

**AGREEMENT
BY AND BETWEEN
THE CITY OF NATIONAL CITY
AND
A REASON TO SURVIVE**

THIS AGREEMENT is entered into on this 7 day of December, 2021, by and between the CITY OF NATIONAL CITY, a municipal corporation (the "CITY"), and A REASON TO SURVIVE (the "ARTS").

RECITALS

WHEREAS, the CITY owns the improved real property located at 200 East 12th Street, National City, California. This real property is commonly known as the Arts Center Building (the "ARTS CENTER"). A description of the ARTS CENTER is attached hereto as Exhibit "A" and Exhibit "B", incorporated herein by reference;

WHEREAS, one of the goals of the CITY's General Plan is to develop a cultural arts program that encourages and facilitates the development of art in public spaces and promotes greater awareness of architectural, urban design, and the cultural heritage of the CITY;

WHEREAS, ARTS is a California non-profit corporation skilled in creating public art, including capital arts projects;

WHEREAS, the CITY desires to employ ARTS to maintain the ARTS CENTER for the benefit of the community and ARTS is willing and able to maintain the ARTS CENTER for such purpose;

WHEREAS, in exchange for maintaining the ARTS CENTER for the benefit of residents and visitors, the CITY desires to grant ARTS a revocable license to enter and operate the ARTS CENTER located at 200 East 12th Street, National City, California;

WHEREAS, the CITY previously entered into a similar arts maintenance agreement with ARTS which commenced on January 1, 2018 and expires on December 31, 2021;

WHEREAS, the CITY wishes to enter into this new agreement for continued arts maintenance with ARTS.

NOW, THEREFORE, THE PARTIES HERETO DO MUTUALLY AGREE AS FOLLOWS:

1. **ENGAGEMENT OF CONSULTANT.** The CITY agrees to engage ARTS to maintain and operate the real property located at 200 East 12th Street, National City, California and known as the ARTS CENTER, in accordance with all the terms and

conditions contained herein. ARTS represents that all services shall be performed directly by ARTS or under direct supervision of ARTS.

1.1 **LICENSE FOR USE OF PROPERTY.** The CITY grants ARTS a revocable license to enter and operate the ARTS CENTER, subject to the covenants and conditions hereinafter set forth, as of the Effective Date of this agreement.

1.1.1 Parking. CITY will maintain control of the public parking lot adjacent to the Arts Center. ARTS shall neither have reserved parking nor exclusive on-site parking spaces.

1.2 **OWNERSHIP OF PERSONAL PROPERTY AND IMPROVEMENTS.** The rights and obligations of CITY and ARTS regarding the ownership of personal property and improvements on the property known as the ARTS CENTER shall be as follows:

1.2.1 Ownership of Personal Property. All improvements existing on the property known as the ARTS CENTER, together with all fixtures permanently attached to the property as of the effective date of this agreement shall remain the property of the CITY during the Term. ARTS shall not remove any improvements or fixtures from the property and shall not waste, destroy, or modify any improvements or fixtures, except as permitted by this agreement.

1.2.2 Ownership of Improvements and Equipment. All improvements made to the ARTS CENTER by ARTS shall become property of the CITY.

2. **TERM.** This agreement will become effective on January 1, 2022. The duration of this agreement is for the period of January 1, 2022 through December 31, 2022. This agreement may be extended by mutual agreement upon the same terms and conditions for an additional two (2) year term. CITY and ARTS may exercise up to three two-year extensions. Any extension of this agreement must be approved by resolution of the City Council.

3. **SCOPE OF SERVICES.** It is the intenton of this agreement that the operation of the Arts Center by ARTS will encourage and foster arts education programming, creative youth development, project based learning, and support services for the students and families at the ARTS CENTER, as well as the creation of public art projects in the community.

In exchange for its use of the ARTS CENTER, ARTS shall provide capital projects and programming services (the "Projects and Programs") within National City's jurisdictional boundaries during the Term. Such Projects shall serve as consideration for the use of the property and shall include: a) capital improvements to the ARTS CENTER; b) the performance of works of authorship as described in California Civil Code 980-989 and United States Code Title 17, Article 106(A) and Section 113(d) (hereafter "Public Art"), throughout the community utilizing various media; c) community event banners; d)

public gateway improvements, that may include aspects of Public Art; e) landscape, streetscape, and park improvements; and f) art consultancy, art installation and art maintenance of ARTS-installed temporary art pieces done on behalf of and for the benefit of the City of National City or National City programs such as, but not exclusively limited to, the annual Dia de los Muertos and Community Services Day programs and events. ARTS is not obligated to maintain permanent public art or public art pieces unless the parties agree. The scope of services described in this Article 3 are in addition to all other property maintenance obligations more specifically described herein.

3.1 **VALUE OF PROJECTS AND PROGRAMS.** The annual value of the Projects and Programs shall total at least one hundred and twenty-five thousand dollars (\$125,000.00). Of this \$125,000, ARTS must obtain at least \$25,000 for the Projects and Programs through fundraising.

3.2 **METHOD OF DETERMINING VALUE OF PROJECTS AND PROGRAMS.** The value of all Projects and Programs shall be determined according to a) the dollar value of each Project and Program, as represented by a separate written agreement approved by the City Manager or designee, or b) copies of invoices, receipts, or bills demonstrating the dollar value of materials purchased for a Project and Program. ARTS must promptly make all invoices, receipts, or bills demonstrating the dollar value of materials purchased for a Project or Program available to the City Manager or designee within 3 days of a written request.

3.3 **WAIVER OF ARTISTIC RIGHTS.** ARTS expressly waives and disclaims any residual rights in the Projects and Programs granted to ARTS by state or federal law, including the California Civil Code, Articles 980-989, relating to intellectual property and artistic works and Title 17 United States Code Section 106A and Section 113(d) relating to artistic rights.

3.4 **HOURS OF OPERATION.** ARTS will open the property known as the ARTS CENTER to the public Monday through Friday from 10:00 a.m. to 5:00 p.m.

3.5 **SERVICE FEES.** ARTS shall not provide any programs and services for profit. However, ARTS may charge user fees for classes and programs offered to school groups and the community to offset costs incurred by ARTS in its maintenance and operation of the ARTS CENTER. Any fees charged this Article 3.5 must be approved by the City Manager or designee. There will no fee for the public to gain access to the ARTS CENTER during the hours of operation listed in Article 3.4.

