

**AGREEMENT FOR ART WORK FOR  
THE MILPITAS LIBRARY ATRIUM**

**THIS AGREEMENT** is entered into this 7 day of JUNE, 2008, by and between the **Redevelopment Agency of the City of Milpitas**, hereinafter Agency, and **Cork Marcheschi**, hereinafter Artist.

**RECITALS:**

Whereas, Agency wishes to acquire that original work of sculpture art (hereinafter "sculpture" for the Milpitas Library south tower as it has been previously proposed by Marcheschi in his proposal and considered by Agency; and

Whereas, Agency requires the services of Marcheschi to design, fabricate, and install the sculpture for a total fee of \$100, 000.00; and

Whereas, the Artist is qualified and desires to perform such services for the Agency;

**NOW, THEREFORE**, in consideration of the foregoing and mutual covenants set forth in this Agreement, **the parties agree as follows:**

**1. SCULPTURE DESIGN; ENGINEERED DRAWINGS; BUILDING PERMITS.** Artist shall prepare a drawing of the sculpture that shows its size, weight, materials, and points of suspension and attachments. The sculpture shall be generally in accord with the proposal submitted by Artist to Agency and attached hereto as Exhibit A. Artist and City officials have met on June 3, 2008, to discuss the sculpture and to determine whether it will require a building permit or building department review. Based on the representations made by Artist concerning the sculpture's size (250-280 pounds, with approximately 50 items individually hung at different elevations weighing 1-4 pounds on average made of glass and plastic and several items from 12-18 pounds), no building permits or building department review is required. Provided

that Artist does not exceed the thresholds for review and permitting, no review or permitting will be required of Artist's sculpture.

**2. FABRICATION.** Artist shall fabricate the sculpture in his studio. Upon completion of fabrication Agency shall inspect the sculpture to assure that it is in accord with Agency and City approvals and to authorize installation.

Artist shall be paid \$29, 000.00 when Agency authorizes Artist to commence the fabrication of the sculpture. When fabrication is 50% completed and inspected and approved by Agency, Artist shall be paid an additional \$37, 000.00.

**3. INSTALLATION.** Artist shall install the sculpture in the Milpitas Library south tower during the month of January 2009 at such time during the month that the parties agree. In the event that the Artist is ready to install the sculpture earlier or is not ready to install the sculpture during January 2009 the parties shall arrange for a different time but not later than March 2009. If the Library has opened, the approval of the Library is likely to be necessary in order to install the sculpture; Agency will coordinate contact with the Library to arrange for approval. If installation occurs after the Library has opened, it is likely that the Library may have requirements for insurance and indemnity and other matters that must be met by Artist.

Artist shall be on-site during the installation process and shall supervise the installation. Artist shall install the sculpture in a safe manner and realizes that the Library will be open to the public. Artist shall isolate the area of his work and provide adequate barriers to protect the public, City staff, and the Library itself during the installation process. Artist shall reasonably clean his work area at the end of each day. At the

completion of installation, Artist shall remove his equipment, excess materials, or other property promptly and as requested by Agency. No equipment shall be used by Artist that will damage the Library, including its floors, and Artist shall protect the walls, floors, and other parts of the Library that could be damaged during installation.

Artist shall be paid \$24, 000.00 when Agency authorizes installation. Upon completion of installation and acceptance by Agency Board, Artist shall be paid the remaining \$10, 000.00 of his fee.

**2. REPRESENTATIONS AND WARRANTIES OF ARTIST.** Artist warrants that the design of the sculpture shall be the original product of his own creative efforts; that unless both parties hereto agree in writing to the contrary, the sculpture shall be an original and an edition of one (1); and that Artist shall not sell or reproduce sculpture, or allow others to do so, without the prior written consent of Agency.

Artist shall guarantee sculpture to be free from faults of material and workmanship. Artist shall deliver sculpture to Agency free and clear of any liens from any source whatsoever.

Artist shall faithfully perform the work required under this Agreement in accordance with standards of care, skill, training, diligence and judgment provided by highly competent professionals who perform work of a similar nature to the work described in this Agreement.

Any installation required hereunder shall be performed in accordance with applicable Federal and State laws and regulations, including, but not limited to, California Business & Professions Code §§7000 to 7173 and Title 22 of the California Code of Regulations.

**3. OWNERSHIP OF ART.** Agency shall receive sole ownership of the sculpture, including all tangible rights and privileges thereof. Artist shall retain copyright and reproduction rights as set forth in Paragraph 5 below. Agency shall, at its expense, prepare and install at an appropriate location, after consultation with Artist, a plaque or sign identifying Artist and his assistants, the title of the Work and the year of completion.

