

AGREEMENT BETWEEN THE CITY OF BROOKINGS, SOUTH DAKOTA AND REED MADDEN DESIGNS REGARDING A PUBLIC ART INSTALLATION

This Agreement is made by and between the City of Brookings, South Dakota (the "City"), and Reed Madden Designs, (the "Artists") whose address is 66 Twain Avenue, Berkeley, California 94804, for the following project:

Installation of a Sculpture known as "Play Ball" at Brookings' Bob Sheldon Field

WHEREAS, the Artists were selected by the City to design, fabricate and install a sculpture known as "Play Ball" (the "Artwork"); and

WHEREAS, the Artists have agreed to provide the Artwork for installation at the Brookings' Bob Sheldon Field ("the Project Site"); and

WHEREAS, the Artists, the City of Brookings and the Brookings Public Arts Commission agree to establish a cooperative relationship to best complete this significant Project;

NOW, THEREFORE, the City and the Artists, for the consideration and under the conditions hereinafter set forth, agree as follows:

SECTION 1. TERM OF AGREEMENT.

The term of this Agreement shall commence on the ____ day of _____, 2020, through the 30th day of November, 2021, or until services are completed in compliance with Section 2, whichever is sooner.

SECTION 2. SCOPE OF WORK

2.1 GENERAL

2.1.1 Design. Artists submitted a design concept/schematic (the "Design Proposal") with an accompanying budget (the "Budget"), pursuant to a competition organized for the procurement of an artist to design and fabricate artwork suitable for the current project, which Design was selected and approved by the City. The Artists' Design Proposal and Budget (pg. 7 of Design Proposal) is attached to this Agreement as Exhibit "A".

2.1.2 The Artists will provide all services and furnish all supplies, materials and equipment as necessary for the design, fabrication, construction, transportation, unloading and installation of the Artwork at the Project Site, unless otherwise agreed to in writing by both parties. The Artwork is described as follows:

(A) Terms and Conditions:

Art Work Title: Play Ball

Medium: Sculpture

Artwork Size: The dimensions are set forth in the Concept Section of Artists' proposal.

Description: The two-part sculpture has an oversized “bouncing” baseball on one side and a glove to catch it on the other. The baseball is suspended directly above the path to mark the entrance. The beginning of the ball’s arc points to the ball field from whence it came.

Approval of Sketches: Brookings Parks and Recreation Dept.

Installation: Completed no later than October 31, 2021

Final Acceptance: November 30, 2021

- (B) Artists further agree to provide artwork to City that is substantially similar to Artwork as shown in the concept documents approved by the Brookings Parks and Recreation Department and the Brookings Public Arts Commission. Artists agree to sculpt, fabricate, paint, deliver and install the finished Artwork to City on or before October 31, 2021.
 - (C) In any public presentation or publication of this work the Artists will acknowledge that it was commissioned by the City of Brookings, South Dakota.
 - (D) All required laws, regulations, codes and ordinances will be observed.
 - (E) Artists will arrange the transportation and installation of the Artwork in consultation with the City. If Artists do not install the Artwork, Artists shall supervise and approve the installation.
 - (F) Artists will provide required insurance in amounts and limits specified in Section 5.4.
 - (G) Artists will provide a list of all subcontractors along with a copy of the agreement between the Artists and each subcontractor.
 - (H) Artists will install the art on the site that the City has prepared and identified.
- 2.1.3 The Artists will coordinate their work with the Brookings Parks and Recreation Department, and its representative Dusty Rodiek, and with the Brookings Public Arts Commission, and its representative, Darla Biel.
- 2.1.4 The Artists will complete the fabrication, assembly and installation of the Artwork in the location approved by the City. The City shall provide timely and suitable access to the installation site.
- 2.1.5 FINAL ACCEPTANCE. The Artists will advise the City in writing when all of their services have been completed. The City will notify the Artists within 30 days and in writing of its acceptance of the Artwork. Title of Ownership to the Artwork will pass to the City upon final acceptance.
- 2.1.6 DOCUMENTATION OF THE ARTWORK. Within sixty (60) days after installation of the Artwork, the Artists will furnish the City with the following documentation concerning the Artwork:
- 2.1.6.1 A brief narrative description of the Artwork for use on the City’s website and in printed publications.
 - 2.1.6.2 Instruction for appropriate maintenance and preservation of the Artwork.

SECTION 3: COMPENSATION AND PAYMENT SCHEDULE

3.1 The City will pay the Artists a fixed fee of One Hundred Ninety Thousand and no/100 (\$190,000.00) Dollars which constitutes full compensation for all services and materials to be performed and furnished by the Artists under this Agreement, including all fees, services, expenses, materials, travel, freight, taxes and any other costs associated with providing the Artwork.

