

PUBLIC ART

OVERVIEW

This document sets out recommended standards for professional artists. The guidelines serve as a model for practical and ethical practices facilitating fair and equitable dealings between creators and partners involved in public art commissions. This is a living document and will be revised and updated based upon ongoing input from stakeholders.

Commissioned art is work that has been created to meet the specifications of a buyer. Commissioners of artwork may be individuals, corporations, or local, provincial, or federal bodies. Commissions may be entered into between artist(s) and purchaser(s) either with or without a public call for submissions or competition among potential creators of the work.

The main stages commonly used in the process of commissioning public art are outlined in this document and are widely adaptable to differing circumstances.

Organizers, artists and persons hired as consultants to work on processes related to the commissioning of public artwork will be able to use these best practices.

Considerations with regard to commissions of public art include:

- a) Who will own copyright?
- b) What form of contract will the parties use?
- c) Has the artist been made aware of the standards for competition and the standards that will be used in the final selection of work?
- d) How feasible is the design and the final work?
- e) What payment will be made for development of a design and for the work itself?

Competitions for commissions of public art, and the commissions that result from them, are dealt with in this document. This information may successfully be applied to the commissioning of artwork in other circumstances, including smaller-scale, special purpose, or private commissions.

Small organizations or communities may adapt these best practices to suit the smaller scale of their project(s), however, all of the standards must still be addressed. CARFAC Alberta can assist and advise on adaptations or changes.

1 DEFINITION OF COMMISSIONED WORKS

- 1.1 Commissioned artworks are produced under a true commission arrangement where the artist functions as an independent contractor in producing the artwork. This arrangement is distinct from an employee relationship. Under a true commission relationship, the commissioner and the artist agree on the nature, form, and content of artwork to be produced, the commissioner pays a fee to the artist for the production of the artwork, and the artist produces the work to the specifications previously agreed upon between the parties.

2 THE COMMISSIONING PROCESS

- 2.1 This document strongly recommends the use of a selection committee that includes artists, art professionals, representatives of the commissioner, and others as needed (see section 4.3).
- 2.2 The commissioning process should demonstrate a professional relationship with the artists involved, and provide reasonable payment for creation, time, materials, and related overhead costs.
- 2.3 Negotiation should also be a process between professionals, and should be guided by other comparable commercial sales of artwork, and relevant best practices e.g. *Contracts, Agreements and Negotiations*.
- 2.4 All details of any contract should be clearly stated and understood by all parties involved before the contract is signed.

3 STAGES IN PUBLIC ART COMPETITIONS

- 3.1 Each stage in the process of organizing competitions for commissions of public art should be followed as outlined below. No stage should be skipped or ignored. These stages and processes are typical for public bodies. Private or sole sourced (i.e. no competition) projects may have different stages, but the processes outlined in this document will still be relevant.

4 STAGE 1 – PLANNING AND PREPARATION

- 4.1 Organizers should make all necessary decisions regarding project planning and preparation before promoting the project.
- 4.2 Methods of and timelines for promoting the competition must be established.
- 4.3 Organizers should establish a selection committee (jury) separate from the organizers themselves. The selection committee's role is to make decisions about short lists of artists and final awarding of commissions. This committee should be kept to a manageable size and should be composed of artists and other art professionals as well as project and community stakeholders such as the sponsoring group or building committee. Scheduling

of the project must take into account the availability of committee members to meet and the time required by the committee at each stage of the project. Professional fees should be paid to artists and arts professional members who sit on the selection committee, as per the CARFAC – RAAV Minimum Recommended Fee Schedule.

4.4 The proposed site or venue for the work must be determined including any restrictions. Site safety and liability for artists, workers, and the public must be considered. It must be decided whether the work will be created on-site or created elsewhere and installed at the site. Permanence and/or movability of the work after it is installed must be considered. (See Section 12 below, and sections 2, 3, and 4 of Best Practices for Community-Based Art for some basic guidelines.)

