

File Attachments for Item:

20. CONSIDERATION OF APPROVAL, ACCEPTANCE, REJECTION, AMENDMENT, AND/OR POSTPONEMENT OF CONTRACT K-2324-108: BY AND BETWEEN THE CITY OF NORMAN AND PAUL BAGLEY D/B/A DESIGN SILO LLC, IN THE AMOUNT OF \$175,000 FOR PUBLIC ART TO BE PLACED IN THE ROUNDABOUT AT JAMES GARNER AVENUE AND FLOOD AVENUE, NORMAN, OKLAHOMA.



CITY OF NORMAN, OK STAFF REPORT

MEETING DATE: 12/12/2023

REQUESTER: AshLynn Wilkerson, Assistant City Attorney I

PRESENTER: Kathryn Walker, City Attorney

ITEM TITLE: CONSIDERATION OF APPROVAL, ACCEPTANCE, REJECTION, AMENDMENT, AND/OR POSTPONEMENT OF CONTRACT K-2324-108: BY AND BETWEEN THE CITY OF NORMAN AND PAUL BAGLEY D/B/A DESIGN SILO LLC, IN THE AMOUNT OF \$175,000 FOR PUBLIC ART TO BE PLACED IN THE ROUNDABOUT AT JAMES GARNER AVENUE AND FLOOD AVENUE, NORMAN, OKLAHOMA.

BACKGROUND:

On October 13, 2015, Norman Voters approved the \$150 million, 15-year, Norman Forward Sales Tax initiative. The program outlined various citywide projects to improve the quality of life for the residents of and visitors to Norman. One of these projects is the James Garner Avenue – Acres Street to Flood Avenue project. This project was to be allotted a budget from Norman Forward funds of \$6,000,000.

On November 8, 2016, the Norman City Council approved programming Resolution R-1617-49 requesting federal funds to extend James Garner Avenue from Acres Street to Flood Avenue. This Resolution states the City's commitment to adhere to the terms and conditions of a federally funded project. Through the Association of Central Oklahoma Governments (ACOG), the Oklahoma Department of Transportation (ODOT) agrees to provide 80% of the cost of construction with a 20% matching share from the City of Norman. In order to receive the federal funding, the City of Norman is required to enter into an agreement with ODOT to complete the design, acquire all rights-of-way and relocate existing utilities/encroachments at City's cost.

This Norman Forward street improvement project will create a new entry into downtown and will help alleviate traffic on both Flood Avenue and Porter Avenue. The scope of this project includes:

- Construction of a new two-lane extension of James Garner Avenue from Acres Street to Flood Avenue;
- New roadway bridge over Robinson Street;
- New two-lane modern roundabout intersection at Flood Avenue;
- Landscaping and Low Impact Development measures in roadway medians;
- Reconstruction and extension of a portion of the Legacy Trail to accommodate the new roadway;

- New lighting along the street and Legacy Trail;
- Reconstruction of local residential streets as necessary.

In March of 2017, the Norman City Council approved a design contract (K-1617-105) with Cabiness Engineering, in the amount of \$427,000, for the James Garner Avenue project from Acres Street to Flood Avenue, and Cabiness began preliminary design for the project.

On August 27, 2019, the Norman City Council approved Contract Amendment One for contract K-1617-105, between the City of Norman and Cabiness Engineering, in the amount of \$2,275, for the design of the James Garner Avenue project from Acres Street to Flood Avenue.

On March 23, 2021, the Norman City Council approved Contract Amendment Two for contract K-1617-105, between the City of Norman and Garver, LLC (as successor to Cabiness Engineering), in the amount of \$5,675, for the design of the James Garner Avenue project from Acres Street to Flood Avenue.

On January 26, 2022, the City of Norman purchased property north of Robinson Street from the Judith E. Drabek Foundation Trust, in the amount of \$81,936, for the construction of the James Garner Avenue Phase II-Acres Street to Flood Avenue Norman Forward Project.

On February 28, 2022, the City of Norman obtained property north of Robinson Street, from the University of Oklahoma, for the construction of the James Garner Avenue Phase II-Acres Street to Flood Avenue Norman Forward Project.

