

RESOLUTION NO. 29347

A RESOLUTION AUTHORIZING THE MAYOR TO ENTER INTO A CONTRACT FOR THE CREATION OF THE FALLEN FIVE MEMORIAL IN THE TENNESSEE RIVERPARK, AMNICOLA MARSH PARK, IN SUBSTANTIALLY THE FORM ATTACHED, RE: SITE STUDIO (ARTISTS NORMAN LEE AND SHANE ALBRITTON), IN THE AMOUNT OF SEVEN HUNDRED FIFTY THOUSAND DOLLARS (\$750,000.00).

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BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, that it is hereby authorizing the Mayor enter into a contract for the Creation of the Fallen Five Memorial in the Tennessee Riverpark, Amnicola Marsh Park, in substantially the form attached, RE: Site Studio (artists Norman Lee and Shane Albritton), in the amount of \$750,000.00.

ADOPTED: March 6, 2018.

/mem

February 21, 2018

Daisy Madison  
Finance Department  
City of Chattanooga  
101 East 11<sup>th</sup> Street  
Chattanooga, Tennessee 37402

In re: Fallen Five Memorial

Dear Daisy:

Per City Charter Chapter V, Article 1, 3.96(4), I am sending you the original City of Chattanooga Public Art Standard Form Agreement between the City and Shane Albritton and Norman Lee (RE:Site Studio) for the Fallen Five Memorial. The document was executed by Katelyn Kirnie, the Public Art Director, on the \_\_\_\_\_ day of \_\_\_\_\_, 2018.

I have provided copies of this letter and the executed documents to the departments listed below, and uploaded copies of this letter and the executed documents on Google Drive, under ECD/Public Art/RE:Site Studio.

1. Purchasing – \_\_\_\_\_
2. Office of City Attorney – Wade A. Hinton
3. Department Administrator – Katelyn Kirnie

I have also provided copies to RE:Site Studio, via email, and also kept copies in my internal file on this matter.

If you have any further questions or concerns, please do not hesitate to contact me.

Sincerely,

Ana May  
Program Assistant  
Chattanooga Public Art Department

Cc: \_\_\_\_\_, Purchasing  
Wade A. Hinton, OCA  
Katelyn Kirnie, Public Art Director

Enclosure as stated

- SELECT:**  **TEMPORARY INSTALLATION**  
 **PERMANENT INSTALLATION**

**CITY OF CHATTANOOGA**  
**PUBLIC ART STANDARD FORM AGREEMENT**

This PUBLIC ART STANDARD FORM AGREEMENT (“Agreement”) governs the purchase, creation, and installation of temporary and permanent works of art (“Artwork”) on property owned and/or operated by the City of Chattanooga (“City”), a Tennessee Municipal Corporation.

In consideration of the mutual promises and covenants contained herein, the City and Artist(s) (“Artist”), as further defined herein, (collectively “Parties”) agree as follows:

**1. Effective Date.**

This Agreement is effective as of the date signed by the City.

**2. Governing Documents.**

The following documents are Exhibits to this Agreement and incorporated herein by reference, unless otherwise indicated in writing and signed by both parties:

- a. City Purchase Order Standard Terms and Conditions (**EXHIBIT A**)
- b. Scope of Work/Specifications and Compensation Schedule (**EXHIBIT B**)
- c. Conservation Record and Maintenance Form (**EXHIBIT C**)
- d. Artwork Site Diagram/Drawing (**EXHIBIT D**)
- e. Artwork Preliminary Design (**EXHIBIT E**)

**3. City Purchase Order Standard Terms.**

In the event of a conflict between the terms set forth in this Agreement and the City Purchase Order Standard Terms and Conditions (“City Standard Terms”), the City Standard Terms shall prevail, unless specifically noted otherwise and agreed to by the parties in writing.

**4. Term.**

For TEMPORARY EXHIBITS, the term of the Agreement shall be for a period of two years from the Effective Date, and the Agreement may be renewed for three (3) additional one (1) year terms on mutual agreement by Parties. For PERMANENT EXHIBITS, the terms of the Agreement shall terminate thirty (30) days after the City’s written acceptance of the installed Artwork; but in no instance shall the Agreement extend beyond five (5) years from the Effective Date. Certain provisions shall survive the termination of the contract period, including the provisions governing Indemnification and Hold Harmless, Insurance, ID Rights and Waivers, Representations and Warranties, and Licensing.

## **5. Scope of Work.**

The Artist shall prepare a Scope of Work and Compensation (**EXHIBIT B**) that shall set forth the following:

- a. Project phases and deliverables at each phase (conceptual design, final design/structural design, fabrication and installation)
- b. Project milestones and deadline for completion of each milestone
- c. Proposed site visits/meetings
- d. Costs associated with all work and expenses and an applicable payment schedule.

## **6. Work Completion and Change Orders.**

Artist understands that time is of the essence in the rendering of services under this Agreement and shall complete the work in accordance with the schedule set forth in Scope of Work, **EXHIBIT B**. Any amendments to the schedule require a written change order to be approved in writing by the appropriate City Public Art Director. In the event so designated in the public art guidelines, the change may be approved by the public art governing body, board or committee (“Approval Body”). Any responsibilities of the City related to the design, fabrication or installation must be specifically set forth in **EXHIBIT B**, in a section entitled “City Responsibilities.”

## **7. Approval.**

The Public Art Director or City designated Approval Body shall review and approve the Artwork at the designated project phases. The City’s approval, through its Public Art Division or through a designated Approval Body, shall not release the Artist of the responsibility for the correction of mistakes, errors or omissions contained in the plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the plans were developed or approved.

The Parties acknowledge that certain elements of the Artwork are to be fabricated at locations away from the designated City property (“Site”). The City reserves the right to inspect each of the elements prior to transporting to the Site and prior to installation.

## **8. Transportation and Installation.**

Artist is responsible for arranging transportation and installation of the Artwork on the designated Site in consultation with the appropriate City Public Art and Public Works personnel. Artist is responsible for any costs associated with storing the Artwork in advance of the scheduled installation date.

