



## **ARTIST SERVICE AGREEMENT**

### **Newcastle Beach Pedestrian Subway Mural**

## Schedule of Terms

Unless otherwise defined below, capitalised terms have the meanings assigned to them in clause 26 of the Terms and Conditions.

Item	Term	Description	Related provisions
1	<b>Agreement Term</b>	Start date: 18 March 2024 ( <b>Agreement Date</b> ). End date: 31 March 2024 ( <b>End Date</b> ). The End Date is also subject to the termination provisions in clause 11 of the Terms and Conditions.	Clause 1 of Terms and Conditions
2	<b>Artist</b>	Name: <b>Artist Name</b> (the <b>Artist / you</b> ) Postal address: <company name> <street> <SUBURB STATE P/Code> Email: <insert email address> Phone: XXX XXX XXXX	
3	<b>Artist Fee</b>	The total artist fee is AUD<insert Fee>, (including GST) ( <b>Artist Fee</b> ). The Artist Fee is consideration for your engagement to undertake the Deliverables outlined in <i>Item 4</i> over the Timeline outlined in <i>Item 6</i> , and as described in Schedule A.	Clause 6.1 and 6.2 of Terms and Conditions
4	<b>Deliverables/Artwork</b>	Refer to Schedule A: Request for Quote - Newcastle Beach Pedestrian Subway Mural	
5	<b>Council's Representative</b>	<insert CN staff member name and contact details>	Clause 16 of Terms and Conditions
6	<b>Timeline</b>	31 March 2024	Clause 23 of Terms and Conditions
7	<b>Travel</b>	<insert if applicable>	Clause 6 of Terms and Conditions

Item	Term	Description	Related provisions
8	<b>Purchase Order</b>	TBA	Clause 17 of Terms and Conditions

# Terms and Conditions

1.	Term of Agreement-----	4
2.	Your appointment -----	4
3.	The Artist's role and obligations -----	4
4.	The Council's role and obligations-----	4
5.	Council Representative-----	5
6.	Fees, expenses and funding-----	5
7.	Insurance -----	5
8.	Intellectual Property -----	5
9.	Media and Marketing -----	7
10.	Installation or Supply -----	7
11.	Termination -----	7
12.	Force majeure-----	8
13.	Indemnity -----	8
14.	Dispute resolution-----	9
15.	Confidentiality -----	9
16.	Notices -----	9
17.	Payments -----	10
18.	Discrepancies in Information-----	10
19.	Conflict of interest-----	10
20.	Subcontracting and assignment -----	11
21.	Personnel-----	11
22.	Reports and information -----	11
23.	Delays and extension of time -----	11
24.	Order of precedence-----	12
25.	General terms -----	12
26.	Definitions-----	14

## **1. Term of Agreement**

This Agreement commences on the Agreement Date and will continue (unless terminated earlier under clause 11) until the End Date.

## **2. Your appointment**

By signing this Agreement, you agree to fulfil your obligations and provide the Deliverables as set out in Item 4, Schedule of Terms and elsewhere in the Agreement.

## **3. The Artist's role and obligations**

You agree to:

- (a) perform the Deliverables and all your obligations under the Agreement in a diligent manner and to the standard of care and skill expected of an expert artist;
- (b) use your best endeavours to create the Artwork in accordance with the Timeline. The Timeline is subject to amendment in accordance with clause 23;
- (c) comply with the current WHS Laws at all times and, if the Artwork involves any work at a Council site, you shall comply with the Council's Safety Management requirements;
- (d) consult with the Council on all aspects relating to the Artwork and the Deliverables;
- (e) allow the Council the opportunity to review the Artwork and request changes to the extent that, in the Council's reasonable opinion, the Artwork does not align with Schedule A; and
- (f) report to and update the Council as requested from time to time.

The Artist shall be bound by the requirements of the Council's Statement of Business Ethics for the term of this Agreement.

<https://newcastle.nsw.gov.au/getmedia/9d75dbe3-0da3-4c22-b8a1-a9cd1116bc7a/NCC313-Statement-of-Business-Ethics-1.pdf>

## **4. The Council's role and obligations**

In addition to other support to be provided by the Council as provided for in this Agreement, the Council will, at its discretion, work to:

- (a) liaise with the Artist on the installation, display and interpretation of the Artwork; and
- (b) manage the relationship between the Artist and the Council.

## **5. Council Representative**

The Council's Representative means the person appointed by the Council for the management of this Agreement. The name and contact details for the Council's Representative is listed in Item 5 of the Schedule of Terms. Should you have any questions about the Deliverables or the Artwork, please contact them.