On April 12, 2022, the Norman City Council approved Contract Amendment Three for contract K-1617-105, between the City of Norman and Garver, LLC, in the amount of \$34,400, for the design of the James Garner Avenue Project from Acres Street to Flood Avenue.

On May 24, 2022, the Norman City Council accepted easement E-2122-65, establishing a roadway, sidewalk, and utility easement across the lands purchased for construction of the James Garner Phase II-Acres Street to Flood Avenue Norman Forward project.

On June 14, 2022, the City of Norman entered into a funding agreement with ODOT (Contract K-2122-135 & Resolution R-2122-129) for the James Garner Avenue-Acres Street to Flood Avenue Norman Forward project. The agreement split the project construction costs between City of Norman funds and federal funds administered by ODOT. The federal share was capped at \$4,825,733, leaving the City to pay \$1,664,597 based on the engineer's estimate at the time of the agreement.

On August 17, 2022, the City was invoiced by ODOT for its portion of the construction cost based on new estimates. The City's portion of construction at that time was estimated to be \$1,662,153. The City paid that amount, as invoiced, to ODOT per the project funding agreement from the Norman Forward project account.

On October 20, 2022, ODOT opened bids for the James Garner Avenue-Acres Street to Flood Avenue Norman Forward project. There were three bids. The low bid was from Redlands Contracting, LLC for a total of \$7,820,546.33. This low bid was approximately 15% over the final engineer's estimate.

On November 22, 2022 City Council approved an appropriation of funds in the amount of \$2,281,034 from the Norman Forward Fund balance (accrued primarily from savings on the Norman Public Library, Central project) to cover the funds necessary to cover the additional construction costs.

DISCUSSION:

On February 8, 2022 the Norman City Council, directed the Norman Public Works Department, in conjunction with Norman Arts Council, to use project funds from the Norman Forward Public Art project, for the purpose of designing, constructing and installing a public art piece for the center of the new roundabout currently under construction at the intersection of James Garner Avenue and Flood Avenue. The cost of the public art piece was estimated at \$200,000.

In August of 2022, a selection committee was appointed by the Norman Arts Council (NAC) to review artist submissions and select the art piece for the roundabout. On April 19, 2023 the committee met to establish criteria for selection and prepare the Request for Qualifications (RFQ) for the art project. In May of 2023, the RFQ was sent out to request submissions from artists nationwide. The NAC received 116 responses to the RFQ.

The selection committee then evaluated the submissions and decided upon three finalists. These three finalists were brought to Norman to review the site and ask questions of the committee regarding any requirements for the art installation. On September 28, 2023, the three finalists gave presentations of their concepts for the art piece and the committee made the final selection and recommendation to the Norman Arts Council and City Council. The selected art installation was unanimously recommended for approval by the NAC Board of Directors.

The selected artist is Paul Bagley of Oklahoma City. This agenda item is for the proposed approval of the contract with Mr. Bagley for the production and installation of the public art piece selected. The contract price for the artwork is \$175,000. The project is to be completed by April 30, 2024, for installation by June 30, 2024.

Funding for this contract is available in Norman Forward Public Arts, Construction (Account 51795500-46101; Project NFP100).

RECOMMENDATION:

Staff recommends the approval of Contract K-2324-108 between the City of Norman and Paul Bagley, doing business as Design Silo LLC in the amount of \$175,000, for a work of art to be placed in the roundabout at James Garner Avenue and Flood Avenue.

K-2324-108

Contract to Commission Artwork
Between

City of Norman, Oklahoma

Paul Bagley d/b/a Design Silo LLC

THIS CONTRACT, made this 27th day of November, by and between the City of Norman (hereinafter referred to as the "Owner"), and Paul Balgey d/b/a Design Silo LLC (hereinafter referred to as the "Artist") for a work of art incorporated herein by reference (hereinafter referred to as the "Work") to be placed in the Roundabout at James Garner Blvd and Flood Avenue, Norman, Oklahoma.

