

**METROPOLITAN EXPOSITION-RECREATION COMMISSION**

**RESOLUTION NO. 00-31**

Accepting on behalf of the Metro Council, the Proposal from Dennis Oppenheim of New York, New York, for Artwork to be placed in the plaza area of the new Hall "D" at the Portland EXPO Center, in compliance with the Metro 1% for Art Program.

The Metropolitan Exposition-Recreation Commission finds:

1. That the MERC entered into a Contract with the Regional Arts Cultural Council (RACC) on September 1, 1999, for the purpose of soliciting an artist to provide artwork for the EXPO's Hall "D" Replacement Project, to comply with the Metro 1% for Art Program.
2. That RACC established a selection committee to review artists proposals and select a final proposed Work of Art to be recommended to the Commission to be placed at the EXPO site.
3. That a Work of Art concept presented by Dennis Oppenheim of New York, New York, was selected by the committee.
4. That the cost of the Art Work proposed is \$110,000.00, which is within the 1% of the budget total for Art contribution.

**BE IT THEREFORE RESOLVED** that the Metropolitan Exposition-Recreation Commission, on behalf of the Metro Council hereby accepts the proposal of Dennis Oppenheim for the placement of a Work of Art at the EXPO Hall "D" site in accordance with the "Agreement for the Creation and Transfer of a Work of Art", Contract #922140, attached hereto, in compliance with the Metro 1% for Art Program, and authorizes the Chairman and Secretary to execute said Contract for the amount of \$110,000.00 (One Hundred Ten Thousand Dollars even).

Passed by the Commission on September 20, 2000.

  
Chairman

  
Secretary/Treasurer

Approved As to Form:

Daniel B. Cooper, General Counsel

By:   
Kathleen A. Pool  
Senior Assistant Counsel

## **MERC STAFF REPORT**

**Agenda Item/Issue:** Authorizing the Chairman and Secretary/Treasurer to execute Contract No. 922140, with Dennis Oppenheim of New York, New York, for, and accepting on behalf of the Metro Council, a proposal for the placement of a Work of Art at the EXPO Hall "D" Project Site.

**Resolution No:** 00-31

**Date:** September 20, 2000

**Presented by:** Chris Bailey

**Background:** On September 1, 1999, MEERC entered into a contract with the Regional Arts and Cultural Council (RACC) to solicit proposals for the provision of art for the EXPO Hall "D" Replacement Project, in accordance with Metro's 1% for Art Program. Subsequently a committee was established to review submissions, shortlist and to make a final selection. Representation on the selection committee included the MERC Commission, RACC, the Project Architect, Metro, Professional Artists and EXPO Management. In June of this year, the committee, selected a proposal, from Dennis Oppenheim of New York, New York, a well known and renowned artist.

**Fiscal Impact:** The cost for the proposed Artwork is \$110,000.00, which is currently budgeted within the GMP. The total cost for all art related expenses is approximately \$138,000.00, which is all of the 1% allocation within the budget, and includes the RACC contract amount, travel expenses for the three finalist artists and logistical expenses for the installation of the work.

**Other Considerations:** Contract #922140 has been reviewed and approved by Metro Counsel, RACC and the Artist.

**Recommendation:** Staff recommends that the Commission authorize the Chairman and Secretary/Treasurer to execute Contract #922140, with Dennis Oppenheim of New York, New York, accepting his proposal on behalf of the Metro Council, for the purpose of the provision of Artwork at the EXPO Hall "D" Project Site.

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**FAX TRANSMITTAL**

September 13, 2000

Mr. Dennis Oppenheim  
54 Franklin Street  
New York, NY 10013  
212-962-0178, F212-587-3314

From: Mark Hunter, Construction/Capital Projects Manager

Re: EXPO Hall "D", Artwork Agreement

Dear Mr. Oppenheim:

Faxed herewith is the latest revised Agreement that has been reviewed by RACC, Metro General Counsel and MERC. All parties' comments, including your own, have been incorporated to the greatest extent possible.

