

Saskatchewan Public Art Commissions



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

This document deals with competitions for commissions of public art and the commissions that result from them. It may successfully be applied to the commissioning of artwork in other circumstances, though the guidelines it contains may not always be appropriate or cost-effective for smaller-scale, special purpose, or private commissions..

Considerations with regard to commissions of public art include:

- Who will own copyright?
- What form of contract will the parties use?
- Has the artist been made aware of the standards for competition and the standards that will be used in the final selection of work?
- What are reasonable expectations for approval of the design and of the final work?
- What payment will be made for development of a design or maquette and for the work itself?

This document intends:

- to clarify underlying “best practice” principles that are ethical for commissioning of public art as well as widely adaptable to differing circumstances;
- to outline the main stages in the process of commissioning public art;
- to provide guidelines that may be used by organizers, creators of art, and artists hired as consultants to the process of commissioning public artwork.

This document sets out recommended standards for professional practice in the Saskatchewan visual arts and crafts sector.

The following organizations have endorsed this document:

- » CARFAC Saskatchewan
- » Museums Association of Saskatchewan
- » Organization of Saskatchewan Arts Councils
- » Saskatchewan Arts Alliance
- » Saskatchewan Arts Board
- » Saskatchewan Craft Council
- » Saskatchewan Cultural Industries Development Council
- » Saskatchewan Professional Art Galleries Association
- » Saskatchewan Publishers Group
- » SaskCulture

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More best practice standards at
www.bestpracticestandards.ca

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This project has been devised based on the “The Code of Practice for the Australian Visual Arts and Craft Sector” Edition 2, developed, commissioned and published by the National Association for the Visual Arts (NAVA).

1 DEFINITION OF COMMISSIONED WORKS

- 1.1 Commissioned artworks are artworks 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 on between the parties.

2 THE COMMISSIONING PROCESS

- 2.1 This document strongly recommends the use of a selection committee that includes artists, art professionals, any representatives of the commissioner, and others as needed.
- 2.2 The commissioning process should demonstrate a professional relationship with the artists involved that provides reasonable payment for creation, time, and materials.
- 2.3 Negotiation should also be a process between professionals, and should be guided by practice for other commercial sales of artwork and for the public exhibition of artwork.
- 2.4 All details of any contract should be understood by all parties involved before the contract is signed.

3 STAGES IN A PUBLIC COMPETITION FOR PUBLIC ART

- 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.

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 separate from the organizers themselves. The selection committee's role is to make decisions about short lists of artists and final awarding of commissions. It should be kept small 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. Consideration should be given to payment for the members of the committee.

- 4.4 The site for the work must be determined and restrictions determined if any. Site safety for artists, workers, and public, and liability 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.

- 4.5 Budget for the competition must be determined. This should include:
- payment to artists for design/maquettes and the final work;
 - payment for GST and PST as a separate item;
 - costs for travel, and artist accommodation if applicable;
 - costs for insurance and who will bear that cost, site preparation, materials and equipment (including industrial equipment such as scissor lift or crane);
 - costs for installation of work including transportation if work is performed off-site;
 - costs for lighting, promotion, signage;
 - artist role in the above;
 - the work of the committee.
- 4.6 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.
- 4.7 The schedule for the project must be set, including time allocations for each stage of the project. (See also 11.4)
- 4.8 Preparation of artist contracts should begin.

5 STAGE 2 – PROJECT PROMOTION

- 5.1 Organizers should promote the competition.
- 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. Also, 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 project description and any restrictions;
 - Specifics of who may submit to the competition and from what geographic area;
 - A site description and any restrictions;
 - Production location for the work;
 - The type of artwork to be accepted (i.e. site specific sculpture or moveable works);
 - All relevant deadline dates and requirements;
 - The name of the project host;
 - Identification of the selection committee;
 - A description of the stages of the selection process;
 - A list of all relevant deadlines;
 - 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 and when these will be returned;
 - A statement as to whether and/or at what stage a design or maquette is required and how much will be paid for production;
 - A statement re ownership of both design and maquette after production for awarded commissions and all other purposes;

- Information on whether maquettes are to be exhibited;
- A list of all necessary requirements that the artist must fulfill when submitting.

