, a nonprofit Colorado organization (“DUG”); The Trust for Public Land, a nonprofit California public benefit corporation (“TPL”), and Tully Artworks LLC (“Artist”), collectively hereinafter referred to as the “Parties.”

**RECITALS**

WHEREAS, DUG holds a license from the City and County of Denver to occupy and use New Freedom Park in Denver, Colorado, as a community garden site;

WHEREAS, DUG received a grant award from the National Endowment for the Arts to create and install artwork at New Freedom Park;

WHEREAS, TPL has also received funds from private donors, Art Tank, and the Gates Foundation to create and install artwork at New Freedom Park;

WHEREAS, after undertaking a comprehensive and community-driven artist selection process, Artist was chosen to design, fabricate and install his artwork at New Freedom Park; and

WHEREAS, the Artist is ready, willing and able to render such services as provided by this Agreement as an Artist.

**NOW, THEREFORE**, in consideration of the mutual promises and covenants set forth below, and the recitals set forth above which are made a part hereof, the Parties agree as follows:

**TERMS**

1. **SCOPE OF SERVICES.**

- (a) Artist shall perform the tasks set forth on **Exhibit 1** to this Agreement, which Exhibit is incorporated into and made a part of this Agreement (the “Services”).
- (b) Artist shall maintain full and accurate records and books of account necessary to document: (i) all activities undertaken by Artist in the course of performing this Agreement; and (ii) all charges, expenses and disbursements incurred by Artist, in performing services hereunder. Artist shall make such books and records available to DUG upon request during normal business hours.

- (c) Artist shall perform its services hereunder in strict compliance with applicable federal, state and local laws and regulations, including the federal requirements of the National Endowment for the Arts at **Exhibit 2** to this Agreement, which Exhibit is incorporated into and made a part of this Agreement.
- (c) Artist shall furnish all of the equipment, supplies, and materials necessary for the performance of the Services called for under this Agreement.
- (d) Artist shall have no authority to act on behalf of or to bind DUG or TPL, including, without limitation, with respect to any third party contracts for goods or services. Further, Artist shall not serve as an agent for DUG nor TPL, nor represent himself as such to any third party.

2. **TERM.** The term of this Agreement shall commence upon execution of this Agreement, and shall continue until June 1, 2020, unless otherwise terminated in accordance to the terms of this Agreement.

3. **CONTRACTUAL RELATIONSHIP OF PARTIES.** Nothing in this Agreement shall be interpreted or construed as creating or establishing partnership, agency, joint venture, or the relationship of employer and employee between Artist, DUG nor TPL and neither Artist nor any of his employees or agents shall have any right to or claim for any worker's compensation, medical, welfare, pension or retirement benefits from DUG or TPL arising out of performance of the Services. Artist is solely responsible for the payment of unemployment insurance, social security, income and any other taxes on the payments made under this Agreement.

4. **PAYMENT FOR SERVICES.** TPL and DUG shall pay to Artist a fee of \$67,500 for services rendered under this Agreement. The first phase of the Services shall be paid by DUG and TPL as follows:

- a. Execution of Contract: \$2,000
- b. Design Development (August): \$3,000
- c. Final Design Development (September): \$17,000
  - i. Artist will submit an invoice in the amount of \$12,000 to DUG and a separate invoice in the amount of \$5,000 to TPL.

The DUG Invoices shall be sent to the attention of Cheryl Brubaker via email at [Accounting@DUG.org](mailto:Accounting@DUG.org). The TPL invoice should be sent to Chandi Aldena at [chandi.aldena@tpl.org](mailto:chandi.aldena@tpl.org). DUG and TPL shall pay invoices within 30 days of receipt of invoices. Artist agrees to provide DUG and TPL with a standard completed IRS form W-9 prior to receiving payment.