3.6 **REPORTING BY ARTS.** ARTS shall provide quarterly reports to the City Manager, or designee, that provide Statistical Information (defined below) for the immediately preceding quarter. Each quarterly report shall contain, at a minimum, the total number of a) National City residents who participated in ARTS' Projects or Programs; b) participants and volunteers who participated in ARTS' Projects or Programs; c) all events and programs coordinated; d) the capital projects completed. The quarterly reports shall also include reports on ARTS' operating and maintenance

plans, long-term and short-term goals, and any other pertinent statistics. The information required to appear in the quarterly reports by this Article 3.6 will be referred to as "Statistical Information." Each quarterly report will include all previous quarters' Statistical Information", if any. ARTS will deliver the quarterly report to the City Manager or designee within 30 days of the end of each quarter.

3.7 **ANNUAL BUDGET.** ARTS shall provide the City Manager, or designee, with a courtesy copy of the proposed budget for ARTS' estimated maintenance and operating expenses for the ARTS CENTER by July 1 of each year during the Term. ARTS shall provide to the City Manager or designee, an audited financial report and tax return, ninety (90) days following June 30 of each year during the Term.

3.8 **VOLUNTEER MANAGEMENT.** ARTS may utilize volunteers to operate the ARTS CENTER, and in providing the Projects and Programs required by this agreement. ARTS is responsible for recruiting, training, and managing all volunteers on the property. Volunteers are considered the responsibility of ARTS for the purpose of workers compensation or general liability.

3.9 **ALCOHOL USE.** ARTS or third parties with permission from ARTS, may, hold events at the ARTS CENTER where alcoholic beverages are served. Alcoholic beverages shall be served subject to the following requirements.

- (a) Alcohol will not be served during youth programming under any circumstance.
- (b) Alcohol will be served in limited areas of the ARTS CENTER designated by ARTS in advance of any event and approved by the City Manager or designee.
- (c) Alcoholic beverages must be served by a licensed bartender,. The bartender must have a copy of their bartender's license located at the property.
- (d) The event host must obtain approval from the California Department of Alcoholic Beverage Control to serve alcohol.
- (e) The event host is responsible for all guests' behavior during and following the service of alcohol.
- (f) "Last call" for service of alcohol shall be at least thirty (30) minutes prior to the scheduled end of the event.
- (g) When third parties (with permission from ARTS) serve alcoholic beverages, the following additional requirements shall apply:
 - 1. The third party shall provide the CITY proof of liability insurance acceptable to the City's Risk Manager;
 - 2. The third party shall provide two licensed security guards for every 100 guests registered to attend the event;
 - 3. ARTS shall reserve the authority to immediately terminate an event if ARTS determines, in its sole discretion, the

third party has not complied with any requirements of this Article 3.9.

4. ARTS shall provide the CITY a copy of their third party rental agreement template for approval.

4. **CONSIDERATION.** ARTS' payment of \$1.00 to the CITY, in addition to ARTS' provision of Projects and Programs under Article 3 of this agreement and the mutual benefit to be derived from ARTS' performance under the remainder of this agreement, shall serve as the sole consideration due the CITY for ARTS license to use and operate the ARTS CENTER.

5. **OWNERSHIP RIGHTS AND LICENSES TO ARTWORK: WAIVER.** Through its provision of Projects and Programs to the CITY, ARTS makes an unconditional donation, in perpetuity, of all Public Art created to the CITY. ARTS acknowledges that the CITY is authorized to accept donations of Public Art pursuant to Sections 37354 and 37355 of the Government Code. Before beginning each Project or Program that contains Public Art, ARTS and all individuals participating in the Project or Program must sign a CITY-approved waiver that expressly waives and disclaims any and all rights they each may have under the California Art Preservation Act, as set forth in Civil Code Section 980-989, and any rights under the Visual Artists Rights Act, as set forth at 17 U.S.C. Section 106A and Section 113(d) to any Public Art created pursuant to this agreement. ARTS, and all participants who create Public Art, shall not attempt to defeat Sections 3.2.3 and 9.2 by cooperating with any organization which seeks to bring an action under Civil Code Article 989 or any other applicable provision of law.

5.1 **OWNERSHIP OF MATERIALS.** Ownership of all materials and concepts produced for the CITY under this agreement, including but not limited to completed Projects, and all rights to licensing and reproductions of Public Art, shall pass to and become the property of the CITY once the CITY accepts the completed Project. The CITY, at its option, will store all drawings and materials that may assist with future repairs.

5.2 **ASSIGNMENT.** ARTS hereby assigns to the CITY all rights to produce, give, sell, and distribute still or motion images and models or other likeness of any kind of Public Art but shall exercise no rights thereto inconsistent with any provision of this Article 5.0. Any Memoranda, Reports, Maps, Drawings, Renderings, Photos, Plans, Specifications, and other documents prepared by ARTS for any Project or Program, whether paper or electronic, shall become the property of the CITY for use with respect to the specific Project or Program provided to the CITY, and shall be turned over to the CITY upon completion of the Project or Program, or any phase thereof, as contemplated by this Agreement.

5.3 **SURVIVAL.** The provisions of Article 5.0 to 5.2 shall survive the termination of this agreement.

6. **COMPLIANCE WITH LAWS.** ARTS, at its sole discretion, shall procure, maintain, and hold available for the CITY's inspection any governmental license or permit required for the proper and lawful conduct of ARTS' operation of the ARTS CENTER. ARTS shall not use the ARTS CENTER for any use or purpose in violation of the laws of the United States of America, or the laws, ordinances, regulations, orders, or requirements of the State of California, the County of San Diego, the CITY, or of other lawful authorities. ARTS shall, at its sole expense, comply with all applicable statutes, laws, ordinances, rules, regulations, orders, covenants and restrictions of record, and requirements in effect during the Term regulating the use by ARTS of the ARTS CENTER.

7. **UTILITY SERVICES.** The CITY shall be responsible for maintaining reasonable utility services to the ARTS CENTER. The CITY shall pay for Twenty Thousand dollars (\$20,000) worth of electricity and reasonable water usage at the property known as the ARTS CENTER. ARTS shall pay for all costs of electricity that exceeds the sum listed in this Article 7. If the CITY determines, in its sole discretion, that ARTS is negligent in its use of the utilities, including water usage, the CITY may hold a good faith meet and confer meeting with ARTS to discuss its utilities usage.

8. **ARTS REPAIRS AND MAINTENANCE OBLIGATIONS.** ARTS acknowledges that it has made a thorough inspection of the ARTS CENTER and that it accepts the property "as-is" as of the Effective Date of this agreement. At ARTS' own cost and expense, ARTS shall repair, replace, and maintain the ARTS CENTER in good, tenable condition as necessary. ARTS shall not be obligated to repair or replace damage to the Property caused by ordinary wear and tear. ARTS shall maintain the property in an accessible manner for use by individuals with disabilities and comply with federal and state law regarding accessibility, including but not limited to the Americans with Disabilities Act and the California's Disabled Persons Act. Other than repair work in emergency situations, not exceeding Three Thousand Dollars (\$3,000), ARTS shall not perform any repair work without the CITY's prior written consent. As used in this Article 8, "emergency" means a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services. All emergency repairs performed by the CITY on the property known as the ARTS CENTER are governed by Public Contract Code Section 22050. ARTS' obligations under this Article shall apply regardless of whether the repairs, restorations, and replacements are ordinary or extraordinary, foreseeable or unforeseeable, capital or noncapital, the fault or not the fault of ARTS, its agents, employees, volunteers, invitees, visitors, or contractors. All replacements made by the ARTS shall be of like size, kind, and quality to the items replaced.