7 STAGE 4 – ACCEPTANCE OF IMAGES

- 7.1 If artist images are required in a first step, organizers should, within a reasonable time frame, accept from 5 to 10 images of artwork from each artist, to be reviewed by the selection committee.

8 STAGE 5 – ARTIST SHORT LIST

- 8.1 The selection committee should create a short list of artists for the project. Short lists 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 Under no circumstances should the short list be considered an opportunity to conduct the first stage of the competition for a second time.
- 8.3 Artists not accepted for the short list should be informed immediately that they are no longer in the competition, and competition materials returned to them.

9 STAGE 6 – DESIGN-MAQUETTE

- 9.1 If the next stage is to look at designs or maquettes, proper conditions must be arranged for shipping, receiving, storing, viewing, and returning the artwork.

- 9.2 Any requests 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 fee for the production of a maquette must be paid to each artist when the organizers receive the finished maquette.

10 STAGE 7 – FINAL DECISION

- 10.1 The selection committee should make final decisions based on the designs or maquettes submitted in stage 7, and the commissions should be awarded.
- 10.2 All artists who submitted to the competition should be informed of the results as soon as they are available, as should the public and any other interested parties.
- 10.3 All remaining artwork submitted to the committee should be returned to the artists.

11 STAGE 8 – CONTRACTS

- 11.1 A contract should be negotiated and signed. Written contracts must be used. The Saskatchewan Arts Professions Act requires a written contract between artists and engagers. The contract must include specific basic elements which are detailed in the *Checklist For Written Contracts*, provided by the Ministry of Tourism, Parks, Culture and Sport and appended to this document.
- 11.2 Any changes requested to the contract by either party after it is signed must also be negotiated. Not until all contract issues are negotiated, agreed to, and contracts signed, should production begin.

- 11.3 Where more than one primary artist is involved in the commission, joint ownership, responsibility, and liability should be stated.
- 11.4 Payment schedules should be established and respected. Payment on signing the contract should be at least half of the total fee and must include consideration of artist costs in producing the work.
- 11.5 The contract should include the schedule as set and articulated in section 4.7. It should also include provisions for re-negotiation of schedules as required based on circumstances which may develop during the production of the commission.
- 11.6 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.
- 11.7 Ownership and licensing of copyright should be clearly stated.
- 11.8 Where the artist plans to use assistants, technicians, or subcontractors for any part of the production of the commission, this must be clearly stated. Liability for work by these must also be stated.
- 11.9 Financial terms should consider those listed under section 4 in this document.
- 11.10 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, repairs or

damage 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 during production of work.
- 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 liability insurance 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 commission contract should specify terms for acceptance of and sign-off on the completed work.
- 13.5 For more information on artists' copyright as it relates to commissions, see *section 14, Copyright and Commissions*.

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), *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 Exceptions to 14.1 are outlined below in clauses 14.4 to 14.7
- 14.4 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 his/her art production.
- 14.5 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 his/her art production.

- 14.6 Exception 3: The Copyright Act 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 his/her art production, these uncertainties may be dealt with by contract.

- 14.7 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.
- 14.8 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.

PUBLIC COMMISSIONS OF ARTWORK – CHECKLIST

This following checklist of terms is intended for use by artists and commissioners of public artwork when entering into negotiations for contracts for commissions.

Terms have been developed using INDUSTRY STANDARDS / BEST PRACTICES document Saskatchewan Public Art Commissions as a reference. All terms should be considered carefully. More complete checklists are available from CARFAC Saskatchewan

IMAGE AND MAQUETTE

- Method of choosing image to be used in the final work.
- Artist's freedom in interpreting assigned subject, and restrictions on creativity.
- Requirement for design, maquette or model.
- Fidelity of completed work to design/maquette/model
- Artist's freedom in making changes to the design, including client consultation required if any.
- Client access to work under development and notice of the inspections if any.

SITE

- Work to be performed on-site or off.
- Responsibility for selection, preparation, payment for use of, and ongoing maintenance of site.
- Responsibility for selection of off-site production location.

SCHEDULE

- Production and installation schedule
- Provisions for and methods of renegotiation of schedules if needed.