WHEREAS, the City Council of the City of Norman believes the beautification of The Roundabout will further enhance the quality of life in Norman, Oklahoma;

WHEREAS, all parties wish to promote and maintain the integrity and clarity of the Artist's ideas and statements as represented by the Work;

WHEREAS, the Selection Panel Advisory Board and the Norman Arts Council Board recommend the retention of the Artist for this Work;

WHEREAS, the parties wish to have the creation of the Work governed by the mutual obligations, covenants, and conditions herein.

THEREFORE, in consideration of the foregoing premises and the mutual covenants hereinafter set forth and other valuable considerations, the parties hereto agree as follows:

I. The Project: The Scope of Services

- A. The Artist will design, execute, fabricate, transport, install and document the Work. These services shall be performed by Artist, and their assistants, as independent contractors.
- B. Artist agrees that said Work will be consistent with and substantially similar to the design concept presented to the Selection Panel Advisory Board and the Norman Arts Council Board. As design details are finalized, Artist will update the Owner.
- C. The Owner agrees to purchase the Work, under the terms and conditions of this contract upon final approval and acceptance of the Work by the Owner.

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- D. The permanent location for the work shall be in in the Roundabout at James Garner Blvd and Flood Avenue, Norman, Oklahoma.
- E. The Artist shall perform all services and furnish all supplies, materials and equipment necessary for the design, execution, fabrication, transportation and installation of the Work. The Owner will make equipment for installation available.
- F. The Owner shall make known its specifications regarding specific location, mounting, installation and other issues related to the finished product's delivery and installation, to the Artist prior to the rendering of their services.
- G. The Owner in consultation with the Artist shall determine the arrangement and placement of the final Work.
- H. The Artist shall be responsible for the delivery, installation, and securing of the Work on a concrete base prepared by the Owner, at the site in Norman, Oklahoma.
- I. The Artist shall coordinate, with the Norman Arts Council, on outreach program design, including number, duration, form, and delivery type.

II. Execution of the Work

- A. The Artist shall complete the fabrication of the work in substantial conformity with the design as recommended by the Norman Arts Council Board and approved by the Owner
- B. Prior to implementation of any significant changes in the Work, the Artist shall present to the Owner in writing, for further review and approval, a thorough description of such proposed changes. A significant change is any change affecting the scope, intent, design, color, size, material or location of the Work not permitted by, or not in substantial conformity with, the approved design. Owner must approve the proposed changes prior to continued work by the Artist.
- C. In performance of the Work described herein, the Artist shall comply with all applicable State and local laws, rules and regulations.

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- D. The Artist shall complete the Work by April 30, 2024. Should the work be ready for delivery prior to April 30, 2024, the Artist shall keep the work safely stored at its studio or other location. The installation of the work will be at a date mutually agreeable between the Artist and the Owner, but no later than June 30, 2024.
- E. The Owner shall notify the Artist of construction delays resulting in delays in site preparation prior to the scheduled delivery date or installation date. A new date shall be agreed upon by the Owner and Artist for completion, delivery and installation of the Work.
- F. The Owner shall always grant a reasonable extension of time to the Artist in the event that there is a delay on the part of the Owner in performing its obligations under this Agreement or in completing the Project, or if conditions beyond the Artist's reasonable control such as, but not limited to, acts of nature; pandemic, national, state, or local quarantine or stay at home order, war or warlike operation; superior governmental regulation or control; public emergency render timely performance of the Artist's services impossible or unexpectedly burdensome. 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.
- G. The Artist shall notify the Owner in writing when fabrication of the Work is completed and the Artist is ready to deliver the Work and install it on the site.
- H. Within forty-five (45) days after installation of the Work, and prior to final payment, the Artist shall make available to the Owner high quality digital images of the completed Work.
- I. The Artist shall furnish the Owner with a full written narrative description of the Work.
- J. The Artist shall provide the Owner written instructions for appropriate maintenance and preservation of the Work.
- K. The Artist shall notify the Owner in writing when all services have been completed. Final Acceptance will be effective as of the earlier to occur of (i) the date of the Owner's written notification of Final Acceptance or (ii) the thirtieth (30th) day after the Artist has sent the written notice to the Owner of completion, unless the Owner, upon receipt of such notice and prior to the expiration of the thirty (30) day period, gives the Artist written

notice specifying and describing the services which have not been completed. Final acceptance shall be determined solely by the Owner and shall constitute the acknowledgment that the Work has been satisfactorily completed and installed according to the terms of this Agreement.