8.1 **CITY REPAIR AND MAINTENANCE OBLIGATIONS.** For any repair and maintenance work exceeding Three Thousand Dollars (\$3,000), the CITY will consider the nature and priority of the work and available funding to determine if and when such repairs will be completed.

8.2 **CITY RIGHT TO INSPECT.** ARTS shall permit the CITY to enter

the ARTS CENTER at all times during usual hours of operation to inspect the property. Any entry pursuant to this Article 8.2 shall not unreasonably interfere with with ARTS operation of the ARTS CENTER. However, nothing contained in this Article 8.2 shall create any duty on the part of the CITY to do any work which, under any provision of this agreement ARTS may be required to do.

9. **ALTERATIONS**. ARTS may alter, replace, add to, change, or construct additional improvements to the ARTS CENTER, as ARTS may find necessary or convenient for its operation of the property. Any alteration performed by ARTS under this Article 9 shall be performed: a) ARTS' sole cost and expense; b) with the CITY's prior written consent; and c) in accordance with construction plans submitted to and approved by the CITY.

9.1 **CONSTRUCTION PERMITS AND LICENSES**. At all times during the Term, ARTS shall procure, at its sole cost and expense, all permits and licenses that are necessary or required from any local governmental agency for the proposed construction of any alterations. The CITY may, in its sole discretion, waive CITY permitting fees where applicable.

9.2 **PROPOSED PLANS**. In its sole discretion, the CITY may require ARTS to do any of the following: a) submit a complete set of proposed plans of any alterations to the CITY; b) apply for and receive a permit from the Building Department to complete any alterations; c) within sixty (60) days of a written request, furnish CITY with a complete set of "as-built" plans for any CITY-approved alterations.

9.3. **PREVAILING WAGES**. ARTS shall comply with prevailing wage statutes for any work not performed by volunteers. State prevailing wage rates may apply to work performed under this agreement. State prevailing wages rates apply to all public works contracts as set forth in California Labor Code, including but not limited to, Sections 1720, 1720.2, 1720.3, 1720.4, and 1771. Consultant is solely responsible to determine if State prevailing wage rates apply and, if applicable, pay such rates in accordance with all laws, ordinances, rules, and regulations.

10. **MECHANICS' LIENS: STOP NOTICES**. ARTS shall pay, or cause to be paid, the total cost and expense of all works of improvement, as that phrase is defined in the Mechanics Lien Law in effect at time and place of construction, done by it, or caused to be done by it, on the property known as the ARTS CENTER, and for all materials furnished for, or in connection with any such work. If any lien or stop notice is filed against the property known as the ARTS CENTER, ARTS shall cause the lien or stop notice to be discharged of record within one hundred eighty (180) days after it is filed. ARTS shall indemnify, defend, and hold the CITY harmless from any and all liability, loss, damage, costs, attorneys' fees, and all other expenses on account of claims of lien of laborers, materialmen, or others for work performed, or materials or supplies furnished for ARTS or persons claiming under ARTS.

10.1 **NOTICE OF LIEN OR STOP NOTICE**. Should any claim of lien or stop notice related to ARTS' work of improvement of the property be filed against the property, or any action be filed against the property, or any action affecting the title to the property be commenced, the party receiving notice of such lien or stop notice or action shall immediately give the other party written notice thereof.

10.2 **NOTICE OF NON-RESPONSIBILITY**. The CITY or its representatives shall have the right to post and keep posted on the property notices on non-responsibility or such other notices which the CITY may deem to be proper for the protections of the CITY's interest in the property. ARTS shall, before the commencement of any work which might result in any such lien or stop notice, give to the CITY written notice of its intention to do so with sufficient time to enable posting of such notices.

11. **DEFINITION OF TAXES**. "Taxes" shall mean all taxes, governmental bonds, special assessments, charges, or transfer taxes, license and transaction fees, including, but not limited to: (a) any state, local, federal income tax, or any real or personal property tax; (b) increases in taxes attributable to ARTS' operation of the property, or; (c) any taxes which are essentially payments to a governmental agency, other than the CITY, for the right to make improvements to the property.

11.1 **POSSESSORY INTEREST**. Notwithstanding Articles 1 to 1.2, ARTS acknowledges that this agreement may create a possessory interest subject to property taxation and that ARTS may be subject to the payment of taxes levied on such interest. ARTS shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon the property.

11.2 **RESPONSIBILITY FOR PAYMENT OF TAXES**. The CITY shall not be obligated to pay any Taxes accruing against any interest in ARTS' use of the property at any time before or during the Term. ARTS shall pay any Taxes that accrue against any interest in ARTS' use of the property. Additionally, ARTS shall pay any Taxes levied upon any improvements, fixtures, or personal property located on the property to the extent such Taxes result from ARTS operation or other activities held upon, or in connection with, the property.

12. **PROJECT COORDINATION AND SUPERVISION**. The Library & Community Services Director hereby is designated as the Project Coordinator for the CITY and will monitor the progress and execution of this agreement. ARTS shall assign a single Project Director to provide supervision and have overall responsibility for the progress and execution of this agreement for the ARTS. The ARTS Executive Director thereby is designated as the Project Director for the ARTS.

13. **INDEMNIFICATION AND HOLD HARMLESS.** To the maximum extent provided by law, ARTS agrees to defend, indemnify and hold harmless the City of National City, its officers, officials, agents, employees, and volunteers against and from any and all liability, loss, damages to property, injuries to, or death of any person or persons, and all claims, demands, suits, actions, proceedings, reasonable attorneys' fees, and defense costs, of any kind or nature, including workers' compensation claims, of or by anyone whomsoever, resulting from or arising out of ARTS' performance or other obligations under this Agreement, or arising either directly or indirectly from, any act, error, omission, or negligence of ARTS or its contractors, licensees, invitees, members, agents, servants or employees; provided, however, that this indemnification and hold harmless shall not include any claims or liability arising from the established sole negligence or willful misconduct of CITY, its agents, officers, employees or volunteers. CITY will cooperate reasonably in the defense of any action, and ARTS shall employ competent counsel, reasonably acceptable to the City Attorney.