Please review this document and advise me via fax, E Mail or telephone, of any issues of concern. We are attempting to present this document to our Commission for approval on Wednesday, September 20, 2000.

As project manager for the EXPO Hall "D" replacement project, I look forward to meeting you and working with you in coordinating the Art element and making sure that all logistical needs are met.

I can be contacted by telephone at 503-731-7827 (office and voice mail), 503-260-8693 (cellular), E Mail at markhunter@oregoncc.org or fax and address as listed on this letterhead.

Sincerely,

Mark Hunter

cc. Chris Bailey, EXPO Manager, w/o/atchs  
Peggy Kendellen, RACC, "  
Katie Pool, Metro General Counsel, "

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**AGREEMENT  
FOR THE  
CREATION AND TRANSFER OF A WORK OF ART**

**THIS AGREEMENT** is between the Metropolitan Exposition-Recreation Commission (MERC), a commission of METRO, the regional government established under the laws of the State of Oregon and the 1992 METRO Charter, and Dennis Oppenheim, 54 Franklin Street, New York, NY 10013.

**RECITALS:** MERC is constructing a major new exhibition hall at the Portland Exposition Center, which is expected to be completed and begin operation in April 2001. The building project includes a Percent for Public Art component whereby 1% of the construction budget is set aside to acquire public art.

The **ARTIST** has been selected by MERC to create and install a piece of artwork at the new Expo Hall "D". The MERC, acting for the METRO Council, has formally approved the Work and location of the **WORK** as addressed in this contract.

**AGREEMENT**

**1) SCOPE OF CONTRACTOR SERVICES**

**ARTIST** shall execute and install the **WORK** in accordance with the design proposal attached as Exhibit B and the following description and specifications:

Description of the Work:

Name of Public Art Project: Expo Center Hall "D".  
Location of Project: 2060 North Marine Drive, Portland, OR.  
Location of Work of Art: Northeast corner of Hall "D" in plaza area.  
Type of Work: Refer to Exhibit B.  
Date for Completion of Work: April 15, 2001.

**2) TEMPORARY EXHIBIT OF WORK**

**ARTIST** may with the permission of MERC, temporarily exhibit **WORK** at the Seagrams Building in New York City for a period not to exceed three (3) months. This temporary installation shall not delay the final installation of the **WORK** at the Expo Center in Portland, OR. Any damage or alteration to the **WORK** while installed in New York shall be repaired by the **ARTIST** at his own expense. A notice to the public regarding the commissioning agency (Portland Exposition Center, Portland, OR) shall be posted near the artwork while exhibited in New York. All costs associated with the temporary exhibit at the Seagrams Building are the responsibility of **ARTIST**. MERC disclaims any responsibility whatsoever for the exhibition of **WORK**, should it occur.

**3) EFFECTIVE DATE**

This Agreement shall be effective as of September 20, 2000.

**4) COMPENSATION**

The compensation as provided in Exhibit A shall constitute full compensation for all work required to complete the project.

**5) INDEPENDENT CONTRACTOR STATUS**

a) The **ARTIST** is engaged as an independent contractor and will be responsible for any federal, state and local taxes and fees applicable to payments.

- b) The ARTIST, his subcontractors and employees are not employees of MERC and are not eligible for any benefits through MERC, including, without limitation of, federal social security, health benefits, workers' compensation, unemployment compensation and retirement benefits.

6) **ASSIGNMENT**

ARTIST shall not assign this Agreement, in whole or in part, or any right or obligation, without the prior written approval of MERC.