- L. Ownership of the Work shall pass to the Owner (City of Norman) upon final acceptance.

III. Warranties and Copyright

- A. The Artist represents and warrants that:

- i. The Work is solely the result of the artistic and creative efforts of the Artist;
- ii. The Work is unique and original and does not infringe upon any copyright;
- iii. The Work has not been accepted for sale elsewhere; and
- iv. The Work is free and clear of any liens from any source whatever.

- B. The Artist represents and warrants that:

- i. The Work, as fabricated and installed, will be free of defects in material and workmanship, including any defects of "inherent vice" or qualities which cause or accelerate deterioration of the Work; and
- ii. Reasonable maintenance of the Work will not require procedures substantially in excess of those described in the maintenance recommendations to be submitted by the Artist; and
- iii. The warranties described in this section shall survive for a period of one (1) year after the final acceptance of the Work. The Owner shall give notice to the Artist of any observed breach with reasonable promptness. The Artist shall, at the request of the Owner, and at no cost to the Owner, reasonably and promptly cure the breach of any such warranty, which is curable by the Artist and which cure is consistent with professional conservation standards. This includes making repairs to the Work or re-fabricating the Work arising out of defects consisting of "inherent vice" or qualities accelerating deterioration of the Work which appear for a period of one (1) year after the installation and which the Artist shall correct.

iv. Except as otherwise specifically provided, no other warranty or representation, either express or implied, is included or intended in the Artist's proposals, reports, deliverables, and/or communications. The warranties in this Section are conditional and shall be voided by the failure of the Owner to maintain the Work in accordance with the Artist's specifications, including the Maintenance Manual, and the applicable conservation standards. If the Owner fails to maintain the Work in good condition, the Artist, in addition to other rights or remedies the Artist may have in equity or at law, shall have the right to disown the Work as the Artist's creation and request that all credits be removed from the Work and reproductions thereof until the Work's condition is satisfactorily repaired. THE ARTIST DISCLAIMS ANY WARRANTIES ARISING OUT OF THE OWNER'S GROSS NEGLIGENCE, WILLFUL MISCONDUCT, OR ANY DAMAGES OR LOSSES TO THE ARTWORK ARISING OUT OF VANDALISM, INTENTIONAL DAMAGES OR OTHER ACTS OUTSIDE THE REASONABLE CONTROL OF THE PARTIES.

EXCEPT AS EXPRESSLY PROVIDED HEREIN, THE ARTIST MAKES NO WARRANTIES TO THE OWNER, WRITTEN OR ORAL, STATUTORY OR EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE. THE OWNER'S EXCLUSIVE REMEDY AND THE ARTIST'S ENTIRE LIABILITY ARISING FROM OR IN CONNECTION WITH THE SERVICES AND THE ARTWORK (INCLUDING WITHOUT LIMITATION FOR BREACH OF WARRANTY OR INFRINGEMENT) SHALL BE THE MODIFICATION OR REPLACEMENT OF THE SERVICES OR WORK OR A REFUND OF ALL OR PART OF THE FEES FOR THE SERVICE PERFORMED.

This Section will survive termination or expiration of this Agreement for any reason.