TRAVEL

- Payment for artist travel to site and number of trips allowed.
- Payment for and selection of artist accommodation, meals, and other expenses during production/installation of work.

MATERIALS, EQUIPMENT, DELIVERY, AND ASSISTANCE

- Choice of and supply of and payment for materials and equipment (including industrial equipment such as scissor lift or crane as well as artistic materials and equipment).
- Supply of and payment for delivery of materials, equipment, and completed work
- Choice of and supply and payment for assistants, technicians, or sub-contractors if any.

INSTALLATION

- Responsibility for installation of the work, including but not limited to insurance, technical support, costs, and repairs.

PAYMENT

- Amount of payment to artist, including consideration for design/model/maquette, production work, materials and equipment, site preparation, and all other expenses.
- Addition of PST and GST where applicable.
- Schedule of payments.
- Interest on late payment?
- Compensation to either party for delays to construction of the work.
- Compensation to the artist if project is cancelled.
- Terms if artist is unable to complete the commission for personal or any other reasons.

RISK AND INSURANCE

- Risk of loss or damage to drawings, maquette, final work, materials, and equipment/tools.
- Responsibility for insurance against property damage or personal injury to artist or others while work is in production.
- Responsibility for site safety, insurance, and liability, including liability for work by assistants, technicians, or sub-contractors if any.
- Sign-off on risk and acceptance of the work.

MAINTENANCE AND REPAIR

- Maintenance of the work after completion.
- Contracting of artist or other for artistic repair.
- Cost and timing of repairs.
- Warranty regarding quality of repair.

RELOCATION

- Provisions for relocation of completed artwork if required.

COPYRIGHT AND MORAL RIGHT

- Ownership of copyright.
- Payment to artist for copyright.
- Rights regarding reproduction of work or maquette.
- Limits on reproduction or use.
- Identification of artist as creator of the work and maquette.
- Protection of artist's moral right.
- Artist's services with regard to reproduction or other promotion.

DISPUTE RESOLUTION

- Resolution of disagreements in case of failure of agreement.

NOTES

CHECK LIST FOR WRITTEN CONTRACTS

provided by the Saskatchewan Ministry of Tourism, Parks, Culture & Sport (2009-06)

www.tpcs.gov.sk.ca/arts-professions-act

The *Arts Professions Act* increases protection for artists and their intellectual property by requiring written contracts between those who engage the services of artists and the artists themselves. The legislation requires the following basic elements be included in each contract:

- the legal names of the engager and the professional artist;
- the effective date of the contract;
- the work, production or enterprise that forms the object of the contract;
- the financial consideration due to the professional artist and the terms and conditions of payment, including the date of the delivery of the work or production or the conduct of the enterprise and the date of the delivery of payment;
- the frequency with which the engager shall report to the professional artist on the transactions made with respect to the work, production or enterprise that is subject to the contract and for which financial consideration remains owing after the contract is entered into;
- the notice and, if applicable, the compensation required if either the engager or the professional artist terminates the contract before its completion;
- dispute resolution mechanisms;
- any transfer of right and any grant of licence consented to by the professional artist, including:
 - a. the purposes of the transfer of right or grant of licence;
 - b. the term of the transfer of right or grant of licence; and
 - c. the jurisdiction in which the transfer of right or grant of licence applies;
- whether any licence granted to an engager is transferable to a third party;
- any limitations on the use of the work or production or the conduct of the enterprise.
- if applicable, any waiver of moral rights within the meaning of section 14.1 of *The Copyright Act* (Canada); and
- in the case of a contract between an engager and an Aboriginal professional artist, the protocols respecting the use of Aboriginal symbols or artifacts or matters of importance to Aboriginal people.

ADDITIONAL CHECK LIST FOR WRITTEN CONTRACTS

If a written contract entered into reserves an exclusive right of the engager over any future use of the work or production of the professional artist, the contract must include the following elements in addition to the elements listed above:

- a description of the work or production;
- a description of the process that the professional artist must follow to terminate the contract after the expiration of a specified period;
- a date on which any exclusive right of the engager over any future use of the work or production of the professional artist or any right of the engager to the work or production expires; and
- any additional elements prescribed in the regulations (at this time there are none).