

ATTACHMENT D: CONTRACT DRAFT

_____, 2003

(Name/Address of Consultant)

Re: MPA Contract No. _____
9/11 Airport Memorial
Logan International Airport
Design Concept

Dear _____:

Massachusetts Port Authority (the "Authority") hereby agrees with _____ (the "Consultant") respecting the terms of its engagement by the Authority as further described below.

I. Scope of Services

As the winning entrant for the Authority's 9/11 Airport Memorial design concept competition, Consultant shall furnish the Authority with the design concept for the 9/11 Airport Memorial. The Consultant shall perform the following services:

- A. *Description of services, including a finalized version of the 9/11 Airport Memorial and design concept, coordination requirements, materials needed, etc. Details about the 9/11 Airport Memorial are set forth in Exhibit A.*

II. Compensation (NA)

Consultant shall not be compensated for the development and furnishing of the 9/11 Airport Memorial design concept to the Authority.

The Consultant shall not perform any services beyond the scope of this Agreement without the express written consent of the Authority's Director of Strategic Projects and Technology Integration. Any services so performed shall be done at the expense of the Consultant.

III. Term

This Agreement shall commence on _____, 2003 and remain in effect until the completion of the Consultant's services hereunder, unless extended or terminated by the Authority by written notice.

IV. Additional Terms and Conditions

A. The Authority's Director of Strategic Projects and Technology Integration is hereby authorized to act on behalf of the Authority with respect to all powers of written approval reserved to the Authority in this Agreement. The authority vested in the Director of Strategic Projects and Technology Integration may be exercised by a designee or delegate whom he or she shall appoint, or by the Chief Executive Officer of the Authority.

B. (1) The Consultant shall maintain in confidence all of the Authority's business information which becomes available to Consultant in connection with Consultant's services under this Agreement. The Consultant shall return all photographs, books, and other materials provided by the Authority upon termination of the Agreement or earlier upon request by the Authority.

(2) The Consultant retains all rights under the Copyright Act of 1976, 17 U.S.C. §101 et seq., and all other rights in and to the design concept other than ownership and possession of the design concept (which the Authority shall have solely and exclusively), except as such rights (other than ownership and possession of the design concept) are limited by this Section IV.B and Section IV.F.2. In view of the intention that the design concept shall be unique, the Consultant shall not make any additional three-dimensional reproductions of the final design concept or design concepts that are substantially similar to the final design concept, nor shall the Consultant grant permission to others to do so.

(3) The Consultant grants to the Authority an irrevocable license to make photographs, drawings, or other two-dimensional reproductions of the design concept and the 9/11 Airport Memorial for its public purposes, including but not limited to use in advertising, brochures, or other media publicity for the Authority or the area in which the 9/11 Airport Memorial is located. The Consultant grants to the Authority an irrevocable license to develop the concept to final design and construction, repair and/or restore the 9/11 Airport Memorial, and to alter or modify the 9/11 Airport Memorial as reasonably necessary in connection with such repair and/or restoration. In exercising its rights hereunder, the Authority will endeavor to respect the integrity of the 9/11 Airport Memorial. The Consultant reserves the right to remove its name from the 9/11 Airport Memorial and disclaim authorship or association with the 9/11 Airport Memorial in the event of such alteration or modification by providing to the Authority written notice to that effect.

(4) The Consultant shall use its best efforts to give a credit reading substantially, “an original design concept owned and commissioned by the Massachusetts Port Authority,” in any public showing under the Consultant’s control of reproductions of the design concept.

(5) The Consultant, at its expense, shall cause to be registered with the United States Copyright Office a copyright in the design concept in the Consultant’s name, and shall promptly notify the Authority in writing when such registration is effective.

(6) The Consultant and the Authority shall each promptly inform the other of any suspected infringement of the copyright in the design concept. The Authority shall have the right, but not the obligation, to institute an action for infringement at its own expense against any such third party. To the extent the Consultant is a necessary party to such action, the Authority may bring the action in the name of the Consultant (and the Consultant hereby designates the Authority its attorney-in-fact for such purposes). In the event the Authority brings such an action, it will be entitled to all damages and other recoveries awarded in such litigation.