7) **OWNERSHIP OF WORK/COPYRIGHT/REPRODUCTION AND RESALE**

- a) **OWNERSHIP.** The WORK created under this agreement shall be the property of METRO.
- b) **COPYRIGHT.** The ARTIST shall retain copyright and all other rights in and to the artwork, but shall make no exact duplications of the WORK at another location.
- c) **PROTECTION OF COPYRIGHT.** MERC shall take no action which infringes on the ARTIST's copyright. MERC understands that the copyright to the work remains with ARTIST and that the copyright is not transferred to MERC unless otherwise stated in writing by ARTIST.
- d) **COPYRIGHT CLAIMS.** ARTIST hereby agrees that ARTIST shall give MERC written notice prior to asserting any claim pertaining to the specific WORK referenced herein which may arise pursuant to 17 U.S.C. Sect. 106 ET SEQ. (The "Copyright Law"), including but not limited to 17 U.S.C. Sect. 106A(e), the Visual Artists' Rights Act. Upon receiving such notice, MERC shall have at least 90 days from the date of receipt to evaluate and/or cure any such claim.
- e) **REPRODUCTIONS.** ARTIST shall allow MERC the irrevocable license to photographically reproduce the image of the WORK, preliminary studies, models and Marquette's thereof that have been delivered to and accepted by MERC, and to authorize third parties to photographically reproduce any and all of the same, as are desired by MERC for all purposes except for those that display the WORK as the primary feature. On each such reproduction that displays the WORK as the primary feature, MERC shall acknowledge the ARTIST's authorship using designations provided by the ARTIST and provide copyright notification in compliance with the U.S. copyright law. Furthermore, Artist grants to METRO and MERC a perpetual license of all rights necessary or desirable incidental to the marketing of Expo, including but not limited to the right to reproduce and sell images of the WORK without payment of royalties or further consideration to ARTIST.
- f) **CREDITS.** The ARTIST also agrees that photographic reproductions of the WORK made by ARTIST for publicity purposes shall refer to the fact that the WORK is installed at the Portland Exposition Center under METRO's Percent for Public Art Program.
- g) **RESALE.** MERC agrees that if in the future, it sells the WORK, independently from the Expo facility during the lifetime of the ARTIST, MERC shall pay the ARTIST a sum equal to fifteen percent (15%) of the appreciated value of the WORK. For the purposes of this Agreement, appreciated value shall mean the sales price of the work or art, less the original purchase price as stated in this Agreement. MERC shall use the best efforts to give written notification to ARTIST of impending sale. If, after 90 days, MERC is unable to contact the ARTIST, it will proceed with the sale.

8) **DELIVERY AND INSTALLATION**

Following delivery of the WORK by the Artist and preliminary acceptance of the WORK by MERC in manner described in Exhibit A, ARTIST shall install the WORK and maintain it in good condition as specified in Exhibit B. ARTIST shall control installation in coordination with the MERC Project Manager for EXPO Hall "D". Final Acceptance of the WORK by MERC will be contingent upon the installation of the WORK and associated completion of all components of the Art Project.

9) **WARRANTY, LOSS, OR DAMAGE**

- a) ARTIST warrants that the WORK is and will be the original product of ARTIST's own creative efforts and does not infringe on any third party's copyrights or other intellectual property rights. This shall not, however, preclude ARTIST from subcontracting certain processes as described in Exhibit B.
- b) ARTIST warrants for a period of one year from the date of acceptance by MERC of the WORK that the WORK shall be free from defects in material and workmanship. MERC shall not unreasonably withhold acceptance of the completed WORK or of its installation, and shall accept or reject the WORK no later than forty-five days after its completion. ARTIST shall repair or replace at MERC's discretion, and at no additional cost to MERC, any portion of the WORK that is found to be defective during the warranty period. MERC AGREES TO NOTIFY ARTIST OF ANY SUCH DEFECT IMMEDIATELY UPON DISCOVERY. Confirmation of notice shall be made in writing.
- c) ARTIST shall assume all risk of loss or damage to the WORK prior to acceptance of the WORK by MERC. MERC shall assume all risk of loss or damage to the WORK after acceptance of the WORK, provided such loss or damage is not the fault of ARTIST.
- d) In the event of physical loss or damage to the WORK prior to completion and installation, the ARTIST shall rectify the loss or damage by repair, restoration, replacement or other appropriate means as soon as possible at no additional cost to MERC.
- e) MERC will designate a specified area of work that will be the responsibility of the ARTIST to secure and maintain security for that area until final acceptance of the WORK by MERC.

