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Council Resolution No. 90-3227
October 10, 1990

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

SECOND AMENDMENT TO CONTRACT:
DALLAS MUSEUM OF ART

THIS SECOND AMENDMENT TO CONTRACT (hereinafter called the "Second Amendment") is entered into this 10th day of October, 1990, by and between the CITY OF DALLAS, a municipal corporation (hereinafter called the "City"), and the DALLAS MUSEUM OF ART, a nonprofit corporation chartered and existing under the laws of the State of Texas, previously known as the Dallas Museum of Fine Arts, or "Museum" (hereinafter called "DMA").

WHEREAS, the City and DMA heretofore have entered into that certain Contract, dated October 30, 1972 (as subsequently amended, hereinafter called the "Contract"), relating to the operation of the Dallas Museum of Art, formerly located in Fair Park and presently located at 1717 North Harwood Street on land owned by the City (which facilities, as expanded or modified from time to time, including the new Hamon Building, as defined below, when construction is complete, are hereinafter called the "Art Museum"); and

WHEREAS, in connection with relocation of the Art Museum to City-owned land at 1717 North Harwood Street, the City and DMA entered into that certain First Amendment to Contract, dated September 12, 1984, pursuant to which the parties thereto agreed that the City held and would continue to hold title to the Art Museum land and buildings located at 1717 North Harwood Street, and to all art works purchased by, or given to, the City or DMA prior to the date thereof, and that DMA would hold title to all art objects bought by, or given to, DMA on or after the date thereof; and

WHEREAS, on December 11, 1985, the City passed a resolution entitled "Cultural Policy and Program" (the "Policy Resolution"), pursuant to which the City established a uniform cultural arts policy in regard to the support of cultural institutions in the City; and

WHEREAS, on April 12, 1989, the City passed Ordinance No. 20266, pursuant to which the City established the Office of Cultural Affairs (hereinafter called "OCA"), and empowered OCA to perform many of the duties previously performed by the Park and Recreation Board in regard to the Art Museum; and

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WHEREAS, DMA proposes to expand the existing facilities at the Art Museum to include the Hamon Building, such expansion to be undertaken by DMA as provided herein, and which, following completion and acceptance, shall be owned by the City subject to the terms of the Contract, as amended; and

WHEREAS, in light of the above circumstances, the City and DMA desire to amend the Contract for the purposes of (i) providing for construction of the Hamon Building; (ii) reflecting changes in administrative responsibility under the Contract; (iii) extending the term of the Contract; (iv) revising the City's funding obligations in regard to the Art Museum; and (v) effecting other changes to the Contract as reflected herein;

NOW, THEREFORE, for and in consideration of the services provided on behalf of the City by DMA for the maintenance, operation and management of the Art Museum, the historic and magnanimous construction for the City of the Hamon Building, and the professional services related to the care and preservation of the City's works of art, and the other mutual covenants and promises contained herein, the City and DMA hereby agree as follows:

1. Term: Sections 2.0 and 8.0 of the Contract are amended to extend the term of the Contract to May 1, 2011.

2. Administration: The Contract is amended to provide that the Contract shall be administered on behalf of the City by OCA, and on behalf of DMA by its duly authorized officials; provided, however that with respect to the construction of the Hamon Building, the Director of Public Works shall represent the City. To the extent necessary to comply with the City's obligations under the Contract, OCA may use the services of other City departments as necessary to perform such obligations.

3. Hours of Operation: Section 4.2 of the Contract is amended to provide that DMA agrees to open the Art Museum to the public each day at such hours as are, in the opinion of DMA's trustees and as approved by OCA, reasonably necessary to serve the public and to best fulfill the public purpose.

4. Sale and Exchange of Art Objects: Section 4.4 of the Contract is amended to change all references to the "Park and Recreation Board" to the "OCA"; all other references to the "Park and Recreation Board" contained in the Contract are also changed to the "OCA".

5. Election of Trustees: Section 4.5 of the Contract is amended to delete the third, fourth and fifth sentences and to substitute the following: "DMA agrees to supply OCA with the names of those persons selected as trustees, which names OCA shall keep in its records as public information. DMA represents to the City that

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it has adopted a code of ethics and that each of its trustees has agreed to abide by such code. DMA shall deliver to the City a true and correct copy of such code as in effect on the date hereof, as well as any revisions thereto made from time to time."