## **9. Licenses and Permits.**

Artist shall secure and purchase any and all required licenses, permits and similar legal authorizations necessary for the installation of the Artwork on the Site.

## **10. Representations and Warranties.**

Artist represents and warrants:

- a. The Artist has full power and authority to enter into this Agreement.
- b. The Artwork is solely the result of the artistic effort of Artist, and Artist is the sole creator of the Artwork.
- c. The Artwork is a unique and original creation from the Artist that has not been previously created or sold in any form (except as related to the procurement forming the basis of this Agreement).
- d. The Artist is the owner of the Artwork.
- e. The Artwork is the exclusive work of the Artist.
- f. The Artwork is free and clear of all liens.
- g. The Artist has free and clear right to sell the Artwork.
- h. The Artwork, or duplicate thereof, has not been accepted for sale elsewhere.
- i. The Artwork is not in the public domain.
- j. The Artwork does not infringe on the proprietary right at common law or intellectual property rights of any third party.
- k. Artist will not enter into any agreements with any other person or entity that conflict with the terms of this Agreement.

## **11. Warranties-Quality and Condition.**

Artist represents and warrants that all work will be performed in accordance with professional workmanlike standards and be free from defective or inferior materials and workmanship, including any defects consisting of inherent vice, or qualities that cause or accelerate the deterioration of the Artwork.

Artist represents and warrants that the Artwork and materials used are not currently known to be harmful to the public health and safety. Artist will accordingly provide a list of materials and substances used in the completion of the Artwork.

If within two years after acceptance of the Artwork, City observes any breach of warranty that is curable by Artist, Artist shall, at the request of the City, promptly cure any breach to the satisfaction of the City and consistent with professional conservation standards, at no cost or expense to the City. City agrees to provide reasonably prompt notice to the Artist of any breach.

If within one year after acceptance of the Artwork City observes any breach of warranty described in this section that is either not curable by Artist or not timely cured by Artist, Artist is responsible for reimbursing the City for all damages, expenses, and loss incurred by City as a result of the breach.

## **12. Indemnification and Hold Harmless.**

Artist, its employees, officers, contractors, and subcontractors shall indemnify (including attorney's fees) and hold harmless the City, its officials, employees, officers, and agents (the

“Indemnified Parties”), in the event of any claim, lawsuit, liability, judgment, or costs arising directly or indirectly from the Artist's performance of this Agreement. **The provisions of this section shall survive termination of this Agreement.**

**13. Site Appearance.**

Artist shall be responsible for maintaining the Site in a neat manner. Artist shall be responsible for any clean-up of the Site made necessary by the installation of the Artwork, including removal of equipment, materials and the repair of any portion of the Site or surrounding area damaged by the installation of the Artwork.

**14. Insurance.**

During the term of this Agreement Artist shall, at its sole expense, obtain and maintain in full force and effect for the duration of the Agreement and any extension hereof insurance coverage levels as set forth in the City Standard Terms, **EXHIBIT A**, and produce a Certificate of Insurance that shows proof of such insurance coverage.

**15. Acceptance.**

City shall require written notice of final acceptance of the Artwork by the City. Until the point of acceptance, any injury to persons or property caused by the Artist's Artwork or any damage to, theft of, vandalism to, complete destruction of, or acts of God or nature affecting the Artist's Artwork are the sole responsibility of the Artist.

**16. Final Inspection.**

Final inspection of the Artwork shall be conducted by the City within thirty (30) days of receiving written notice from the Artist of the completed installation.

**17. Documentation.**

Prior to receipt of final payment, Artist shall provide photographic documentation of the Artwork, including: a set of three high resolution digital files of the Artwork and a written narrative description of the Artwork.

**18. Copyright, Trademark, Service Mark and Infringement of Third Party Intellectual Property Rights.**

Artist shall, at its own expense, be entitled to and shall have the duty to defend any suit which may be brought against the City to the extent it is based on a claim that the Artwork infringes upon the intellectual property rights of a third party.

Artist shall further indemnify and hold harmless the City against any award of damages and costs made against City by a final judgment of a court of last resort in any such suit.

All copyright and further reproduction rights to the Artwork remain with the Artist.

City shall provide the Artist immediate notice in writing of the existence of any such claim and give the Artist the full right and opportunity to conduct the defense thereof, together with all available information and reasonable cooperation, assistance and authority to enable Artist to do so.

City reserves the right to participate in the defense of any such action.

Artist shall have the right to enter into negotiations for and to effect settlement or compromise of any such action, but no such settlement or compromise shall be binding upon City unless approved by the City consistent with the requirements set forth in Chattanooga City Code. **The provisions of this section 18. shall survive termination of this Agreement.**

#### 19. **License.**

Artist grants a perpetual license to the City for the use of the Artwork for educational, community, and other non-commercial uses. In the event the City wishes to use the Artwork for commercial purposes, the Artist agrees to negotiate in good faith to enter into a separate agreement governing the use of the Artwork for commercial purposes.

#### 20. **Intellectual Property: Rights and Waivers.**

##### a. **Ownership.**

Any artwork created for permanent installation under this Agreement shall be the property of the City. Ownership of the Artwork shall be transferred from the Artist to the City upon written final acceptance by the City. City shall retain all documentation regarding the Artwork. Upon final acceptance, City shall have a right to all plans, drawings, sketches, designs, and other work of the Artist pertaining to the Artwork for maintenance, repair and historical documentation purposes only, unless otherwise specified herein.

##### b. **Copyright.**

Artist retains all copyrights not otherwise granted to the City herein. Artist is responsible for registering the Artwork in his or her name with the U.S. Register of Copyrights at no additional cost to the City.

c. Reproductions.

Artist shall not create or display three-dimensional reproductions of the Artwork at any location other than the City Site, nor shall Artist grant permission for others to create or display three-dimensional reproductions, except with written permission of the City.

d. Exclusive License for Non-Commercial Reproductions.