## **6. Fees, expenses and funding**

### **6.1 Artist Fee**

The total Artist Fee outlined in the Schedule of Terms will be paid to the Artist in accordance with Item 3 of the Schedule of Terms. The Artist Fee is in recognition of your engagement as an artist and is the entire fee that will be payable to you for undertaking all the Deliverables and associated activities and obligations in this Agreement.

### **6.2 Other fees**

Any participation by you in other activities relating to the interpretation and promotion of the Artwork, beyond those outlined in the Schedule of Terms, may be subject to an additional fee which would be discussed and agreed with you at the relevant time.

If you are required, as contemplated in clause 9, to attend any media events, such as the Artwork launch, in relation to the promotion of your Artwork, the Council will provide support in relation to travel costs (Item 7).

## **7. Insurance**

- (a) The Artist is responsible for obtaining and maintaining for the duration of the Agreement Term the following insurances, some of which may be obtained through a premium membership to the National Association for the Visual Arts (NAVA):
  - (i) public liability insurance with a limit of liability of at least \$20 million per occurrence; and
  - (ii) workers compensation insurance as required by NSW law.
- (b) Whenever requested by the Council, the Artist must provide evidence of the currency of insurance in the form of a copy of the policy schedule and terms and conditions.

## **8. Intellectual Property**

### **8.1 Artist warranty**

You warrant that:

- (a) you are entitled to use any Intellectual Property which may be used by you in connection with this Agreement;
- (b) you have right to grant the licences in respect of the Intellectual Property in the Artwork in accordance with the terms of this Agreement; and

- (c) the Artwork or use of the Artwork in accordance with the terms of this Agreement will not infringe the Intellectual Property, Moral Rights or other rights of any third party.

You indemnify and must at all times keep the Council indemnified from and against any action, claim, suit or demand, including a claim, suit or demand for or liability to pay compensation or damages and costs or expenses arising out of or in respect of any actual or alleged breach of any third party's Intellectual Property or Moral Rights relating to the scope of activities under the Agreement.

You must notify the Council of any Authors of the Work (other than the Artist) and must obtain irrevocably given consent from each Author of the Work to any acts or omissions of any person, including the Council, in connection with the Work, whether occurring before or after the date of this agreement, which might otherwise infringe the Moral Rights of that Author.

## 8.2 Ownership and licence

You will retain ownership of all Intellectual Property created by you under this Agreement. You hereby grant the Council an irrevocable, non-exclusive, royalty-free, perpetual, worldwide, transferrable licence to use, copy, deal with and reproduce images of such Intellectual Property (including approved contextual images (portraits etc) and any images we might create (such as installation photography), and any photographs, film or recordings of you, the Artwork and any related public program events (including artist's talks, workshops and performances) for any non-commercial purposes including but not limited to:

- (a) activities relating to the Artwork, or the Council (including any accompanying Artwork catalogue or publication);
- (b) promoting you, the Artwork, and/or the Council (including on the Council's website and social media channels);
- (c) archival and preservation purposes;
- (d) research, study and educational purposes; and
- (e) any non-commercial uses not covered under Fair Dealing provisions under the *Copyright Act (1968)* (Cth) including the distribution to third-party media outlets for publicity and editorial use.

You acknowledge that, when the Artwork is on display, it will be impractical for the Council to prevent visitors taking photographs of the Work for personal use, and that you will not hold the Council liable for such unauthorised photography or filming or for a visitor's subsequent use of such photographs or footage.

## 8.3 ICIP

Ownership of any Indigenous Cultural and Intellectual Property (**ICIP**) remains with the traditional owners or custodians of the ICIP.

Where the Work contains ICIP, you confirm that you are authorised by the traditional owners of the ICIP to use any ICIP contained in the Work and have undertaken any necessary consultations with the relevant communities with rights associated with the particular ICIP, to grant the Council a licence to use the ICIP as permitted under this Agreement, which may include making that ICIP available to a world-wide audience.

You will let the Council know in writing of any customary law conditions or cultural protocols that must be followed for the appropriate use of the ICIP in the Work, and the Council agrees to respect and use ICIP in accordance with those protocols.

In the event that ICIP is identified as being contained in the Work, the Council will attribute the traditional owners or custodians, as advised by you or according to the traditional custodians.

The parties agree that in the event of your death during the term of this Agreement, the licence will continue for the Agreement Term, however with respect to the ICIP rights contained in the Work, the Council will discuss the ongoing use of your name, likeness and biography in connection with the Work with your representative or next of kin.

## **9. Media and Marketing**

The Council's activities receive widespread media interest, and the Council facilitates all media enquiries and requests in partnership with staff within the wider City of Newcastle. All media enquiries or requests that you receive directly in relation to the Work must be directed to the Council in the first instance, so that the Council can monitor all media coverage for, provide appropriate information and images, and ensure appropriate City of Newcastle media protocols are followed.

