

**CITY OF SAND CITY  
RESOLUTION SC 20-16, 2020**

**RESOLUTION OF THE CITY COUNCIL OF SAND CITY APPROVING A SERVICE AGREEMENT WITH SO-GNAR, INC. (PAT MILBERY) FOR THE 2020 WEST END MURAL FESTIVAL "WE" (WE) AND AUTHORIZING THE CITY MANAGER TO ENTER INTO THE WEST END MURAL FESTIVAL ARTIST PROCUREMENT AND CURATION SERVICE AGREEMENT**

**WHEREAS**, the City of Sand City will be sponsoring and coordinating the West End Mural Festival (WE) in collaboration with the Sand City Arts Committee in the Summer of 2020; and

**WHEREAS**, the West End Mural Festival will be held annually, will create an instant sense of place, an accessible public art gallery, and book end the highly successful West End Celebration; and

**WHEREAS**, the City desires to hire a contractor for the general purposes of Artist Procurement and Curation for the 2020 West End Mural Festival including sponsorship development related to the event; and

**WHEREAS**, Pat Milbery of So-Gnar, Inc. is a Denver based artist who is well known for the large-scale murals that he has created alongside some of the most prominent street and graffiti artists in the world; has helped curate and create major art installation projects for brands including the Ford Motor Company, X Games, Budweiser, Zumiez, Loveland Ski Area, Wahoo Fish Tacos, and Pabst Blue Ribbon, and will provide professional event and artist procurement and curation services for the West End Mural Festival that will result in continuous improvement to the West End, and create a sense of pride for the neighborhood; and

**WHEREAS**, ten (10) quality large-scale murals will be produced by twenty (20) national and international artists that will create conversation, and build a foundation of an accessible public art gallery in the West End; and

**WHEREAS**, the 2020 West End Mural Festival will be held on August 17<sup>th</sup> through 23<sup>rd</sup>, and will include various daily events outside of the painting of murals throughout the week; and

**WHEREAS**, the total 2020 West End Mural Festival City budgeted sponsorship, including artist procurement and curation services, is \$65,000, and the approved 2019-2020 Budget funds to be used in support of the festival includes \$15,000 from 5005-00 Arts Committee, and \$50,000 from the Capital Improvement Plan Public Art; and

**WHEREAS**, the West End Mural Festival curation services includes up to three (3) public murals to be produced by So Gnar Creative within the West End prior to the West End Mural Festival.

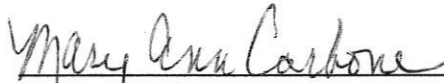
**NOW, THEREFORE, BE IT RESOLVED** by the City Council of Sand City as follows:

1. The City Manager is authorized to enter into the West End Mural Festival artist procurement and curation service agreement attached hereto and incorporated herein as Attachment 1 and is approved at a cost not to exceed \$15,000;
2. The City Council hereby approves a presenting sponsorship budget amount of \$50,000 for the 2020 West End Mural Festival;
3. So-Gnar Inc. will maintain a current Sand City Business License for the term of the service agreement.

**PASSED AND ADOPTED** by the City Council of Sand City on this 3rd, day of March, 2020 by the following vote:

AYES: Council Members Carbone, Cruz, Hawthorne, Sofer  
NOES: None  
ABSENT: Council Member Blackwelder  
ABSTAIN: None

APPROVED:

  
\_\_\_\_\_  
Mary Ann Carbone, Mayor

ATTEST:

  
\_\_\_\_\_  
Linda K. Scholink, City Clerk

## CITY OF SAND CITY

**WEST END MURAL FESTIVAL ARTIST PROCUREMENT AND CURATION SERVICE AGREEMENT**

This West End Mural Festival Artist Procurement and Curation Service Agreement ("**Agreement**") made this 3<sup>rd</sup> day of March, 2020 ("the Effective Date"), is by and between the CITY OF SAND CITY, a municipal corporation ("**City**") and So-Gnar, Inc., a Colorado Corporation, hereinafter referred to as "**Consultant**" (together referred to the "Parties").

In consideration of the mutual covenants and conditions set forth herein, the Parties agree as follows:

**I. TERM**

The term of the Agreement will begin on March 3<sup>rd</sup>, 2020 and shall end on June 30, 2021, unless sooner terminated pursuant to the provisions of this Agreement. The Agreement may be reviewed and renewed annually. No modification to the terms of this Agreement shall be valid unless made in writing and signed by the parties hereto.

**II. SERVICES**

Subject to the terms and conditions set forth in this Agreement, CONSULTANT shall provide to the CITY the services described in the Scope of Work in Exhibit A, attached hereto and incorporated herein as though set forth in full. Unless otherwise explicitly stated in Exhibit A, CONSULTANT shall at its sole cost and expense furnish all facilities and equipment which may be required for completing the tasks set forth in Exhibit A. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, this Agreement shall prevail.

**III. PERFORMANCE**

CONSULTANT shall at all times faithfully, competently and to the best of his/her ability, experience, and talent, perform all tasks described herein. CONSULTANT shall employ, at a minimum, generally accepted standards and practices utilized by persons engaged in providing similar services as are required of CONSULTANT hereunder in meeting its obligations under this AGREEMENT.

**IV. TIME**

CONSULTANT shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in section III (Performance) and to satisfy CONSULTANT'S obligations hereunder.

**V. ASSIGNMENT OF PERSONNEL**

CONSULTANT shall assign only competent personnel to perform services pursuant to his Agreement. In the event that CITY, in its sole discretion, at any time during the term of the Agreement, desires the reassignment of any such persons, CONSULTANT shall, immediately upon receiving notice from CITY of such desire, reassign such person or persons.