3.2 Compensation will be paid as follows:

- Initial payment of \$47,500.00 at the time of signing this Agreement.
- Partial payment of \$47,500.00 based on approximately 25% completion.
- Partial payment of \$47,500.00 based on approximately 75% completion.
- Final payment of \$47,500.00 upon completion of the installation of the Artwork

SECTION 4. TIME OF PERFORMANCE

4.1 DURATION. The services of the Artists will be substantially completed by October 31, 2021. Installation dates will be mutually agreed upon and scheduled between the Artists and the City. It is anticipated the Artwork will be installed in August, 2021.

4.2 TRANSPORTATION AND INSTALLATION OF ARTWORK. The Artists are responsible for transportation of the Artwork to the City of Brookings for installation. The Artwork must be installed by the agreed-upon date. The Artwork must be suitable for installation in an outdoor setting, open to the elements in Brookings.

4.3 INSTALLATION OF ARTWORK. The Artists will install the Artwork on the dates to be agreed upon with the City of Brookings. Upon request, the City will provide installation assistance as agreed in advance. However, Artists will oversee and complete the installation process using their tools and hardware as required. The City's staff, if utilized, will not be responsible for loss or damage to the Artwork during installation.

4.4 ACCEPTABLE STANDARD OF DISPLAY. Artists represent and warrant that:

- i. General routine cleaning and repair of the Artwork and any associated working parts and/or equipment will maintain the Artwork within an acceptable standard of public display.
- ii. Foreseeable exposure to the elements and general wear and tear will cause the Artwork to experience only minor repairable damages and will not cause the Artwork to fall below an acceptable standard of public display.
- iii. With general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the Artwork will not experience irreparable conditions that fall within an unacceptable standard of public display, including mold, rust, fracturing, staining, chipping, tearing, abrading and peeling.

- iv. Manufacturer's Warranties. To the extent the Artwork incorporates products covered by a manufacturer's warranty, Artists shall provide copies of such warranties to City.

SECTION 5. TITLE/REPRODUCTION RIGHTS

5.1 ARTISTS' REPRESENTATIONS AND WARRANTIES.

- (A) Warranties of Title. Artists represent and warrant that:
 - a) the Artwork is solely the result of the artistic effort of Artists;
 - b) except as otherwise disclosed in writing to the City, the Artwork is unique and original and does not infringe upon any copyright or the rights of any person;
 - c) the Artwork (or duplicate thereof) has not been accepted for sale elsewhere;
 - d) Artists have not sold, assigned, transferred, licensed, granted or encumbered the Artwork;
 - e) the Artwork is and will be at time of title transfer free and clear of any liens from any source whatsoever;
 - f) all Artwork created by Artists under this Agreement, whether created by Artists alone or in collaboration with others, shall be wholly original with Artists and shall not infringe upon or violate the rights of any third party;
 - g) these representations and warranties shall survive the termination of this Agreement.
- (B) Warranties of Quality and Condition.
 - a) Artists represent and warrant that all work will be performed in accordance with professional "workmanlike" standards and free from defective or inferior materials and workmanship, including qualities that cause or accelerate deterioration of the Artwork for one year after the date of final acceptance by the City.
 - b) Artists represent and warrant that reasonable maintenance of the Artwork will not require procedures substantially in excess of those described in the Maintenance & Preservation Plan submitted by Artists pursuant to Section 2.1.6.2.
- (C) Title. Title to the Artwork shall pass to City upon City's written final acceptance and payment for the Artwork. Artists will provide City with a Transfer of Title in substantially the form attached hereto as Exhibit "B".
- (D) Copyright of Ownership. Artist retains all rights under the Copyright Act of 1976, 17 U.S.C. § 101 et seq., as the sole authors of the Artwork for the duration of the copyright.
- (E) Reproduction Rights.
 - a) In view of the intention that the final Artwork will be unique, Artists will not make any additional exact duplicate three-dimensional reproductions of the final Artwork, nor will Artists grant permission to others to do so except with written permission of City. However, nothing shall prevent Artists from creating future Artworks in Artists' manner and style or artistic expression.

- b) Artists grant to City and its assigns an irrevocable license to make two-dimensional and miniature three-dimensional reproductions of the Artwork for non-commercial purposes, including, but not limited to, reproductions used in brochures, media publicity and exhibition catalogs and other similar publications.
- c) The City of Brookings may use images of the Artists and Artwork in promotional or educational materials. In view of the intention that the Artists' Design Proposal and Artwork will be unique, the Artists will not make any additional duplicate reproductions of it except for promotional and marketing purposes, nor will the Artists grant permission to others to do so except with the written permission of the City of Brookings.
- d) Artists will give acknowledgement to the City in substantially the following form: "an original Artwork commissioned by and in the public art collection of the City of Brookings."
- e) If the City wishes to make reproductions of the Artwork for commercial purposes, including, but not limited to, T-shirts, postcards and posters, the parties hereto shall execute a separate agreement to address the terms of the license granted by Artists and the royalty Artists shall receive.
- f) Third Party Infringement. City is not responsible for any third party infringement of Artists' copyright and is not responsible for protecting the intellectual property rights of Artists.