As the Artist, you will be expected to:

- (a) be available for comment to media and publications in the promotion of your Artwork;
- (b) attend any media events, such as the Artwork Launch, in relation to the promotion of your Artwork. If travel to Newcastle is required to attend these events, you will only be required to attend if travel is supported by the Council (Item 7); and
- (c) review in a timely manner any copy and images intended for use in the public promotion of your Artwork.

## **10. Installation or Supply**

The supply or (where applicable) installation of the Artwork will be:

- (a) within the Timeline as described in Item 6; and
- (b) done by the Artist and/or their subcontractor/s, if covered by relevant personal insurances and agreed to in writing by the Council.

## **11. Termination**

### **11.1 Termination by the Council**

The Council may terminate this Agreement in writing:

- (a) if the Artist commits a substantial breach of the Agreement, including:
  - (i) failure to carry out the Agreement at all, or within the time specified, or at a reasonable standard as determined by the Council, acting reasonably; or



- (ii) failure to carry out a reasonable direction of a Council Contact;
- (b) at the Council's discretion, provided no less than two business days written notice of such termination is provided to the Artist.

#### 11.2 Termination by the Artist

The Artist may terminate this Agreement in writing if the Council commits a substantial breach of the Agreement, including failure to carry out the Agreement at all or within the time specified, provided the Council has been provided a reasonable opportunity to remedy such breach following receipt of written notice from the Artist.

#### 11.3 Effect of termination

Upon termination of this Agreement, you must immediately cease all activities under the Agreement and take all appropriate action to mitigate any loss or prevent further costs from being incurred. Termination will not release you from any liability in respect of any obligation relating to this Agreement.

Where termination takes place following the payment of costs and expenses associated with the Deliverables, the Council will seek to have returned (which you must use your best endeavors to assist with) any funds which are unspent at the point of termination or are otherwise reasonably recoverable. The Council will not seek the return of amounts that have been reasonably expended with proof of expenditure to the point of termination. This applies to funds supplied by the Council to the Artist from the Council's operational budget and grant funding secured by the Council. Any grant funding secured by the Artist will be the responsibility of the Artist to accurately acquit and return as and if required by the relevant funding body.

### 12. **Force majeure**

Neither party will be in breach for failure to carry out their obligations under this Agreement where such failure is caused by an event beyond their control, such as natural disaster, serious illness, or domestic conflict (**Force Majeure Event**). You will notify the Council immediately of any such Force Majeure Event. A party must promptly notify the other party if it becomes aware that it will be unable to perform all or part of its obligations under this Agreement due to a Force Majeure Event. In these circumstances, the party must further advise the other party when it expects to be able to continue performing its obligations.

### 13. **Indemnity**

You indemnify the Council, its servants and agents from and against all actions, claims, losses, damages, penalties, demands or costs whatsoever which may be brought or made against it or them by any person in respect of or by reason of or arising out of the performance by you of this Agreement including:

- (a) any negligence, wrongful act or omission of you or of any other persons for whose acts or omissions you are responsible; and/or
- (b) death or injury to any person or loss of or damage to any property; and/or
- (c) any claim or allegation that the Artwork or use of the Artwork in accordance with this Agreement infringes a third party's Intellectual Property or Moral Rights; and/or

- (d) any breach of the Agreement by you; and/or
- (e) any action, claim or demand from liability brought against the Council in connection with a breach by you of the Work Health & Safety Act 2011 and associated legislation (so far as it is permissible at law).

Your liability to indemnify the Council is reduced proportionally to the extent that an action or omission of the Council or employees or agents (other than you) of the Council may have contributed to the injury, damage or loss.

## **14. Dispute resolution**

If a dispute arises between the parties in relation to this Agreement, the parties agree in the first instance to discuss the matter to see if it can be resolved. If the dispute is not resolved within 15 business days of the commencement of such discussions, the Council will nominate a formal dispute resolution process to be followed by the parties. You must continue to perform your obligations under the Agreement pending resolution of the dispute.

## **15. Confidentiality**

In this clause 15, **Confidential Information** includes:

- (a) the amount of the Artist Fee and the other terms of this Agreement;
- (b) any Intellectual Property of the Council or other information disclosed by the Council and designated as confidential or which by its nature should reasonably be expected to be confidential information of the Council.

You must not and, to the extent applicable, must procure that your employees, agents, directors, partners, shareholders or consultants do not, disclose to any third party, any Confidential Information including by way of media interviews or releases relating to the Council or its affairs which may have come to your or their knowledge as a result of the Agreement.

