

**CITY OF ALBUQUERQUE
ART IN MUNICIPAL PLACES**

**PROFESSIONAL SERVICE AGREEMENT
TO COMMISSION A WORK OF ART**

THIS AGREEMENT, between the City of Albuquerque, a municipal corporation ("City"), P.O. Box 1293, Albuquerque, New Mexico 87103, Reynaldo "Sonny" Rivera ("Artist") dba Reynaldo Rivera-Sculptor, Inc., a New Mexico Corporation, 1851 Calle Los Vecinos NW, Albuquerque, NM 87107, is made in Albuquerque, New Mexico, and is entered into as of the date of final execution of this Agreement.

WHEREAS, the City has enacted an Art in Municipal Places ordinance to promote and encourage private and public programs to further the development of the fine arts; and

WHEREAS, from the one-percent-for-art fund established by the Ordinance, funds presently are available for the work of art which is described in this Agreement; and

WHEREAS, the Cultural Services Department in partnership with the Public Art Program also presently has funds available for the work of art which is described in this Agreement; and

WHEREAS, both the Artist and the work of art were selected by procedures established by the Arts Board of the City in accordance with Section 10-5-1 *et seq.*, of the Revised Ordinances of the City of Albuquerque, New Mexico, 1994; and

WHEREAS, the Artist is qualified, able and willing to design and create the work of art which is described in this Agreement;

THEREFORE, the City and the Artist agree:

I. Scope of Services. The Artist will perform the following "Services", also referred to as the "Project", which include all other obligations required of the Artist by this Agreement, in a satisfactory and proper manner as determined by the City:

A. Design and Description of the Work of Art. The Artist will design and create a work of art, which will consist of the following: A monumental scale, figurative, bronze sculpture depicting two young women who represent the "Sister Cities" of Albuquerque and Guadalajara, entitled "Sister Cities (Albuquerque - Guadalajara)" (the "Work"). The first figure is a woman standing and half seated on the rim of large flower pot, wearing a flowing evening dress, holding a bouquet of roses with shoulder length hair. The second figure is a standing woman with her left hand resting on right shoulder of seated woman, her left hip leaning against the flower pot. The standing figure has a single rose in right her hand that rests on her right hip. She is wearing modern day casual clothing - a long sleeved blouse and three-quarter length pants. Her hair falls loosely just beyond her shoulders. The dimensions of the sculptures are: Standing woman – 7' high; Seated woman - a seated 7' figure; and Pedestal - 3' high by 3' x 7" wide.

The Work will be made of bronze with a stainless steel armature for placement on the Work Base. The Work will be located in the Albuquerque Biopark Rose Garden. The orientation will be coordinated between the Artist and the City Cultural Services Director. The Artist will allow representatives of the selection committee to view a preliminary clay figure of the Work and will consider their comments about the Work prior to casting it in bronze. The Artist will submit a proposal for the color of the patina to be applied to the bronze for approval prior to completion.

A photocopy of the initial design of the Work is attached hereto as Exhibit A and incorporated herein. The Artist represents to the City that the Work to be produced is a unique, original work of art especially designed for the City and has not and will not be substantially duplicated by the Artist without the prior written permission of the City.

B. Fabrication of the Work. The Artist will fabricate the Work in accordance with engineering drawings paid for by the Artist as part of this Agreement and in accordance with the final engineering design approved by the City. The structural drawings will be created in coordination with the City regarding placement of the Work on the foundation and base.

C. Design and Construction of the Work Base; Site Preparation. The City's Cultural Services Department, or its licensed contractor, will design and construct a foundation for the Work (the "Work Base") in conjunction with the Artist. The Work Base shall consist of a structural footing and attachment for the Work. The City Cultural Services Department and its contractor shall also be responsible for installation of the Work Bases, but shall coordinate the installation with the Artist, who will be responsible to insure proper orientation and attachment of the Work and compliance with approved drawings and designs.

The Work Base will be installed at the location indicated on the attached Exhibit B (the "Work Site"). Preparation of the Work Site in accordance with a design created or approved by the Artist shall be the responsibility of the City Cultural Services Department or its contractor.