Artist grants City the exclusive right to publicly display and reproduce images of the Work by photographic, electronic, digital, mechanical, or any other method that may become available following the installation of the Artwork for educational, procurement, public relations, arts promotional, tourism, and other non-commercial purposes. On any such reproductions, City will acknowledge Artist's authorship and provide copyright notification substantially in the following form: Artist's name and date of publication. In the event City wishes to use the Artwork for commercial purposes, City shall contact the Artist to negotiate a separate agreement.

e. Publicity.

City shall have the right to use the Artist's name, likeness, and biographical information, in connection with the display or reproduction and distribution of the Artwork.

f. Credits.

Artist agrees that any reproduction made by Artist for publicity purposes shall refer to "City of Chattanooga Public Art." City shall have the right to review and approve any public announcements or press releases generated by Artist or Artist's sub-contractors regarding the Artwork until the Artwork has been publicly dedicated and final acceptance has been issued.

Artist agrees to be photographed or videoed for purposes of promoting the Artwork. Artist grants City permission to use his or her likeness in photograph, video or digital reproduction, for purposes of promoting the Artwork.

**21. Maintenance, Repair or Restoration.**

The Artist acknowledges that the Artwork must be durable, with due consideration given to the outdoor nature of the Artwork and its subsequent exposure to elements such as weather, temperature variation, and considerable movement of people and equipment. Artist must ensure that the Artwork's maintenance requirements will be reasonable in terms of time and expense.

With respect to any cleaning, maintenance, repair or restoration of the Artwork, Artist shall be consulted if possible if the need for repair or restoration arises. City will send written notice to the Artist at least thirty (30) days prior to the commencement of any repair and restoration work.



Artist understands that the Artist's participation shall be at no cost to the City. The nature of the repair shall not significantly alter the original appearance of the Artwork and shall be consistent with the Artist's repair instructions. The Artist shall not be responsible for bearing any costs associated with the maintenance, repair or restoration of the Artwork for damage or deterioration to the Artwork that occurs at a point after the City's final written acceptance of the Artwork.

The City shall maintain the Artwork pursuant to the instructions provided by Artist and submitted by Artist on the Conservation Record and Maintenance Form attached hereto as **EXHIBIT C** and incorporated herein by reference.

Artist shall take reasonable measures to protect or preserve the integrity of the Artwork, such as the application of protective or anti-graffiti coatings.

Artist warrants the foreseeable exposure to the elements and general wear and tear will not cause the Artwork to fall below an acceptable standard of public display.

Prior to receipt of final payment, Artist shall provide a maintenance manual with a description of all materials, products and fabrication methods used in the Artwork and the required care and upkeep involved, including: (i) product data sheets for any material or finish used; (ii) the names and contact information of relevant manufacturers or producers; and, (iii) to the extent the Artwork incorporates products covered by a manufacturer's warranty, Artist shall provide copies of such warranties. Artist warrants the responsible maintenance of the Artwork will not require procedures substantially in excess of those described in the recommended maintenance manual.

Repairs and restoration of the Artwork, if any, are to be distinguished from maintenance of the Artwork, as addressed above. City shall determine when and how repairs and restoration to the Artwork will be made. However, at no cost to City whatsoever, and to the extent practicable, Artist will have the opportunity to comment on and participate in all repairs and restoration that are made during the Artist's lifetime. City will give written notice to the Artist prior to undertaking repairs or restoration of the Artwork, and Artist will have thirty (30) days from the date that the notice is sent by City to advise City, as specified in the notice, of Artist's wish to so comment and/or participate. Notice will only be sent by City to the address provided by Artist, in keeping with the Communications provision of this Agreement in Section 29. where Artist is responsible for keeping City advised of Artist's current mailing address. Artist understands that City's repairs and restoration of the Artwork will be limited and determined in significant part by funding decisions of the City Council and other officials and departments. **The provisions of this section shall survive termination of this Agreement.**

## **22. Deaccessioning.**

The Artist agrees and acknowledges that should deaccessioning of the Artwork become necessary at any point the City shall proceed with deaccessioning pursuant to the guidelines as may be established by the City's Public Art division or as may be established by an Approval Body.

**23. Resiting.**

City intends that the Artwork shall remain in its designated site as set forth in the drawing attached hereto as **Exhibit D** and incorporated herein by reference; however, City reserves the right to relocate the Work.

**24. Societal Remains Uncovered at Site.**

If, in the process of installation, the excavation or moving of dirt causes human remains to be uncovered at the Site, Artist shall immediately stop all work at the Site and immediately notify City of the discovered human remains. The Parties shall then work together to follow applicable state and federal laws that address the discovery of human remains, and the Parties shall identify a new location for the Artwork that is satisfactory to both Parties. While the Parties work together to follow the applicable state and federal laws, all work at the Site and the Project Milestones and Deadlines, as outlined in **EXHIBIT B**, shall be put on hold (“Hiatus Period”).

Once the City determines that the discovered human remains have been properly and completely addressed according to applicable laws, the City shall notify the Artist in writing that the situation has been appropriately addressed. Such notice will automatically end the Hiatus Period, and at such time, the Artist shall submit, in writing, revised Project Milestones and Deadlines, which shall not impact the number of days needed for the Artist to complete the work.

**25. Waiver.**

No waiver of any provision of this contract shall affect the right of any party thereafter to enforce such provision or to exercise any right or remedy available to it in the event of any other default.

**26. Attorney Fees.**

Artist agrees that in the event either party takes legal action to enforce any provision of the contract or to obtain a remedy for any breach of the contract, and in the event City prevails in such action, Artist shall pay all expenses of such action incurred at any and all stages of the litigation, including costs, and reasonable attorney fees for City.

