

CITY CLERK ORIGINAL

C-7733
06/30/2011

CITY OF GLENDALE PUBLIC ART AGREEMENT

"El Corrido de Glendale Arizona" Mural 7023 North 58th Avenue, Glendale AZ 85301

This public art agreement ("Agreement") is made and entered into on **June 30, 2011**, by and between the **City of Glendale**, an Arizona municipal corporation ("City"), and **The Fusion Foundation**, an Arizona non-profit corporation ("Foundation").

RECITALS

- A. WHEREAS, the City wishes to partner with the Foundation to create certain public artwork services pursuant to the terms of this Agreement, hereinafter, called the "Artistic Service;" in the creation and completion of a mural project.
- B. WHEREAS, the trained personnel needed for such Artistic Services are not available within the City; and
- C. WHEREAS, the Foundation desires to provide Artistic Services, as more specifically defined herein.

NOW, THEREFORE, in consideration of these premises and of the mutual clauses and agreement herein contained, and the performance thereof, the Foundation and the City contract and agree:

- 1. **INDEPENDENT BUSINESS.** The Foundation is an independent business and holds services out to the public as a separate business entity from the City and is not in business for the purpose of providing services solely to the City.
- 2. **COMPLIANCE WITH LAWS.** The Foundation shall comply with all applicable federal, state and local laws, rules and regulations, and executive orders governing equal employment opportunities, non-discrimination and immigration including compliance with Immigration Reform and Control Act of 1986 as well as with all other regulations, restrictions and requirements, including maintaining valid business permits and licenses required to perform the work required under this Agreement at his own cost and expense.

The Foundation further agrees to include foregoing provisions in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials. Any violation of such provisions shall constitute a material breach of contract.

- 3. **ARTISTIC SERVICES.** The Artistic Services for the project shall be as follows:

The Foundation will contract with Martin Y. Moreno ("Artist") to fabricate and install a tile mural on the exterior wall of a building located on 7023 North 58th Avenue, Glendale, AZ 85301. The tile mural will be sixteen (16) feet in length and six (6) feet in height and bordered by a steel frame. A detail description of the tile mural design is attached to this Agreement as Exhibit C.

The Foundation shall report to **Justine Cornelius, Public Artworks Coordinator**, or other staff as directed in writing.

4. **TERMS OF PAYMENT AND TIMELINE.** The City shall pay the Foundation according to the following terms and conditions:

For services described in Section 3 of this Agreement, the Foundation shall receive a sum not-to-exceed **\$4,500.00**, which shall be payment in full for materials, labor, installation, travel, taxes, insurance and any other expenses needed to perform the Artistic Services and complete the Project. Foundation shall produce construction documents necessary for the completion of Artistic Services. Payment for any sub-consultants to produce construction documents including the structural engineer and electrical engineer shall be the responsibility of the Foundation.

Payment will be made in one installment. The Foundation must submit invoice to the City of Glendale Public Artworks Coordinator (Justine Cornelius), 5850 West Glendale Avenue, Glendale, AZ 85301. The invoice must include the Artistic, Technical and Maintenance Record as set forth in Exhibit A. Upon completion of services and City approval of work and billings, the City will make payment within thirty (30) days. Title and ownership transfer to the City upon Foundation's receipt of the payment. The invoice must be submitted in the City's approved format set forth in Exhibit B.

Prior to commencing work under this Agreement, the Foundation shall submit to the City insurance documents as specified in Section 13. Upon request of the Foundation, the City's Risk Manager may provide written waiver or modification to the insurance requirement.

5. **CONTROL.** Artistic Services described in Section 3 shall be performed by the Foundation and the Artist. Any work done by assistants, other persons or other means must be under the direct control and supervision of the Foundation or Artist. Quality of all work is subject to approval by the City.
6. **INSTRUMENTALITIES.** The Foundation shall supply all equipment, tools, labor, materials and supplies to accomplish the designated tasks and services.
7. **TITLE TO WORK.** Title to all artwork created under this Agreement will become property of the City upon the Foundation's receipt of the final payment under this Agreement. The City retains the option to return any part of the artwork to the Foundation after project completion.
8. **OWNERSHIP AND REPRODUCTION RIGHTS OF PUBLIC ARTWORK.**

8.1 The Foundation agrees that the City owns the original public artwork created for this Project. The Foundation warrants that the design being commissioned and produced under this Agreement is the original product of the Artist's own creative efforts, the artwork is unique, it is an edition of one, it has not been accepted for sale elsewhere, and that the design shall not be offered for sale elsewhere without the express approval of the City.