10) **REPAIR**

With respect to any repair or restoration of the WORK not covered by the warranty provided in Paragraph 9, ARTIST shall be consulted, if possible, at no expense to MERC if the need for repair or restoration arises. MERC shall endeavor to make repairs and alterations in a manner which shall not significantly alter the original appearance of the WORK.

11) **ALTERATION OF THE WORK OR THE SITE**

- a) MERC agrees that it will not purposefully destroy, alter, modify or change the WORK without the prior written approval of the ARTIST. If any alteration occurs after the receipt of the WORK by MERC, whether intentional or accidental, the ARTIST has the right to request that the WORK shall no longer be represented to be the WORK of the ARTIST, or that the WORK be removed until restored at MERC's expense.
- b) MERC shall make reasonable efforts to notify the ARTIST of any proposed alteration of the site that would affect the intended character and appearance of the WORK and shall consult with the ARTIST in the planning and execution of any such alteration and shall make a reasonable effort to maintain the integrity of the WORK. Notwithstanding the above, MERC and the ARTIST acknowledge

that there is a planned expansion/alteration of the adjacent exhibit halls, Hall "C", "B" and "A", and have recognized that the site upon which the WORK is located may be substantially modified. Modifications may include the installation of covered walkways connecting the exhibit hall entrances which could require moving of the WORK. The ARTIST agrees that site changes or relocation incidental to the expansion alternatives of Halls A, B and C, would not be detrimental to the integrity of the WORK.

- c) Nothing in this Section 11 shall preclude any right of MERC (1) to remove the WORK from public display or (2) to destroy the WORK. However, in the event MERC contemplates either removal or destruction of the WORK, MERC shall first notify and consult with the ARTIST about alternatives to such removal or destruction, e.g. relocation of the WORK. If, after such consultation, MERC determines to destroy the WORK, MERC shall, by additional notice to the ARTIST, offer the ARTIST a reasonable opportunity to recover the WORK at no cost to MERC. This right of recovery is personal to the ARTIST and is non-assignable or transferable by the ARTIST.

12) **ARTIST'S ADDRESS**

ARTIST shall notify MERC of changes in ARTIST's address. The failure to do, if such failure prevents MERC from locating the ARTIST, as Designated in section 7(g), shall be deemed a waiver by the ARTIST of the right subsequently to enforce those provisions of Sections 7 and 11 that require the express approval or consultation of the ARTIST.

13) **MAINTENANCE**

MERC shall be responsible for the proper cleaning, maintenance and protection of the WORK after installation, pursuant to the instructions provided by ARTIST.

14) **RIGHT TO WITHHOLD PAYMENTS**

MERC shall have the right to withhold from payments due to ARTIST, such sums as necessary, in MERC's sole opinion, to protect MERC against any loss, damage or claim which may result from ARTIST's performance or failure to perform under this Agreement or the failure of ARTIST to make proper payment to any suppliers or subcontractors.

15) **SITUS**

The situs of this Agreement is Portland, Oregon. Any litigation over this agreement shall be governed by the laws of the State of Oregon, and shall be conducted in the Circuit Court of the State of Oregon, for Multnomah County, or, if jurisdiction is proper, in the U.S. District Court of the District of Oregon.

16) **TERMINATION**

This Agreement may be terminated by mutual consent of the parties. In addition, MERC may terminate this Agreement by giving ARTIST 30 days prior written notice of intent to terminate, without waiving any claims or remedies it may have against ARTIST. Termination shall not excuse payment for expenses properly incurred prior to notice of termination, but neither party shall be liable for indirect or consequential damages arising from termination under this section. In the event of early termination, all ARTIST's WORK product will become and remain the property of MERC, and shall not be displayed, but may be disposed of at MERC's sole option.

17) **INDEMNIFICATION**

The ARTIST shall hold harmless, defend and indemnify METRO, its Commission, elected and appointed officials, departments, agents and employees against all claims, demands, actions and suits (including all attorney fees and costs) brought against any of them arising from the ARTIST's work or any subcontractor's work under this Agreement.