D. Delivery of the Work and Supervision of Installation. As part of the Services, the Artist will be responsible for delivery of the Work with stainless steel attachment hardware to the Work Site. The Artist will consult with the City regarding the dates of delivery in order to coordinate the delivery with the site preparation and installation by the City. The Artist will oversee and coordinate the placement of the Work on to the Work Base at the Work Site. The Artist will provide installation of the Work and will provide a temporary enclosed/fenced area at the Work Site to safeguard the materials for construction while the Work is being completed.

E. Documentation. Following installation of the Work and the issuance of the Notice of Acceptance by the City, but prior to the Final Payment, the Artist will furnish the City with:

(1) Six clearly labeled, good quality 5" X 7" images, which indicate the Artist's name, Project name, date of completion; up to six digital images suitable for posting on the City's Public Art webpage in a jpeg or tiff format at 600 dpi resolution or greater; and a full written narrative description of the Work; and a ten minute interview discussing the Work.

(2) Written maintenance instructions for the Work. During the Artist's lifetime, at no charge to the City, the Artist agrees to provide advice concerning problems relating to maintenance of the Work.

(3) An identification plaque for the Work that is acceptable to the City and which includes at least the following information: title of the Work, name of the Artist, the year, and that the Work was commissioned by the City of Albuquerque's Art in Municipal Places Program.

F. Construction Requirements. In providing the Services:

(1) The Artist will work with the City at all times throughout the Project to coordinate schedules, construction techniques, and materials.

(2) If construction issues arise, the Artist will meet with the staff of City's Cultural Services Department and Public Art Program and third parties involved in the Project to discuss and resolve the concerns.

(3) The Artist will provide a Project schedule for approval by the City's Project Manager as soon as possible following execution of this Agreement.

(4) The Artist will assist the City as needed in obtaining City Development Review Board approvals if needed.

G. Change in Design. The parties recognize that the shift in scale from preliminary drawings and/or maquettes to a full-scale work may require artistic judgments. The Artist reserves the right to make minor adjustments to the Work as the Artist deems aesthetically and structurally necessary. Any substantial change in the scope, design or material of the Work must be approved in writing and in advance by the Albuquerque Arts Board before the Artist may continue completing the Work and receive any additional Compensation.

H. Additional Services. The Artist may be required to provide "Additional Services" under the terms and conditions of this Agreement, if the parties agree in writing to the scope of services and the amount and method of compensation before the Additional Services are performed. Submittal of a proposal and acceptance by the City in the form of a letter of written authorization from the City's project manager shall constitute an amendment to this Agreement and the Additional Services performed shall be subject to the terms and conditions of this Agreement as amended by those documents. The City shall execute an Additional Services supplement summarizing the changes to contract terms and provide a copy to the Artist. Additional Services may include:

(1) Providing the services of a consultant for the purpose of providing professional services necessary to accomplish the Services described in Section 1.

(2) Making revisions in designs, drawings, specifications or other documents when such revisions are due to causes not within the control of the Artist or the Artist's employees, agents or contractors.

(3) Other related and appropriate Additional Services as authorized by the City and required to accomplish the Services described in Section 1.

2. Compensation and Method of Payment.

A. Compensation. For performing the Services specified in Section 1 hereof, the City agrees to pay the Contractor the amount of One Hundred Thirty Thousand and No/Dollars (\$130,000.00) which amount includes any applicable gross receipts taxes and which amount shall constitute full and complete compensation for the Contractor's Services under this Agreement, including all expenditures made and expenses incurred by the Contractor in performing the Services.

B. Method of Payment. The Compensation will be paid to the Artist in the following installments within a reasonable period of time after completion of the Services described below:

(1) Twenty Thousand and No /100 Dollars (\$20,000.00) following the City's approval of the Artist's final proposal and for work done by the Artist in creating the design or the Work (First Payment);

(2) Thirty Eight Thousand Two Hundred Fifty and No/100 Dollars (\$38,250.00) following approval of engineering drawings and creation of the armature (Second Payment);

(3) Thirty Eight Thousand Two Hundred Fifty and No/100 Dollars (\$38,250.00) following creation of a clay figure and review by the selection committee (Third Payment);

(4) Thirty Two Thousand Five Hundred and No/100 Dollars (\$32,500.00), which in combination with the Final Payment is at least 25% of the Total Compensation (which the City Art in Municipal Places Ordinance requires to be withheld until the Work is formally accepted by the Mayor) following issuance of the Notice of Acceptance by the City (Fourth Payment);

(5) One Thousand and No/100 Dollars (\$1,000) following the City's receipt of (a) photographic documentation suitable for publication; (b) a final description of the Work including the ten minute interview; and (c) maintenance instructions for care of the Work and for installation of the required plaque (Final Payment).