6. Admission Fees: Section 4.8 of the Contract is deleted in its entirety and the following is substituted: "DMA, with the prior review and consent of OCA (which consent will not be unreasonably withheld), may, but is not obligated to, charge a reasonable admission fee to the Art Museum, or to special exhibits held by DMA at the Art Museum. Any sales, admissions, entertainment, or similar tax authorized by law shall be collected and remitted separately as provided by law, without offset or credit to DMA. If requested by OCA, quarterly reports shall be provided by DMA to OCA detailing the revenues derived from admission fees and their distribution."

7. The State Fair of Texas: Section 4.9 of the Contract, and all other references to the State Fair of Texas contained in the Contract, are deleted in their entirety.

8. Operating Budget: Section 4.10 of the Contract is amended to delete "May 10 of each fiscal year" in the first sentence and substitute "a date in each fiscal year specified in a written notice from OCA."

9. City's Funding Obligations: Section 4.12 of the Contract is deleted in its entirety and the following is substituted:

"4.12. Subject to the provisions of Section 4.10 and the discretion of the City Council regarding the appropriation of necessary funding, it is the City's intention to provide funding for the operation of the Art Museum consistent with the City's established cultural policy, as such policy may exist from time to time. Funding by the City is provided in consideration of the historic and magnanimous construction for the City of the Hamon Building, professional services rendered by DMA for the preservation of the City's art collection and the management of the Art Museum for public purposes.

a. In accordance with the procedure set forth in subparagraph C. below, and in addition to other obligations undertaken by the City under this Contract, as amended, the City agrees, subject to annual City Council appropriation, to provide funding in its departmental budgets for the following items for the Art Museum:

(1) All structural maintenance and repairs of buildings (and building systems), fountains and other improvements, landscaping and routine maintenance of external grounds, comprising the Art Museum and related facilities now or hereafter located at 1717 North Harwood Street, Dallas, Texas.

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(2) Purchase by the City of reasonable property insurance or self-insurance for the Art Museum, related City improvements and other City-owned property, except the works of art owned by the City that are in the possession of DMA. Such insurance shall include DMA as an additional insured, or alternatively, shall contain a waiver of subrogation as to DMA. With respect to the City-owned works of art, the City agrees to reimburse DMA, in accordance with subparagraph B. below, for the cost of fine arts insurance coverage procured by DMA on the City's behalf. DMA is responsible for securing all other insurance coverage reasonably required by the City's Office of Risk Management and other provisions of this Contract at DMA's cost. With respect to insurance coverage secured by DMA, the City shall be named as an additional insured on all such coverage and shall have the right to review the insurance carrier proposed, policy coverages, deductibles and rates for acceptability.

(3) Minor, non-structural improvements to buildings and related facilities comprising the Art Museum, now or hereafter located at 1717 North Harwood Street, Dallas, Texas. DMA may, at its option and expense, perform such minor improvements; provided, however, that the City has the right to review all plans and specifications for such improvements and all such improvements shall be done in conformance with City codes, ordinances, regulations, design criteria and building standards.

(4) The cost of all gas, electricity, water and wastewater utilities, but not waste disposal or telephone service, incurred by DMA in connection with the operation of the Art Museum and related facilities.

B. (1) In accordance with the procedures set out in subparagraph C. below, the City agrees, subject to approval of costs by OCA and annual City Council appropriation, to provide funding directly to DMA for the following:

(i) One-half of the annual cost of salaries and customary benefits for internal and external security personnel for the Art Museum, which relates to the protection of the City-owned art works in DMA's possession.

(ii) One-half of the annual costs and expenses (excluding office supplies, travel and staff education expenses) incurred by DMA for salaries, customary benefits and related expenses for curators, preparators, registrars, conservators and photographers used by DMA, which relates

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to the storage and care (including preservation and restoration) of the City-owned art works in DMA's possession.

(iii) The City's pro rata portion of fine arts insurance coverage to be obtained by DMA on the City's behalf.