## VI. PAYMENT

- A. The CITY agrees to pay CONSULTANT monthly for services performed and reimbursable costs, in accordance with the payment rates and terms and the schedule of payment as set forth in Exhibit B, attached hereto and incorporated herein by this reference as though set forth in full, based upon actual time spent on the above tasks. This amount shall not exceed fifteen thousand dollars (\$15,000.00) for the total term of the Agreement unless additional payment is approved as provided in this Agreement. Except as specifically authorized by CITY in writing, CONSULTANT shall not bill CITY for duplicative services performed by more than one person. Fees for work performed by CONSULTANT on an hourly basis shall not exceed the amounts shown on the compensation schedule attached hereto as Exhibit A. Reimbursable expenses are included in the total amount of compensation provided under this Agreement that shall not be exceeded.
- B. CONSULTANT shall not be compensated for any services rendered in connection with its performance of this AGREEMENT which are in addition to those set forth herein, unless such additional services are authorized in advance and in writing by the City Manager. CONSULTANT shall be compensated for any additional services in the amounts and in the manner as agreed to by City Manager and CONSULTANT at the time CITY's written authorization is given to CONSULTANT for the performance of said services. The City Manager may approve additional work not to exceed ten percent (10%) of the amount of the AGREEMENT.. Any additional work in excess of this amount shall be approved by the City Council of Sand City.
- C. CONSULTANT will submit invoices monthly for actual services performed. Invoices shall be submitted on or about the first business day of each month, or as soon thereafter as practical, for services provided in the previous month. Invoices shall include a task summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement. For each work item and task, a copy of the applicable time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense. Payment shall be made within thirty (30) days of receipt of each invoice as to all non-disputed fees. If the CITY disputes any of CONSULTANT's fees it

shall give written notice to CONSULTANT within thirty (30) days of receipt of an invoice of any disputed fees set forth on the invoice. Any final payment under this AGREEMENT shall be made within forty-five (45) days of receipt of an invoice. In no event shall CONSULTANT submit an invoice for an amount in excess of the maximum amount of compensation provided above for either a task or the entire Agreement, unless the Agreement is properly modified in writing prior to the submission of such an invoice.

## **VII. SUSPENSION OR TERMINATION OF AGREEMENT**

- A. The CITY may at any time, for any reason, with or without cause, suspend or terminate this AGREEMENT, or any portion hereof, upon written notification to CONSULTANT. Upon receipt of said notice, the CONSULTANT shall immediately cease all work under this AGREEMENT, unless the notice provides otherwise. If the CITY suspends or terminates a portion of this AGREEMENT such suspension or termination shall not make void or invalidate the remainder of this AGREEMENT.
- B. CONSULTANT may cancel this Agreement upon 60 days written notice to CITY and shall include in such notice the reasons for cancellation.
- C. In the event this AGREEMENT is terminated pursuant to this Section, the CITY shall pay to CONSULTANT the actual value of the work performed up to the time of termination, provided that the work performed is of value to the CITY; CITY may however condition payment of such compensation upon CONSULTANT delivering to CITY any and all Documents prepared in connection with this Agreement. Upon termination of the AGREEMENT pursuant to this Section, the CONSULTANT will submit an invoice to the CITY pursuant to Section 6.
- D. The parties may amend this Agreement only by a writing signed by all the parties.
- E. All obligations arising prior to the termination of this Agreement and all provision of this agreement allocating liability between the CITY and CONSULTANT shall survive the termination of this Agreement.
- F. If CONSULTANT materially breaches any of the terms of this Agreement, CITY's remedies shall include, but not be limited to, the following:
  - a. Immediately terminate the Agreement
  - b. Retain all Documents and other work product prepared by CONSULTANT pursuant to this Agreement
  - c. Retain a different consultant to complete the work described in an given task order not finished by Consultant; and/or

- d. Charge the consultant the difference between the cost to complete the work described in a given task order that is unfinished at the time of breach and the amount the CITY would have paid CONSULTANT pursuant to section 6 if CONSULTANT had completed the work.

## VIII. OWNERSHIP OF DOCUMENTS

- A. CONSULTANT shall maintain complete and accurate records with respect to sales, costs, expenses, receipts, and other such information required by CITY that relate to the performance of services under this AGREEMENT. CONSULTANT shall maintain adequate records of services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. CONSULTANT shall provide free access to the representatives of CITY or its designees at reasonable times to such books and records; shall give CITY the right to examine and audit said books and records; shall permit CITY to make transcripts or copies therefrom as necessary; and shall allow inspection of all work, data, documents, proceedings, and activities related to this AGREEMENT. Such records, together with supporting documents, shall be maintained for a period of three (3) years after receipt of final payment. CONSULTANT understands that all such records may be subject to the examination and audit of the State Auditor or as part of any audit of the CITY.
- B. Upon completion of, or in the event of termination or suspension of this AGREEMENT, all original documents, designs, drawings, maps, models, computer files, surveys, notes, and other documents, in electronic or other form, prepared in the course of providing the services to be performed pursuant to this AGREEMENT ("Documents") shall become the sole property of the CITY and may be used, reused, or otherwise disposed of by the CITY in connection with the project for which CONSULTANT'S services are provided under this AGREEMENT and without the permission of the CONSULTANT. With respect to computer files, CONSULTANT shall make available to the CITY, at the CONSULTANT's office and upon reasonable written request by the CITY, the necessary computer software and hardware for purposes of accessing, compiling, transferring, copying and/or printing computer files. CONSULTANT hereby grants to CITY all right, title, and interest, including any copyright, in and to the documents, designs, drawings, maps, models, computer files, surveys, notes, and other documents prepared by CONSULTANT in the course of providing the services under this AGREEMENT.
- C. CONSULTANT agrees to execute the Agreement for Public Art attached to this Agreement as Exhibit D. Parties agree that the executed version of the attached Agreement for Public Art constitutes part of this Agreement. CONSULTANT

agrees that the CITY has the absolute right to change, modify, destroy, remove, relocate, move, replace, transport, repair or restore the work, or decline to do so, in whole or in part, in CITY's sole discretion.