The payments which are described in this section include any applicable gross receipts taxes and will be made to the Artist after the City receives acceptable invoices for payment as required by the budgetary and fiscal guidelines of the City, and upon the condition that the Artist has performed the Services described and all other requirements of this Agreement to the satisfaction of the City.

The City and the Cultural Services liaison will determine when the Work has reached a given payment stage.

C. Reimbursement of Payments. If this Agreement is terminated, the City shall be entitled to full reimbursement of any amount paid to the Artist that is in excess of just and equitable compensation for the Services completed to the satisfaction of the City by the Artist as of the date of termination.

3. **Time of Performance.** The Artist's Services will begin on the date of signing this Agreement and will be undertaken and completed in a sequence which will assure timely completion of the Services. In any event, the Artist will complete all Services and requirements of this Agreement by no later than July 31, 2010.

4. **Guarantee of Workmanship and Material.** For a period of one year from the date of acceptance by the City, as established by the Notice of Acceptance issued by the City, the Artist warrants and guarantees all workmanship on, and material used in the Work, and, to the extent provided by the Artist or the Artist's agent, subcontractor or employee, the workmanship and material used in the Work Base. The Artist is not responsible for damage due to vandalism.

5. **Formal Acceptance and Ownership of the Work.** Within fifteen (15) days after the Artist has informed the City that the Work has been installed, the City will inform the Artist in writing that either: (A) the Work has been completed and installed according to the terms of the Agreement and the City formally accepts the Work ("Notice of Acceptance"); or (B) issues remain which prevent the City from issuing a Notice of Acceptance, in which case the issues will be described. Upon the City's issuing the Notice of Acceptance, the City will become the sole owner of the Work, which the Artist warrants shall be free of all liens or encumbrances of any kind.

6. **Assignment of the Work.** The Services described in this Agreement will be performed by the Artist and will not be assigned, subleased or transferred without the prior written consent of the City. This section does not prohibit the Artist from employing or subcontracting with qualified personnel who will work under the Artist's supervision.

7. **Independent Contractor.** The Artist, which for purposes of this Section includes but is not limited to its officers, members, volunteers, employees, agents, contractors and subcontractors, if any, are not employees of the City for any purpose whatsoever. The Artist is an independent contractor at all times the Artist is performing the Services. The Artist will furnish all supervision, labor, materials, equipment, supplies and other incidentals, as well as provide related Services as required by this Agreement. The Artist agrees that the Artist is not entitled to any benefits from the City under the provisions of the Merit System Ordinance as now enacted or as hereafter amended.

8. **Indemnity.** The Artist agrees to defend, indemnify and hold harmless the City, its officials, agents and employees from and against any and all claims, actions, suits or proceedings of any kind brought against said parties for or on account of any matter arising from or out of the obligations performed pursuant to this Agreement by the Artist and the Artist's volunteers, employees, agents and contractors.

9. **Insurance.** The Artist shall procure and maintain at the Artist's expense, during the term of this Agreement following completion of preparatory stages, insurance in the kinds and amounts hereinafter provided, with insurance companies authorized to do business in the State of New Mexico, covering all operations under this Agreement, whether performed by the Artist or Artist's volunteers, employees, agents or contractors. Following completion of the Artist's preparatory stage, the Artist shall furnish to the City a certificate or certificates of insurance in a form that is satisfactory to the City showing that the Artist has complied with this Section. All certificates of insurance shall provide

that written notice be given to the Risk Manager, Department of Finance and Administrative Services, City of Albuquerque, P.O. Box 470, Albuquerque, New Mexico 87103, before a policy is canceled, materially changed, or not renewed. Various types of required insurance may be written in one or more policies. If the City wishes to review a binder or policy in addition to a certificate of insurance, the Artist will deliver a copy of the requested document to the City before anyone begins the work for which the coverage is required. The kinds and amounts of insurance required are:

A. Commercial General Liability Insurance. A commercial general liability insurance policy with combined limits of liability for bodily injury as follows:

\$1,000,000	Per Occurrence
\$1,000,000	Policy Aggregate
\$1,000,000	Products Liability/Completed Operations
\$1,000,000	Personal and Advertising Injury
\$ 50,000	Fire, Legal
\$ 5,000	Medical Payments

Said policy of insurance must include coverage for all operations performed for the City by the Artist, and contractual liability coverage shall specifically insure the hold harmless provisions of this Agreement. The City shall be named an additional insured and the coverage afforded shall be primary with respect to operations provided. If equivalent coverages are provided and the form is approved by the City, the Artist may provide a commercial general liability policy in a form different from that described above.

B. Automobile Liability Insurance. An automobile liability insurance policy with liability limits in amounts not less than \$1,000,000 combined single limit of liability for bodily injury, including death, and property damage in any one occurrence. Said policy of insurance must include coverage for the use of all owned, non-owned, hired automobiles, vehicle and other equipment both on and off work. The City shall be named an additional insured and the coverage afforded shall be primary with respect to operations provided.

C. Transportation/Cartage Insurance. All-risk transportation/cartage insurance coverage in a form acceptable to the City that covers physical damage to or destruction of the Work up to the total value of the Work. Coverage must include loading, transportation and unloading the Work. The City shall be named an additional insured. The certificate of insurance must be delivered to and approved by the City before the Work is loaded. If the Work is to be loaded, transported or unloaded by a person or entity other than the Artist, that person or entity must provide the City with an acceptable certificate of insurance, binder or policy evidencing both (1) transportation/cartage coverage which meets the requirements of this Section 9.C; and (2) commercial general liability and comprehensive automobile coverage which meets the requirements of Sections 9.A and 9.B above. Ten (10) days written notice to the City is required before a policy providing transportation/cartage coverage is canceled, materially changed or not renewed.

D. Workers' Compensation Insurance. Workers' compensation insurance policy for the Artist's employees in accordance with the provisions of the Workers' Compensation Act of the State of New Mexico (the "Act"). If the Artist employs fewer than three employees and has determined that the Artist is not subject to the Act, the Artist will certify, in a signed statement, that the Artist is not

subject to the Act. The Artist will notify the City and comply with the Act if the Artist employs three or more persons during the term of this Agreement.

E. **Increased Limits.** If, during the term of this Agreement, the City requires the Artist to increase the maximum limits of any insurance required herein, an appropriate adjustment in the Artist's compensation will be made.

F. **Risk to Artist.** The Artist understands and agrees that, until the Work is accepted by the City, any injury to or loss of the Work and any injury to property or persons caused by the Work and any services described in Section 1 is the sole liability of the Artist. The City will not provide the Artist with any insurance coverage against such risks.

10. **Taxes.** The State of New Mexico imposes a gross receipts tax on anyone or any entity engaging in business in New Mexico. The tax may be imposed by the State of New Mexico on the Compensation received for the Services under this Agreement, unless exempted by the New Mexico Taxation and Revenue Department. The Artist shall insert his New Mexico Tax Identification Number below the Artist's signature block on this Agreement before signing and returning copies of this Agreement to the City.

11. **Personnel.** The Artist has, or will secure at Artist's expense, all personnel required to perform Artist's Services. If any of the individuals performing the Services are City employees or have any contractual relationship with the City, the Artist will provide written details to the City before the Agreement is signed by the parties.

12. **Supervision.** The City is under no obligation to supervise the Artist's performance of Services that are described in this Agreement, except as expressly provided in this Agreement. The Artist's duty to defend and indemnify the City applies to any claim alleging that the City failed to supervise the Artist's actions.

13. **Termination for Cause.** If the Artist fails to fulfill any of the Artist's obligations under this Agreement in a timely or proper manner, or if the Artist violates any other term of this Agreement, the City thereupon will have the right to terminate this Agreement by giving the Artist written notice of termination at least ten (10) days before the effective date of termination. The termination date will be stated in the notice.