4.5 Budget for the competition must be determined. This should include:

- a) payment to artists for design/maquettes and the final work
- b) payment for all taxes and or/surcharges (GST, etc.) as a separate item
- c) costs for travel, and artist accommodation if applicable
- d) costs for insurance and who will bear that cost, site preparation, materials and equipment (including industrial equipment such as scissor lift or crane)
- e) costs for installation of work including transportation
- f) costs for any engineered drawings, specialist assessments and approvals
- g) costs for lighting, signage, promotion
- h) artist role in the above
- i) the work of the committee

4.5 Where exact production or installation expenses cannot be determined, an estimate should be included in the contract with a provision that clearly states who is responsible for costs and cost overruns.

4.6 The schedule for the project must be set, including time allocations and payment schedules for each stage of the project (see section 11).

4.7 Artist contracts must be drafted in readiness for the selection committee.

5 STAGE 2 – PROJECT COMPETITION CALL

5.1 Organizers should promote the call for competition for the commission, a minimum of 60 days before the deadline.

- 5.2 Initial promotional information should contain a general project description and should outline submission requirements with deadline dates for each stage and the amount of money available in the competition.
- 5.3 Information on who is hosting the project and who will be making the selection should be included in this call.

6 STAGE 3 – DETAILED PROJECT DESCRIPTION

- 6.1 Organizers should make available for interested artists a detailed project description with requirements for submitting to the competition.
- 6.2 The detailed project description should include:
- a) a project description and any restrictions
 - b) specifics of who may submit to the competition and from what geographic area(s)
 - c) a site description and any restrictions
 - d) acceptable location(s) for production of the work (e.g. locally or remotely)
 - e) the type(s) of artwork to be accepted e.g. site-specific sculpture, mural, etc.
 - f) all relevant deadline dates and requirements
 - g) the name(s) of the project host(s)
 - h) composition of the selection committee
 - i) a description of the stages of the selection process, including any interviews
 - j) a statement of whether artist images are required in the first step of a competition. If they are, it must be stated what formats are acceptable, whether hard copies are required and if so, if/how they will be returned
 - k) a statement as to whether and/or at what stage a design or maquette (a scaled visualization of the proposed work, normally in 3D) is required and how much will be paid for production
 - l) a statement of ownership of copyright and intellectual property rights, both for artists images, maquettes, plans and other materials provided by the artist for the competition, and secondly for the completed commissioned work

- m) a statement regarding ownership of both design and maquette after production for awarded commissions and all other purposes
- n) an assurance that any competed materials presented by the artist (plans, design, maquettes, etc) will remain the exclusive property and copyright of the artist, and will be returned in good order (see section 14)
- o) a list of all necessary requirements that the artist must fulfill when submitting
- p) information on any public and/or private exhibition or disclosure of the submitted maquettes, designs and plans
- q) a list of the criteria by which submissions will be ranked and how the competition will be adjudicated

7 STAGE 4 – ACCEPTANCE OF PROPOSAL

- 7.1 If a preliminary proposal, e.g. high-level concept, 5-10 images and CV, is required as a first step, organizers should, within a reasonable timeframe, confirm receipt of the proposal for review by the selection committee.

8 STAGE 5 – ARTIST SHORT LIST

- 8.1 The selection committee should create a ranked shortlist of artists for the project. Shortlists of artists should be short, and should only contain the names of those artists whose work is reasonably considered to be appropriate for the project. The time, value of work, and commitment of artists must be respected.
- 8.2 Shortlisting should be conducted objectively by ranking submissions against the written criteria provided to artists in the detailed project description.
- 8.3 Exhibition of the work or competition materials of the shortlisted artists may not be made unless there is express written agreement by the artists. There shall not be any penalty or prejudice should an artist decide not to participate in an exhibition. Such exhibitions may be subject to the payment of artist royalties (fees) as specified in the CARFAC – RAAV Minimum Recommended Fee Schedule.
- 8.4 Under no circumstances should the completed shortlist be considered an opportunity to re-conduct proposal rankings for a second time.
- 8.5 Artists not accepted for the short list should be informed immediately that they are no longer in the competition. Any returnable competition materials should be returned promptly to the artists at the organizer's expense.