8.2 The Foundation shall ensure that the design for the Project contains no material from other artworks or other copyrighted material without the prior written permission of the owner of such material where such other work is copyrighted or where such permission is otherwise required.

8.3 The designs, sketches, models and any other completed artwork created and submitted by the Foundation to the City under the terms of this Agreement as described in Section 3, shall be the property of the City.

8.4 The Foundation waives all rights to the artwork under the Copyright Act of 1976, 17 U.S.C. § 101, et seq., as amended by the Visual Artists Rights Act of 1990, and any successor act.

8.5 The City shall have the sole right to display the artwork and to display two-dimensional reproductions of the completed Project.

8.6 The City shall have the sole right to make, and to authorize the making of, photographs and other two-dimensional reproductions of the artwork for educational, public relations, arts promotional and other noncommercial purposes. The Foundation and Artist are authorized to reproduce the artwork for educational, public relations, arts promotion and other noncommercial purpose. For the purposes of this Agreement, the following are among, but not limited to be reproductions for noncommercial purposes: brochures, pamphlets or promotional material pertaining to the City, Foundation, or the Artist; reproduction in books, slides, photographs, postcards, posters, and calendars; and film strips, websites and television intended for a mass audience. The Foundation and Artist may not sell an image of the artwork in any form without written permission of the City.

8.7 The City agrees all references to the artwork shall credit the Foundation and the Artist in an appropriate manner.

9. **WARRANTY.** The Foundation warrants to the City that the fabrication and installation of the Project will be performed by the Artist in a workmanlike manner and that the Project will be free of defects in workmanship or materials, including inherent vice, and that the Foundation will, at the Foundation's own expense, remedy any defects found in the Project fabricated by the Foundation due to faulty workmanship or materials for a period of one (1) year after the Project is accepted by the City.

The Foundation warrants to the City that the Project will not require maintenance substantially in excess of that described in the maintenance recommendations to be provided by the Foundation to the City set forth in Exhibit A.

The Foundation agrees to deliver and construct the artwork free and clear of any liens and claims arising from any source.

With the exception of damage due to vandalism or accident by any person other than the Foundation or persons under their employ, direction or supervision, the Foundation warrants that the artwork will not contain any defect in design or construction including any defect which may be a hazard or a danger to the health and safety of the public and further agrees to cooperate in making or permitting adjustments to the artwork, if necessary, to eliminate hazards or potential hazards which become apparent after the Project is accepted by the City.

10. **MAINTENANCE AND REPAIRS.** As a condition of and prior to final acceptance of the Project by the City, the Foundation will supply the City with maintenance instructions set forth in Exhibit A. The City agrees to ensure that the artwork is maintained and protected to the extent practical. During the lifetime of the artwork

the Foundation will supply at no cost to the Foundation and at no charge to the City, advice as to problems arising in relation to maintenance of the Project.

The City shall make every reasonable effort to consult with the Foundation concerning repairs to the Project. To the extent practical, the Foundation shall be given the opportunity to accomplish repairs at a reasonable fee. The City reserves the right to obtain competitive bids and to choose the highest quality and least expensive vendor for all repairs and restoration.

11. **LICENSES AND TAXES.** No payroll or employment taxes of any kind shall be withheld or paid with respect to payments to Foundation.
12. **CLAIMS AGAINST THE CITY.** To the fullest extent permitted by law, the Foundation shall defend, indemnify and hold harmless the City, its agents, officers, officials, employees and volunteers from and against all claims, damages, losses and expenses (including but not limited to attorney's fees, court costs, and the costs of appellate proceedings), arising out of, or alleged to have resulted from the negligent acts, errors, mistakes, omissions, work, services, or professional services of the Foundation, its agents, employees, or any other person (not the City) for whose acts, errors, mistakes, omissions, work, services, or professional services the Foundation may be legally liable in the performance of this agreement. It is the Foundation's duty to hold harmless and indemnify the City, its agents, officers, officials, employees and volunteers shall arise in connection with any claim for damage, loss or expenses that is attributable to bodily injury, sickness disease, death, or injury to, impairment, or destruction of any person or property, including loss of use resulting there from, caused by any negligent acts, errors, mistakes, omissions, work, services, or professional services in the performance of this agreement by the Foundation or any employee of the Foundation, or any other person (not the City) for whose negligent acts, errors, mistakes, omissions, work, or services the Foundation may be legally liable. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of indemnity in this paragraph.
13. **INSURANCE.** Without limiting any of his obligations or liabilities, the Foundation, at its own expense, shall purchase and maintain the minimum insurance specified below with companies duly licensed or otherwise approved by the State of Arizona Department of Insurance and acceptable to the City, and with forms satisfactory to the City:

Automobile Liability Insurance with limits of not less than statutory requirements including coverages for owned, hired and non-owned vehicles, as applicable.