- C. The Artist retains all rights under the Copyright Act of 1976 under 17 U.S.C. § 101 *et seq.*, Visual Artists Rights Act of 1990 (VARA) 17 USC §106A, and all other rights in and to the Work except ownership and possession, except as such rights may be limited by this Agreement. The Artist shall not make any additional exact duplicate reproductions of the final Work, nor shall the Artist grant permission to others to do so except

with the written permission of the Owner. The Artist grants to the Owner and its assigns an irrevocable license to make photographic or graphic reproductions of the Work for non-commercial purposes, including but not limited to reproductions used in advertising, brochures, media publicity and catalogs or other similar publications, if the Artist is duly credited, except where the Work is merely an incidental feature of a photograph. A plaque provided by the Owner, identifying the title, date, and Artist, shall be placed on or near the Work. The Artist shall have the right to use photographs of the completed Work as an example of his work and in books or brochures he may publish.

IV. Fee for Services

- A. The total purchase price of creation, preparation and completion of the final Work shall be \$175,000. This fee does not include the cost to Owner for preparation of the site for installation. Owner shall not provide any additional compensation for any alterations or revisions in the final Work which substantially depart from the approved preliminary models and specifications and which cause the Artist an unusual and unanticipated expense.
- B. The Artist shall receive payments from the Owner to the Artist to be paid in the amount of \$175,000.00 as follows:
 - i. \$87,500.00 within thirty (30) days of delivery of the signed contract by the Owner and Artist and the issuance of Artist's invoice;
 - ii. \$43,750.00 within thirty (30) days upon documentation of the 50% milestone of completion of fabrication of the Work;
 - iii. \$21,875.00 within thirty (30) days upon documentation of the 100% milestone of completion of fabrication of the Work;
 - iv. \$21,875.00 within thirty (30) days of final acceptance of the Work by Owner.
- C. Artist's lack of performance during either the payment stages ii or iii, listed above, shall initiate a thirty (30) day period to cure the deficiency and/or lack of performance upon receipt of written notice from the Owner which provides a statement addressing Owner's dissatisfaction with Artist's performance as well as what steps the Artist may take to cure the inadequate performance. The Artist must cure the deficiency or take reasonable steps towards curing the deficiency within the thirty (30) day

period. Upon failure of the Artist to do so, the Owner may pursue any remedies available to them against the Artist at law and in equity, including, but not limited to, the right to terminate this Agreement and reimbursement from Artist for all funds expended by Owner thus far including costs to remove the base or foundation.

- D. Artist shall provide proof of completion of the Work by submitting at least ten (10) pictures of the Work from various angles which tend to clearly show the Artist's progression during the stages of fabrication to completion. Additionally, Artist shall submit Form A along with these documents.

V. Funding

- A. Owner guarantees and warrants that it will produce funds in the amount of \$175,000.00 for the completion of the Work.
- B. If any payment from the Owner is past due, the Artist will promptly notify the Owner and the Artist may immediately cease all services until full payment for the relevant payment stage has been made and the Schedule and/or completion date shall be adjusted accordingly. The Artist has no obligation to provide services unless the Owner is in good standing and no amounts are owed to the Artist.

VI. Alteration and De-accession Right

- A. The Owner agrees that it will not consent to intentional alteration, modification, change, destruction of or damage to the Work by the Owner without attempting to consult the Artist.
- B. The Artist shall notify the Owner of changes in their address. The failure to do so, if such failure prevents the Owner from locating the Artist, shall be deemed a waiver by the Artist of the right subsequently to enforce that which requires the express approval of the Artist. The Owner shall make reasonable efforts to locate the Artist when matters arise relating to the Artist's rights.
- C. The Owner may remove the Work from the City of Norman collection if it determines that the Work represents a safety hazard in its present condition or cannot reasonably be restored to its original structural or aesthetic integrity due to technical difficulties or expense disproportionate to the value of the Work. The Owner shall notify the Artist of such a decision to de-access the Work. Such notification shall be made before the de-

accession, whenever possible. The Owner has no responsibility to relocate, restore, or replace the Work if it is misplaced, damaged or stolen.

VII. Insurance

The Artist, as an independent contractor, is responsible for any requirements pertaining to Workers' Compensation insurance and employee liability insurance, and shall obtain and maintain insurance satisfactory to covering comprehensive general liability, and all risks of loss, damage to, or theft of the Work while it is being made, transported, or installed by the Artist. The Artist shall deliver to the Owner a copy of this insurance prior to beginning work. In addition, the City of Norman will provide insurance to cover loss, damage to, or theft of the Work once installed under the City of Norman's current policy covering the construction of the James Garner Ave Phase II street project.