(7) The Consultant shall produce for the Authority drawings of the design concept of the 9/11 Airport Memorial. The Consultant shall also provide to the Authority duplicates of all plans, drawings, field notes, and other documents as and when they are prepared by Consultant and its subconsultants (if any) in connection with the Project such that the Authority has a full and complete set of Project documents at all times during the term of this Agreement.

(8) The Consultant represents and warrants that: (a) the design concept is solely the result of the artistic effort of the Consultant and does not infringe upon any copyright; (b) the design concept is unique and original; (c) the design concept has not been accepted for sale or transfer elsewhere; (d) the Consultant will not design or create any additional substantially similar work or version of the design concept; and (e) the design concept is, and during the term of this Agreement will remain, free and clear of any liens, security interests or similar claims from any source whatsoever. The Consultant will notify the Authority promptly in the event any lien, security interest or similar claim is made or placed or threatened on the design concept.

(9) The Consultant recognizes the existence of moral rights of artists set forth in the Visual Artists’ Rights Act of 1990, as amended, and as codified in Title 17 of United States Code (the “Visual Artists’ Rights Act”) and Mass. Gen. Laws c. 231, §85S (the “State Statute”). To the extent the design concept is protected by the Visual Artists’ Rights Act or the State Statute and the Consultant is entitled to protection thereunder, the Consultant expressly waives any and all rights arising under the Visual Artists’ Rights Act and the State Statute. If the Consultant intends to engage any subconsultant, contractor, or other artist in connection with the Project to develop the design concept which are or may be protected by the Visual Artists’ Rights Act or the State Statute, the

Consultant shall so notify the Authority, and shall require such subconsultant, contractor, or other artist to execute and deliver to the Authority a waiver of its rights under the Visual Artists' Rights Act and the State Statute and other rights as provided in this Article IV.B.

(10) The Authority shall bear all risk of damage to the 9/11 Airport Memorial following installation of the 9/11 Airport Memorial. The Authority shall have the right to remove the 9/11 Airport Memorial from display or relocate the 9/11 Airport Memorial to a new location. The Consultant reserves the right to remove its name from the 9/11 Airport Memorial and disclaim authorship or association with the 9/11 Airport Memorial in the event of such removal or relocation by providing to the Authority written notice to that effect.

(11) The Authority shall have the right to determine when and if repairs and restorations to the 9/11 Airport Memorial will be made. The Consultant reserves the right to remove its name from the 9/11 Airport Memorial and disclaim authorship or association with the 9/11 Airport Memorial in the event such repair or restoration is undertaken or completed by providing to the Authority written notice to that effect.

(12) The Consultant shall have the right to prepare and affix a credit name plate on or near the 9/11 Airport Memorial upon its completion, provided that all features of the name plate and its location and placement shall remain subject to the approval of the Authority in its sole discretion.

(13) The Authority shall maintain on permanent file a record of this Agreement and of the location and disposition of the 9/11 Airport Memorial.

(14) As security for the performance by the Consultant of its obligations under this Agreement, the Consultant hereby grants to the Authority a security interest in the design, work in progress and all materials purchased in connection with the development of the design concept (collectively, the "Collateral"). In furtherance of the foregoing, the Consultant agrees to execute for filing such financing statements or other instruments as may be requested and prepared by the Authority in order to perfect the Authority's security interest in the Collateral; and to deliver to the Authority, on or prior to the date of Consultant's agreement with a fabricator, the consent and agreement of the fabricator to the conditional assignment of the contract between the Consultant and such fabricator. The Authority shall release its security interest in the Collateral at such time as this Agreement is terminated under Section IV.F.1.

(15) The subparagraphs of this Article IV.B shall survive any termination or expiration of this Agreement.

C. This Agreement is intended to secure for the Authority the faithful assistance and cooperation of Consultant, and Consultant, therefore, shall not accept engagements in work or business adverse to the interest of the Authority in the subject matter of this

Agreement.