If termination for cause occurs, at the option of the City, all finished or unfinished drawings, specifications, models, portions of the Work and Work Base, supplies, or other objects which have been prepared by the Artist under this Agreement, will become the City's property and the City will be entitled to have the Work completed and displayed, but the Artist will not be named on the plaque. The Artist will be entitled to receive just and equitable compensation for any work completed by the Artist under this Agreement to the satisfaction of the City. The City shall have the option of either owning and keeping the Work as it exists on the date of termination for cause, or requiring the Artist to remove the Work, at the Artist's expense, by the deadline stated in a written notice to the Artist given by the City.

Notwithstanding the above, the Artist will not be relieved of liability to the City for damages sustained by the City by virtue of any breach of this Agreement by the Artist, and the City may withhold

any payments to the Artist for the purposes of set-off until such time as the exact amount of any damages due the City from the Artist is determined.

14. Termination by the City Not for Cause. The City may terminate this Agreement at any time by giving at least thirty (30) days notice in writing to the Artist. If the Agreement is terminated by the City as provided herein, the Artist will be paid an amount which bears the same ratio to the total Compensation as the Services actually performed to the satisfaction of the City bear to the total Services of the Artist which are required by this Agreement, less Compensation payments previously made. If this Agreement is terminated due to the fault of the Artist, the prior section, regarding termination for cause, will apply.

15. The Albuquerque Arts Board as Nonbinding Mediator. During the Artist's performance of the Services, if a major disagreement arises between the Artist and the City, the Albuquerque Arts Board may mediate the disagreement and endeavor to resolve the disagreement to the satisfaction of both parties. Agreeing to mediate will not legally bind either party to accept the outcome. The Artist agrees to notify the Arts Board before the Artist terminates this Agreement or pursues any legal remedy regarding this Agreement.

16. Review of Progress and Reports. At reasonable times and with advance notice to the Artist, the City has the right to review the Work in progress and to require and receive progress reports from the Artist.

17. Copyright and Reproduction Rights. The Artist shall apply for a US registered copyright for the Work. The Artist agrees to assign his interest in the copyright to himself and the City of Albuquerque. The Artist agrees to execute contemporaneously with the execution of this Agreement the Assignment of Copyright, attached hereto as Exhibit C. The parties agree the City and the Artist shall have the right to make or disseminate copies, images, reproductions or the like of the Work for (i) non-commercial use, (ii) for advertising or promotion of his/its business. and (iii) for commercial purposes with approval and participation of the co-copyright owner, which participation shall be negotiated prior to such commercial development. Any reproduction of the Work shall contain a copyright notice substantially in the form: "Copyright, Reynaldo Rivera, Artist, and City of Albuquerque, 2010."

21. Alterations to the Work or Site of the Work After Acceptance.

A. VARA. To the extent required by the Visual Artist's Rights Act of 1990, Title 17, United States Code ("VARA") or other applicable laws and regulations, during the Artist's lifetime the City will not distort, mutilate or otherwise modify the Work in a manner which is prejudicial to the Artist's honor or reputation ("Modification"), nor will the City destroy the Work during the Artist's lifetime. As provided in VARA, Modifications shall not include modifications caused by the passage of time, the inherent nature of the materials or the result of conservation, lighting or placement in connection with public presentation unless caused by the gross negligence of the City.

B. Repairs. After issuance of the Notice of Acceptance, the City may elect to repair the Work if it is determined that it is in critical need of repair. If the City decides to repair a Work, the City will make a reasonable effort to consult with the Artist concerning substantial repairs to, and restoration of the Work. To the extent the City determines it is appropriate, the Artist will be given the opportunity to perform substantial repairs to and restoration of the Work for a reasonable fee. If the City

and the Artist cannot agree whether the Work should be repaired, or in what manner, the City will make the final decision regarding whether and in what manner the Work will be repaired.

C. Change in the Site of the Work. The parties understand that any substantial change in the immediate vicinity of the Work or moving the Work to a different Work Site could change the intended appearance and character of the Work. If for any reason the Work must be removed or moved from the Work Site to a new location, the City will make a reasonable attempt to notify the Artist in writing and obtain the Artist's advice regarding any such removal or moving of the Work. VARA provisions may apply.

D. Request by the Artist. The Artist may make a written request to the City that the Work no longer be represented on the plaque as the Work of the Artist, and the City will comply with that request:

(1) If the Artist believes the Work requires repair and the City does not repair the Work to the satisfaction of the Artist;

(2) If any significant Modification occurs to the Work after the Work is formally accepted by the City, whether the change is intentional, unintentional or malicious;

(3) If there is a substantial change in the immediate vicinity of the Work; or

(4) If for any reason the Work must be removed from the Site or moved to a new location.