The indemnity, defense, and hold harmless obligations contained herein shall survive the termination of this Agreement for any alleged or actual omission, act, or negligence under this agreement that occurred during the term of this agreement.

13.1 **THIRD PARTY INDEMNITY.** ARTS shall not invite third party organizations onto the property known as the ARTS CENTER until said third party organization furnishes CITY a written agreement in which it indemnifies and holds CITY harmless, upon terms satisfactory to CITY.

13.2 **WAIVERS FROM THIRD PARTIES.** ARTS agrees to obtain from all guests, invitees, or third party organizations whose participants visit the property, a waiver of liability and hold harmless agreement upon terms satisfactory to the CITY.

14. **INSURANCE.** ARTS, at its sole cost and expense, shall purchase and maintain, and shall require its subcontractors, and third party organizations ARTS invites onto the property to purchase and maintain, throughout the term of this agreement, the following insurance policies:

- (a) If checked, **Professional Liability Insurance** (errors and omissions) with minimum limits of \$1,000,000 per occurrence.
- (b) **Automobile Insurance** covering all bodily injury and property damage incurred during the performance of this agreement, with a minimum coverage of \$1,000,000 combined single limit per accident. Such automobile insurance shall include owned, non-owned, and hired vehicles. The policy shall name the CITY and its officers, agents, employees, and volunteers as additional insureds, and a separate additional insured endorsement shall be provided.
- (c) **Commercial General Liability Insurance**, with minimum limits of either \$2,000,000 per occurrence and \$4,000,000 aggregate, or \$1,000,000 per occurrence and \$2,000,000 aggregate with a \$2,000,000 umbrella policy, covering all bodily injury and property damage arising out of its operations, work, or performance under this agreement. The policy shall name the CITY and its officers, agents, employees, and volunteers as additional insureds, and a separate additional insured endorsement

shall be provided. The general aggregate limit must apply solely to this "project" or "location". The "project" or "location" should be noted with specificity on an endorsement that shall be incorporated into the policy. The Commercial General Liability required by this Section must include Sexual Misconduct Liability coverage.

- (d) **Workers' Compensation Insurance** in an amount sufficient to meet statutory requirements covering all of ARTS employees and employers' liability insurance with limits of at least \$1,000,000 per accident. In addition, the policy shall be endorsed with a waiver of subrogation in favor of the CITY. Said endorsement shall be provided prior to commencement of work under this Agreement.
- (e) If CONSULTANT has no employees subject to the California Workers' Compensation and Labor laws, ARTS shall execute a Declaration to that effect. Said Declaration shall be provided to ARTS by CITY.
- (f) The aforesaid policies shall constitute primary insurance as to the CITY, its officers, officials, employees, and volunteers, so that any other policies held by the CITY shall not contribute to any loss under said insurance. Said policies shall provide for thirty (30) days prior written notice to the CITY's Risk Manager, at the address listed in subsection (h) below, of cancellation or material change.
- (g) If required insurance coverage is provided on a "claims made" rather than "occurrence" form, the CITY shall maintain such insurance coverage for three years after expiration of the term (and any extensions) of this agreement. In addition, the "retro" date must be on or before the date of this agreement.
- (h) The Certificate Holder for all policies of insurance required by this Section shall be:

City of National City
c/o Risk Manager
1243 National City Boulevard
National City, CA 91950-4397

- (i) Insurance shall be written with only insurers authorized to conduct business in California that hold a current policy holder's alphabetic and financial size category rating of not less than A:VII according to the current Best's Key Rating Guide, or a company of equal financial stability that is approved by the CITY'S Risk Manager. In the event coverage is provided by non-admitted "surplus lines" carriers, they must be included on the most recent List of Approved Surplus Line Insurers ("LASLI") and otherwise meet rating requirements.
- (j) This agreement shall not take effect until certificate(s) or other sufficient proof that these insurance provisions have been complied with, are filed with and approved by the CITY'S Risk Manager. If ARTS does not keep all insurance policies required by this Article 14 in full force and effect at all times during the term of this agreement, the CITY may treat the

failure to maintain the requisite insurance as a breach of this agreement and terminate the agreement as provided herein.

- (k) All deductibles and self-insured retentions in excess of \$10,000 must be disclosed to and approved by the CITY. CITY reserves the right to modify the insurance requirements of this Article 14, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.
- (l) If ARTS maintains broader coverage or higher limits (or both) than the minimum limits shown above, the CITY shall be entitled to the broader coverage or higher limits (or both) maintained by ARTS. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the CITY.

15. **LEGAL FEES.** If any CITY or ARTS brings a suit or action against the other arising from any breach of any of the covenants or agreements or any inaccuracies in any of the representations and warranties on the part of the other party arising out of this agreement, then in that event, the prevailing party in such action or dispute, whether by final judgment or out-of-court settlement, shall be entitled to have and recover of and from the other party all costs and expenses of suit, including attorneys' fees.

For purposes of determining who is to be considered the prevailing party, it is stipulated that attorney's fees incurred in the prosecution or defense of the action or suit shall not be considered in determining the amount of the judgment or award. Attorney's fees to the prevailing party if other than the CITY shall, in addition, be limited to the amount of attorney's fees incurred by the CITY in its prosecution or defense of the action, irrespective of the actual amount of attorney's fees incurred by the prevailing party.

16. **TERMINATION.**

- (a) This agreement may be terminated with or without cause by the CITY. Termination without cause shall be effective only upon 60-day's written notice to ARTS. During said 60-day period ARTS shall perform all services in accordance with this agreement.
- (b) This agreement may also be terminated immediately by the CITY for cause in the event of a material breach of this agreement, misrepresentation by the ARTS in connection with the formation of this agreement or the performance of services, or the failure to perform services as directed by the CITY.
- (c) Termination with or without cause shall be effected by delivery of written Notice of Termination to ARTS as provided for herein.
- (d) CITY further reserves the right to immediately terminate this agreement upon: (1) the filing of a petition in bankruptcy affecting ARTS; (2) a reorganization of ARTS for the benefit of creditors; or (3) a business reorganization, change in business name or change in business status of the ARTS.

17. **HAZARDOUS MATERIALS LAWS.** As used in this Article 17, the term "Hazardous Materials' Laws" means any and all federal, state or local laws or ordinances, rules, decrees, orders, regulations or court decisions (including the so-called "common law") relating to hazardous substances, hazardous materials, hazardous waste, toxic substances, environmental conditions on, under, or about the Property, soil and ground water conditions, or other similar substances or conditions. ~~The following legal authority is a non-exhaustive list of the legal authority that applies~~ to the definition of the term "Hazardous Materials Laws": the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C., Section 9601 et seq.); the Hazardous Materials Transportation Act, as amended (49 U.S.C., Section 1801 et seq.); and the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C., Section 6901 et seq.).