5.2 INDEPENDENT CONTRACTOR. In performing the services herein specified, Artists are acting as an Independent Contractor, and neither Artists nor any of Artists' staff shall be considered employees of City.

5.3 RISK OF LOSS. Artists will bear the risk of loss or damage to the Artwork until City's final acceptance of the Artwork. Artists will take such measures as are reasonably necessary to protect the Artwork from loss or damage. The City will bear the risk of loss or damage to the Artwork prior to final acceptance only if, during such time, the partially or wholly completed Artwork is in the custody, control or supervision of City or its agent(s) for the purposes of transporting, storing, installing or performing other services to the Artwork.

5.4 GENERAL INSURANCE.

- (A) Insurance. Artists will, at their sole cost and expense, procure and maintain throughout the term of this contract insurance, with minimum policy limits equal to or greater than the coverage limits documented in Exhibit "C", and will provide a certificate of insurance evidencing such coverage, and naming the City as a named, additional insured. Said insurance coverages procured by Artists shall be considered, as primary insurance over and above any other insurance, or self-insurance, available to the City, and that any other insurance available to the City

shall be considered secondary to, or in excess of, the insurance coverage(s) procured by Artists as required herein.

- (B) Artists acknowledge that until final acceptance of the Artwork by the City, any injury to property or persons caused by the Artists' Artwork or any damage to, theft of, vandalism to, or acts of God affecting the Artists' Artwork are the sole responsibility of Artists, including, but not limited to, any loss occurring during the creation, storage, transportation or delivery of the Artists' Artwork, regardless of where such loss occurs.

5.5 INDEMNIFICATION. Artists will defend, indemnify and hold harmless the City and all of City's officers, and employees from, liabilities, damages, losses, and costs, including, but not limited to, reasonable attorneys' fees, to the extent caused in whole or in part by the negligence, recklessness, or intentionally wrongful conduct of the Artists and other person employed or utilized by the Artists in the performance of this Agreement. This obligation does not expire or terminate with the remainder of this Agreement.

5.6 TERMINATION. Either party may terminate this Agreement upon breach by the other party of any material provision of this Agreement, provided such breach continues for fifteen (15) days after receipt by the breaching party of written notice of such breach from the non-breaching party. Should City terminate this Agreement after commencement of physical construction on the Artwork due to a breach by Artists, City may elect to either (1) retain the Artwork, in which case Artists shall be considered to have waived any rights regarding the Artwork under this Agreement and state and federal laws, including any claim of title, such that the City may independently complete the Artwork with or without Artists' permission; or (2) reject the Artwork, in which case Artists shall return all payments received from the City and Artists shall be responsible for the prompt removal of the Artwork from the Site and returning the Site to its original condition. Should Artists fail to return the Site to its original condition within 60 days, the City may freely dispose of the Artwork and charge all costs of removal and Site repair to Artists.

5.7 ENTIRE AGREEMENT MODIFICATION. This Agreement contains the entire understanding of the parties with respect to the subject matter hereof and supersedes all prior agreements, oral or written, and all other communications between the parties relating to such subject matter. This Agreement may not be amended or modified except by mutual written agreement of the authorized parties to this Agreement.

5.8 GOVERNING LAW. This Agreement shall be construed in accordance with the laws of the State of South Dakota. The venue for any litigation involving this Agreement shall be the Third Circuit Court in and for Brookings County, South Dakota.

5.9 NOTICES. All notices hereunder by either party to the other shall be in writing, delivered personally, by certified or registered mail, return receipt requested, or by overnight courier, and shall be deemed to have been duly given when delivered

personally or when deposited in the United States mail, postage prepaid, addressed as follows:

As to City:
Dusty Rodiek, Parks and Recreation Director
City of Brookings
520 Third Street, Suite 130
Brookings, South Dakota 57006
(605) 692-2708
drodiek@cityofbrookings.org

As to Artists:
Jeffrey Reed and Jennifer Madden
66 Twain Ave.
Berkeley, Ca 94804
510-384-0804
Reed@reedmadden.com, rm@reedmadden.com

or to such other persons or places as either party may from time to time designate by written notice to the other.

5.10 ASSIGNMENT. Artists shall not assign or transfer, in whole or in part, this Agreement or any of Artists' rights, duties or obligations under this Agreement without the prior written consent of the City.

SECTION 6. ENTIRE AGREEMENT

This writing embodies the entire Agreement and understanding between the parties hereto, and there are no other Agreements and understandings, oral or written, with reference to the subject matter hereof that are not merged herein and superseded hereby.

Dated this _____ day of December, 2020.

CITY OF BROOKINGS

ATTEST:

BY: _____
Paul Briseno, Its: City Manager

Bonnie Foster, City Clerk

Dated this _____ day of December, 2020.

REED MADDEN DESIGNS, Artists

BY: _____
_____, Its: Owner