The next three phases of the Services shall be paid by TPL as follows:

- d. Mid-Point of Fabrication (late September): \$25,500
- e. Installation (October): \$15,000
- f. Post-Installation and Final Acceptance (December): \$5,000

Invoices shall be sent to the attention of Chandi Aldena via email at chandi.aldena@tpl.org. TPL shall pay invoices within 30 days of receipt of invoices. Artist agrees to provide DUG and TPL with a standard completed IRS form W-9 prior to receiving payment from TPL.

5 **EXPENSES.** Artist shall not be reimbursed for Artist's transportation expenses, or for any other out-of-pocket expenses incurred by Artist in the course of rendering services for DUG and TPL. Artist shall be responsible for such costs and expenses, including materials needed.

6. **WARRANTY.**

- (a) **Exercise of Judgment and Skill.** Artist represents and warrants to DUG and TPL that he is an experienced artist with the specialized knowledge, training and experience required for the provision of services to DUG and TPL pursuant to this Agreement.
- (b) **Warranty as to Title.** Artist represents and warrants that the artwork produced pursuant to this Agreement (i) is solely the result of the artistic effort of the Artist; (ii) except as otherwise disclosed in writing to DUG and TPL, the artwork is unique and original and does not infringe upon any copyright or the rights of any third party; (iii) that neither the artwork installed nor a duplication thereof has been accepted for sale elsewhere; and (iv) the Artist has not sold, assigned, transferred, licensed, granted encumbered or utilized the artwork or any element thereof or any copyright related thereto which may affect or impair the rights granted pursuant to this Agreement; and (v) the artwork is free and clear of any liens from any source whatsoever.
- (c) **Warranties of Quality and Condition.** The Artist represents and warrants, except as otherwise disclosed to DUG and TPL in writing, that the execution and fabrication of the artwork will be performed in a skillful manner and the artwork, as fabricated and installed, will be free of defective or inferior materials and workmanship, including any defects consisting of "inherent vice" or qualities which cause or accelerate deterioration of the artwork. The Artist also represents and warrants that the artwork and materials used are not currently known to be harmful to public health and safety.

The warranties described above shall survive the termination or other extinction of this Agreement.

7. **TITLE TO AND OWNERSHIP OF ARTWORK.** Artist shall own the artwork and bear the risk of any loss or damage prior to the time the artwork is installed. Upon installation of the

artwork, title to and ownership of the artwork shall transfer to DUG and TPL pursuant to this Agreement, and Artist agrees and understands that DUG and TPL shall subsequently transfer title to and ownership of the artwork to the City and County of Denver by means of a separate agreement.

8. **LICENSES AND CERTIFICATES.** Artist shall maintain any current license or certification required by law, and shall conform with all legal requirements applicable to persons rendering the same or similar services, in effect during the course of rendering services to TPL. Artist shall not rely upon or use any license or license number that may be maintained from time to time by DUG and/or TPL.

9. **TERMINATION.**

- (a) This Agreement shall terminate automatically on the occurrence of any of the following events: (i) death or disability of Artist; (ii) bankruptcy or insolvency of DUG and/or TPL; (iii) assignment of this Agreement by either party without the express written consent of the other party; or (iv) completion of the project or services described above in Paragraph 1. As used herein, "disability" means any physical or mental condition that prevents Artist from performing his obligations pursuant to this Agreement.
- (b) Except as otherwise provided in this Agreement, this Agreement may not be terminated by either party except in good faith, for good cause shown, and upon written notice to the other party. A termination of this Agreement shall be considered to be a termination "for good cause," if such termination is for reasons including but not limited to the following: (i) material dishonesty; (ii) failure of DUG and/or TPL to compensate Artist in accordance with the provisions of Paragraph 6; and (iii) failure of Artist to perform services under or comply with the terms of this Agreement.
- (c) Upon termination of this Agreement, DUG and/or TPL will reimburse Artist for work performed prior to termination.
- (d) Artist's obligations to indemnify DUG and TPL under Paragraph 10 below shall continue in full force and effect notwithstanding any termination of this Agreement.