## **IX. INDEMNIFICATION AND DEFENSE**

### **A. Indemnity**

To the fullest extent permitted by law, CONSULTANT shall indemnify and hold harmless CITY and any and all of its officials, employees, contractors and agents ("Indemnified Parties") from and against any and all claims, losses, liabilities, damages, costs and expenses, including legal counsel's fees and costs, caused in whole or in part by the negligent, reckless or wrongful act, error or omission of CONSULTANT, its officers, agents, employees or subconsultants (or any agency or individual that CONSULTANT shall bear the legal liability thereof) in the performance of services under this AGREEMENT. CONSULTANT's duty to indemnify and hold harmless CITY shall not extend to the CITY's sole or active negligence. This indemnification obligation is not limited by any limitation on the amount or type of damages available under any applicable insurance coverage and shall survive the expiration or termination of this Agreement with respect to any liability arising during the term of the Agreement. With respect to third party claims against the CONSULTANT, CONSULTANT waives any and all rights of any type to express or implied indemnity against the Indemnified Parties.

### **B. Duty to defend**

In the event the CITY, its officers, employees, agents and/or volunteers are made a party to any action, lawsuit, or other adversarial proceeding arising from the performance of the services encompassed by this AGREEMENT, and upon demand by CITY, CONSULTANT shall defend the CITY at CONSULTANT's cost or at CITY's option, to reimburse CITY for its costs of defense, including reasonable attorney's fees and costs incurred in the defense of such matters to the extent the matters arise from, relate to or are caused by CONSULTANT's negligent acts, errors or omissions. Payment by CITY is not a condition precedent to enforcement of this indemnity.

### **C. California Civil Code Section 2782.8**

Notwithstanding the foregoing, to the extent that the CONSULTANT's services are subject to California Civil Code Section 2782.8, the above indemnity, including the cost to defend, shall be limited to the extent required by California Civil Code Section 2782.8.

**X. INSURANCE**

CONSULTANT shall maintain prior to the beginning of and for the duration of this AGREEMENT insurance coverage as specified in Exhibit C attached to and part of this AGREEMENT.

**XI. INDEPENDENT CONSULTANT**

A. CONSULTANT is and shall at all times remain as to the CITY a wholly independent consultant and/or independent contractor and not an employee of CITY. The personnel performing the services under this AGREEMENT on behalf of CONSULTANT shall at all times be under CONSULTANT's exclusive direction and control. Neither CITY nor any of its officers, employees, or agents shall have control over the conduct of CONSULTANT or any of CONSULTANT's officers, employees, subcontractors or agents, except as set forth in this AGREEMENT. CONSULTANT shall not at any time or in any manner represent that it or any of its officers, employees, subcontractors or agents are in any manner officers, employees, or agents of the CITY. CONSULTANT shall not incur or have the power to incur any debt, obligation, or liability whatever against CITY, or bind CITY in any manner.

B. No employee benefits shall be available to CONSULTANT in connection with the performance of this AGREEMENT. Except for the fees paid to CONSULTANT as provided in the AGREEMENT, CITY shall not pay salaries, wages, or other compensation to CONSULTANT for performing services hereunder for CITY. CITY shall not be liable for compensation or indemnification to CONSULTANT for injury or sickness arising out of performing services hereunder.

**XII. LEGAL RESPONSIBILITIES**

The CONSULTANT shall keep itself informed of State and Federal laws and regulations which in any manner affect those employed by it or in any way affect the performance of its service pursuant to this AGREEMENT. The CONSULTANT shall at all times observe and comply with all such laws and regulations. The CITY, and its officers, consultants and employees, shall not be liable at law or in equity occasioned by failure of the CONSULTANT to comply with this Section.

**XIII. UNDUE INFLUENCE/CONFLICT OF INTEREST**

CONSULTANT declares and warrants that no undue influence or pressure was used against or in concert with any officer or employee of the CITY in connection with the award, terms or implementation of this AGREEMENT, including any method of coercion, confidential financial arrangement, or financial inducement.



No officer or employee of the CITY has or will receive compensation, directly or indirectly, from CONSULTANT, or from any officer, employee or agent of CONSULTANT, in connection with the award of this AGREEMENT or any work to be conducted as a result of this AGREEMENT. Violation of this Section shall be a material breach of this AGREEMENT entitling the CITY to any and all remedies at law or in equity. CONSULTANT may not serve other clients whose activities within the corporate limits of CITY or whose business regardless of location would place CONSULTANT in a "conflict of interest" as that term is defined in the Political Reform Act, California Government Code section 81000 et seq.

**XIV. NO BENEFIT TO ARISE TO LOCAL EMPLOYEES**

No member, officer, or employee of CITY, or their designees or agents, and no public official who exercises authority over or responsibilities with respect to the Project during his/her tenure or for one year thereafter, shall have any interest, direct or indirect, in any Agreement or sub-Agreement, or the proceeds thereof, for work to be performed in connection with the Project performed under this AGREEMENT.