17.2 **HAZARDOUS MATERIALS DEFINITION.** As used in this Article the term "Hazardous Materials" means any chemical, compound, material, substance or other matter that:

- (a) is a flammable, explosive, asbestos, radioactive nuclear medicine, vaccine, bacteria, virus, hazardous waste, toxic, overtly injurious or potentially injurious material, whether injurious or potentially injurious by itself or in combination with other materials;
- (b) is controlled, referred to, designated in or governed by any Hazardous Materials Laws;
- (c) gives rise to any reporting, notice or publication requirements under any Hazardous Materials Laws, or;
- (d) is any other material or substance giving rise to any liability, responsibility or duty upon the CITY or the ARTS with respect to any third person under any Hazardous Materials Law.

17.3 **ARTS REPRESENTATIONS AND WARRANTIES.** ARTS represents and warrants that, during the Term or any extension thereof, ARTS shall comply with the following provisions of this Article unless otherwise specifically approved in writing by the CITY, subject to the terms and conditions of the ARTS' maintenance obligations provided elsewhere in this Agreement:

- (a) ARTS shall not cause or permit any Hazardous Materials to be brought, kept or used in or about the property by ARTS, its agents, employees, assigns, contractors or invitees, except as required by ARTS' permitted use of the property in the normal course of operations;
- (b) Any handling, transportation, storage, treatment, or usage by ARTS of Hazardous Materials that is to occur on the property following the Effective Date shall be in compliance with all applicable Hazardous Materials Laws;
- (c) Any leaks, spills, release, discharge, emission or disposal of Hazardous Materials which may occur on the Property following the Effective Date shall be promptly and thoroughly cleaned and removed

- from the Property by ARTS at its sole expense, and any such discharge shall be promptly reported in writing to the CITY, and to any other appropriate governmental regulatory authorities;
- (d) No friable asbestos shall be constructed, placed on, deposited, stored, disposed of, or located by ARTS on the property;
 - (e) No underground improvements, including but not limited to treatment or storage tanks, or water, gas or oil wells shall be located by ARTS on the property without the CITY's prior written consent.
 - (f) ARTS shall promptly supply the CITY with copies of all notices, reports, correspondence, and submissions made by ARTS to the United States Environmental Protection Agency, the United Occupational Safety and Health Administration, and any other local, state or federal authority which requires submission of any information concerning environmental matters or hazardous wastes or substances pursuant to applicable Hazardous Materials' Laws; and

17.4 ARTS shall promptly notify the CITY of any liens threatened or attached against the Property pursuant to any Hazardous Materials' Law. If such a lien is filed against the Property, then, within the earlier of (i) twenty (20) days following such filing, or (ii) before any governmental authority commences proceedings to sell the Property pursuant to the lien, ARTS shall either:

- (a) pay the claim and remove the lien from the Property, or
- (b) furnish either: (1) a bond or cash deposit reasonably satisfactory to the CITY in an amount not less than the claim from which the lien arises, or; (2) other security satisfactory to the CITY in an amount not less than that which is sufficient to discharge the claim from which the lien arises.

17.5. At the end of this agreement, ARTS shall surrender the property to the CITY free of any and all Hazardous Materials and in compliance with all Hazardous Materials' Laws affecting the Property.

18. ARTS shall not voluntarily or involuntarily assign or otherwise transfer all or any portion of its rights and duties under this agreement without the CITY's prior written consent. Any attempted assignment or transfer without the CITY's prior written consent shall be void.

18.1 ARTS may engage third party organizations to provide special services or programming at the Property if: a) CITY consents, in writing, to the third party organizations' proposed use of the Property and; b) the third party organization obtains policies of insurance acceptable to the City's Risk Manager and Article 14 of this agreement.

19. **EVENTS OF DEFAULT; REMEDIES.** The following sub-articles shall apply if either ARTS or the CITY neglects, fails to perform, or fails to observe any of their respective obligations under the terms, covenants, or conditions contained in this agreement ("Default"):

19.1 **THIRTY-DAY CORRECTION OF DEFAULT.** If either ARTS or the CITY determines that the other party is in default, then the non-defaulting party must provide the defaulting party written notice of the Default and thirty (30) days to correct the default.

19.2 **EXTENDED CORRECTION OF DEFAULT.** If the defaulting party determines that more than thirty (30) days is required to correct the Default, the defaulting party must provide the other party written notice of the reasons why additional time is required to correct such Default. The defaulting party must use diligent efforts to correct a Default under this Article 13.1.2 and, in any case, must correct such Default within ninety (90) days from the date of the written notice of default.

19.3 **REMEDIES FOR FAILURE TO CORRECT DEFAULT.** If the defaulting party fails to comply with Article 19.1. or 19.2, then the non-defaulting party may immediately terminate this agreement. The defaulting party shall be liable to the non-defaulting party for any and all damages sustained by the non-defaulting party as a result of the defaulting parties' breach.

20. **ABANDONMENT.** ARTS shall not vacate or abandon the property at any time during the Term nor permit the property to remain unoccupied for a period of longer than five (5) consecutive days during the term of this agreement. These provisions shall not apply if the property is closed and operation is temporarily discontinued therein on account of strikes, lockouts, acts of nature, or similar causes beyond the reasonable control of ARTS. Any exceptions must be submitted in writing to the City Manager or designee for approval.

21. **ARTS' DUTY TO REPAIR CASUALTY.** ARTS shall, as expeditiously as reasonably possible, repair any damages to the property caused by fire, earthquake, or any other identifiable event of a sudden, unexpected, or unusual nature ("Casualty"), and repair, restore, and replace any such damaged or destroyed Fixtures, Improvements or Personal Property ("Casualty Repairs"). Any Casualty Repairs made are: (a) to be performed at ARTS' sole cost and expense; (b) subject to all other terms and conditions of this agreement.

21.1 **CONSTRUCTION PROVISIONS.** In the event of any reconstruction of the property, fixtures or improvements required of ARTS pursuant to this Article, ARTS shall repair the property, and repair or rebuild such fixtures and improvements, to substantially the same condition they were in immediately preceding such casualty.

21.2 **NO ABATEMENT.** In the event of reconstruction, replacement, or repair by ARTS pursuant to this Article, ARTS shall continue its operations on the property during any such period to the extent reasonably practicable from the standpoint of prudent business management, and in continuing compliance with applicable laws and regulations. ARTS shall not be entitled to any compensation or damages from CITY for: (a) loss of use of the whole or any part of the property; (b) ARTS' Personal Property; or

(c) any inconvenience or annoyance occasioned by such damage, reconstruction, or replacement.