Agency recognizes that maintenance of the sculpture on a regular basis is essential to the integrity of the sculpture. Accordingly, for the life of the Work, Agency shall reasonably assure that sculpture is properly maintained and protected. The Artist shall provide a detailed description of and schedule for maintenance of the Work before receiving final payment for the Work. In the event that Artist is not satisfied with maintenance of the sculpture, Artist's sole remedy shall be to withdraw his name from the art.

Agency shall be the owner of the sculpture and shall have all rights and prerogatives of ownership, including but not limited to the right to remove the art, sell it, repair it, or transfer it. At any time that Artist is not satisfied with Agency's manner of ownership of the sculpture, Artist may withdraw his name from the art as his sole remedy.

In the event that Agency determines to remove or relocate the work it shall comply with the following steps: The removal proposal shall first be submitted to and considered by the City of Milpitas Public Art Committee, which committee shall make a recommendation to the Milpitas City Council. The City Council, or designee, shall have the authority to decide whether the work shall be removed or relocated, after considering the recommendations and consulting with Artist. Artist shall be offered a choice of sites for relocation if Agency in its judgment

determines that relocation sites exist, may consult with the City of Milpitas designee regarding the site of relocation for the Work, and shall be paid a reasonable fee for such consultation services, provided the Agency and the Artist agree in writing and prior to the commencement of any consultation to the Artist's fee for such services. Artist shall have the right to have his name removed from the sculpture, as well as from the plaque in the event the Artist determines that the sculpture will not be relocated to a site mutually agreeable to Agency and Artist. Artist expressly waives any rights that he or his heirs may have under California Civil Code Sections 987 and 989; copies of those sections are attached hereto as Exhibit B.

Agency shall have the right to determine when and if repairs and restorations to the sculpture will be made. In the event that the Agency makes repairs or restorations, Agency shall notify the Artist in writing of the repairs or restorations and the Artist shall have the right, at his sole option, to have his name and association with the work severed. To the extent practical, the Artist, during his lifetime, shall be given the opportunity to make or supervise significant repairs and restorations and shall be paid a reasonable fee for any such service, provided that the Agency and the Artist shall agree in writing prior to the commencement of any significant repairs or restorations to the Artist's fee for such services. In the event that repairs and restorations need to be made to the Work and Artist is deceased, Agency shall have no further obligation to Artist or his heirs.

**4. COPYRIGHT.** Artist retains all rights under the Copyright Act of 1976 §§101 et seq. In view of the intention that the Work in its final dimension shall be unique, the Artist shall not make any exact scale duplicate, three-dimensional reproductions of the final Work, nor shall the Artist grant permission to others to do so, except with the prior,

written permission of the Agency. However, Artist shall have the right to make and sell drawings and three-dimensional maquettes of the work.

The Artist grants to the Agency and its assigns an exclusive, irrevocable, royalty-free license to make two-dimensional reproductions of the Work for Agency's teaching, research and public service purposes including, but not limited to, reproductions used in advertising, brochures, media publicity, and catalogues or other similar publications, provided that these rights are exercised in a tasteful and professional manner. Agency shall make reasonable efforts to provide Artist copies of all reproductions. Agency shall not sell images of the Work without Artist's prior written consent that shall not be unreasonably withheld.

All reproductions by the Agency shall contain a credit to Artist. In any public showing, under the Artist's control, of reproductions of the Work, the Artist shall use his best efforts to give a credit reading substantially "an original work owned and commissioned by The Redevelopment Agency of the City of Milpitas, California."

**5. RISK OF LOSS.** The risk of loss of or damage to the sculpture shall be borne by the Artist until final acceptance by Agency. The Artist shall take such measures as are necessary to protect the Work from loss or damage until final acceptance except that the risk of loss or damage shall be borne by the Agency prior to final acceptance during such period of time as the partially or wholly completed Work is in the custody, control or supervision of the Agency. Artist shall not be responsible at any time for damage done to Work by Agency, its officers, employees, contractors, sub-contractors and agents, and the public.

**6. INDEMNITY.** Artist shall defend, indemnify and hold the City of Milpitas, the Redevelopment Agency, their officers, employees and agents

harmless from and against any and all liability, loss, expense (including reasonable attorneys' fees), or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Artist, its officers, employees and agents.

Agency shall defend, indemnify and hold Artist, its officers, employees and agents harmless from and against any and all liability, loss, expense (including reasonable attorneys' fees), or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Agency, its officers, employees, and agents.