**XV. RELEASE OF INFORMATION/CONFLICTS OF INTEREST**

- A. All information gained by CONSULTANT in performance of this AGREEMENT shall be considered confidential and shall not be released by CONSULTANT without CITY's prior written authorization. CONSULTANT, its officers, employees, agents, or subconsultants, shall not without written authorization from the City Manager, or unless requested by the City Attorney, voluntarily provide declarations, letters of support, testimony at depositions, response to interrogatories, or other information concerning the work performed under this AGREEMENT or relating to any project or property located within the CITY. Response to a subpoena or court order shall not be considered "voluntary" provided CONSULTANT gives CITY notice of such court order or subpoena.
- B. CONSULTANT shall promptly notify CITY should CONSULTANT, its officers, employees, agents, or subconsultants be served with any summons, complaint, subpoena, notice of deposition, request for documents, interrogatories, request for admissions, or other discovery request ("Discovery"), court order, or subpoena from any person or party regarding this AGREEMENT and the work performed there under or with respect to any project or property located within the CITY, unless the CITY is a party to any lawsuit, arbitration, or administrative proceeding connected to such Discovery, or unless CONSULTANT is prohibited by law from informing the CITY of such Discovery. CITY retains the right, but has no obligation, to represent CONSULTANT and/or be present at any deposition, hearing, or similar proceeding as allowed by law. Unless CITY is a party to the lawsuit, arbitration, or administrative proceeding and is



and such subcontractor which shall include and indemnity provision similar to the one provided herein and identifying CITY as an indemnified party, or an incorporation of the indemnity provision provided herein, and proof that such proposed subcontractor carries insurance at least equal to that required by this AGREEMENT or obtain a written waiver from CITY for such insurance.

**XVIII. LICENSES**

At all times during the term of this AGREEMENT, CONSULTANT, its employees, agents, and any subcontractors shall have in full force and effect, all licenses, permits, qualifications and approvals required of it by law for the performance of the services described in this AGREEMENT. In addition, CONSULTANT and any subcontractors shall obtain and maintain during the term of this Agreement a valid Sand City business license.

**XIX. GOVERNING LAW**

This AGREEMENT shall be governed by and interpreted in accordance with the laws of the State of California. Any action to enforce or interpret this Agreement shall be brought in the Superior Court of the State of California, County of Monterey, or, in the case of any federal claims, in the United States District Court, Central District of California.

**XX. ENTIRE AGREEMENT**

This AGREEMENT contains the entire understanding between the parties relating to the obligations of the parties described in this AGREEMENT. All prior or contemporaneous Agreements, understandings, representations, and statements, oral or written and pertaining to the subject of this AGREEMENT or with respect to the terms and conditions of this AGREEMENT, are merged into this AGREEMENT and shall be of no further force or effect. Each party is entering into this AGREEMENT based solely upon the representations set forth herein and upon each party's own independent investigation of any and all facts such party deems material.

**XXI. SEVERABILITY/NO IMPLIED WAIVER OF BREACH**

If a court of competent jurisdiction finds that any provision of this Agreement is invalid, void or unenforceable, the provisions not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any breach of that term or any other term of this Agreement.

**XXII. ATTORNEYS FEES**

If a party to this Agreement brings any action to enforce or interpret this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled.

**XXIII. AUTHORITY TO EXECUTE THIS AGREEMENT**

The person or persons executing this AGREEMENT on behalf of CONSULTANT warrants and represents that he/she has the authority to execute this AGREEMENT on behalf of the CONSULTANT and has the authority to bind CONSULTANT to the performance of its obligations hereunder. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed the day and year first above written.

CONSULTANT

By: Pat Milbery  
(Signature)

Pat Milbery  
(Typed Name)

Owner/Founder - So-Gnar Inc.  
(Title)

CITY OF SAND CITY

  
Aaron Blair, City Manager

ATTEST:

  
Linda K. Scholink/City Clerk

APPROVED AS TO FORM:

City Attorney

By:  \_\_\_\_\_

Attachments:	Exhibit A	Scope of Services
	Exhibit B	Consultant's Fee Schedule
	Exhibit C	Insurance Requirements
	Exhibit D	Agreement for Public Art

## EXHIBIT A

### SCOPE OF SERVICES

Contractor agrees to perform the following services for City in connection with the West End Mural Festival:

- (a) Contact and actively solicit for financial contribution and sponsorships, nationally recognized and local companies, organizations and individuals. In particular, companies that have policies of corporate giving shall be contacted for potential financial assistance regarding the West End Mural Festival. This sponsorship development activity shall be documented by the Contractor and presented to the City on an annual basis prior to June 30, 2020.
- (b) Create all promotional materials necessary for the 2020 West End Mural Festival (e.g., posters; flyers, public service announcements, website development, and advertising for all media outlets).
- (c) Organize volunteers and coordinate with the Sand City Arts Committee to conduct the event.
- (d) Ensure that the West End Mural Festival is conducted in the manner required by City, State and Federal law (e.g., business license, safety and land use requirements; alcoholic and beverage control laws and regulations).
- (e) Coordinate the planning of the West End Mural Festival with the Sand City Arts Committee, City staff and the City's Police Department.
- (f) Contractor will prepare a draft budget for the 2020 West End Event. Expected expense items shall be categorized in the draft budget itemized to a level of detail which is acceptable to the City Manager. Contractor shall submit the draft budget to the City Manager for his/her review and approval no later than April 1, 2020.
- (g) Contractor agrees to provide curation services including;
  - Meet monthly with the Sand City Arts Committee and City Council, as necessary, to provide festival updates.
  - Selecting artists for the festival based upon the following criteria: skill, execution, experience, capability, style, quality, diversity, individuality, and context.
  - Coordinate artist and property owner agreement for public art.
  - Assist in festival budget oversight with City Staff.
  - Organize and manage all festival and artist paint and supplies.
  - Arranging and providing art and designs for City and property owner approval.
  - Provide design assistance and coordination of all marketing and branding of the festival.