- D. The Authority may at any time, by written order to Consultant, make changes in the service tasks within the general scope of this Agreement. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the services under this Agreement, an equitable adjustment in the price or the delivery schedule, or both, shall be made by the Authority and communicated to Consultant concurrently with said written change order. Any claim for or contest of adjustment under this clause must be asserted, if at all, within thirty (30) days from the date of receipt by Consultant of said written change order.
- E. (1) The Consultant agrees that the services provided hereunder shall conform to the professional standards of care and practice exercised by firms engaged in performing comparable services; that the personnel furnishing said services shall be qualified and competent to perform adequately the services assigned to them; and that the recommendations, guidance and performance of such personnel shall reflect such standards of professional knowledge and judgment.
- (2) The Consultant, its contractors, representatives and agents, during the course of the Consultant's performance of the services hereunder, shall have access to the site in order to meet the schedule hereunder, provided that the Consultant shall coordinate all such access to the site with the Authority.
- (3) The Consultant may advise the Authority in writing in reasonable detail if any work performed by Authority's contractor or design team does not conform to Consultant's final approved design concept, and the Authority reserves the right, in its sole discretion, to instruct its contractor(s) to make any corrections required, at no cost to Consultant.
- F. The Authority may terminate this Agreement as follows:
1. on fourteen (14) days' written notice, without cause; or
 2. on seven (7) days written notice if (a) the Agreement or any part thereof shall be assigned without the previous written consent of the Authority; (b) the Consultant shall violate any provision of the Agreement, or shall fail to perform services in a timely and workmanlike manner; or shall fail to perform, keep, or observe any of the terms, covenants or conditions herein contained; (c) the Consultant abandons in whole or in part its services, or becomes unable to perform its services; or (d) a lien or security interest or similar claim arising under or through the Consultant is placed on the 9/11 Airport Memorial; provided, however, that the Consultant shall not be in default if any such failure to perform or make progress under (a) – (c) above arises out of causes beyond the control and without the fault or negligence of the Consultant or such failure to perform has been cured (as reasonably supported by tangible evidence) prior to the expiration of such seven-day period. In the event of such termination, the Authority may

procure, upon such terms and in such manner as it shall deem appropriate, services similar to those so terminated, without prejudice to any other rights and remedies for default that the Authority may have.

In the event of any termination pursuant to the provisions hereof, the Consultant shall promptly deliver to the Authority all documents pertaining to Consultant's services to that time. In the event of termination pursuant to Section IV.F.1, no right to fabricate and install the 9/11 Airport Memorial shall pass to the Authority nor any rights pursuant to Section IV.B(2), (3), (9), or (11). In the event of a termination of this Agreement arising out of Section IV.F(2) hereof, all of the aforesaid documents and all work in progress shall become the property of the Authority and sole and exclusive right to fabricate and install the 9/11 Airport Memorial shall pass to the Authority, and the Consultant shall assign to the Authority any and all rights under its contract(s) with the fabricator, installer and others needed to complete and install the 9/11 Airport Memorial as contemplated hereunder.

It is acknowledged and agreed that Consultant's services under this Agreement may not be assumed or assigned by a trustee in bankruptcy.

- G. The Consultant is engaged under this Agreement as an independent consultant and not as an agent or employee of the Authority, and shall be responsible for its own services. The employees furnished by the Consultant to perform the services described herein shall be deemed to be the Consultant's employees exclusively, and shall be paid by the Consultant for all services in this connection. The Consultant shall be responsible for all obligations and reports covering Social Security withholding, unemployment insurance, workers' compensation, income tax and other reports and deductions required by any applicable state and federal law for such employees.
- H. The Consultant covenants that he presently has no interest (to the best of its knowledge after due inquiry), and that it shall not have any interest, direct or indirect, that would conflict in any manner with the performance of services required under this Agreement. During the term of this Agreement, Consultant shall not employ, on either a full-time or part-time basis, any person so long as such person shall be employed by the Authority.
- I. Any failure by the Authority to assert its rights for or upon any default of this Agreement shall not be deemed a waiver of such rights, nor shall any waiver be implied from the making of any payment hereunder.
- J. In no event shall the Authority be liable to Consultant for damages for loss resulting from causes beyond the reasonable control of the Authority, and in no event shall the Authority be liable for incidental, special or consequential damages, including loss of anticipated revenues or profits, whatever the cause.
- K. The Consultant agrees to defend, indemnify and hold harmless the Authority and its employees from and against any and all claims, demands, actions, including actions for personal injury or wrongful death, actions for property damage, and any other types of claims asserted by third persons alleging a violation of law or for any other cause, arising