The Foundation shall provide Commercial General Liability Insurance with a limit of not less than \$1,000,000 for each occurrence with a \$1,000,000 General Aggregate Limit. The policy shall include coverage for bodily injury, property damage, personal injury, products and blanket contractual covering, but not limited to the liability assumed under the indemnification provisions of this Agreement.

The Commercial General Liability Insurance coverage required by this Agreement shall name the City of Glendale as an additional insured, and shall specify that insurance afforded by the Foundation shall be primary insurance and that any insurance coverage carried by the Foundation or its employees shall be excess coverage and not contributory coverage to that provided by the Foundation. The Foundation shall include all subcontractors as insured under this policy or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein for the Foundation.

Prior to commencing activities and services under this Agreement, except as noted above, the Foundation shall furnish the City with Certificates of Insurance, or formal endorsements as required by the Agreement issued by Foundation's insurer(s), as evidence that policies providing the required coverages, conditions and limits required by this Agreement are in full force and effect. Such certificates shall identify this Project and shall provide for not less than thirty (30) days advance Notice of Cancellation, Termination, or Material Alteration and thirty (30) days for non-payment. Such certificates shall be sent directly to:

City of Glendale
Attn: Justine Cornelius
5850 West Glendale Avenue
Glendale, AZ 85301

14. **WORKERS' COMPENSATION.** No workers' compensation insurance has been or will be obtained by the City for the Foundation.

15. IMMIGRATION LAW AND COMPLIANCE

- 15.1 The Foundation, and on behalf of any subcontractor, warrants, to the extent applicable under A.R.S. § 41-4401, compliance with all federal immigration laws and regulations that relate to their employees as well as compliance with A.R.S. § 23-214(A) which requires registration and participation with the E-Verify Program.
- 15.2 Any breach of warranty under subsection 15.1 is considered a material breach of this Agreement and is subject to penalties up to and including termination of this Agreement.
- 15.3 The City retains the legal right to inspect the papers of any of the Foundation or subcontractor employee who performs work under this Agreement to ensure that the Foundation or any subcontractor is compliant with the warranty under subsection 15.1.
- 15.4 The City may conduct random inspections, and upon request of the City, the Foundation shall provide copies of papers and records of the Foundation demonstrating continued compliance with the warranty under subsection 15.1. The Foundation agrees to keep papers and records available for inspection by the City during normal business hours and will cooperate with the City in exercise of its statutory duties and not deny access to its business premises or applicable papers or records for the purposes of enforcement of this section.
- 15.5 The Foundation agrees to incorporate into any subcontracts under this Agreement the same obligations imposed upon the Foundation and expressly accrue those obligations directly to the benefit of the City. The Foundation also agrees to require any subcontractor to incorporate into each of its own subcontracts under this Agreement the same obligations above and expressly accrue those obligations to the benefit of the City.
- 15.6 The Foundation's warranty and obligations under this section to the City is continuing throughout the term of this Agreement or until such time as the City determines, in its sole

discretion, that Arizona law has been modified in that compliance with this section is no longer a requirement.

15.7 The "E-Verify Program" above means the employment verification program administered by the United States Department of Homeland Security, the Social Security Administration, or any successor program.

16. PROHIBITIONS. The Foundation certifies, under A.R.S. §§ 35-391 *et seq.* and 35-393 *et seq.*, that it has no "scrutinized" business operations, as defined above, in Sudan or Iran.

17. SAFETY. The Foundation shall be solely and completely responsible for conditions on any job site over which it has oversight responsibility, including the safety of all persons (including employees) and property during performance of the artwork. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to all applicable federal (including OSHA), state, county and local laws, ordinances, codes and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. The Foundation's failure to thoroughly familiarize itself with the aforementioned safety provisions shall not relieve it from compliance with the obligations set forth therein.