21.3 **MAJOR DESTRUCTION**. Notwithstanding any of the foregoing provisions of this Article to the contrary, if, at any time after the Effective Date, (a) the improvements are damaged or destroyed to the extent of more than twenty-five percent (25%) of their replacement cost, or (b) the damage is such that the improvements cannot be repaired and restored within one hundred and eighty (180) days after the casualty, then ARTS shall have the right to terminate this agreement upon thirty (30) days' prior written notice to the CITY.

22. **CONDEMNATION**. ARTS may terminate this agreement within twenty (20) days after the date that a condemning authority (by a party other than the CITY) takes possession of the property by delivery of written notice of such condemnation if: (a) all of the property is taken under eminent domain proceedings; or (b) less than all of the property is taken under such eminent domain proceeding and the part taken substantially impairs the ability of ARTS to use the remainder of the property for the purposes permitted by this agreement.

22.1 In the absence of such written notice from a condemning authority, ARTS may terminate this agreement within twenty (20) days after the condemning authority shall have taken possession.

22.2 **CONTINUATION OF OPERATING AGREEMENT AFTER CONDEMNATION**. If this agreement is not terminated by ARTS, it shall remain in full force and effect as to any portion of the property remaining, and this agreement will end as of the date possession of the part taken by the public entity as to the part of the property that is taken.

22.3 **AWARD**. All monies awarded in any condemnation shall belong to the CITY. The CITY shall have no liability to ARTS for any award not provided by the condemning authority.

23. **SALE OR MORTGAGE**. The CITY may, pursuant to existing and subsequently enacted CITY ordinances and State laws, at any time, and without the consent of ARTS, vacate, sell, purchase, exchange, transfer, assign, lease, encumber or convey the CITY's interest in whole or in part, in the property (collectively referred to in this Article as a "Sale"). The CITY shall provide to ARTS written notice of the CITY's intent to a Sale or discontinuance pursuant to this Article at least ninety (90) days prior to said proposed transfer.

23.1 **RELEASE ON SALE**. From and after a Sale or discontinuance of the CITY's entire interest in the Property, the CITY shall be released from all liability to ARTS and ARTS successors and assigns arising from this Agreement because of any act, occurrence, or omission of the CITY occurring after such Sale.

24. **RIGHT OF ENTRY**. CITY, its agents, employees, and contractors may enter the Property at any time with or without notice to ARTS to: (a) respond to

health and safety concerns; (b) inspect the property and improvements; (c) determine whether ARTS is complying with its obligations in this Agreement (including its obligations with respect to compliance with Hazardous Materials Laws); (d) post notices of non-responsibility or similar notices; (e) inspect the progress of construction of any improvement; or (f) make repairs that this agreement requires or allows CITY to make, or make repairs to any adjoining space or utility services, or make repairs, alterations, or improvements to any other portion of the Property

24.1 All work enumerated in this Article 24 must be done as promptly as reasonably possible and so as to cause as little interference to ARTS as reasonably possible.

25. **NOTICES.** All notices or other communications required or permitted hereunder shall be in writing, and shall be personally delivered; or sent by overnight mail (Federal Express or the like); or sent by registered or certified mail, postage prepaid, return receipt requested; or sent by ordinary mail, postage prepaid; or telegraphed or cabled; or delivered or sent by telex, telecopy, facsimile or fax; and shall be deemed received upon the earlier of (i) if personally delivered, the date of delivery to the address of the person to receive such notice, (ii) if sent by overnight mail, the business day following its deposit in such overnight mail facility, (iii) if mailed by registered, certified or ordinary mail, five (5) days (ten (10) days if the address is outside the State of California) after the date of deposit in a post office, mailbox, mail chute, or other like facility regularly maintained by the United States Postal Service, (iv) if given by telegraph or cable, when delivered to the telegraph company with charges prepaid, or (v) if given by telex, telecopy, facsimile or fax, when sent. Any notice, request, demand, direction or other communication delivered or sent as specified above shall be directed to the following persons:

CITY: City Manager
City of National City
1243 National City Boulevard
National City, CA 91950-4397

With a copy to:

Library & Community Services Director
City of National City
1401 National City Boulevard
National City, CA 91950

ARTS:A Reason to Survive, Inc.
Executive Director
200 East 12th Street
National City, CA 91950

25.1 Notice of change of address shall be given by written notice in the manner specified in this Section. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given shall be deemed to constitute receipt of the notice, demand, request or communication sent. Any notice, request, demand, direction or other communication sent by cable, telex, telecopy, facsimile or fax must be confirmed within forty-eight (48) hours by letter mailed or delivered as specified in this Article.

26. **ARTS' DUTY TO KEEP RECORDS.** ARTS shall, at all times during the term, and for a period of five (5) years following expiration or earlier termination of this agreement, keep or cause to be kept, true and complete books, records and accounts of all: (a) construction undertaken pursuant to the rights conferred on ARTS under this agreement, and (b) financial transactions in the operation of all business activities, of whatever nature, conducted pursuant to the rights granted by this agreement. Such records shall also include the source and disposition of all trash and other waste collected and disposed of by ARTS in the operation of its business. Said records must be supported by source documents such as receipts, invoices, sales slips, cash register tapes, purchase invoices or other pertinent documents.

26.1 **CITY'S RIGHT TO AUDIT.** All ARTS books, accounts, and records shall be kept and made available at one location within the limits of the County of San Diego. The CITY shall have the right at any reasonable time to examine and perform audits of ARTS' records pertaining to (a) construction undertaken pursuant to the rights conferred on ARTS under this Agreement, and (b) its operations on the Property, including , without limitation , any records pertaining to ARTS' use of utilities on the Property. The cost of said audits shall be borne by the CITY, except that ARTS shall provide to the CITY, at ARTS' expense, necessary data to enable the CITY to fully comply with each and every requirement of the State of California or by the United States of America for information or reports relating to this Agreement and to ARTS' use of the Property.

27. **ADMINISTRATIVE PROVISIONS.**

- A. **Amendment to this Agreement.** The terms of this agreement may not be modified or amended except by an instrument in writing executed by each of the parties hereto.
- B. **Applicable Law.** This agreement shall be governed by and construed in accordance with the laws of the State of California. The venue for any legal action arising under this agreement shall be in either state or federal court in the County of San Diego, State of California.
- C. **Assignment & Assumption of Rights.** ARTS shall not assign this agreement, in whole or in part, to any other party without first obtaining the written consent of CITY.
- D. **Audit.** If this agreement exceeds ten-thousand dollars (\$10,000), the parties shall be subject to the examination and audit of the State Auditor for a period of three (3) years after final payment under the agreement, per Government Code Section 8546.7.