from or related to Consultant's performance of services under this Agreement, or its acts or omissions; provided, however, that this obligation to defend, indemnify and hold harmless shall not apply to claims which Consultant demonstrates were caused solely by the gross negligence or willful misconduct of the Authority. This paragraph shall survive any termination or expiration of this Agreement.

- L. No member or employee of the Authority shall be charged personally or held contractually liable by or to Consultant under any term or provision of this Agreement, or because of any breach thereof, or because of its execution or attempted execution.
- M. This Agreement, any duties hereunder, or interest herein may not be assigned or delegated by Consultant without the prior express written consent of the Authority.
- N. This Agreement shall be governed by and construed under the laws of the Commonwealth of Massachusetts without regard to its principles regarding conflicts of laws. Any dispute arising between the parties under this Agreement may be decided by any court of competent jurisdiction in the Commonwealth of Massachusetts.
- O. The parties, by execution of this Agreement, voluntarily and intentionally waive all rights to trial by jury as to all claims, disputes, or other controversies arising out of, or relating to, this Agreement or the performance or breach thereof.
- P. This Agreement sets forth the entire understanding between the parties as to the subject matter hereof and supersedes all prior or collateral agreements and representations. This Agreement may not be amended or modified except by a writing signed by both parties; provided, however, that the Authority may make changes in the service tasks within the general scope of this Agreement in accordance with the provisions of Article IV.D hereof; provided, further, that any compensation due Consultant under this Agreement shall require a writing signed by both parties.
- Q. The Consultant shall complete the Consultant's Certificate and Certificate of Compliance with Laws forms designated as Exhibits B and C, attached hereto and incorporated by reference herein.
- R. (1) Chapter 757, Section 6, Legislative Acts of 1967, January 1, 1968, exempts the following sales and gross receipts therefrom:

Sales of building materials and supplies to be used in the construction, reconstruction, alteration, remodeling or repair of any building, structure, public highway, bridge or other public works owned by or held in trust for the benefit of any governmental body or agency mentioned in paragraph (d) (Sales to the United States, the Commonwealth or any political subdivision thereof, or their respective agencies) and used exclusively for public purposes; provided, however, that such governmental body or agency shall have first obtained a certificate from the Commissioner stating that it is

entitled to such exemption and the vendor keeps a record of the sales price of each such separate sale, the name of the purchaser, the date of each such separate sale and the number of such certificate. In this paragraph the words “building materials and supplies” shall include all materials and supplies consumed, employed or expended in the construction, reconstruction, alteration, remodeling or repair of any building, structure, public highway, bridge or other such public work, as well as such materials and supplies physically incorporated therein. Said term shall also include rental charge for construction vehicles, equipment and machinery rented specifically for use on the site of any such exempt project or while being used exclusively for the transportation of materials for any such tax exempt project.

The Consultant shall provide the Authority’s exemption number and/or a certificate of exemption, as applicable, to vendors and suppliers providing goods or services for the Project in order to claim the Authority’s exemption from such sales and gross receipts therefrom. The Authority shall have no responsibility for the payment of taxes on such sales and gross receipts therefrom.

(2) The exemption number assigned to the Authority as an exempt purchaser is: E046-006-429.