18. COMMUNICATIONS. Any communications and/or deliverables required under this Agreement shall be deemed sufficiently given when personally delivered or mailed via US Certified Mail, return receipt requested, and addressed as follows (or to any other address agreed upon in writing by both parties):

To City: City of Glendale
Public Artworks Coordinator, Justine Cornelius
5850 West Glendale Avenue
Glendale, Arizona 85301

With Copy to: City of Glendale
City Attorney
5850 West Glendale Avenue
Glendale, Arizona 85301

To Foundation: Annie Loyd
President/CEO
2762 East Villa Rita Drive
Phoenix Arizona 85032

19. DISPUTE RESOLUTION. In the event of a dispute concerning this Agreement, the parties will meet in good faith to attempt to resolve the dispute.

20. RIGHT OF TERMINATION. The City and the Foundation hereby agree to the full performance of the covenants contained herein, except the City reserves the right, at its discretion, to terminate or abandon all or any part of the Project at any time.

In the event the City shall terminate or abandon the service or any part of the services as herein provided, the City shall notify the Foundation in writing, and immediately after receiving such notice, the Foundation

shall discontinue advancing work under this Agreement and proceed to close said operations under the Agreement.

The Foundation shall appraise the services completed prior to notification of termination and submit an appraisal to the City for evaluation. The City shall have the right to inspect the Foundation's work to appraise the Artistic Services completed. The City will not pay more than the corresponding progress payment set forth above for the percentage of work completed to that point in time.

The Foundation shall deliver to the City all Project-related work, including copies of photographs, drawings, concepts, plans, reports, calculations, writing and computer disks, created and prepared by the Foundation specifically for this Project together with all unused materials supplied to the Foundation by the City or from funds paid by the City.

In the event of such termination or abandonment, the Foundation shall be paid for services performed and materials ordered or purchased, prior to receipt of said notice of termination.

The City shall make final payment within thirty (30) days after the Foundation has delivered the last of the completed and/or partially completed items, all Project-related materials and a final invoice for the final fee that has been agreed upon by both parties.

In the event this Agreement is terminated or abandoned, the City may make use of the completed or partially completed work for this Project for the uses for which it was intended. Any use of incomplete work for this Project by the City following termination without specific written authorization by the Foundation will be without responsibility or liability to the Foundation.

In the event this Agreement is terminated, the City shall have the option of completing the Project, or entering into an Agreement with another party for the completion of the artwork according to the provisions and agreements herein.

The Foundation shall have the right to cancel the Agreement within thirty (30) days after notice in writing to the City for non-payment.

This Agreement may be canceled pursuant to the provisions of A.R.S. § 38-511.

21. **ENTIRE AGREEMENT.** This Agreement shall constitute the entire agreement between the parties hereto. No oral representation has been made by any of the parties. This Agreement may not be amended, changed, modified or rescinded except in writing signed by all parties hereto and any attempt at oral modification of this Agreement shall be void and of no effect.
22. **SUCCESSORS AND ASSIGNS.** This Agreement shall not be assignable except at the written consent of the parties hereto.
23. **FORCE MAJEURE.** If either party shall be delayed or prevented from the performance of any act required under this Agreement by reason of acts of God or other cause, including delays in schedule not caused by, beyond the control of and without fault of the Foundation (financial inability excepted), performance of that act shall be excused, but only for the period of the delay. The time for performance of the act shall be extended for a period equivalent to the period of delay.

24. GOVERNING LAW. This Agreement shall be governed by and construed under the laws of the State of Arizona and any court actions related to this Agreement shall be filed in Maricopa County, Arizona.

This Agreement shall be in full force and effect only when it has been executed by the duly authorized representatives of the Foundation and the City.

The parties have executed this Agreement as of the date listed above.

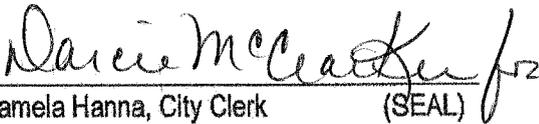
"City":

CITY OF GLENDALE,
an Arizona municipal corporation



Ed Beasley, City Manager

ATTEST:



Pamela Hanna, City Clerk (SEAL)

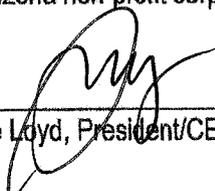
APPROVED AS TO FORM:



Craig Tindall, City Attorney

"Foundation":

THE FUSION FOUNDATION,
an Arizona non-profit corporation



Annie Loyd, President/CEO

**EXHIBIT A – ARTISTIC, TECHNICAL AND MAINTENANCE RECORD
TO BE SUBMITTED WITH FINAL INVOICE**

1. General Information

Artist Name: Martin Moreno

Title of artwork is "El Corrido de Glendale Arizona"