(2) From time to time, beginning in 1995, in addition to the annual review of appropriations, the City and DMA shall review the portions of direct operations costs borne by the City pursuant to clauses (i) through (iii) immediately above. The objectives of any such review shall be the possible revision of such operating expenses borne by the City, after consideration of the following factors, among others: (a) the number of the art objects owned by the City in relation to the total number of art objects owned by DMA; (b) the fair market value of the respective collections owned by the City and DMA; and (c) the degree of conservation, restoration, storage care and general art care of the respective collections of the City and DMA.

C. The foregoing represents the City's funding requirements under the Contract, as amended, subject to annual City Council approval and funding, at its discretion. Any direct payments to DMA shall be made pursuant to its annual service agreement with the City, following City Council approval. All other necessary operating expenses of the Art Museum (excluding those paid by the City under this Contract) shall be paid by DMA. In addition, DMA from time to time may apply to OCA for additional funding for programs or special projects, all in accordance with OCA's established funding policy for cultural institutions, as such policy may change from time to time."

10. Building Maintenance: Section 4.13 of the Contract is deleted in its entirety and the following is substituted: "The City's General Services Department shall provide for the mechanical and structural maintenance of the Art Museum buildings, improvements, and systems, including parking facilities, but excluding telephone systems and janitorial maintenance, which shall be provided by DMA."

11. Remedies: Section 5.0 of the Contract is deleted in its entirety; provided, however, that nothing in the Contract or in the deletion of Section 5.0 shall be construed to prevent either party from seeking whatever remedies it may have, at law or in equity, including termination, in the event of a breach of this Contract. The parties shall use best efforts to attempt to resolve disputes that may arise in the course of the Contract.

12. Construction of the Hamon Building: The Contract is amended to add new Section 9.0 as follows:

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"9.0 CONSTRUCTION OF THE HAMON BUILDING

- A. The purpose of this Section is to set forth terms and conditions regarding DMA's construction of a new addition, remodeling of existing portion of the Art Museum and construction of an underground parking facility (all hereinafter called the "Hamon Building"). The City shall have no responsibility for the cost of design and construction, regardless of whether or not such cost exceeds DMA's construction estimates or budgets. DMA expressly agrees to not in any way make a claim against the City in connection with the Hamon Building or hold the City responsible for any cost of the Hamon Building. The City shall have no liability for any claims that may arise out of design or construction of the Hamon Building, and DMA shall cause all of its consultants and contractors to agree in writing that they will look solely to DMA, not to City, for payment of all costs and valid claims associated with the Hamon Building. Construction of the Hamon Building shall not commence until the City receives financial information reasonably satisfactory to it evidencing the availability of the minimum amount of funds necessary, either unconditionally or on such conditions as to which the City shall consent, to substantially complete the Hamon Building and obtain the issuance by the City of a certificate of occupancy for the Hamon Building (but not necessarily evidencing the availability of funds for finish-out and other costs typically incurred after substantial completion or the issuance of a certificate of occupancy). The determination of the availability of such amount of funds shall be made by reference to the most recent cost estimate (which estimate shall include a reasonable reserve for contingencies) for the Hamon Building previously submitted to the City.
- B. All construction plans and specifications for the Hamon Building shall be reviewed and approved by the Director of Public Works, or his designee, prior to commencement of any work. All construction and design shall conform to applicable City codes, ordinances, regulations, design criteria, building standards and specifications. All revisions to approved plans shall be submitted to City for approval; any revisions reasonably required by the City to meet the requirements of applicable City codes and building standards shall be paid for by DMA.

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C. DMA shall provide three sets of construction documents to the Director of Public Works on or before the date of distribution of the documents to potential contractors. The City shall have the right to review, comment on and approve the construction documents. In addition, the construction documents utilized by DMA to govern construction of the Hamon Building shall be at a minimum substantially equivalent to the City's form of General and Supplementary General Conditions (AIA Document A201, 1987 Edition; July 11, 1989 City Supplementary General Conditions). DMA shall provide the City with a set of approved reproducible drawings prior to commencement of construction, signed and sealed by one or more registered professional architects or engineers licensed in the State of Texas. Any material changes to the final plans and specifications shall require the approval of the Director of Public Works. DMA shall also furnish the City with complete as-built drawings within sixty (60) days after construction is complete.

D. The City agrees to provide personnel from its Department of Public Works to assist DMA in securing and expediting plan review and the necessary permits and approvals from other City departments. DMA shall not direct its contractors to commence work within City property or right-of-way until any and all City required permits have been obtained.