10. **INDEMNIFICATION.** Artist shall indemnify, defend and hold the City and County of Denver, DUG and TPL and the aforementioned organizations' officers, agent and employees harmless from any and all demands, claims, causes of action, suits, proceedings, arbitrations, judgments, losses, liabilities, costs, expenses and fees, including but not limited to reasonable attorneys' fees, which arise from or in connection with the services provided by Artist or Artist's subcontractors and/or employees; the design, fabrication or installation of the artwork; and/or

the negligence or intentional acts of Artist. This indemnity shall be interpreted in the broadest possible manner to indemnify the City and County of Denver, either passive or active, for any acts or omissions of Artist irrespective of fault, including the City's concurrent negligence whether active or passive, except for the sole negligence or willful misconduct of the City. This indemnification provision shall survive the termination or expiration of this Agreement.

11. **CONFLICT OF INTEREST.** It is understood that Artist may provide consulting and/or artistic services for other clients during the term of this Agreement. However, during the term of this Agreement, Artist will not undertake any responsibilities or engage in activities that may conflict with or be detrimental to the success of Artist's Services to DUG and TPL. Further, Artist shall disclose to DUG and TPL any situation which may reasonably present a conflict of interest. DUG, TPL and Artist will mutually and in good faith attempt to resolve any apparent or perceived conflict of interest. If the conflict cannot be resolved between the parties, DUG and TPL may terminate the Agreement effective on the day notice is sent to Artist.

12. **PROJECT ADMINISTRATION.** This Agreement will be administered by the following representative of DUG: Cheryl Brubaker, Director of Finance and Human Resources provided that DUG reserves the right to change such person at any time. This Agreement will be administered by the following representative of TPL: Chandi Aldena, Parks for People Project Manager, provided that TPL reserves the right to change such person at any time.

13. **DEFAULT.** In the event that Artist defaults in the performance of any of Artist's obligations under this Agreement, in addition to DUG's and TPL's right to recover damages for breach of contract or any other remedy provided by law or equity, DUG and TPL shall be entitled to receive all information and materials obtained by Artist in connection with the performance of this Agreement up until the time of Artist's default, and Artist shall return to DUG and TPL all supplies, documents and materials acquired by Artist by or on behalf of DUG and TPL.

14. **INSURANCE.** Artist shall, while performing the Services hereunder, maintain the following insurance coverage:

- a. Commercial general liability insurance coverage with limits of \$1 million for each occurrence, \$1 million for each personal and advertising injury claim, \$2 million products and completed operations aggregate, and \$2 million policy aggregate;
- b. Artist agrees that he shall be personally responsible and liable for his own automobile liability insurance coverage, and shall indemnify and hold harmless DUG, the City and County of Denver, and TPL from any liability related to Artist's use of automobiles in carrying out the Services. However, Artist shall provide certificates of business automobile liability insurance coverage for Artist's subcontractors to this Agreement with limits of \$1 million combined applicable to all owned, hired and non-owned vehicles.

Artist and Artist's subcontractors shall include Denver Urban Gardens; The Trust for Public Land; and the City and County of Denver, their elected and appointed officials, employees and volunteers as additional insured.

15. **MISCELLANEOUS.**

(a) **Assignment.** Neither party shall assign this Agreement or any rights or benefits accruing to it hereunder without the prior written consent of the other party.

(b) **Governing Law.** This Agreement shall be governed by the laws of the State of Colorado, applicable to contracts executed and performed entirely therein.

(c) **Waiver of Default.** Failure by either party to enforce any provision of this Agreement shall not be construed as a waiver of such provision or of the right to such party thereafter to enforce such provision. No term or provision hereof shall be deemed waived and no breach excused unless such waiver or consent shall be in writing and signed by the party claimed to have waived or consented.

(d) **Modifications.** Except as expressly set forth elsewhere in this Agreement, this Agreement may be modified only in writing, signed by both parties hereto.