- E. **Authority.** ARTS represents and warrants that it has full power and authority to execute and fully perform its obligations under this agreement pursuant to its governing instruments, without the need for any further action, and that the person executing this agreement on behalf of ARTS is the duly designated agent of ARTS and is authorized to do so.
- F. **Captions.** Any captions to, or headings of, the sections or subsections of this agreement are solely for the convenience of the parties hereto, are not a part of this agreement, and shall not be used for the interpretation or determination of the validity of this agreement or any provision hereof.
- G. **Computation of Time Periods.** If any date or time period provided for in this Agreement is or ends on a Saturday, Sunday or federal, state or legal holiday, then such date shall automatically be extended until 5:00 p.m. Pacific Time of the next day which is not a Saturday, Sunday or federal, state, or legal holiday.
- H. **Conflict of Interest and Political Reform Act Obligations.** During the term of this agreement, ARTS shall not perform services of any kind for any person or entity whose interests conflict in any way with those of the City of National City. ARTS shall at all times comply with the terms of the Political Reform Act and the National City Conflict of Interest Code. ARTS shall immediately disqualify itself and shall not use its official position to influence in any way any matter coming before the CITY in which ARTS has a financial interest as defined in Government Code Section 87103. ARTS represents that it has no knowledge of any financial interests that would require it to disqualify itself from any matter on which it might perform services for the CITY.
- I. **Construction.** The parties acknowledge and agree that (i) each party is of equal bargaining strength, (ii) each party has actively participated in the drafting, preparation and negotiation of this agreement, (iii) each such party has consulted with or has had the opportunity to consult with its own, independent counsel and such other professional advisors as such party has deemed appropriate, relative to any and all matters contemplated under this agreement, (iv) each party and such party's counsel and advisors have reviewed this agreement, (v) each party has agreed to enter into this agreement following such review and the rendering of such advice, and (vi) any rule or construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this agreement, or any portions hereof, or any amendments hereto.
- J. **Counterparts.** This agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute but one and the same instrument.
- K. **Entire Agreement.** This agreement supersedes any prior agreements, negotiations and communications, oral or written, and contains the entire agreement between the parties as to the subject matter hereof.

No subsequent agreement, representation, or promise made by either party hereto, or by or to an employee, officer, agent or representative of any party hereto shall be of any effect unless it is in writing and executed by the party to be bound thereby

- L. **Exhibits and Schedules.** The Exhibits and Schedules attached hereto are hereby incorporated herein by this reference for all purposes. To the extent any exhibits, schedules, or provisions thereof conflict or are inconsistent with the terms and conditions contained in this agreement, the terms and conditions of this agreement shall control.
- M. **Force Majeure.** If either party is prevented or delayed from performing any act or discharging any obligation hereunder, because of any and all causes beyond either party' s reasonable control, including unusual delays in deliveries, abnormally adverse weather conditions, unavoidable casualties, strikes, labor disputes, inability to obtain labor, materials or equipment, acts of God, governmental restrictions, regulations or controls, any hostile government actions, acts of terrorism, civil commotion and fire or other casualty, legal actions attacking the validity of this agreement or the CITY or ARTS' operations of the property, or any other casualties beyond the reasonable control of either party ("Force Majeure"), performance of such act shall be excused for the period of such delay, and the period for performance of such act shall be extended for a period equivalent to the period of such delay. Force Majeure shall not include any bankruptcy, insolvency , or other financial inability on the part of either party hereto.
- N. **Independent Contractor.** ARTS acknowledges that it is an independent contractor; that it alone retains control of the manner of conducting its activities in furtherance of this agreement; and that it, as well as any persons, contractors or agents it may employ, are not employees of CITY for any purpose.
- O. **No Obligations to Third Parties.** Except as otherwise expressly provided herein, the execution and delivery of this agreement shall not be deemed to confer any rights upon, or obligate any of the parties hereto, to any person or entity other than the parties hereto.
- P. **Partial Invalidity.** If any provision of this agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this agreement shall not be affected thereby. Each provision shall be valid and enforceable to the fullest extent permitted by law.
- Q. **Subcontractors or Subconsultants.** The CITY is engaging the services of the ARTS identified in this agreement. ARTS shall not subcontract any portion of the work, unless such subcontracting was part of the original proposal or is allowed by the CITY in writing, or within the terms of this agreement. In the event any portion of the work under this agreement is subcontracted, the subconsultant(s) shall be required to comply with and agree to, for the benefit of and in favor of the CITY,

provision shall be valid and enforceable to the fullest extent permitted by law.


- Q. **Subcontractors or Subconsultants.** The CITY is engaging the services of the ARTS identified in this agreement. ARTS shall not subcontract any portion of the work, unless such subcontracting was part of the original proposal or is allowed by the CITY in writing, or within the terms of this agreement. In the event any portion of the work under this agreement is subcontracted, the subconsultant(s) shall be required to comply with and agree to, for the benefit of and in favor of the CITY, both the insurance provisions and the indemnification and hold harmless provisions of this Agreement.
- R. **Successors and Assigns.** This agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the parties hereto.
- S. **Waiver.** The waiver or failure to enforce any provision of this agreement shall not operate as a waiver of any future breach of any such provision or any other provision hereof.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on the date and year first above written.

CITY OF NATIONAL CITY

By: 
Alejandra Sotelo Solis, Mayor

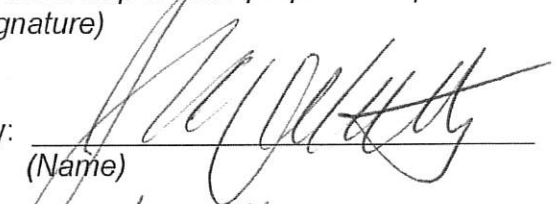
APPROVED AS TO FORM:

By: 
Gabriela Torres
Deputy City Attorney

A REASON TO SURVIVE (ARTS)

(Corporation – signatures of two corporate officers required)

(Partnership or Sole proprietorship – one signature)

By: 
(Name)

JAMES HALLIDAY
(Print)