Artist shall indemnify, defend, and hold harmless the City of Milpitas, the Redevelopment Agency, their officers, agents, and employees against all losses, damages, liabilities, costs, and expenses (including but not limited to attorneys' fees) resulting from any judgment or proceeding in which it is determined, or any settlement agreement arising out of the allegation, that Artist'S furnishing or supplying Agency with parts, goods, components, programs, practices, or methods under this order or Agency's use of such parts, goods, components, programs, practices, or methods supplied by Artist under this order constitutes an infringement of any patent, copyright, trademark, trade name, trade secret, or other proprietary or contractual right of any third party. Artist shall not settle such suit or action without the consent of Agency. Agency retains the right to participate in the defense against any such suit or action.

**7. INSURANCE.** Artist shall, at his expense, obtain, keep in force and maintain insurance to cover its performance under this agreement as follows.

See attached: EXHIBIT B - INSURANCE REQUIREMENTS - GENERAL

**8. COOPERATION IN DISPOSITION OF CLAIMS.** Agency and Artist agree to cooperate with each other in the timely investigation and disposition of audits, disciplinary actions and third-party liability claims arising out of any services provided under this Agreement. The parties shall notify one another as soon as possible of any adverse event that may result in liability to the other party. It is the intention of the parties to cooperate fully in the disposition of all such audits, actions or claims. Such cooperation may include, but is not limited to, timely notice, joint investigation, defense, disposition of claims of third parties arising from services performed under this Agreement and making witnesses available.

To the extent allowed by law, Agency and Artist shall have reasonable and timely access to the records, plans, drawings or other records of the other party relating to any claim or investigation related to services provided pursuant to this Agreement; provided however, that nothing shall require either Artist or Agency to disclose any documents, records or communications which are subject to privilege.

**9. ARBITRATION.** In the event of any dispute arising between the parties concerning the interpretation or enforcement of the provisions of this Agreement, the parties agree to first attempt in good faith to resolve the dispute between themselves using a mutually agreed upon mediator if necessary, the costs to be equally split. If the parties are unable to resolve the dispute within thirty (30) working days, then all matters in controversy shall be submitted to arbitration pursuant to California Code

of Civil Procedure Section 1280, et seq. using the offices of the American Arbitration Association. Arbitration shall be initiated by either party making a written demand for arbitration on the other party. Unless the parties can agree on a single arbitrator within ten (10) working days from the receipt of the written demand for arbitration, each party shall designate an arbitrator within fifteen (15) working days of receipt of the written demand for arbitration. Within seven (7) working days of the appointment of two arbitrators, those arbitrators shall designate a third arbitrator. The parties agree that either party to an arbitration may seek judicial review by way of a petition to the court to confirm, correct or vacate an arbitration award pursuant to the provisions of California Code of Civil Procedure §§ 1285 and 1294.2.

**10. EQUAL OPPORTUNITY AFFIRMATIVE ACTION.** Artist shall not maintain or provide racially segregated facilities for employees at any establishment under its control. Artist agrees to adhere to the requirements set forth in Executive Orders 11246 and 11375, and with respect to activities occurring in the State of California, to the California Fair Employment and Housing Act (Government Code section 12900 et seq.). Expressly, Artist shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, ancestry, medical condition (as defined by California Government Code Section 12925f), marital status, age, physical and mental handicap in regard to any position for which the employee or applicant for employment is qualified, or because he or she is a disabled veteran or veteran of the Vietnam era. Artist shall further specifically undertake affirmative action regarding the hiring, promotion and treatment of minority group persons, women, the handicapped, and disabled veterans and veterans of the Vietnam era. Artist shall communicate this policy in both English and Spanish to all persons concerned within its company, with outside recruiting services and the minority community at large.

Artist shall provide the Agency on request a breakdown of Artist's labor force by groups, specifying the above characteristics within job categories, and shall discuss with the Agency its policies and practices relating to its affirmative action programs.

**11. INTERRUPTION OF SERVICE.** Either party shall be excused from any delay or failure in performance hereunder caused by reason of any occurrence or contingency beyond its reasonable control, including, but not limited to, acts of God, acts of way, fire, insurrection, labor disputes, riots, earthquakes, or other acts of nature. The obligations and rights of the party so excused shall be extended on a day-to-day basis for the time period equal to the period of such excusable interruption.

**12. ATTORNEYS' FEES.** In the event of any action, suit or proceeding between the parties hereto, the cost of such action, suit or proceeding, including reasonable attorneys' fees, shall be borne by the losing party or, in the case of an arbitration, as determined by the arbitrator, except that the maximum amount of fees that either party may be due from the other for actions based upon this agreement shall be \$50,000 for said attorney's fees whether incurred during administrative or judicial proceedings or whether during a single or multiple proceedings.