(e) **Integration Clause.** This Agreement shall constitute the entire agreement between the parties hereto with respect to the subject matter hereof and shall supersede all prior correspondence, conversations and negotiations with respect thereto.

(f) **Attorneys' Fees.** The parties agree that reasonable attorneys' fees and costs shall be awarded to the prevailing party in any arbitration or litigation between the parties in connection with this Agreement.

(g) **Binding Effect.** This Agreement shall be binding upon the heirs, successors, assigns and representatives of the parties hereto.

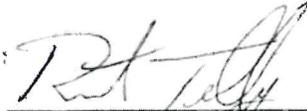
(h) **Severability.** If any provision, in whole or in part, of this Agreement should be found to be invalid or unenforceable, it shall not affect the validity of any other provisions within this Agreement which shall continue to bind the parties.

(i) **Time is of the Essence.** Artist understands that time is of the essence in this Agreement and that TPL will be relying on the timeliness of the Artist.

(j) **Multiple Originals/Electronic Signatures.** Electronic signatures of or on behalf of either party on this Agreement shall be effective for all purposes, including delivery, as an original. This Agreement may be executed in multiple originals, which shall be deemed to be one document.

**IN WITNESS WHEREOF**, the parties have executed this Agreement. The effective date (the "Effective Date") of this Agreement shall be the last date of execution by either of the parties to this Agreement.

**ARTIST**



By: Robert Tully  
Tully Artworks LLC  
733 McKinley Ave.  
Louisville CO 80027  
Telephone: 720-771-8502  
Email: [robert@tullyartworks.com](mailto:robert@tullyartworks.com)

FEIN# 83-0878867

Date: 8-6-19

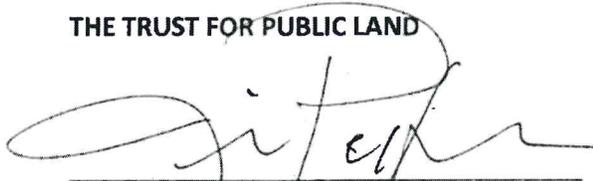
**DENVER URBAN GARDENS**



By: Michael Buchenau, Executive Director  
1031 33rd Street, Suite 100  
Denver, CO 80205  
Telephone: 303.292.9900

Date: 8/7/19

**THE TRUST FOR PUBLIC LAND**



By: Jim Petterson, Colorado State Director  
The Trust for Public Land  
1410 Grant Street, Suite D210  
Denver, CO 80203  
Telephone: 303-837-1414

Date: 8/7/19

## **EXHIBIT 1**

### **Description of Services**

#### **Project Goal**

The Artist shall create a one-of-a-kind piece of art to address the need for shade at New Freedom Park by engaging the community in designing a solution that is culturally appropriate and reflective of this diverse refugee community, as well as durable and constructed for outdoor installation.

#### **Site for the Artwork**

The Artist will be encouraged to consider the areas around the playground and the seating walls on the north end of the park for the location of the artwork. Final location will be proposed by the Artist and confirmed by the project partners. The Artist will work with project partners including Denver Parks and Recreation to ensure that the location of the artwork is appropriate for the park and works with the existing park features.

#### **Appropriate & Unique**

The artwork should be an artful response addressing the need for shade in the park due to the loss of the large shade tree that was the heart of the park. In addition to providing much needed shade, the artwork will be part of a larger effort by project partners to provide education and stewardship for new trees to be planted in the park. The Artist should have an understanding of, and respect for, the cultural diversity of the community. This neighborhood is home to hundreds of refugees from countries like Burundi, Somalia, Myanmar, Afghanistan, and Nepal and many are monolingual, speaking only their native language. The Artist will be required to take this into account as they plan their community engagement and work with The Trust for Public Land to provide appropriate language interpretation.

#### **Materials & Media**

The project partners are open to three-dimensional artwork in all media, materials and formats including interactive art, environmental art, eco-art, and sound art. All proposed materials must be suited for outdoor installation in a park setting.