- S. All notices, approvals, requests, consents or other communications, required or permitted pursuant to this Agreement shall be effective upon receipt if hand delivered, sent by Federal Express or sent by United States registered mail, return receipt requested, to the Authority addressed to **MASSACHUSETTS PORT AUTHORITY, Logan Office Center, One Harborside Drive, Suite 200S, East Boston, Massachusetts, 02128**, and directed to the attention of the Director of Capital Programs and Logan Modernization, or to the Consultant addressed to _____, and directed to the attention of _____, or to such other address as either party may specify to the other by notice given as provided herein.
- T. The person executing this Agreement represents and certifies that he/she has authority and power to sign on behalf of Consultant and to bind Consultant to the obligations contained herein.
- U. The Consultant shall abide by and conform with the non-discrimination and affirmative action terms attached as Exhibit D to this Agreement.
- V. Upon signing the enclosed copies, please return all executed originals to Massachusetts Port Authority, One Harborside Drive, Suite 200S; East Boston, MA 02128-2909, Attention: Michael Grieco, Assistant Secretary Treasurer. One fully executed original will be returned to you for your files.

IN WITNESS WHEREOF, this Agreement is executed as of the day and year first written above:

Name of Consultant

MASSACHUSETTS PORT AUTHORITY

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

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EXHIBIT A

Description of 9/11 Airport Memorial

Insert details about the 9/11 Airport Memorial

A pictorial representation is attached hereto and made a part of this Exhibit A.

[Pictorial representation to be attached by Consultant]

EXHIBIT B

Consultant's Certificate

The Consultant named in an agreement with Massachusetts Port Authority numbered **MPA CONTRACT NO.** _____ certifies that:

- a) the Consultant or construction manager has not given, offered or agreed to give any gift, contribution or offer of employment as an inducement for, or in connection with, the award of the contract for design services;
- b) no consultant to or subcontractor for the Consultant or construction manager has given, offered or agreed to give any gift, contribution or offer of employment to the Consultant or construction manager, or to any other person, corporation, or entity as an inducement for, or in connection with, the award to the Consultant or subcontractor of a contract by the Consultant or construction manager;
- c) no person, corporation or other entity, other than a bona fide full-time employee of the Consultant or construction manager, has been retained or hired to solicit for or in any way assist the Consultant or construction manager in obtaining the contract for design services upon an agreement or understanding that such person, corporation or other entity be paid a fee or other consideration contingent upon the award of the contract to the Consultant; and
- d) with respect to contracts which exceed ten thousand dollars, or which are for the design of a building for which the budgeted or estimated construction costs exceed one hundred thousand dollars, that the Consultant has internal accounting controls as required by M.G.L. Chapter 30, Section 39R, and that the Consultant will:
 - (1) retain accurate and detailed books, records, and accounts for a six-year period after the final payment;
 - (2) file regular statements of management concerning internal auditing controls;
 - (3) file an annual financial statement; and
- (e) submit a statement from an independent certified public accountant that such CPA has examined management's internal auditing controls and expresses an opinion as to their consistency with management's statements described in (2) above, and whether such statements are reasonable with respect to transactions and assets that are material in relation to the Consultant's financial statements.

For the purposes of this Certificate, the terms "consultant" and/or "Construction Manager" shall be synonymous with "Consultant".

Consultant: _____

By: _____
duly authorized

Print Name: _____

Date: _____

EXHIBIT C

Certificate of Compliance with Laws

Massachusetts Employment Security Law

Pursuant to G.L. c. 151A, ' 19A(b), the undersigned hereby certifies* under the penalties of perjury that Consultant, with D.E.T. ID Number _____, has complied with all laws of the Commonwealth relating to unemployment compensation contributions and payments in lieu of contributions.

*Compliance may be certified if Consultant has entered into and is complying with a repayment agreement satisfactory to the Commissioner, or if there is a pending adjudicatory proceeding or court action contesting the amount due pursuant to G.L. c. 151A, §19A(c).

or check the following:

_____ *The undersigned certifies that the Massachusetts Employment Security Law does not apply to it because Consultant does not have any individuals performing services for it within the Commonwealth to the extent that it would be required to make any contributions or payments to the Commonwealth.*

Massachusetts Child Care Law

Pursuant to Chapter 521 of the Massachusetts Acts of 1990, as amended by Chapter 329 of the Massachusetts Acts of 1991, the undersigned hereby certifies that Consultant (check applicable item):

1. _____ employs fewer than fifty (50) full-time employees; or
2. _____ offers either a dependent care assistance program or a cafeteria plan whose benefits include a dependent care assistance program; or
3. _____ offers child care tuition assistance, or on-site or near-site subsidized child care placements.