22. Ownership of Documents and Models. Drawings, specifications and models of the Work, or which relate to the Work, including all preliminary studies, will be the property of the Artist both following the City's formal acceptance of the Work and following termination of the Agreement by the City not for cause, and will not be used by the City in other projects, unless the Artist otherwise agrees in writing.

23. Entire Agreement. This Agreement contains the entire agreement of the parties and supersedes any and all other agreements or understandings, oral or written, whether previous to the execution hereof or contemporaneous herewith.

24. Changes to the Agreement. Changes to this Agreement are not binding unless made in writing, signed by both parties.

25. Captions. The captions to the sections or paragraphs of this Agreement are not part of this Agreement and will not affect the meaning or construction of any of its provisions.

26. Binding Effect. This Agreement is binding upon and inures to the benefit of the successors and/or assigns of the parties.

27. **Discrimination Prohibited.** In performing any Services required hereunder, the Artist shall not discriminate against any person on the basis of race, color, religion, gender, sexual orientation, sexual preference, national origin or ancestry, age, physical handicap or disability.

28. **ADA Compliance.** In performing any Services required hereunder, the Artist shall comply with all applicable requirements of the Americans with Disabilities Act of 1990 (the "ADA"). The Artist's responsibility to defend and indemnify the City, as provided in this Agreement, includes, but is not limited to, claims arising from the Artist's, its agents' or employees' acts or omissions in violation of the ADA.

29. **Applicable Law.** This Agreement will be governed by and construed and enforced in accordance with the laws of the State of New Mexico, and the laws, rules and regulations of the City of Albuquerque.

30. **Construction and Severability.** If any part of this Agreement is held to be invalid or unenforceable, such holding will not affect the validity or enforceability of any other part of this Agreement as long as the remainder of the Agreement is reasonably capable of completion.

31. **Conflict of Interest.** No officer, agent or employee of the City will participate in any decision relating to this Agreement which affects that person's financial interest, the financial interest of his or her spouse or minor child or the financial interest of any business in which he or she has a direct or indirect financial interest.

32. **Interest of Artist.** The Artist agrees that the Artist presently has, and shall acquire no direct or indirect interest which conflicts in any manner or degree with the performance of the terms of this Agreement. The Artist will not employ any person who has any such conflict of interest to assist the Artist in performing the Services.

33. **Notice.** For purposes of giving formal written notice to the Artist, Artist's address is as stated in the first paragraph of this Agreement.

For purposes of giving formal, written notice to the City, the City's address is:

Mayor
City of Albuquerque
P.O. Box 1293
Albuquerque, New Mexico 87103

Copies of all notices to the City also must be given to:

Public Art Program/CIP/Department of Municipal Development
City of Albuquerque
P.O. Box 1293
Albuquerque, New Mexico 87103

Written notice must be made either personally or by regular United States Mail. If the notice is mailed, the notice will be complete 3 days after deposited in the United States Mail, postage paid, and addressed as required in this Section.

Notice of change of address of the Artist or the City will be given pursuant to this Section. Until the City gives its Notice of Acceptance, the Artist will provide the City with notice of any change in the Artist's address within ten (10) days following that change. After the Final Payment, the Artist will notify the City of any change in the Artist's address within thirty (30) days following that change.

34. Counsel Obtained; Signature Authority. The parties to this Agreement acknowledge that they have thoroughly read this Agreement, have sought and received whatever competent advice or counsel was necessary for them to form a full and complete understanding of all rights and obligations herein, and, having done so, hereby execute this Agreement. Each individual signing this Agreement warrants he or she has full authority to sign.

35. Required Signatures. This Agreement will not be binding upon the City until all signatures required below have been obtained.

CITY OF ALBUQUERQUE

ARTIST: Reynaldo Rivera

By: _____
Michael Riordan, P.E.
Acting Director Municipal Development

By: _____
(signature)

Date: _____

Federal Taxpayer Identification Number:

Ray Darnell
Director, Cultural Services Department

New Mexico Taxation and Revenue Dept.
Taxpayer Identification Number

Date: _____

EXHIBITS A and B ATTACHED