VIII. Indemnity

Upon execution of this document, but prior to transfer of ownership, Artist agrees to defend, indemnify, and hold harmless Owner, its agents and employees, from and against legal liability for all claims, losses, damages and expenses to the extent such claims, losses, damages or expenses are caused by Artist, its agents or employees' negligent acts, errors or omissions. Artist shall indemnify the City of Norman, Oklahoma up to one hundred thousand dollars (\$100,000.00) for any claim arising out of this Agreement. Artist further waives any rights against the City for any and all injuries or damages alleged to have arisen during the term of this Agreement.

IX. Default

If either party defaults in any of the covenants or agreements contained herein, the defaulting party shall pay all court ordered costs and expenses, including reasonable attorney's fees, incurred by the other party in enforcing its rights arising under this Agreement.

X. Binding

This Agreement shall be binding upon and inure to the benefit of the parties hereto, their agents, successors, and assigns.

XI. Integration

This Agreement represents the entire and integrated Agreement between the parties. It supersedes all prior and contemporaneous communications, representations, and agreements, whether oral or written, relating to the subject matter of this Agreement. This Agreement may only be changed by a written amendment executed by all parties.

XII. Ownership of Documents and Models

Upon final acceptance, all studies, drawings, designs, maquettes and models prepared and submitted under this Agreement shall be returned to the Artist and shall belong to the Artist unless agreed by all parties.

XIII. Notice

Notice of any breach or other correspondence related to this contract shall be by email or regular mail to the following contacts:

Artist:

Design Silo LLC

Paul Bagley, Owner

Address: 718 W. Sheridan
OKC OK 73102

405-209-5425

Email: paulbagley@me.com

City:

Shawn O'Leary

Director, Public Works

225 N. Webster Ave.

Norman, OK 73070

Shawn.OLeary@NormanOK.gov

XIV. Modification

No alteration, change or modification of the terms of this Agreement shall be valid unless made in writing and signed by all parties hereto.

XV. Severability

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Any provision of this contract which is hereafter found by a court of law or otherwise to be in conflict with the laws, rules, and/or regulations of the United States, State of Oklahoma or City of Norman shall be considered null and void. Any provision rendered null and void by the operation of this provision will not invalidate the remainder of this contract to the extent the contract is capable of execution.

XVI. Governing Law; Venue

This Agreement shall be governed and construed in accordance with the laws of the United States of America and the State of Oklahoma. The venue for any action under this agreement shall be in the District Court of Cleveland County, Oklahoma or the United States District Court for the Western District of Oklahoma. The parties agree to submit to the subject matter and personal jurisdiction of said court.

XVII. Nondiscrimination

Artist agrees further that it will not discriminate against any persons on the basis of race, color, religion, ancestry, national origin, age, place of birth, disability, sex, sexual orientation, gender identity or expression, familial status, or marital status, including marriage to a person of the same sex.

[Signatures on the following page]

ARTIST

Design Silo LLC
Paul Bagley, Owner



Before me, the undersigned, a Notary Public in and for said County and State, on this 27 day of November, 2023, personally appeared Paul Bagley and Design Silo LLC, to me known to be the identical person(s)/company title) who executed the foregoing and acknowledged to me that executed the same as free and voluntary act and deed for the uses and purposes therein set forth.

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WITNESS my hand and seal the day and year last above written.



Bridgid Cook

Notary Public

My Commission Expires: 06/03/24**CITY OF NORMAN**

APPROVED this ____ day of _____, 2023, by the Norman City Council.

Larry Heikkila, MAYOR

ATTEST:

Brenda Hall, City Clerk

APPROVED as to form and legality this 4th day of December, 2023.

[Signature]
CITY ATTORNEY

SCHEDULE I**[to be included]**



**Public Art Piece
in Center of
Multi-lane
Roundabout**

**Robinson Street
Bridge Aesthetics**

Legacy Trail