9 STAGE 6 – INTERVIEWS, DESIGNS, MAQUETTES

- 9.1 If the next stage is to conduct interviews, or request more detailed designs or maquettes, clearly articulated processes must be followed for interview scheduling and any shipping, receiving, storing, viewing, and return of artwork.
- 9.2 Any notifications to artists for designs or maquettes should be made at this stage. Requirements for maquettes must be stated clearly. Ample time must be given for artists to complete maquettes. An appropriate professional fee for the production of a maquette must be paid to each artist when the organizers receive the finished maquette.
- 9.3 The artist retains ownership of copyright and intellectual property rights for artist's images, maquettes, plans and other materials provided by the artist for the competition.

10 STAGE 7 – FINAL DECISION

- 10.1 The selection committee should make final decisions based on the designs or maquettes submitted in Stage 6 and the fulfillment of all of the other requirements of the competition, and the commission should be awarded.
- 10.2 All artists who submitted to the competition should be informed of the results as soon as they are available.
- 10.3 All remaining artwork submitted to the committee should be returned to artists at the organizer's expense.

11 STAGE 8 – CONTRACTS

- 11.1 A contract must be negotiated and signed. Written contracts must be used.
- 11.2 Not until all contract issues are negotiated, agreed to, and contracts signed, should production begin.
- 11.3 Any changes requested to the contract by either party after it is signed must also be negotiated and recorded in a signed, written addendum to the original contract.
- 11.4 Where more than one primary artist is involved in the commission, joint ownership, responsibility, and liability should be stated.
- 11.5 Payment schedules should be established and respected. Payment on signing the contract may be at least half of the total fee and must include consideration of artist costs in producing the work. An example of a recommended payment schedule is as follows:
 - 1st 50% of total fee that must include some consideration of the artist's costs in producing the work, e.g. agreement of partial completion against agreed milestones.

2nd 20% after inspection prior to installation or completion.

3rd 20% within 30 days after installation or delivery.

4th 10% at sign off. Note that it is common practice for clients to withhold a percentage of the fee, e.g. 10%, until a pre-specified time after completion, e.g. 45 days. This is known as a hold-back fee and allows for final inspections or review of work.

- 11.6 The contract should include the schedule (as set out and noted in sections 4.6 and 11.5). The contract should also include provisions for re-negotiation of schedules as required based on circumstances which may develop during the production of the commission.
- 11.7 The contract should include a description of the design and/or maquette. It should provide details of compensation to the artist if modifications to either are requested. It should also specify terms regarding deaccession, destruction, and/or relocation and associated costs.
- 11.8 Ownership and licensing of copyright should be clearly stated.
- 11.9 Project confidentiality and rights of disclosure must be clearly stated and agreed upon. Who has the right to share information and with whom must be outlined, and both parties should maintain confidentiality at all times.
- 11.9 Where the artist plans to use assistants, technicians, fabricators or subcontractors for any part of the production of the commission, this must be clearly stated. Liability for work by these parties must also be stated.
- 11.10 Financial terms should consider those listed under section 4 in this document.
- 11.11 Ownership of the commissioned work, and all liabilities, will transfer from the artist to the commissioner on payment of the final sign off amount
- 11.12 Other contract considerations should include, but are not limited to: liability, insurance, steps to be taken in the case of unfulfilled work or unavailable site, maintenance of the work after installation, warranties of materials used, expected life of the art work, repairs or damage and costs after installation, exhibition of maquettes where appropriate, and remedies in case of dispute.