**27. Death or Incapacity of Artist.**

In the event of Artist’s physical incapacity or death prior to the completion of the Artwork, all work performed up to the point of incapacity or death will be reasonably compensated. Upon payment to compensate Artist or Artist’s estate for all work performed to the date of incapacity or death, the incomplete Artwork and any material paid for by City will become the property of City. However, if the Artwork is substantially designed and/or completed and it is feasible for the work to be fully completed without undue delay, City may elect to proceed under the terms of this Agreement and hereby has the consent of the Artist to proceed. In the event the City elects to proceed with the completion of the Artwork, all remaining work to be completed in accordance with this Agreement will be delegated to:

Name: **METALAB**  
Address: 20 North Sampson  
Houston, TX 77003  
Phone Number: (713) 426-3640

**28. Compensation.**

The pricing details are demonstrated in **EXHIBIT B**. Artist shall be paid as work is completed and City will be accordingly invoiced as milestones, as set forth in **EXHIBIT B**, are completed and approved by City.

There will be no other charges or fees for performance under this Agreement. City will make reasonable efforts to make payments within thirty (30) days of receipt of invoice but in any event shall make payment within sixty (60) days.

**29. Taxes.**

City shall not be responsible for any taxes that are imposed on Artist. Furthermore, Artist understands that it cannot claim exemption from taxes by virtue of any exemption that is provided to City.

**30. Communications.**

Any notice to the Parties shall be made in writing to the respective addresses specified below:

**City:** City of Chattanooga  
Attn: Purchasing  
101 E. 11<sup>th</sup> Street, Suite G3  
Chattanooga, TN 37402  
(423) 643-7230

With a copy to: Office of the City Attorney  
100 E. 11<sup>th</sup> Street, Suite 200  
Chattanooga, TN 37402

**Artist:** See artist address as listed in **EXHIBIT B**. Artist shall be responsible for keeping City advised of Artist's current mailing address.

**31. Venue.**

Any action between the parties arising from this Agreement shall be maintained in the courts of Hamilton County, Tennessee

### **32. Governing Law.**

The validity, construction, and effect of this Agreement and any and all extensions and/or modifications thereof shall be governed by the laws of the State of Tennessee. Tennessee law shall govern regardless of any language in any attachment or other document that the Artist may provide.

### **33. Termination.**

**Breach.** Should Artist fail to fulfill, in a timely and proper manner, its obligations under this Agreement, or if it should violate any of the terms of this Agreement, City shall have the right to immediately terminate the Agreement. Such termination shall not relieve Artist of any liability to City for damages sustained by virtue of any breach by Artist.

**Notice by City.** City may terminate this Agreement at any time upon thirty (30) days written notice to Artist and a reasonable reconciliation of costs incurred up to the date of written termination.

**Lack of Funding.** Should funding for this Artwork be discontinued, City shall have the right to terminate the Agreement immediately upon written notice to Artist.

### **34. Fundraising Efforts.**

Artist acknowledges that the City has undertaken fundraising efforts to procure the necessary funds to acquire the Artwork. In the event that the City needs additional time to continue its fundraising efforts, the Parties agree that the Project Phases and Deliverables and the Project Milestones and Deadlines, as outlined in **EXHIBIT B**, shall be put on hold (“Hiatus Period”) until the necessary funds have been raised by the City.

Once the City has completed any additional fundraising efforts, the City shall notify the Artist in writing that the fundraising activities have ceased. Such notice will automatically end the Hiatus Period and the City will expect Artist to immediately resume performance of the work as set forth in **EXHIBIT B**.

### **35. City Property.**

Any City property that is in Artist’s possession shall be maintained by Artist in good condition and repair, and shall be returned to City by Artist upon termination of the Agreement. All goods, documents, records, and other work product and property produced during the performance to this Agreement are deemed to be City property.

### **36. Contingent Fees.**

Artist hereby represents that Artist has not been retained nor retained any persons to solicit or secure a City contract upon an agreement or understanding for a contingent commission, percentage, or brokerage fee, except for retention of bona fide employees or bona fide established commercial selling

agencies for the purpose of securing business. Breach of the provisions of the paragraph is, in addition to a breach of this contract, a breach of ethical standards which may result in civil or criminal sanction and/or debarment or suspension from being an Artist or subcontractor Artist under City contracts.

The Parties have read and understand the terms set forth herein. By signing this Agreement below, the Parties affirm they have the authority to enter into this legally binding Agreement on behalf of the Parties hereto. The Parties agree to be bound by the terms set forth herein.

**CITY OF CHATTANOOGA**

Signature \_\_\_\_\_

Printed Name \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

**ARTIST**

Signature \_\_\_\_\_

Printed Name \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

**ARTIST**

Signature \_\_\_\_\_

Printed Name \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

**EXHIBIT A**  
**CITY PURCHASE ORDER STANDARD TERMS AND CONDITIONS**

1. **ACCEPTANCE-AGREEMENT.** Contractor's commencement of work on the goods/non-professional services subject to the purchase order or shipment/performance of those goods/non-professional services, whichever occurs first, is considered an effective mode of Contractor's acceptance of this purchase order. Any acceptance of the purchase order is limited to acceptance of the express terms contained on the face of the purchase order and these terms and conditions. Any proposal for additional or different terms or any attempt by Contractor to vary in any degree any of the terms of this offer in Contractor's acceptance is objected to and rejected, but any proposals do not operate as a rejection of this offer unless the variances are in the terms of the description, quantity, price or delivery schedule of the goods/non-professional services, but are considered a material alteration, and this offer will be considered accepted by Contractor without additional or different terms. Additional or different terms or any attempt by Contractor to vary in any degree any of the terms of this purchase order are considered material and are objected to and rejected, but the purchase order does not operate as a rejection of the Contractor's offer unless it contains variances in the terms of the description, quantity, price or delivery schedule of the goods/non-professional services.

2. **GOVERNING LAW.** This Agreement shall be governed by the laws of the State of Tennessee and the Codes of the City of Chattanooga ("City").