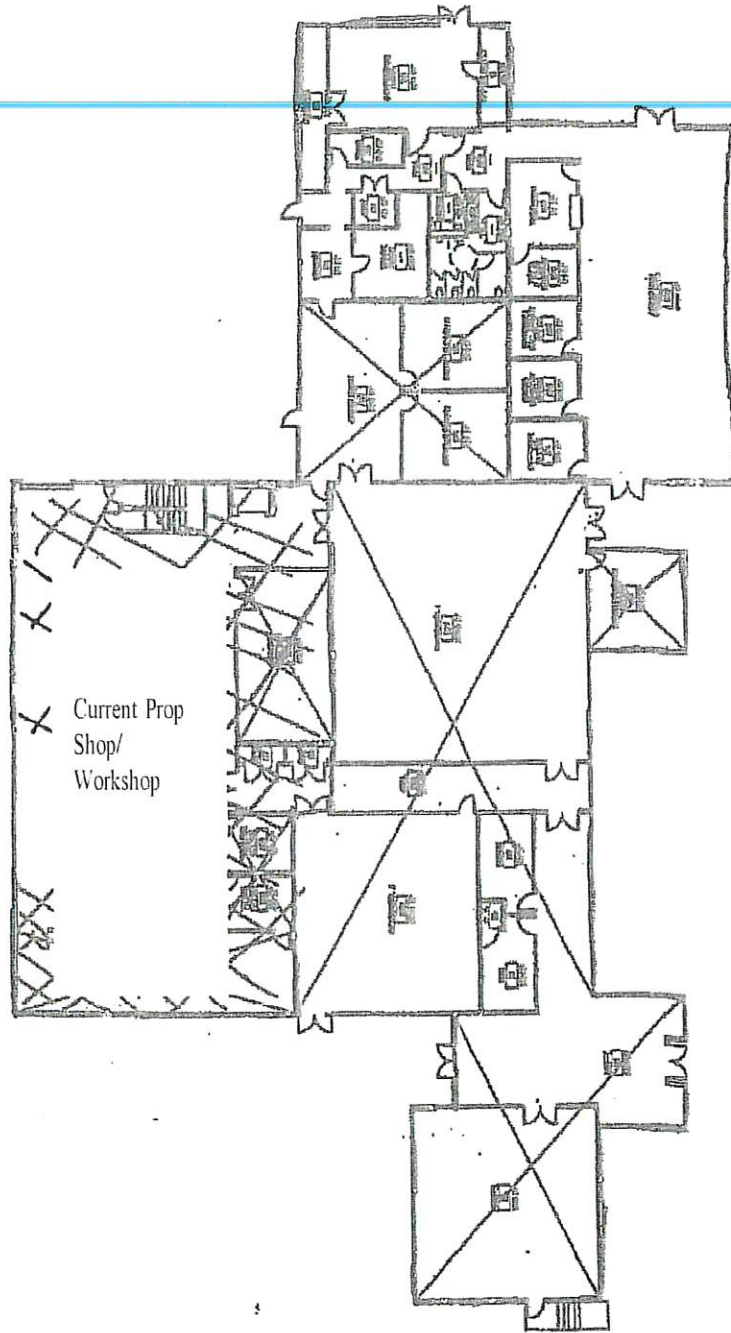
EXECUTIVE DIRECTOR
(Title)

By: 
(Name)

Jacqueline Reynoso
(Print)

Board Chair woman
(Title)

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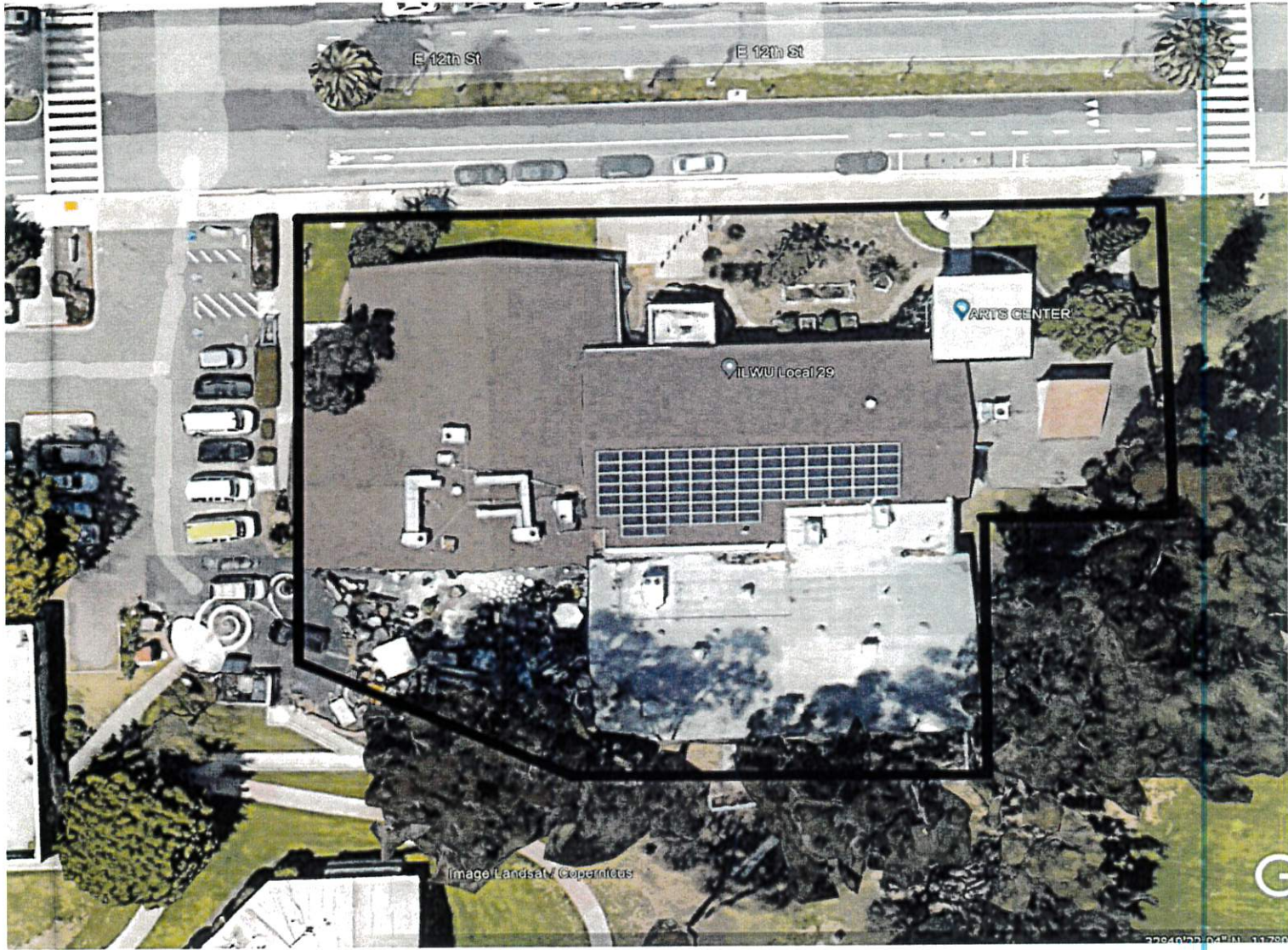


EXHIBIT B - ARTS CENTER, 200 East 12th Street, National City CA