12 SITE

- 12.1 Both parties should be clear about expectations regarding site selection, preparation, ongoing maintenance, and payment for use of the site during production, installation or maintenance of work. The site and all details regarding the site and access, including any security, should be clearly outlined in the contract.
- 12.2 Both parties should be clear about whether work will be performed on- or off-site.

- 12.3 Both parties should be clear about responsibility for the site once the work has been completed.

13 RISK AND INSURANCE

- 13.1 Both parties should be clear about who takes risk and provides insurance for the work and the site during production and installation and after work is completed.
- 13.2 The artist can reasonably be expected to take risk and provide appropriate insurance e.g. liability, contract, advertising, for the work and those involved in its production during production and installation of the work.
- 13.3 The commissioner can reasonably be expected to provide insurance for the site and liability insurance for use of the site by other than those involved in production of the work, and for the completed and installed work once it has been approved by the commissioner.
- 13.4 The contract should specify terms for acceptance of and sign-off on the completed work and the terms for risk, insurance and liability.
- 13.5 For more information on artists' copyright as it relates to commissions (see section 14).

14 COPYRIGHT AND COMMISSIONS

- 14.1 Commissioned works are works produced under a true commission arrangement where the artist functions as an independent contractor in producing the work. Except in certain specific circumstances (noted below in 14.4) Canada's Copyright Act states that in Canada the artist/contractor owns copyright in the work.
- 14.2 The law allows the parties involved to deal with copyright through contractual agreement. Therefore, the artist may license, waive, or assign copyright for a specific purpose or period of time, or in perpetuity.
- 14.3 The artist's copyright may be managed by the artist, or by a copyright collective to which the artist has assigned copyright for that purpose. A copyright collective can greatly simplify and streamline copyright agreements or licensing for both parties. For further information consult the website for Copyright Visual Arts (cova-daav.ca)
- 14.4 Exceptions to 14.1 are outlined below in clauses a - d
- a) Exception 1. Where the artist is not an independent contractor but is employed to make artwork, the artist's employer owns copyright in art made under these terms of employment. (When the artist is employed, the employer deducts CPP and EI from the artist's income and pays vacation pay.) However, the artist and employer may contractually agree that the artist retains copyright in their art production.

- b) Exception 2. When the artist is commissioned to produce, for pay, an engraving, photograph, or portrait, the commissioner of the work is the first owner of copyright. This exception applies only to engravings, photographs, and portraits, not to other forms. Engravings are defined by the Act to include etchings, lithographs, woodcuts, prints and other similar works, not being photographs. Photographs are defined by the Act to include photo-lithographs and other works produced by any process analogous to photography. Portraits are not defined by the Act and have never been clearly defined in the case law. Again, the artist and commissioner may agree that the artist retains copyright in their art production.
- c) Exception 3. The Copyright Act currently reads as follows: “Without prejudice to any rights or privileges of the Crown, when any work is, or has been, prepared or published by or under the direction or control of Her Majesty, or any government department, the copyright in the work, shall subject to any agreement with the author, belong to Her Majesty and, in such case shall continue for a period of 50 years from the date of first publication of the work.” There is no clear interpretation or case law that defines whether the exception applies to all commissions of the Crown, whether the Crown includes both Federal and Provincial governments, or whether the usual remedies available to others for infringement of copyright in their works are also available to the Crown. Because the law allows artist and commissioner to agree that the artist retains copyright in **their** art production, these uncertainties may be dealt with by contract.
- d) Exception 4. Where the artist has licensed, assigned, or waived copyright, the artist no longer holds copyright in the artwork, subject to provisions on moral rights.

14.6 Any exceptions or agreements notwithstanding, the artist retains moral rights. According to The Copyright Act, moral rights cannot be sold or assigned, though they can be waived. Also, according to the Act, paintings, sculpture, and engravings may not be distorted, mutilated or modified in any way without infringement, as such modification is “to the prejudice of the honour or reputation” of the artist.

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