E. DMA's construction manager and architect contracts shall include (1) insurance requirements acceptable to both DMA and the City, naming both as additional insureds, and (2) indemnification provisions with both DMA and City as indemnitees.

F. All construction contracts entered into between DMA and its contractor(s) for the purpose of the Hamon Building, including any construction performed by the construction manager, shall require performance and payment bonds and minimum insurance requirements in the form and amounts normally required by the City for construction projects of this magnitude. The contracts shall also require the contractor(s) to name the City of Dallas, its officers, agents and employees, DMA, and such other parties as DMA includes, as indemnitees under the indemnification provisions of the construction contracts. The contractor(s) shall also be required to name the City of Dallas, its officers, agents and employees,

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as an additional insured on all liability insurance policies required for the project. If DMA enters into a contract with a construction manager under a guaranteed maximum price or other arrangement, and if contracts or subcontracts are to be assigned to or entered into by the construction manager, DMA shall require the construction manager to include the above-mentioned requirements in its subcontractor documents. The construction manager shall also in such event be required to obtain the bonds (in the amount of any construction undertaken) and insurance in the form typically required by the City of construction managers on such projects, with DMA and the City as joint obligees, or joint insureds, as the case may be. The construction manager shall also be required to look solely to DMA, not the City, for payment of all costs and valid claims.

- G. During construction, DMA's construction manager and architect (or the architect's designated representative) shall provide full-time, on-site representation, administration and inspection to assure that the Hanon Building will be completed in accordance with the approved plans and specifications. The City's assigned representative shall be entitled to receive notice of and attend all construction meetings at which a representative of DMA shall be present and shall be provided with copies of minutes by DMA's architect or construction manager.
- H. The City shall have the right (but not the obligation) to inspect work performed by any contractor(s). City inspection of the job site shall be coordinated with DMA's contractor(s), construction manager and the architect. The City shall perform such inspection in an expeditious manner calculated to minimize inconvenience and delay.
- I. To the extent required by law, DMA shall require its construction manager to be responsible for maintaining reasonable vehicular and pedestrian access to property and buildings abutting City right-of-way at all times during DMA's construction activities. DMA's contractor(s) shall be responsible for the maintenance of temporary facilities, including pavements, to the City's satisfaction until they are replaced by the permanent pavement.

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- J. DMA shall submit its contractor's haul routes to the City for approval. DMA shall be responsible for documenting existing condition of haul routes and adjacent streets and private properties adjacent to the project. DMA's contractor(s) shall correct all damages caused by its contractors' negligence.
- K. All material construction field changes which affect the Hamon Building or any other City facilities shall be approved in advance by City. The City shall receive notice within a reasonable time of all field changes which do not affect City facilities. Construction of field revisions to approved plans, including unforeseen revisions to utility and drainage facilities, shall be paid for by DMA; provided, however, that field change unrelated to the scope of the Hamon Building that are requested by the City for its benefit shall be paid for by the City.
- L. Any construction and materials testing, as agreed to by the City and DMA, shall be performed by certified independent laboratories under contract to DMA or its construction manager, and paid for by DMA or its construction manager. DMA shall furnish the City with certified copies of the results of all tests.
- M. During construction, DMA shall be responsible for obtaining timely repair, replacement or correction of all damage caused to any property or facilities of the City, to the City's satisfaction, or damage caused to any property or facilities of any other person or entity. All costs thereof shall be borne by DMA or its contractors, and shall not be a charge against the City. Emergency repairs made by the City shall be reimbursed to the City by DMA.
- N. DMA and the City recognize the authority of the City under its charter and ordinances to exercise its police powers to protect the public health, safety, and welfare. Such powers extend to DMA's or its contractor's construction activities on City property, and DMA recognizes the City's authority to take appropriate enforcement action under its charter and ordinances to provide such protection. Whenever, in the City's judgment such action is required, the Director of Public Works or his designee shall immediately notify DMA's Project Manager to resolve the situation. The Director of Public Works or his designee has the right to stop

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construction in progress in the event DMA fails to resolve the situation or in the event it appears that applicable City ordinances continue to be violated. Any such action by the City will be exercised reasonably, but shall not subject the City to any liability for costs incurred by the contractor(s) or DMA, and as between DMA and the City, any such costs shall be the sole responsibility of DMA and its contractors.