- Coordination of all event volunteers.
- Ensure that all Artists meet deadlines as determined by City Manager
- Locate and coordinate sponsors and partners of the festival.
- Production of up to three (3) public murals on City owned property, to be produced by So Gnar, Inc., within the West End prior to the West End Mural Festival. Contractor agrees that City has sole discretion to approve or disapprove such murals. City Council will review and approve design sketches and mural locations before installation.

**EXHIBIT B**

**CONSULTANT'S FEE SCHEDULE**

So-Gnar, Inc.

Retainer Fee 10%: \$1500

Per hour for his services: \$200

Per Hour for support services under this contract: \$200

Travel and lodging to be billed at cost.



## EXHIBIT C

### INSURANCE REQUIREMENTS

Without limiting CONSULTANT's indemnification of CITY, and prior to commencement of Work, CONSULTANT shall obtain, provide and maintain at its own expense during the term of this AGREEMENT, policies of insurance of the type and amounts described below and, in a form, satisfactory to CITY.

**General liability insurance.** CONSULTANT shall maintain commercial general liability insurance with coverage at least as broad as Insurance Services Office form CG 00 01, in an amount not less than \$1,000,000 per occurrence, \$2,000,000 general aggregate, for bodily injury, personal injury, and property damage. The policy must include contractual liability that has not been amended. Any endorsement restricting standard ISO "insured contract" language will not be accepted.

**Automobile liability insurance.** CONSULTANT shall maintain automobile insurance at least as broad as Insurance Services Office form CA 00 01 covering bodily injury and property damage for all activities of the Consultant arising out of or in connection with Work to be performed under this AGREEMENT, including coverage for any owned, hired, non-owned or rented vehicles, in an amount not less than \$1,000,000 combined single limit for each accident.

**Professional liability (errors & omissions) insurance.** CONSULTANT shall maintain professional liability insurance that covers the Services to be performed in connection with this AGREEMENT, in the minimum amount of \$1,000,000 per claim and in the aggregate. Any policy inception date, continuity date, or retroactive date must be before the effective date of this AGREEMENT and CONSULTANT agrees to maintain continuous coverage through a period no less than one (1) year after completion of the services required by this AGREEMENT.

**Workers' compensation insurance.** CONSULTANT shall maintain Workers' Compensation Insurance (Statutory Limits) and Employer's Liability Insurance (with limits of at least \$1,000,000).

CONSULTANT shall submit to CITY, along with the certificate of insurance, a Waiver of Subrogation endorsement in favor of CITY, its officers, agents, employees and volunteers.

**Umbrella or excess liability insurance.** [Optional depending on limits required]. CONSULTANT shall obtain and maintain an umbrella or excess liability insurance policy with limits that will provide bodily injury, personal injury and property damage liability coverage at least as broad as the primary coverages set forth above, including commercial general liability, automobile liability, and employer's liability. Such policy or policies shall include the following terms and conditions:

- A drop-down feature requiring the policy to respond if any primary insurance that would otherwise have applied proves to be uncollectible in whole or in part for any reason;
- Pay on behalf of wording as opposed to reimbursement;
- Concurrency of effective dates with primary policies;
- Policies shall “follow form” to the underlying primary policies; and
- Insureds under primary policies shall also be insureds under the umbrella or excess policies.

### **Other provisions or requirements**

**Proof of insurance.** CONSULTANT shall provide certificates of insurance to CITY as evidence of the insurance coverage required herein, along with a waiver of subrogation endorsement for workers’ compensation. Insurance certificates and endorsements must be approved by City’s Risk Manager prior to commencement of performance. Current certification of insurance shall be kept on file with CITY at all times during the term of this contract. CITY reserves the right to require complete, certified copies of all required insurance policies, at any time.

**Duration of coverage.** CONSULTANT shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property, which may arise from or in connection with the performance of the Work hereunder by CONSULTANT, his agents, representatives, employees or subconsultants.

**Primary/noncontributing.** Coverage provided by CONSULTANT shall be primary and any insurance or self-insurance procured or maintained by CITY shall not be required to contribute with it. The limits of insurance required herein may be satisfied by a combination of primary and umbrella or excess insurance. Any umbrella or excess insurance shall contain or be endorsed to contain a provision that such coverage shall also apply on a primary and non-contributory basis for the benefit of CITY before the CITY’s own insurance or self-insurance shall be called upon to protect it as a named insured.

**City’s rights of enforcement.** In the event any policy of insurance required under this AGREEMENT does not comply with these specifications or is canceled and not replaced, CITY has the right but not the duty to obtain the insurance it deems necessary and any premium paid by CITY will be promptly reimbursed by CONSULTANT or CITY will withhold amounts sufficient to pay premium from CONSULTANT payments. In the alternative, CITY may cancel this AGREEMENT.

**Acceptable insurers.** All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance or is on the List of Approved Surplus Line Insurers in the State of California, with an assigned policyholders’ Rating of A- (or higher) and Financial Size Category Class VI (or larger) in accordance with the latest edition of Best’s Key Rating Guide, unless otherwise approved by the City Manager.

**Waiver of subrogation.** All insurance coverage maintained or procured pursuant to this Agreement shall be endorsed to waive subrogation against CITY, its elected or appointed officers, agents, officials, employees and volunteers or shall specifically allow CONSULTANT or others providing insurance evidence in compliance with these specifications to waive their right of recovery prior to a loss. CONSULTANT hereby waives its own right of recovery against CITY, and shall require similar written express waivers and insurance clauses from each of its subconsultants.