#### **Installation & Permits**

The Artist is responsible for coordinating all aspects of installation of the artwork with TPL, DUG, and the City of Denver Parks and Recreation and meet all permitting requirements set forth by the City.

#### **Maintenance & Durability**

The Artist is expected to consider the issues of long-term conservation and maintenance of public art, along with time and budget. These projects exist in the public realm and are exposed to weather and physical stresses, as well as vulnerable to vandalism. Public art projects should be fabricated of highly durable, low-maintenance materials. The Artist proposal will be reviewed by the City of Denver's Public Art Committee, City of Denver Parks and Recreation, and other appropriate city agencies to ensure conformity with city standards of maintenance and durability, as well as ADA (Americans with Disabilities Act) standards. Artist is expected to stay on budget and to complete work in an approved timeframe.

## **Budget**

The budget for this commission is \$67,500 USD. These funds come from The Trust for Public Land, and an ArtWORKS grant from the National Endowment for the Arts received by Denver Urban Gardens. This budget will support: design (including refinement of design based on stakeholder input, if necessary), two (2) community workshops/engagement events, fabrication, materials, engineering review, shipping, contract labor, installation, insurance, travel expenses necessary to complete the project, final documentation, and incidental expenses. There will be no funds available to support project overruns, and the Artist is responsible for delivering the proposed artwork within the budget and should build their budget accordingly.

## **Tentative Timeline (timeline is subject to adjustments)**

- RFQ Invitation to artists: March 29, 2019
- Site Visit with Artists: Thursday, April 11, 2019 from 9:00 a.m. to 10:00 a.m.
  - New Freedom Park is located at 8800 E 13<sup>th</sup> Ave. Denver, CO 80220
- Deadline for Proposals: Monday, April 22, 2019 11:59 p.m. MST
- Finalists' Presentations & Selection: May 31, 2019
- Finalist Notification and Contract Review/Approval: June 2019
- Artist's Community Engagement: June – August
- Artist Propose Final Concept of Artwork(s): August (this timeline may be flexible depending on the community engagement)
- Presentation of final concept to the Denver Arts & Venues Public Art Commission: August or September
- Fabrication and installation: August – October (this timeline may be adjusted depending on the scale and scope of the artwork)
- Artwork is presented to the Denver Arts & Venues Public Art Commission for approval of donation to the City's public art collection: November/December
- Community celebration and art dedication: Spring 2020

**EXHIBIT 2**  
**National Endowment for the Arts Requirements**

Because Denver Urban Gardens has received federal grant funding from the National Endowment for the Arts for this project, the Artist must adhere to various provisions of federal law (see <https://www.arts.gov/sites/default/files/GTC-for-Organizations-11.9.18.pdf>) including but not limited to the following:

**I. Acknowledgment**

In materials announcing the artwork, acknowledgement of the National Endowment for the Arts must be prominently displayed in all materials. Print materials shall use the following language: “This project is supported in part by an award from the National Endowment for the Arts.”

**II. Financial Reporting Requirements**

a. Expense Tracking and Reporting. Beyond the submission of invoices from Artist that detail the services provided during the relevant time period, TPL may request that Artist provide additional expense documentation and accounting information to comply with federal agency tracking and reporting requirements in conformance with the OMB Super Circular (effective December 26, 2013, at 2 CFR Part 200). The required federal agency reporting must occur at least annually but no more frequently than quarterly.

**III. Nondiscrimination Policies .**

a. Title VI of the Civil Rights Act of 1964, as amended, provides that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. Title VI also extends protection to persons with limited English proficiency, as clarified by Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency (42 USC 2000d et seq.).

b. As clarified by Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, national origin discrimination includes discrimination on the basis of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs. Meaningful access may entail providing language assistance services, including oral and written translation, where necessary. You are encouraged to consider the need for language services for LEP persons in conducting your programs and activities. For assistance and information go to [www.arts.gov/foia/reading-room/nea-limited-english-proficiency-policy-guidance](http://www.arts.gov/foia/reading-room/nea-limited-english-proficiency-policy-guidance).