O. Following substantial completion of construction, the Director of Public Works, or his designee, shall accompany DMA's architect and construction manager during inspection. The City shall review, comment on and approve the punch list for conformance with the technical specifications. Items identified by the City shall be added to the punch list at the City's request. After (1) the punch list items are performed to meet specifications, (2) receipt of certification by DMA's architect that the construction performed conforms with the approved plans and specifications, and (3) a certificate of occupancy has been issued in accordance with City ordinances, the City shall accept the Hamon Building, provided, however, that warranty obligations of the contractor(s) and correction of defective work shall not by such acceptance become the responsibility of the City, but shall remain the responsibility of DMA's construction manager and its contractor(s). DMA or its Construction Manager shall turn over to the City all building systems, training, operation and maintenance manuals for the Hamon Building and its facilities.

P. Upon final completion of all construction and acceptance by the City, fee simple title to the Hamon Building shall vest in and belong to the City, free and clear of all liens and encumbrances, subject to DMA's right to use and occupancy pursuant to the terms and conditions of the Contract, as amended. DMA agrees to do nothing before or during construction that would prejudice the City's ability to secure clear title to the Hamon Building upon completion. All rights under construction warranties shall be assigned to the City and administered by DMA's construction manager; provided, however, that any net funds received after deduction of expenses by the City in settlement or compromise of, or otherwise resulting from, rights associated with any of such warranties shall belong

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to, and promptly be paid by the City to, DMA to the extent such funds are not spent to repair, replace or correct any properties or facilities of the Hamon Building to conform to approved plans and specifications.

- Q. The parties understand, without affecting DMA's liability for all costs of construction, that the construction of the Hamon Building is for a public purpose, i.e. the expansion of a public art museum, and is being built upon public property for the benefit of the City as an improvement to the City's Art Museum and property.
- R. Any consent or approval by or on behalf of the City or the Director of Public Works (or any designee of any of them) required in connection with the design and construction of the Hamon Building shall not be unreasonably withheld. Any review associated with any determination to give or withhold any such consent or approval shall be conducted in a timely and expeditious manner with due regard to the cost to DMA associated with delay."

13. Right to Audit: The Contract is amended to provide that the City retains the right to audit, at the City's election and sole expense, all of DMA's records as they relate to the operation and use of the Art Museum, the construction of the Hamon Building, and any other matter relating to DMA's operating expenses and performance of its obligations under the Contract. Any such audit shall be conducted in a reasonable manner calculated to minimize disruption and inconvenience to DMA.

14. Equal Opportunity Employment and Good Faith Effort: DMA shall include in the terms of its contract(s) for the construction of the Hamon Building the terms and provisions of the City's Good Faith Effort Plan regarding Minority Business Enterprises and the provisions of Chapter 15B, Dallas City Code, regarding Equal Opportunity Employment, copies of which are attached hereto for reference as Exhibit A.

15. Operating Endowment: DMA shall establish an operating endowment fund and shall also use its best efforts to raise contributions from year to year in order to augment such endowment. Earnings shall be used for the benefit of the Art Museum's operations. In addition, DMA agrees to undertake, together with OCA or another designated representative of the City, an annual review with five year projections beginning in 1993 to determine ways of enhancing DMA's revenues, with an intent to defray and absorb a greater share of operating costs.

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16. Single Agreement: All other terms, provisions, and obligations of the Contract between the City and DMA shall remain in full force and effect, and the Contract, as same may have been previously amended, and this Second Amendment shall be construed together as a single contractual agreement. There shall be no third party beneficiaries to this Second Amendment or the Contract.

IN WITNESS WHEREOF, the City, signing by and through its City Manager, as authorized by Council Resolution No. 90-3227, approved on October 10, 1990, and DMA, signing by and through its duly authorized officials, have executed this Second Amendment as of the date first above written.

APPROVED AS TO FORM:
ANALESLIE MUNCY
City Attorney

CITY OF DALLAS
JAN HART
City Manager

BY [Signature]
Assistant City Attorney

BY [Signature]
City Manager

DALLAS MUSEUM OF ART

BY [Signature]
President

BY [Signature]
Director

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