Location will be on the south wall of Bitzee-Mama's

General description of artwork is six feet by sixteen feet, glazed tile mural

2. Foundation's Statement about Artwork – to be used for publicity of the artwork.

3. Artwork Information – in depth information for overall project and for each individual element.

Medium and Description of Materials (include materials thickness, welding rod alloy or joint material, casting alloy, wax body, glass or fiber type)

Special Methods Utilized in Execution of Artwork (welding or joint method, technique or construction method – attach fabrication drawings)

Material Finish (glaze, paint color and type, sanding grit, tool pattern, patina, surface sealer)

Installation Method(s) (foundation installation structure, bolt/pin size, grout)

Placement of Artwork (cautions regarding sunlight, heat, etc)

4. Vendors/Parts/Storage – include supplier's name, address and phone number, description for all components of Project; attach copies of manufacturer specifications whenever possible.

5. Regular Maintenance Schedule – include cleaning agents and recommended cleaning procedure, yearly maintenance schedule for the entire piece and recommended procedure to check any electrical or mechanical parts that are integrated in this artwork.

6. Special Considerations and/or Additional Pertinent Information

EXHIBIT B – APPROVED FORMAT FOR INVOICES

INVOICE

TO: City of Glendale
Attn: Justin Cornelius, Public Artwerks Coordinator

FROM: Company
Address
City/State/Zip
Telephone/Fax/Email

DATE: Date submitted

RE: Name of Project

FINAL PAYMENT

AMOUNT: Amount of payment

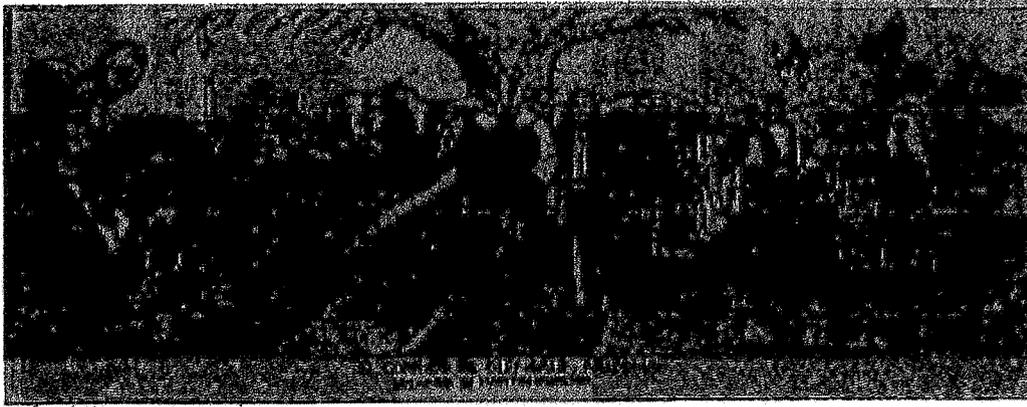
To ensure payment, the Foundation must submit certificates of insurance as required herein.

Signature

FIN or Social Security Number

EXHIBIT C – DETAIL DESCRIPTION OF THE MURAL DESIGN

"El Corrido de Glendale Arizona"



The mural design presented is not the work of one individual; rather it is a compilation of thoughts and ideas from Glendale citizens who believe in the power of art.

It is with sincere appreciation to all involved that I present the following mural design described from left to right.

The mariachi figure serenades the community about its history and agriculture. Agriculture was the initial foundation of the Glendale Community. Crops are fed by the canals that provide the source of life, Water. The pots at the foot of the tree are based on designs by the Hohokam peoples, who established the original irrigation system in the valley. The structures on the horizon represent a timeline, beginning with the Beet Sugar Factory Mill which still stands today. This is followed by Glendale High School. The central elephant tree (eucalyptus) dedicated 2004. The tree resembles a hand firmly holding its roots to the community. The central shield represents the Native American symbol of the Sacred Directions with the beat at the center. The beat resembles the Sacred Heart of the community. The figures to the right of the tree represent a multi-cultural portrait of individuals that have contributed to the city's development. Only one figure represents an actual individual; Jack Swilling, credited with the excavation and utilization of ancient canals. The Thunderbirds flying above the fields are symbolic of Luke Air Force Base. The jet turns into Butterflies and represent Metamorphosis. The University of Phoenix Stadium shows the most current source of pride. The roses at the bottom right of the design have double meaning with the first symbolizing the Saguaro Ranch. The roses also have a special meaning to the designing artist. The Bleeding Rose is used symbolically in many of my murals and paintings. "Life is beautiful, yet sometimes painful!"

Martin Y Moreno, Visual Artist