c. Title IX of the Education Amendments of 1972, as amended, provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance (20 USC 1681 et seq.).

d. Section 504 of the Rehabilitation Act of 1973, as amended, provides that no otherwise qualified individual with a disability in the United States shall, solely by reason of his/her disability, be excluded from participation in, be denied benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance (29 USC 794). All organizations are legally required to provide reasonable and necessary accommodations for staff and visitors with disabilities.

d. The Age Discrimination Act of 1975, as amended, provides that no person in the United States shall, on the basis of age, be excluded from participation in, be denied benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance (42 USC 6101 et seq.).

e. The Americans with Disabilities Act of 1990 (ADA), as amended, prohibits discrimination on the basis of disability in employment (Title I); State and local government services (Title II); and places of public accommodation and commercial facilities (Title III) (42 USC 12101-12213).

#### **IV. Environmental and Preservation Policies**

a. The National Environmental Policy Act of 1969, as amended, applies to any federal funds that would support an activity that may have environmental implications. TPL may require your assistance with responding to specific questions or providing additional information in accordance with the Act. If there are environmental implications, either a determination of a categorical exclusion, an undertaking of an environmental assessment, or an issuance of a "finding of no significant impact" must occur, pursuant to applicable regulations and 42 USC Sec. 4332.

b. The National Historic Preservation Act of 1966, as amended, applies to any Federal funds that would support either the planning or major renovation of any structure eligible for or on the National Register of Historic Places, in accordance with Section 106. This law also applies to project activities, such as new construction, that would affect such properties. Additional information may be requested, as well as changes in the design, renovation or construction plans, to ensure compliance with the Act (16 USC 470).

#### **V. Construction-Related Policies**

a. Davis-Bacon and Related Acts (DBRA), as amended, requires that each contract over \$2,000 to which the United States is a party for the construction, alteration, or repair of public buildings or public works (these activities include, but are not limited to, painting, decorating, altering, remodeling, installing pieces fabricated off-site, and furnishing supplies or equipment for a work-site) must contain a clause setting forth the minimum wages to be paid to laborers and mechanics employed under the contract. Under the provisions of DBRA, independent contractors or their subcontractors must pay workers who qualify under DBRA no less than the locally prevailing wages and fringe benefits paid on projects of a similar character. Information about the laborers and projects that fall under DBRA can be found in the Department of Labor's Compliance Guide at [ww.dol.gov/compliance/guide/dbra.htm](http://ww.dol.gov/compliance/guide/dbra.htm). DBRA wage determinations are to be used in accordance with the provisions of Regulations, 29 CFR Part 1, Part 3, and Part 5,

and with DOL's Compliance Guide. The provisions of DBRA apply within the 50 states, territories, protectorates, and Native American nations (if the labor is completed by non-tribal laborers).

b. Copeland "Anti-Kickback" Act. If applicable to this project, the Artist shall be subject to the provisions of the Copeland "Anti-Kickback Act (18 U.S.C. 874 and 40 U.S.C. 276c) as supplemented by Department of Labor regulations (29 CFR part , "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States").

## **VI. Other National Policies**

a. Conflict of Interest. Artist certifies that no employee, officer, or agent participated in the selection, award or administration of a contract supported by a federal award. Artist further certifies that it neither solicited, offered nor accepted gratuities, favors or anything of monetary value in procuring this contract.

b. Debarment and Suspension. Artist must comply with requirements regarding debarment and suspension in Subpart C of 2 CFR 180. There are circumstances under which TPL may receive information concerning your fitness to carry out a project and administer Federal funds, such as:

- i. Conviction of, or a civil judgment for, the commission of fraud, embezzlement, theft, forgery, or making false statements;
- ii. Any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;
- iii. Any other cause of so serious or compelling a nature that it affects an organization's present responsibility.