**Enforcement of contract provisions (non estoppel).** CONSULTANT acknowledges and agrees that any actual or alleged failure on the part of the CITY to inform CONSULTANT of non-compliance with any requirement imposes no additional obligations on the CITY nor does it waive any rights hereunder.

**Requirements not limiting.** Requirements of specific coverage features or limits contained in this Section are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any insurance. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all inclusive, or to the exclusion of other coverage, or a waiver of any type. If the Consultant maintains higher limits than the minimums shown above, the CITY requires and shall be entitled to coverage for the higher limits maintained by the Consultant. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the CITY.

**Notice of cancellation.** Consultant agrees to oblige its insurance agent or broker and insurers to provide to CITY with a thirty (30) day notice of cancellation (except for nonpayment for which a ten (10) day notice is required) or nonrenewal of coverage for each required coverage.

**Additional insured status.** General liability policies shall provide or be endorsed to provide that CITY and its officers, officials, employees, and agents, and volunteers shall be additional insureds under such policies. This provision shall also apply to any excess/umbrella liability policies.

**Prohibition of undisclosed coverage limitations.** None of the coverages required herein will be in compliance with these requirements if they include any limiting endorsement of any kind that has not been first submitted to CITY and approved of in writing.

**Separation of insureds.** A severability of interests provision must apply for all additional insureds ensuring that Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the insurer's limits of liability. The policy(ies) shall not contain any cross-liability exclusions.

**Pass through clause.** CONSULTANT agrees to ensure that its subconsultants, subcontractors, and any other party involved with the project who is brought onto or involved in the project by CONSULTANT, provide the same minimum insurance coverage and endorsements required of CONSULTANT. CONSULTANT agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this section. CONSULTANT agrees that upon request, all Agreements with consultants, subcontractors, and others engaged in the project will be submitted to CITY for review.

**City's right to revise specifications.** The CITY reserves the right at any time during the term of the contract to change the amounts and types of insurance required by giving the CONSULTANT ninety (90) days advance written notice of such change. If such change results in substantial additional cost to the CONSULTANT, the CITY and CONSULTANT may renegotiate CONSULTANT's compensation.

**Self-insured retentions.** Any self-insured retentions must be declared to and approved by CITY. CITY reserves the right to require that self-insured retentions be eliminated, lowered, or replaced by a deductible. Self-insurance will not be considered to comply with these specifications unless approved by CITY.

**Timely notice of claims.** CONSULTANT shall give CITY prompt and timely notice of claims made or suits instituted that arise out of or result from CONSULTANT's performance under this AGREEMENT, and that involve or may involve coverage under any of the required liability policies.

**Additional insurance.** CONSULTANT shall also procure and maintain, at its own cost and expense, any additional kinds of insurance, which in its own judgment may be necessary for its proper protection and prosecution of the work.

## Exhibit D

### AGREEMENT FOR PUBLIC ART

THIS AGREEMENT is executed this \_\_\_ day of \_\_\_\_, 2020 by and between the City of Sand City, a municipal corporation, (hereinafter "City") and So-Gnar, Inc., a Colorado Corporation and So-Gnar's Principal, Pat Milbery. (Hereinafter, combined called "Artist")

WHEREAS, the City has selected Artist to design and execute three murals ("Artwork") to be installed at locations within Sand City.

#### **NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:**

1. **Scope.** Artist hereby agrees to provide to the City of Sand City, as the scope of services under this Agreement, the following services:

a. Artist shall furnish and provide at their cost and expense all supplies, materials, equipment and shipment thereof, if applicable, related to the performance of this Agreement. Services shall be performed in a professional manner and in strict compliance with all terms and conditions in the Agreement.

b. Upon issuance of a Notice to Proceed by City, Artist shall commence the final design and execution of the Artwork.

c. Artist must obtain design approval. Artist shall present to Arts Committee at least four designs from which committee will select three (3) to be installed.

d. Artist must obtain approval from the arts committee regarding final placement of the Artwork. The location of the Artwork shall be on City owned property, and the location of the Artwork shall be referred to herein as the "Site."

e. If applicable, Artist shall provide City with the names of all subcontractors along with a copy of the agreement between the Artist and each subcontractor, and the subcontractors City of Sand City business license.

f. Artist shall take reasonable measures to protect or preserve the integrity of the Artwork with the application of a protective sealant, patina, or anti-graffiti coating, if applicable.

g. Artist must coordinate installation of Artwork with the City Manager, or designee, and the City's Public Works Director, or designee. Artist must secure all required licenses, permits and similar legal authorizations at the Artist's expense as may be necessary for the installation of the artwork at the Site.

h. Artist shall be responsible for installation of the Artwork and all costs associated with its creation and placement. Artist must consult with the City Manager, or designee, and the City's Public Works Director, or designee, prior to and during installation.

## Exhibit D

i. Installation of artwork must be completed by July 15, 2020, unless otherwise notified in writing by City. Artist shall notify the City of any adverse Site conditions that will impact the installation of the Artwork. Failure to do so by the Artist shall be deemed as an acceptance of the Site conditions.

j. If installation does not meet criteria at City Manager's discretion, Artist at their own cost shall continue working until such time as approval is obtained from the City.

### 2. Duties of City.

City shall provide, at no cost to Artist, any documents or information available to City that is reasonably required by Artist for performance of their duties.