**13. SEVERABILITY.** If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws effective during the term hereof, such provision shall be fully severable. This Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never been a part of the Agreement, and the remaining provisions shall remain in full force and effect unaffected by such severance, provided that the severed provision(s) are not material to the overall purpose and operation of this Agreement.

**14. TIME OF THE ESSENCE.** Time is of the essence in this Agreement. The Agency shall always grant a reasonable extension of time to the Artist in the event there is a delay on the part of Agency in performing its obligations under this Agreement in completing the underlying capital project, or if conditions beyond the Artist's control or Acts of God render timely performance of the Artist's services impossible. Failure to fulfill contractual obligations due to conditions beyond either party's reasonable control will not be considered a breach of contract; provided that such obligations shall be suspended only for the duration of such conditions.

**15. TERMINATION.** In the event of a material breach of this Agreement, the aggrieved party may terminate this Agreement by giving thirty (30) days prior written notice of termination to the breaching party. However, should the breaching party cure the breach within this thirty (30) day period, the notice of termination shall be revoked.

**16. WAIVER.** Waiver by either party of any breach of any provision of this Agreement or warranty of representation herein set forth shall not be construed as a waiver of any subsequent breach of the same or any other provision. The failure to exercise any right hereunder shall not operate as a waiver of such right. All rights and remedies provided for herein are cumulative.

**17. EXHIBITS.** Any and all exhibits attached hereto are incorporated herein by reference and made a part of this Agreement.

**18. MODIFICATIONS AND AMENDMENTS.** This Agreement may be amended or modified at any time by mutual, written consent of the authorized representatives of both parties. Agency and Artist agree to amend this Agreement to the extent amendment is required by an

applicable regulatory authority and the amendment does not materially affect the provisions of this Agreement.

**19. ENTIRE AGREEMENT.** This Agreement contains all of the terms and conditions agreed upon by the parties regarding the subject matter of this Agreement and supersedes any prior agreements, oral or written, and all other communications between the parties relating to such subject matter.

**20. VENUE AND GOVERNING LAW.** The law of the State of California shall control this Agreement and any document to which it is appended. Any arbitration or litigation arising out of this Agreement shall take place in Santa Clara County, California.

**21. NOTICES.** All notices required under this Agreement shall be deemed to have been fully given when made in writing, faxed, and deposited in the United States mail, postage prepaid, certified mail, return receipt requested, and addressed as follows:

**To AGENCY:** City Manager  
City of Milpitas  
455 East Calaveras Boulevard  
Milpitas, CA 95035

**To ARTIST:** Cork Marcheschi  
192 Connecticut Street  
San Francisco, CA 94107  
415-730-4204 CELL  
650-738-2932 Office

Executed this 7 day of 6, 2008, at Milpitas, California.

For the Artist

For The Redevelopment Agency of  
the City of Milpitas

By: Cork Marcheschi  
Title: Artist  
Date: June 7, 2008

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**AGREEMENT BETWEEN THE CITY OF MILPITAS AND THE MILPITAS  
HISTORICAL SOCIETY REGARDING A 1932 GMC FIRE TRUCK KNOWN AS  
LEAPIN LENA**

**DRAFT**

**THIS AGREEMENT**, made and entered into this \_\_\_\_\_, 200\_\_, by and between the **CITY OF MILPITAS**, a municipal corporation of the State of California, hereinafter referred to as "City", and the **MILPITAS HISTORICAL SOCIETY**, hereinafter referred to as "Society".

**RECITALS:**

WHEREAS, Society is in possession and control of a 1932 GMC fire truck that has been restored; and

WHEREAS, Society wishes to provide public viewing of and access to the historical fire truck at the City's newly constructed parking garage at 120 North Main Street and the City concurs that the public will be benefitted from a display of the truck; and

WHEREAS, the City, as part of the new garage construction, installed attractive graphical displays that depict some the early history of the City and also will construct a removable metal railing enclosure near elevator #1 for the purpose of displaying the City's first volunteer fire department truck commonly known as Leapin Lena; and WHEREAS, the PARTIES desire to memorialize such agreement in writing;

**NOW, THEREFORE**, for and in consideration of their mutual promises and agreements, and subject to the terms, conditions, and provisions hereinafter set forth, the PARTIES hereto agree as follows:

- 1. Use of the Garage.** City agrees that Society may display and store the fire truck within the new parking garage at 120 North Main Street on or before January 31, 2009, within the metal railing enclosure constructed for that purpose as shown in exhibit "A". Society agrees to display the truck within garage in the area provided for a period of at least 10 years, unless the City or Society terminates the agreement as set forth herein. Society agrees to comply with any requirements of the Building Department and Fire Department regarding the display of the fire truck within the garage.
- 2. Hours of the Garage.** The garage will remain open to the public to serve Midtown developments, the Library, the book drop within the garage, and other purposes as the City determines. The anticipated hours that garage will remain open is from 5:00 a.m. to 1:00 a.m., seven days a week, 365 days a year. The hours the garage remains open are subject to change in the City's discretion and City has no obligation to notify the owner of the fire truck before the change.
- 3. Security.** The City is under no obligation to provide security for the fire truck and shall not be responsible to Society or liable for theft, vandalism, or damage to the fire truck. Security cameras and digital video recording equipment have been installed within the garage, and at least one camera may cover the fire truck. In addition, City will install, to the extent reasonably permissible a security system the design of which is at the discretion of the City, at or about the railing to

discourage unauthorized intrusion beyond the railing. Society shall be solely responsible for the truck's security and repair of damage and agrees to carry comprehensive and collision insurance providing at least \$10,000 coverage on the truck and will install a vehicle alarm system to protect it from vandalism and theft.

**4. Maintenance.** Society shall be solely responsible for the truck's maintenance, washing and cleaning, and shall provide for its washing at least once a month or as necessary to maintain a clean and attractive appearance. The City has no obligation nor is it responsible for providing any maintenance, washing, or cleaning of the fire truck while it is displayed and housed within the City's parking garage. The City will provide access to a water hose bib near elevator #1 for use in cleaning and washing the fire truck. The City shall be responsible for cleaning and maintenance outside the railing and will routinely sweep, clean, and pick-up trash around the fire truck as necessary during routine maintenance of the garage structure. The registered owner shall provide drip pan(s) as necessary under the truck to prevent staining of the garage floor.

**5. Use of the Truck.** Society shall have full use and enjoyment of the truck while it is displayed and housed within the City's parking garage. Society agrees to notify the City's Building Maintenance Section, (408) 586-2662, 24-hours in advance (and 72 hours on weekends) prior to dismantling the security railing surrounding the truck and removing the truck from the garage. The City shall provide Society, or its designee, access to the fire truck at all reasonable times, which are considered the normal business hours of City Hall or the normal hours the parking garage is open to the public or at such other times the Parties are jointly agreeable to.

**6. Insurance.** During the term of this agreement, Society shall maintain liability insurance covering the fire truck in the amount of no less than \$100,000. Society shall provide City with proof of all insurance coverage by submitting to City a certificate of insurance evidencing such coverage to be in effect at all times during the duration of this Agreement. Such insurance shall not be a "claims made" policy. In addition, Society shall add the City as an additional insured on such insurance policy if it is not cost prohibitive to do so.

**7. Indemnification.** Society shall indemnify, defend and hold the City harmless from and against all claims, demands and causes of action for injury, death or damage to any person or property which may arise or result from the Society's performance of this Contract or from acts or omissions of any person(s) employed by Society or acting on its behalf.

City shall indemnify, defend and hold the Society harmless from and against all claims, demands and causes of action for injury, death or damage to any person or property which may arise or result from the City's performance of this Contract or from acts or omissions of any person(s) employed by City or acting on its behalf.

**8. Term of Agreement.** The term of this Agreement shall commence upon execution of the Agreement by both parties and shall remain in effect until terminated by mutual agreement of the PARTIES or by the City giving 30 days written notice to the Society. Society may terminate this Agreement only if the fire

truck is vandalized on two or more occasions while located in the City parking structure or if due to vandalism or other cause of damage to the fire truck, Society's comprehensive and collision coverage is cancelled.

**9. Amendments to the Agreement.** All changes or extensions to this Agreement must be in writing in the form of an amendment and approved by both parties.

**10. Notices.** Notices given under this Agreement shall be delivered by first class mail addressed to the appropriate party at the following addresses:

To CITY: 455 E. Calaveras Boulevard  
Milpitas, CA 95035  
Attn: Thomas C. Williams, City Manager

To Society: \_\_\_\_\_  
\_\_\_\_\_

**IN WITNESS WHEREOF**, the parties have entered into this Agreement as of the date written on Page 1.

**CITY OF MILPITAS**  
a municipal corporation

**MILPITAS HISTORICAL SOCIETY**

By: \_\_\_\_\_  
City Manager

By: \_\_\_\_\_  
Owner of Fire Truck

Attest:  
  
\_\_\_\_\_  
City Clerk

Attest:  
  
\_\_\_\_\_

APPROVED AS TO FORM & LEGALITY:

\_\_\_\_\_  
City Attorney