18) **LIABILITY INSURANCE**

As part of this contract, the ARTIST shall maintain public liability and property damage insurance that protects the ARTIST and METRO, its Commission, elected and appointed officials, departments, agents and employees from and all claims, demands, actions and suits for damage to property or personal injury, including death, arising from the ARTIST's work under this Agreement. The insurance shall provide coverage for not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$500,000 for each occurrence involving property damages; or a single limit policy of not less than \$500,000 covering all claims per occurrence. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon, during the term of the Agreement. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insured, METRO, its Commission, elected and appointed officials, departments, agents and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insured of the policy. The insurance shall provide that the insurance shall not terminate or be cancelled without thirty (30) days written notice first being given to MERC. If the insurance is cancelled or terminated prior to completion of the contract, ARTIST shall provide a new policy with the same terms ARTIST agrees to maintain continuous uninterrupted coverage for the duration of the contract.

19) **OREGON LAW AND WORKERS' COMPENSATION INSURANCE**

- a) All applicable provisions of ORS Chapters 187 and 279, and all other terms and conditions necessary to be inserted into public contracts in the State of Oregon are hereby incorporated as if such provision were a part of this Agreement, including, but not limited to, ORS 279.310 to 279.320. Specifically, it is a condition of this contract that contractor and all employers working under this agreement are subject employers that will comply with ORS 656.017 as required by 1989 Oregon Laws, Chapter 684.
- b) If applicable, the ARTIST shall obtain workers' compensation insurance coverage for all of its workers, employees and subcontractors, as provided by Chapter 656 of the Oregon Revised Statutes, before this Agreement is executed. A certification of insurance, or copy thereof, shall be attached to this Agreement as Exhibit C, and shall be incorporated herein and made a term and part of the Agreement. The ARTIST further agrees to maintain workers' compensation insurance coverage for the duration of the Agreement.
- c) In the event the ARTIST's workers' compensation insurance coverage expires during the term of this Agreement, the ARTIST agrees to timely renew his insurance either as a carrier-insured employer or a self-insured employer, as provided by Chapter 656 of the Oregon Revised Statutes, such further certification of workers' compensation insurance as renewals of said insurance occur.

20) **ARBITRATION**

Any dispute between the parties, arising out of this Agreement, shall upon written notice, be submitted to binding arbitration pursuant to Oregon law by a professional arbitration service acceptable to the parties. Unless otherwise agreed, the arbitration shall be conducted in Portland, Oregon. If the parties are unable to agree on an arbitrator or an arbitration service within 15 days from receipt of written notice, the arbitrator shall be selected by the presiding court judge for the County of Multnomah. The parties agree that all facts and other information relating to any arbitration arising under this Agreement shall be kept confidential to the fullest extent permitted by law.



- 21) **ATTORNEY'S FEES**  
 In the event of arbitration or litigation arising out of, or in any way related to any term set forth in this agreement, the prevailing party, in addition to any other relief awarded shall be entitled to recover its reasonable attorney's fees and court costs at arbitration, trial and/or on appeal. The costs of mediation shall be borne equally by the parties.
- 22) **NONWAIVER**  
 The waiver by any party of a breach or violation of any term of this Agreement by the other party shall not operate or be construed as a waiver of any subsequent breach.
- 23) **MODIFICATION**  
 This Agreement and the documents expressly incorporated by reference constitute the parties' entire agreement regarding this matter and supersede all prior agreements or communications regarding the same matter. This Agreement may be modified only by writing signed by an authorized representative of each party, and shall be termed an Amendment to the Agreement.
- 24) **SEVERABILITY**  
 If any term of this Agreement is held to be illegal, void or unenforceable in any respect for any reason, the validity and enforceability of any such provision in any other respect and of the remaining provisions of this Agreement will not be in any way impaired.
- 25) **NOTICES**  
 All notices or other communications required or permitted by this Agreement must be in writing and will be deemed to have been duly given when delivered personally to the party for whom such notice was intended, or at the expiration of the third day after the date of deposit if deposited in the United States mail, postage pre-paid, certified or registered, return receipt requested, to the respective parties at the current addresses at the time of the execution of this contract, or at such other address that a party may specify by written notice given to the parties.