3. **COMPENSATION AND PAYMENT TERMS.** For the completion of the Work, City shall pay Contractor the contract sum set forth in the purchase order. Payments may be made in amounts which are consistent with percentage of goods/non-professional services completed and invoiced by the Contractor as set forth in the purchase order.

The City's delivered payment terms are payment within thirty (30) days except where the law provides otherwise. Payment may be sooner where cash discounts are offered for early payment, however, cash discounts offered will not be considered in determining lowest bidder. In no event will payment be made prior to receipt of an original invoice containing invoice and purchase order numbers and receipt of purchased item(s). The City is not liable for delays in payment caused by failure of the Contractor to send invoice to the address referenced herein.

4. **INSPECTION/TESTING.** Payment for the goods delivered does not constitute acceptance of the goods. City has the right to inspect the goods and to reject any or all of the goods which are in City's judgment defective or nonconforming. Goods rejected and goods supplied in excess of quantities called for may be returned to Contractor at its expense and in addition to City's other rights. City may charge Contractor all expenses of unpacking, examining, repacking and reshipping those goods. In the event City receives goods whose defects or nonconformity is not apparent on examination, City reserves the right to require replacement, as well as payment of damages. Nothing contained in this purchase order will relieve in any way the Contractor from the obligation of testing, inspection and quality control.

5. **PRICE WARRANTY.** Contractor warrants that the prices for the goods or nonprofessional services sold City are not less favorable than those currently extended to any other customer for the same or similar goods or nonprofessional services in similar quantities. In the event Contractor reduces its price for the goods or nonprofessional services during the term of this purchase order, Contractor agrees to reduce the prices charged to City correspondingly. Contractor warrants that prices shown on this purchase order are complete, and no additional charges of any type will be added without City's express written consent. Any additional charges include, but are not limited to, shipping, packaging, labeling, custom duties, taxes, storage, insurance, boxing, crating.

6. **STANDARD OF CARE.** Contractor shall exercise the same degree of care, skill, and diligence in the performance of services as is ordinarily possessed and exercised by a professional Contractor under

similar circumstances in the same area of practice. Contractor makes no warranty or guarantee, either expressed or implied, as part of this agreement.

7. **INDEMNIFICATION.** Contractor must defend, indemnify and hold harmless the City against all damages, claims or liabilities and expenses (including attorney's fees) arising out of or resulting in any way from any defect in the goods or services purchased, or from any act or omission of Contractor, its agents, employees or subcontractors.

8. **INSURANCE.** Contractor shall purchase and maintain during the life of this Agreement, insurance coverage which will satisfactorily insure Contractor against claims and liabilities which arise because of the execution of this Agreement, with the minimum insurance coverage as follows:

- a. **Commercial General Liability Insurance**, with a limit of \$1,000,000 for each occurrence and \$2,000,000 in the general aggregate.
- b. **Automobile Liability Insurance**, with a limit of \$1,000,000 for each accident, combined single limit for bodily injury and property damage.
- c. **Worker's Compensation Insurance and Employer's Liability Insurance**, in accordance with statutory requirements, with a limit of \$500,000 for each accident.
- d. **Professional Liability Insurance**, with a limit of \$1,000,000 for each claim and aggregate.

If any of the above cited policies expire during the life of this Agreement, it is the Contractor's responsibility to forward renewal Certificates within ten (10) days after the renewal date containing all the aforementioned insurance provisions. Certificates must specifically cite the following provisions:

i. City of Chattanooga, its agents, representatives, officers, directors, officials and employees must be named an Additional Insured under the following policies:

- a) Commercial General Liability
- b) Auto Liability
- c) Worker's Compensation Insurance and Employer's Liability Insurance
- d) Professional Liability Insurance

ii. Contractor's insurance must be primary insurance as respects performance of subject contract.

iii. All policies, except Professional Liability Insurance, if applicable, waives rights of recovery (subrogation) against City of Chattanooga, its agents, representatives, officers, directors, officials and employees for any claims arising out of work or services performed by Contractor under this Agreement.

9. **LIMITATIONS OF RESPONSIBILITY.** In no event is City liable for anticipated profits or for incidental or consequential damages. City's liability on any claim of any kind for any loss or damage arising out of or in connection with or resulting from this Agreement or from the performance or breach of this Agreement will in no case exceed the unit price allocable to the goods or nonprofessional services which gives rise to the claim. City is not liable for penalties of any description. Any action resulting from any breach of this Agreement by City as to the goods or nonprofessional services delivered must be commenced within one (1) year after the cause of action has accrued.

10. **PROPRIETARY INFORMATION-CONFIDENTIALITY-ADVERTISING.** Contractor must consider all information furnished by City to be confidential and not disclose any information to any other person, or use the information itself for any purpose other than performing this Agreement, unless Contractor obtains written permission from City to do so. This paragraph applies to drawings, specifications, or other documents prepared by Contractor for City in connection with this Agreement.

Contractor must not advertise or publish the fact that City has contracted to purchase goods from Contractor, nor is any information relating to the order to be disclosed without City's written permission. No commercial, financial or technical information disclosed in any manner or at any time by Contractor to City is to be considered secret or confidential, unless otherwise agreed in writing, and Contractor has no rights against City with respect to this information except any rights as may exist under patent laws. Contractor recognizes that City's employees have no authority to accept any information in confidence.

11. **RECORDS RETENTION AND AUDIT.** The term "Contractor" is used interchangeably to describe signatories to contracts, grants, and agreements with the City and applies to reflect the relationship with the City (Engineer, Contractor, Licensee, Supplier, Vendor, Contractor, Grant Recipient, etc.)