### 3. Time for Performance.

Artist shall promptly commence the Artwork upon receipt of a Notice to Proceed issued by City. No work shall begin prior to issuance of the Notice to Proceed. Upon receipt of said Notice, Artist shall diligently work to complete all of the Artwork by July 15, 2020. Time is of the essence in performance of all obligations under this Agreement, and extensions of time may be granted by the City only as provided in section entitled Force Majeure, below.

### 4. Compensation.

a. Compensation shall be as set forth the Consultant's Agreement to which this Agreement is an exhibit.

b. City shall have the right at reasonable times to review Artwork while in the process of fabrication. Artist shall give progress reports to the City Manager on a monthly basis or when otherwise requested.

### 5. Artist Warranties.

a. Warranty of Title. Artist represents and warrants that Artist is the sole author of the Artwork and that Artist is the sole owner of any and all copyrights pertaining to the Artwork. Artist further represents that the Artwork is free and clear of any liens and that there are no outstanding disputes in connection with property rights, intellectual property rights or any other rights in the Artwork or any parts of the Artwork.

b. Workmanship. Artist shall warrant and maintain the Artwork free from all faults or defects related to material or workmanship for a period of two years after the Artwork is accepted by City.

c. Originality. Artist warrants that the design of the Artwork as is an edition of one, and that neither Artist nor Artist's agents will execute or authorize another to execute another work of the same or substantially similar image, design, dimensions and materials as the Artwork.

## Exhibit D

d. **Public Safety.** Artist represents and warrants that the Artwork will not pose a danger to the safety of persons or property in view of the possibility of misuse, if such misuse is in a manner that was reasonably foreseeable at any time during the term of this Agreement. Artist agrees to cooperate with City in making or permitting adjustment to the Artwork if necessary to eliminate hazards that become apparent after the Artwork is accepted by City.

e. **Acceptable Standard of Display.** Artist represents and warrants that: (1) general routine cleaning and repair of the Artwork and any associated working parts and/or equipment will maintain the Artwork within an acceptable standard of public display; (2) foreseeable exposure to the elements and general wear and tear will cause the Artwork to experience only minor repairable damages and will not cause the Artwork to fall below an acceptable standard of public display; and (3) with general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the Artwork will not experience irreparable conditions that do not fall within an acceptable standard of public display, including mold, rust, fracturing, staining, chipping, tearing, abrading and peeling.

**6. Acceptance of Artwork.** The Artist must notify the City when the Artwork is fully installed and complete. No more than thirty (30) days after receiving such notice, the City will provide the Artist a written response, informing the Artist that either (1) the City agrees that the Artwork is fully installed and is complete consistent with the terms of this Agreement, and the City formally accepts the Artwork as completed ("Letter of Acceptance"); or (ii) the City does not consider the Artwork to be completed due to unresolved issues or defects that remain, and describing the outstanding issues or defects and the time frame in which the Artist must then cure before the City will issue a Letter of Acceptance. The Artwork is not finally complete for purposes of this Agreement until the City has issued a Letter of Acceptance ("Final Acceptance"). No payments to Artist shall be deemed as a waiver of City's right to refuse to accept the Artwork.

**7. Transfer of Title to Artwork.** Title to the Artwork shall remain in Artist's name until City has accepted the Artwork as completed and it is installed to the satisfaction of City. Once the City has issued a Letter of Acceptance the City will be the sole owner of the Artwork. Transfer of title shall be self-executing upon City's Final Acceptance. Artist shall bear all risk of loss of the Artwork until title has been transferred to City.

**8. Maintenance.** Not later than completion of the Artwork, Artist shall supply City with any instructions for proper care of the Artwork. The City recognizes that maintenance of the Artwork on a regular basis according to the maintenance instructions is essential to the integrity of the Artwork. The City shall nonetheless have the right to determine, in its sole discretion, when and if maintenance, repairs, and restorations to the Artwork will be made.

### **9. Artist's Moral Rights; Waiver of VARA and CAPA Rights.**

a. The City, having expended considerable public funds to commission the Artwork, and pursuant to its responsibilities to maintain artworks owned by City, intends to make its best

## Exhibit D

efforts to display the Artwork at the Site, as originally created by Artist and to maintain the Artwork in good condition. However, City must preserve complete flexibility to operate and manage City property. Therefore, subject to City's obligation to make good faith efforts to consult with Artist as set forth in subsection (c), below, Artist agrees that City, in connection with its power and duty to operate and manage City property in the public's interest, shall have the absolute right to alter, repair, modify, remove, relocate, sell, dispose of, or destroy (collectively, "MODIFY") the Artwork in City's sole judgment. For example, City may MODIFY the Artwork to eliminate hazards, to comply with the ADA, to otherwise aid City in the management of its property and affairs, or through neglect or accident. City also has the right to install the Artwork in an alternate location that the City chooses in its sole discretion. The CITY has the absolute right to change, MODIFY, destroy, remove, relocate, move, replace, transport, repair or restore the Artwork.

b. Artist waives any and all claims, arising at any time and under any circumstances, against City, its officers, agents, employees, successors and assigns, arising under the federal Visual Artists Rights Act (17 U.S.C. §§106A and 113(d)), the California Art Preservation Act (Cal. Civil Code §§987 et seq.), and any other local, state, federal or international laws that convey rights of the same nature as those conveyed under 17 §106A, Cal. Civil Code §§987 et seq., or any other type of moral right protecting the integrity of works of art. If the Artwork is incorporated into a site such that the Artwork cannot be removed from the Site without modifying the Artwork, Artist waives any and all such claims against any future owners of the Site, and its agents, officers and employees, for modifying the Artwork.