**ARTIST:**

**METROPOLITAN EXPOSITION-  
 RECREATION COMMISSION:**

Name: Dennis Oppenheim  
 Address: 54 Franklin Street  
 New York, NY 10013

\_\_\_\_\_

Chairman

Phone: (212)962-0178  
 FAX: (212)587-3314

\_\_\_\_\_

Secretary/Treasurer

Social Security #: \_\_\_\_\_

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_

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**EXHIBIT A**

**PAYMENT PROVISIONS:** MERC shall pay the ARTIST a fixed fee of One Hundred Ten Thousand Dollars (\$110,000.00), which shall constitute full compensation for all services, materials, travel, delivery, insurance, fabrication and installation to be furnished under the terms of this Agreement.

Such fee shall be paid in installments as follows:

- 1st Payment: \$27,500.00 to be paid upon execution of this contract by all parties and receipt of an appropriate invoice.
- 2nd Payment: \$27,500.00 to be paid on January 1, 2001.
- 3rd Payment: \$27,500.00 to be paid upon completion of one-half of the project as determined by MERC.
- 4th Payment: \$27,500.00 to be paid upon completion of all work by ARTIST, including installation and Final Acceptance of the project by MERC.

These payments are based on completion of the WORK and inspection and acceptance by MERC for conformance with project specifications. ARTIST will notify MERC of the date upon which fabrication of the WORK commences.

**PROGRESS PAYMENTS:** Representatives of MERC shall inspect ARTIST's progress through on-site studio visits or photographic documentation provided by the ARTIST. Progress payments specified above will be made when MERC representatives authorize payment based on progress of the WORK and the above Payment benchmarks.

To facilitate scheduling of MERC's inspections of the progress of the WORK, ARTIST shall notify MERC when the WORK is approximately 50% complete. All payments will be made by MERC within 30 days of receipt of appropriate invoice.

**ACCEPTANCE:** MERC may reject the WORK and require that it be redone if it is not in conformance with the project specifications agreed upon by ARTIST and MERC. MERC will preliminarily accept the finished WORK following delivery to the site if/when it conforms sufficiently to the intended specifications, prior to the installation of the WORK. MERC reserves the right to reject any portion of the WORK outright if it cannot be brought into satisfactory conformance with the intended specifications for the WORK. Final Acceptance will occur upon completion of the entire project including installation of the WORK.

## EXHIBIT B

The ARTIST has been commissioned, based upon a design submitted, for jurying in the Expo Center Percent for Art project. The design proposal is attached as part of Exhibit B. It is understood that the ARTIST will make every effort to create the WORK in the spirit of the design, but that the necessity for continuous refinement and development may alter the final rendering. The ARTIST, therefore, with the approval of MERC, which approval shall not be unreasonably withheld, may make necessary design modifications as the WORK progresses so long as the general concept and materials remain the same. For example...

### ARTIST SHALL:

- 1) Deliver and install WORK in good condition in accordance with specifications described in the design proposal. The WORK shall also be designed, constructed and installed in accordance with all applicable codes, regulations, guidelines, standards and laws. ARTIST shall leave WORK and site in good condition when installation is complete.
- 2) Consult with professional art conservator, Jonathan Taggart, of Taggart Objects Conservation, P.O. Box 252, Bath, ME 04530, (207)371-2099, regarding appropriate materials for outdoor work.
- 3) Provide MERC with detailed description of proposed installation plans and schedule, the materials and fabrication methods used in WORK, and the recommended maintenance instructions and means of future conversation or restoration that may be required, including the names and addresses of relevant manufacturers or agencies.
- 4) Design, fabricate and install the WORK in accordance with the ARTIST's original design proposal, the model and slides submitted and written documentation between the ARTIST and MERC, incorporated herein by reference.
- 5) Install the WORK in a manner acceptable to MERC.
- 6) Provide MERC with proper documentation including:
  - Conservation Record Form
  - 2 slides each of 3 different views of the piece.

Final payment shall be withheld until documentation is received in a manner acceptable to MERC.