- a. All records relating in any manner whatsoever to the Project, or any designated portion thereof, which are in the possession of the Contractor, or any of the Contractor's independent contractors, associates, and/or subcontractors, shall be made available for inspection and copying upon written request to the City. Additionally, said records shall be made available upon request by the City to any state, federal or other regulatory authorities and any such authority may review, inspect and copy such records. Said records include, but are not limited to, all plans, specifications, submittals, correspondence, minutes, memoranda, tape recordings, videos, or other writings or things which document the Project, its design, and its construction. Said records expressly include those documents reflecting the time expended by the Contractor and its personnel to perform the obligations of this Agreement, and the records of expenses incurred by the Contractor in its performance under said Agreement. The Contractor shall maintain and protect these records for no less than **seven (7) years** after the completion of the Project, or for any longer period of time as may be required by applicable law, good professional practice, and upon notice during the pendency of any claims or litigation arising from the Project.
- b. The City, or its assigns, may audit all financial and related records (including digital) associated with the terms of the contract or agreement, including timesheets, reimbursable out of pocket expenses, materials, goods and equipment claimed by the Contractor. The City may further audit any of the Contractor's records to conduct performance audits (to identify waste and abuse or to determine efficiency and effectiveness of the contract or agreement), or to identify conflicts of interest.
- c. The Contractor shall at all times during the term of the contract or agreement, and for a period of seven (7) years after the end of the contract, keep and maintain records of the work performed pursuant to this contract or agreement. This shall include proper records of quotations, contracts, correspondence, invoices, vouchers, timesheets, and other documents that support actions taken by the Contractor. Documents shall be maintained by the Contractor, which are necessary to clearly reflect all work and actions taken. All such records shall be maintained in accordance with general accepted accounting principles. The Contractor shall, at its own expense, make such records available for inspection and audit (including copies and extracts of records as required) by the City at all reasonable times and without prior notice.
- d. The obligations of this Section shall be explicitly included in any subcontracts or agreements formed between the Contractor and any subcontractors or suppliers of goods or nonprofessional services to the extent that those subcontracts or agreements relate to fulfillment of the Contractor's obligations to the City.
- e. Costs of any audits conducted under the authority of this section and not addressed elsewhere will be borne by the City, unless the audit identifies significant findings that would benefit the City. The Contractor will reimburse the City for the total costs of an audit that identifies significant findings that would benefit the City.
- f. This Section shall not be construed to limit, revoke, or abridge any other rights, powers, or obligations relating to audit which the City may have by Federal, State, or Municipal law, whether those rights, powers, or obligations are express or implied.



12. **TERMINATION FOR CONVENIENCE.** City reserves the right to terminate this order or any part of this order at its sole convenience with thirty (30) days written notice. In the event of termination, Contractor must immediately stop all work and immediately cause any of its suppliers or subcontractors to cease any further work. Contractor will be paid a reasonable termination charge consisting of a percentage of the order price reflecting the percentage of the work performed before the notice of termination, plus actual direct costs resulting from termination. Contractor will not be paid for any work done after receipt of the notice of termination, nor for any costs incurred by Contractor's suppliers or subcontractors which Contractor could reasonably have avoided. Contractor must not unreasonably anticipate the requirements of this order.

13. **TERMINATION FOR CAUSE.** City may also cancel this order, or any part of this order, with seven (7) days written notice for cause in the event of any default by Contractor, or if Contractor fails to comply with any of the terms and conditions of this offer. Late deliveries, deliveries of products which are defective or which do not conform to this order, and failure to provide City, upon request, with adequate assurances of future performance are all causes allowing City to cancel this order for cause. In the event of cancellation for cause, City is not liable to Contractor for any amount, and Contractor is liable to City for any and all damages sustained by reason of the default which gave rise to the cancellation. If it should be determined that City has improperly cancelled this contract for a default, the cancellation is considered a termination for convenience.

14. **DISPUTE RESOLUTION.** Claims, disputes, or other matters in question between the parties to this Agreement arising out of or relating to this Agreement, or breach thereof, shall be subject to mediation in Chattanooga, Tennessee, in accordance with the following provisions:

- a. The mediation shall be conducted by a mediator mutually acceptable to both parties.
- b. The parties agree to share equally in the expense of the mediation.
- c. Such mediation may include the Contractor or any other person or entity who may be affected by the subject matter of the dispute.
- d. Unless the parties agree otherwise, mediation shall be a condition precedent to the exercise of any legal remedy other than a proceeding seeking an immediate injunction or restraining order to protect the rights of a party pending litigation. Notwithstanding the issuance of an injunction or restraining order, or the refusal of a court to issue such an order, the dispute shall continue to be subject to mediation.

15. **DELAY IN PERFORMANCE.** Neither City nor Contractor shall be considered in default of the Agreement for delays in performance caused by circumstances beyond the reasonable control of the nonconforming party. For purposes of this Agreement, such circumstances include abnormal weather conditions; floods; earthquakes; fire; epidemics; war, riots, or other civil disturbances; sabotage; judicial restraint; discovery of unanticipated hazardous wastes; and inability to procure permits, licenses, or authorizations from any local, state, or federal agency for any of the supplies, materials, accesses, or services required to be provided by either City or Contractor under this Agreement. Should such circumstances occur, the nonconforming party shall, within a reasonable time of being prevented from performing, give written notice to the other party describing the circumstances preventing continued performance and the efforts being made to resume performance of the Agreement. If the Contractor is delayed in the performance of the services for more than three hundred sixty-five (365) calendar days, either by the City or circumstances beyond his control, an equitable adjustment to the contract amount can be made to compensate for additional costs incurred.

For delays in performance by Contractor caused by circumstances which are within its control, such delays shall be documented and presented to the Purchasing Department at the conclusion of Project and acknowledged by both City and Contractor. Completed form shall be retained by City for a period of

seven years and reviewed prior to Contractor selection for future City projects. In the event Contractor is delayed in the performance of Services because of delays caused by City, Contractor shall have no claim against City for damages or contract adjustment other than an extension of time.

16. **HAZARDOUS MATERIALS.** Hazardous materials may exist at a site where there is no reason to believe they could or should be present. The City and Contractor agree that the discovery of unanticipated hazardous materials constitutes a changed condition mandating a renegotiation of the scope of work or termination of services. City and Contractor also agree that the discovery of unanticipated hazardous materials may make it necessary for the Contractor to take immediate measures to protect health and safety. City agrees to compensate Contractor for any equipment decontamination or other costs incident to the discovery of unanticipated hazardous materials.