c. To the extent practical, during the ten years following the Final Acceptance of the Artwork, the Artist shall be given the opportunity to consult on repairs or restorations of the Artwork. Such consultation shall be without charge by Artist unless otherwise specifically agreed to the charges in writing. If the Artwork is to be repaired or restored and City intends to maintain the Artwork on display, City shall make a reasonable good faith effort to engage Artist in the restoration of the Artwork and to compensate Artist for Artist's time and efforts at fair market value, which may be the subject of a future Agreement between Artist and City. However, City has no obligation under this Agreement to repair or restore the Artwork and City may contract with any other qualified art conservator or artist for such repair or restoration.

d. If City alters the Artwork without Artist consent in a manner that is prejudicial to Artist's reputation, Artist may disclaim authorship of the Artwork.

e. City shall have the right to donate or sell the Artwork at any time. Before exercising this right during the lifetime of the Artist, City, by written notice to Artist at Artist's last known address, agrees to give Artist the opportunity to purchase the Artwork for the amount of any offer which City has received for the purchase of the Artwork, plus all costs associated with the removal of the Artwork from the Site, clean-up of the Site and delivery to Artist. Artist shall have thirty (30) days from the date of City's notice to exercise the option to purchase the Artwork.



## Exhibit D

### 11. Copyright.

a. Except as provided in this Agreement, Artist shall retain all copyrights in the Artwork and Artists Submittals. Artist's copyright shall not extend to predominantly functional aspects of the building or Site that may be incorporated into Artwork or which are in the area of the Artwork, such as the walls and other fixtures and features of the Site, or other similar objects located at the Site. If Artist is comprised of two or more individual persons, the individual persons shall be deemed joint authors of the Artwork.

b. Artist may, at Artist's option, place a copyright notice on the Artwork in the form and manner required to protect copyrights in the Artwork under United States copyright law. If the copyright is registered with the U.S. Copyright Office, Artist shall provide City with a copy of the application for registration, the registration number and the effective date of registration.

c. City is not responsible for any third-party infringement of Artist's copyright and not responsible for protecting the intellectual property rights of Artist.

### 12. Reproduction and Distribution.

a. Artist agrees that City may use Artists Submittals for the purposes related to the development and consideration of the Artwork Design, including without limitation, obtaining any and all approvals of the Artwork Design and the Artwork. Artist authorizes City to make, and to authorize the making of, photographs and other two-dimensional reproductions of the Artwork for educational, public relations, arts promotional and other noncommercial purposes.

b. For purposes of this Agreement, the following are deemed to be reproductions for noncommercial purposes: reproduction of the Site, where the Artwork is incidental; in catalogues, books, slides, photographs, postcards, posters and calendars; in news sections of newspapers; in general books and magazines not primarily devoted to art but of an educational, architectural, historical or critical nature; slides and film strips not intended for a mass audience; and television from stations operated for educational purposes or on programs for educational purposes from all stations; and in electronic newspapers, websites, blogs and other electronic formats for news, review or commentary. Artist shall also allow City to publish reproductions to provide information to the public on the City's public art or to otherwise promote the City's public art program, even if the publication occurs within art publications, on commercial television stations, in other commercial publications or on the internet.

c. On any and all such reproductions, City shall place a copyright notice (if the Artist has the work copyrighted) in the form and manner required to protect the copyrights in the works under the United States copyright law.

d. Public Records Requests. Any documents provided by Artist to City are public records and City may authorize third parties to review and reproduce such documents pursuant to the California Public Records Act.

**13. Waiver.** The parties agree that waiver of any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained

## Exhibit D

herein or a waiver of any subsequent breach or violation of the same or any other term or condition.

**14. Validity.** If any provision in this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will continue in full force without being impaired or invalidated in any way.

**15. Assignment of Interest.** The duties under this Agreement shall not be assignable, delegable, or transferable without the prior written consent of City. Any such purported assignment, delegation, or transfer shall constitute a material breach of this Agreement upon which City may terminate this Agreement and be entitled to damages.

**16. Conflict of interest.** Artist hereby certifies that it does not now have, nor shall it acquire, any financial or business interest that would conflict with the performance of services under this Agreement.

**17. Force Majeure.** For purposes of this Agreement, the term "Force Majeure" shall mean earthquake, fire, or other casualty, flood, landslide, epidemic, unforeseeable adverse weather, "acts of God," war, civil disturbance, court ordered injunction, intervention by civil or military authorities or government, strikes, lockouts, boycotts, or other labor disputes, to the extent any of the foregoing are beyond the reasonable control of either City or Artist and which cause such party to be delayed or hindered in or prevented from the performance of any covenant or obligation under this Agreement other than the payment of money. If either Artist or City is delayed or prevented from the performance of any act required by this Agreement by reason of acts of Force Majeure, performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.


**18. Counterparts.** This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

**19. Laws.** Artist agrees that in the performance of this Agreement it will comply with all applicable State, Federal and local laws and regulations. This Agreement shall be governed by and construed in accordance with the laws of the State of California and the City of Sand City. Any action to enforce or interpret this Agreement shall be brought in the Superior Court of the State of California, County of Monterey, or, in the case of any federal claims, in the United States District Court, Central District of California.

**Exhibit D**

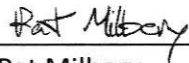
**IN WITNESS WHEREOF**, this Agreement is entered into by the parties hereto on the day and year first above written in Sand City, California

City:

  
\_\_\_\_\_  
Aaron Blair, City Manager

3/4/2020  
\_\_\_\_\_  
Date

Artist/So-Gnar, Inc.:

  
\_\_\_\_\_  
Pat Milbery

03/04/2020  
\_\_\_\_\_  
Date

Attest:

  
\_\_\_\_\_  
Linda Scholink, City Clerk