Revenue Enforcement and Protection Program

Pursuant to G.L. c. 62C, §49A, the undersigned hereby certifies under the penalties of perjury that Consultant's tax payer identification No. is (complete applicable item): Social Security No. is _____ or Federal Identification No. is _____ and that to the best of his/her knowledge and belief Consultant has complied with all laws of the Commonwealth relating to taxes, the reporting of employees and contractors, and withholding and remitting of child support.

In order to comply with all laws of the Commonwealth relating to taxes, the undersigned certifies that Consultant (check applicable item):

1. _____ has filed all tax returns and paid all taxes required by law; or
2. _____ has filed a pending application for abatement of such tax; or
3. _____ has a pending petition before the appellate tax board contesting such tax; or
4. _____ does not derive taxable income from Massachusetts Sources such that it is subject to taxation by the Commonwealth. The undersigned further certifies that Consultant's tax payer identification no. is (complete applicable item):

Social Security No. _____ **or**

Federal Identification No. _____.

Certification Regarding Companies Doing Business with or in Northern Ireland

Pursuant to G.L. c. 7, § 22C, the undersigned hereby certifies under the pains and penalties of perjury that Consultant is not engaged in the manufacture, distribution or sale of firearms, munitions, including rubber or plastic bullets, tear gas, armored vehicles or military aircraft for use or deployment in any activity in Northern Ireland, and that Consultant (check applicable item):

1. _____ does not employ ten or more employees in an office or other facility located in Northern Ireland; or
2. _____ employs ten or more employees in an office or other facility located in Northern Ireland, but such office or other facility in Northern Ireland (a) does not discriminate in employment, compensation, or the terms, conditions and privileges of employment on account of religious or political belief; and (b) promotes religious tolerance within the work place, and the eradication of any manifestations of religious and other illegal discrimination.

Signed this ____ day of _____, 20____.

Name of Consultant: _____

Authorized Signature: _____

Title: _____

EXHIBIT D

Authority's Non-Discrimination and Affirmative Action Terms

In accordance with policies adopted by the Massachusetts Port Authority, Consultant shall further agree with respect to its exercise of all uses, rights, privileges and obligations granted on required herein as follows:

1. Consultant shall not discriminate by segregation or otherwise against any person, employee or applicant for employment because of race, color, creed, national origin, ancestry, age, sexual orientation, handicap, Vietnam Era veteran status, or membership in any legally protected class, and shall undertake affirmative action measures designed to guarantee and effectuate equal employment opportunity for all persons.

2. Consultant will provide all information and reports pertinent to the Authority's Equal Employment, Anti-Discrimination and Affirmative Action requirements by the Authority and will permit access to its facilities and any books, records, accounts or other sources of information which may be determined by the Authority to affect the Consultant's obligation herein.

3. Consultant shall comply with all federal and state laws and Authority regulations pertaining to Civil Rights and Equal Opportunity, including executive orders and rules and regulations of appropriate federal and state agencies unless otherwise exempt therein.

4. Consultant's non-compliance with the provisions of this Exhibit shall constitute a material breach of this Agreement, for which the Authority may, in its discretion, upon failure to cure said breach within thirty (30) days of written notice thereof, terminate this Agreement upon ten (10) days written notice.

5. Consultant shall indemnify and hold harmless the Authority from any claims and demands of third persons resulting from Consultant's non-compliance with any of the provisions of this Exhibit and in case of termination or cancellation of this Agreement pursuant to Paragraph 4, the Consultant shall indemnify the Authority during the remainder of the original term against any loss or damage suffered by reason of such termination.