Contractor agrees to notify City when unanticipated hazardous materials or suspected hazardous materials are encountered. City agrees to make any disclosures required by law to the appropriate governing agencies, and agrees to hold Contractor harmless for any and all consequences of disclosures made by Contractor which are required by governing law. In the event the project site is not owned by City, the City agrees to inform the City of the discovery of unanticipated hazardous materials or suspected hazardous materials.

17. **COMMUNICATIONS.** Any notice to the City shall be made in writing to the address specified below:

City of Chattanooga  
Attn: Purchasing  
101 E. 11<sup>th</sup> Street, Suite G13  
Chattanooga, TN 37402  
(423) 643-7230

Nothing contained in this Article shall be construed to restrict the transmission of routine communications between representatives of Contractor and City.

18. **WAIVER.** A waiver by either City or Contractor of any breach of this Agreement shall be in writing. City's failure to insist on performance of any of the terms or conditions of this purchase order or to exercise any right or privilege, or City's waiver of any breach does not waive any other terms, conditions, or privileges, whether of the same or similar type

19. **SEVERABILITY.** The invalidity, illegality, or unenforceability of any provision of this Agreement or the occurrence of any event rendering any portion or provision of this Agreement void shall in no way affect the validity or enforceability of any other portion or provision of this Agreement Any void provision shall be deemed severed from this Agreement, and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain the particular portion or provision held to be void. The parties further agree to amend this Agreement to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision. The provisions of this Article shall not prevent this entire Agreement from being void should a provision which is of the essence of this Agreement be determined void.

20. **INTEGRATION.** This Agreement represents the entire and integrated agreement between City and Contractor. All prior and contemporaneous communications, representations, and agreements by Contractor, whether oral or written, relating to the subject matter of this Agreement, as set forth in the Purchase Order, are hereby incorporated into and shall become a part of this Agreement.

21. **SUCCESSORS AND ASSIGNS.** City and Contractor each binds itself and its directors, officers, partners, successors, executors, administrators, assigns, and legal representatives to the other party of this Agreement and to the directors, officers, partners, successors, executors, administrators, assigns, and legal representatives of such other party in respect to all provisions of this Agreement.

22. **ASSIGNMENT.** Neither City nor Contractor shall assign any rights or duties under this Agreement without the prior written consent of the other party. Unless otherwise stated in the written consent to an assignment, no assignment will release or discharge the assignor from any obligation under this Agreement. Nothing contained in this Article shall prevent Contractor from employing independent Contractors, associates, and subcontractors to assist in the performance of the Services; however, other agreements to the contrary notwithstanding, in the event Contractor employs independent Contractors, associates, and subcontractors to assist in performance of the Services, Contractor shall be solely responsible for the negligent performance of the independent Contractors, associates, and subcontractors so employed.

23. **THIRD PARTY RIGHTS.** Nothing in this Agreement shall be construed to give any rights or benefits to anyone other than City and Contractor.

24. **RELATIONSHIP OF PARTIES.** Nothing contained herein shall be construed to hold or to make the City a partner, joint venturer, or associate of Contractor, nor shall either party be deemed the agent of the other, it being expressly understood and agreed that the relationship between the parties is and shall at all times remain contractual as provided by the terms and conditions of this Agreement.

25. **NON-DISCLOSURE.** Contractor agrees not to disclose or to permit disclosure of any information designated by the City as confidential, except to the Contractor's employees and independent Contractors, associates, and subcontractors who require such information to perform the services specified in this agreement.

26. **NON-DISCRIMINATION.** Contractor agrees to comply with all federal, state, and local non-discrimination laws and regulations. Contractor agrees not to discriminate against any participant in this Agreement on the basis of race, color, religion, sex, age or national origin. Contractor further agrees to comply with all federal, state and local laws regarding treatment and accommodations for individuals with disabilities.

27. **DRUG FREE WORKFORCE.** Contractor certifies that it will provide a drug-free workplace and agrees to comply with the applicable requirements of the Drug-Free Workplace Act of 1988.

28. **FEDERAL OR STATE FUNDING.** In the event that the Project is funded in whole or in part by Federal or State grants, Contractor agrees to abide by all applicable Federal and State laws, regulations, grant conditions and procedures.

29. **COMPLIANCE WITH LAWS.** The City has entered into this agreement with Contractor relying on its knowledge and expertise to provide the services contracted for. As part of that reliance, Contractor represents that he knows and understands the relevant and applicable federal and state laws that apply to the services provided through this contract, and agrees to comply with these relevant and applicable federal and state law.

The Contractor understands and acknowledges the applicability to it of the American with Disabilities Act, the Immigration Reform and Control Act of 1986, and the Drug Free Workplace Act of 1988.

## **EXHIBIT B**

### **SCOPE OF WORK/SPECIFICATIONS AND FEES**

NOTE: This EXHIBIT B must be provided to the City Attorney's Risk and Claims Analyst for inclusion of the Artwork under the City's fine art insurance policy.

#### **I. SCOPE OF WORK**

Artist shall execute and install the Artwork in accordance with the design proposal as attached and identified as EXHIBIT E and the following description and specifications:

#### DESCRIPTION OF WORK

ARTWORK/PROJECT NAME: Fallen Five Memorial

ARTWORK INSTALL LOCATION: TN Riverpark, Amnicola Marsh Park  
2622-, 2628 Riverport Road  
Chattanooga, TN 37406

ARTIST NAME: Shane Albritton and Norman Lee (RE:site Studio)

ARTIST ADDRESS: 3946 Roseland  
Houston, TX 77006

ARTIST PHONE: (832) 526-8162

ARTIST EMAIL: Norman Lee: [norman@resite-studio.com](mailto:norman@resite-studio.com)  
Shane Albritton: [shane@resite-studio.com](mailto:shane@resite-studio.com)

CREDIT: Shane Albritton and Norman Lee (RE:site Studio)  
(Exact form of Artist's name for attribution in all written materials, exhibition, labels, etc.)