In these circumstances, TPL may suspend and/or terminate the contract to undertake an investigation of the specific facts in coordination with the federal funding agency.

c. The Drug Free Workplace Act requires Artist to publish a statement about her drug-free workplace program. Artist must give a copy of this statement to each employee (including consultants and temporary personnel) who will be involved in this project. Artist must maintain on file the place(s) where work is being performed under this contract (i.e., street address, city, state, and zip code). Artist must notify TPL and the federal funding agency of any employee convicted of a violation of a criminal drug statute that occurs in the workplace (41 USC 701 et seq. and 45 CFR 1155).

d. Lobbying. Artist certifies, to the best of the Artist's knowledge and belief that:

- i. No U.S. Federal appropriated funds have been paid or will be paid, by the Artist or on behalf of the Artist, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any U.S. federal contract, the making of any

U.S. federal grant, the making of any U.S. Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any U.S. federal contract, grant, loan, or cooperative agreement.

- ii. If any funds other than U.S. federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection the underlying U.S. federal award, the Artist shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- iii. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The Artist certifies that the Artist will not:

- i. Attempt to influence legislation or support lobbying within the meaning of Section 501(c)(3) of the U.S. Internal Revenue Code using any of the funds received from TPL; or
  - ii. Use any portion of these funds to participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office, to cause any private benefit to occur, or to take any other action inconsistent with Section 501(c)(3) of the U.S. Internal Revenue Code
- e. The Native American Graves Protection and Repatriation Act of 1990 applies to any organization that controls or possesses Native American human remains and associated funerary objects and receives Federal funding, even for a purpose unrelated to the Act (25 USC 3001 et seq.).

**FIRST AMENDMENT TO  
PROFESSIONAL SERVICES AGREEMENT  
(New Freedom Park Art Installation)**

Denver Urban Gardens, a nonprofit Colorado organization (“DUG”); The Trust for Public Land, a nonprofit California public benefit corporation (“TPL”), and Tully Artworks LLC (“Artist”), signed a Professional Services Agreement on August 7, 2019, under which DUG and TPL agreed to pay Artist for professional services and Artist agreed to provide such services to DUG and TPL (the “Agreement”).

NOW, DUG, TPL and Artist (together, “the Parties”) acknowledge and understand that the original ending term of the Agreement was June 30, 2020, and an extension of the term is necessitated by delays due to the Covid epidemic. The Parties therefore desire to amend the Agreement by extending the term thereof.

The Agreement is hereby amended pursuant to Paragraph 15(d) and (e) of the Agreement by consent of the Parties as follows:

1. Paragraph 2 of the Agreement is amended such that the term of the Agreement is extended to completion of the services or June 30, 2021, whichever comes later.
2. Paragraph 4 of the Agreement is also amended to update the timing for the last two payment as follows:
  - a. Installation (approximately April 2021): \$15,000
  - b. Post-Installation and Final Acceptance of artwork by the City and County of Denver (approximately June 2021): \$5,000

These last two payments shall be made by TPL to Artist as DUG has fulfilled its financial responsibility for this Agreement.

3. All other provisions of the Agreement shall continue in full force and effect.

*[Signatures on next page]*

IN WITNESS WHEREOF, the Parties have executed this Amendment to the Professional Services Agreement. The effective date (the “Effective Date”) of this Amendment shall be the last date of execution by the parties to this Amendment.

**TULLY ARTWORKS LLC**



By: Robert Tully  
Tully Artworks, LLC  
733 McKinley Ave.  
Louisville, CO 80027  
Telephone: 720-771-8502



Date: 3/12/21

**THE TRUST FOR PUBLIC LAND**



By: Jim Petterson, Colorado State Director  
1410 Grant Street, Suite D210  
Denver, CO 80203  
Telephone: 303-837-1414

Date: 3/10/21

**DENVER URBAN GARDENS**



By: Linda Appel Lipsius, Executive Director  
1031 33rd Street, Suite 100  
Denver, CO 80205  
Telephone: 303.292.9900

Date: 3/9/21