TITLE OF ARTWORK: TBD

DESIGN: AS SET FORTH IN EXHIBIT E

MEDIUM: Natural Stone, Metal, Lighting, Landscaping

DIMENSIONS: Approximately: 26' (H) 40'(W) 40 (D)

ESTIMATED INSURANCE VALUATION: \$600,000.00

## PROJECT PHASES & DELIVERABLES

### Design Development Phase:

1. Artist agrees to attend a plans pre-submittal meeting with City of Chattanooga departmental review.
2. Chattanooga Public Art Commission review and approval of final design.

### Artist Deliverables:

- a. Final design/construction documents and any documents required to obtain required permits.

### Community Input Phase:

1. Artist agrees to plan community outreach with City staff to collect phrases to be considered in the final design of the memorial's suspended wreath element.
2. Artist agrees to consult with City staff, military personnel and the liaison to the families of the Fallen Five to determine interpretive text for the memorial including all signage and inscriptions.
3. The Fallen Five Memorial Artist Selection Panel shall review and approve all text included in the memorial's design.

### Artist Deliverables:

- a. Initial draft of memorial interpretive text for review
- b. Finalized memorial interpretive text for approval

### Fundraising Phase:

1. Artist agrees to provide recognition to project donors as artist deems appropriate in the final design.
2. Artist agrees to provide and allow use of any renderings, images or documents pertaining to the memorial's design for fundraising purposes.

### Artist Deliverables:

- a. Artist agrees to design a commemorative print for fundraising purposes.
- b. Artist agrees to provide a replica of the suspended wreath (model size) for fundraising purposes.

### Fabrication Phase:

1. Artist agrees to fabricate all elements as illustrated in EXHIBIT E.

### Artist Deliverables:

- a. 25% progress photos of fabrication
- b. 50% progress photos of fabrication
- c. 75% progress photos of fabrication
- d. 100% photos of completion

### Sitework:

1. Artist agrees to implement all sitework as illustrated in EXHIBIT E.

### Artist Deliverables:

- a. Photos of commencement of site work
- b. Photos of completion of site work

Installation:

1. Artist agrees to install all elements of the memorial as illustrated in EXHIBIT E.

Artist Deliverables:

- c. Photos of commencement of installation
- d. Photos of completed installation

PROJECT MILESTONES & DEADLINES

- **February 2018:** Project Kick Off and initial site visit (to be scheduled as convenient for all parties)
- **July 16, 2018:** Ground breaking ceremony.
- **June 30, 2018:** Installation and all site work complete.
- **July 16, 2019:** Fallen Five Memorial officially open to the public.

COMPENSATION SCHEDULE

City agrees to compensate Artist a fixed fee, which shall constitute full compensation for all services, materials, travel, delivery, insurance, and installation to be furnished under the terms of this Agreement. The Artist is not responsible for site preparation, foundation, and lighting. Such fee shall be paid in installments as follows:

Total Compensation: \$750,000.00		
<b>Installment</b>	<b>Amount</b>	<b>Deliverable</b>
Installment 1	\$187,500.000	Upon receipt of revised budget, timeline and executed agreement.
Installment 2	\$375,000.00	Upon completion of final design/construction documents and commencement of fabrication
Installment 3	\$150,000.00	Upon completion of 50% of fabrication and initiation of sitework
Installment 4	\$37,500.00	Upon completion of installation

Any changes to the Compensation amounts and associated deliverable must be approved in writing by an appropriate City representative.

**EXHIBIT C**

**CONSERVATION FORM AND MAINTENANCE RECORD**

This form should be completed by the ARTIST. The information provided by the ARTIST will be used for the artwork's permanent catalogue record as well as for the future care of the artwork.

GENERAL INFORMATION

- 1. Artist: \_\_\_\_\_
- 2. Address: \_\_\_\_\_
- 3. Phone: \_\_\_\_\_
- 4. Email: \_\_\_\_\_
- 5. Title of Artwork(s): \_\_\_\_\_  
\_\_\_\_\_
- 6. Description of Artwork (s): \_\_\_\_\_  
\_\_\_\_\_
- 7. Date and Place Executed: \_\_\_\_\_
- 8. Installation Date: \_\_\_\_\_
- 9. Project Name: \_\_\_\_\_
- 10. Location of Artwork/Site: \_\_\_\_\_
- 11. Medium: \_\_\_\_\_
- 12. Dimensions:           Height:                           Width:                           Depth:
- 13. Approx. Weight: \_\_\_\_\_
- 14. Location and Description of Signature Copyright Mark (if it occurs):
- 15. Fabricator, if other than artist (name, address, telephone):
- 16. Exhibitions and Collections (pertaining to the above work):

17. Reproductions and Periodicals (pertaining to the above work)

#### TECHNICAL AND MAINTENANCE INFORMATION

18. Construction technique:

19. Foundation structure (include bolt/pin size, and grout as well as any underground anchoring systems):

20. Material(s) (types, sizes, manufacturers):

21. Material(s) thickness:

22. Welding or jointing method:

23. Welding rod alloy or joint material:

24. Material finish (glaze, paint, color and type, sanding grit, tool pattern, patina, surface sealer etc.):

25. What is your intention relating to the work over time? (patina etc.) Should the work reflect the impact of the environment? Should the work be cleaned?

26. Suggested routine maintenance:

27. To your knowledge, can the CITY cleaning staff be responsible for this routine maintenance?



28. Yearly maintenance and care of artwork (cleaning agent and procedure):

29. Can the CITY Staff at the site be responsible for these procedures?

Artist's Signature \_\_\_\_\_

Date \_\_\_\_\_

**EXHIBIT D**  
ARTWORK SITE DIAGRAM AND DRAWING

**EXHIBIT E**  
ARTWORK DESIGN