You must not issue any Intellectual Property, publication, document or article for publication concerning any aspect of the Confidential Information in any media without prior written approval of a Council Contact, which approval shall not be unreasonably withheld. You must refer to a Council Contact, any enquiries concerning any aspect of the Agreement from any media.

You agree to comply with the provisions of the *Privacy and Personal Information Protection Act 1998* (NSW), as if it were included in the definition of 'public sector agency' under that Act, the Privacy Code of Practice for Local Government and the Council's Privacy Management Plan.

## **16. Notices**

Notices to you may be signed on behalf of the Council and will be directed to your address, as specified in Item 2 of the Schedule of Terms or as otherwise notified in writing by you from time to time.

All notices (including invoices) from you must be directed to the Council Contacts as specified in Item 5 of the Schedule of Terms, or as notified by the Council to you from time to time. Email is the Council's preferred method of communication.

A notice is regarded as given and received:

- (a) if delivered by hand, upon delivery to the relevant address;
- (b) if sent by email, on the day on which it is transmitted or, if transmitted after 5:00pm (local NSW time), on the next business day unless the sender receives an automated reply that the email was not delivered; or
- (c) if sent by mail, three business days from and including the date of postage.

## **17. Payments**

### **17.1 Claims for Payment**

Payment is within 25 business days of the receipt of an approved payment claim in the form of a valid tax invoice under GST law in respect of the Artwork delivered and accepted. The Artist must quote Purchase Order Number (stated at Item 8 of the Schedule of Terms) on any Tax invoice or claim for payment.

### **17.2 Costs, Fee & Expenses**

The Contract Sum (or Artist Fee) is inclusive of all expenses of the Artist, including fees, disbursements, provisional sums and taxes, all of which shall be paid by the Artist. Unless otherwise provided, no payment will be made for travelling in relation to the Artwork.

Fees and expenses shall not be subject to price variation (rise & fall) unless otherwise provided in the Agreement.

### **17.3 Goods and Services Tax (GST)**

Unless otherwise expressly stated in the Agreement, all prices, rates or other sums payable in accordance with the Contract include an amount for GST.

If the Artist fails to provide an ABN on any tax invoice or adjustment note, the Council may be required to withhold from the payment an amount of tax calculated in accordance with the relevant taxation act or regulation.

## **18. Discrepancies in Information**

You must give written notice to the Council if information and particulars made available to you are inadequate or contain errors. This notice must be given as soon as practicable.

## **19. Conflict of interest**

You must inform the Council of any matter which may give rise to an actual, potential or perceived conflict of interest at any time during the Agreement Term, and any extension of the Agreement beyond this time. The Council may regard a conflict of interest as a breach of a fundamental term of the Agreement and may elect to terminate the Agreement.

You warrant that you do not hold any office or possess any property, are not engaged in any business, trade or calling and do not have any obligations by virtue of any contract or any family relationship where, directly or indirectly, duties or interests are or might be created in conflict

with or might appear to be created in conflict with your duties and interests under this Agreement.

## **20. Subcontracting and assignment**

You must not without the prior written approval of a Council contract, subcontract or assign any performance of rights or obligations under the Agreement. In giving such approval the Council may impose such terms and conditions as deemed necessary.

Where the development and/or production of the Artwork requires the subcontracting of additional personnel/expertise, you will supply the Council with details of your preferred subcontractor and the work they are undertaking, or the Council will work with you to research and review appropriate personnel to support the Deliverables.

Fees associated with subcontracting development or delivery of the Work will only be covered by the Council where these have been agreed to in writing as part of the Schedule of Terms, or by subsequent negotiation in writing. The Council may require the Artist to seek multiple quotes for subcontracted work to ensure best market value, where the Council is supplying production funds.

Any subcontractor engaged is required to hold at a minimum, the same insurances as the Artist in accordance with clause 7. The Council may require the subcontractor to enter into a direct Agreement with the Council.

## **21. Personnel**

Without limiting clause 20, you warrant that all personnel engaged by you are appropriately qualified, competent and experienced in the provision of the type of activities connected with the Agreement.

The Council may direct you to remove any person performing activities connected with the Agreement who is, in the opinion of the Council, incompetent, negligent or otherwise unacceptable.

## **22. Reports and information**

You must provide the Council with written reports or information on any aspects of the Agreement when requested, in the form requested by the Council.

## **23. Delays and extension of time**

You agree to use your best efforts to perform the Deliverables with due expedition, without delay and in accordance with the Timeline. When it becomes evident to either party that anything, including acts or omissions by the other party, may delay carrying out the Artwork in accordance with the Timeline, that party will notify the other party as soon as practicable, in writing, with details of the delay and its cause.

If you are delayed, the Timeline may be extended at the discretion of the Council, to the extent of the delay, where the delay is beyond your reasonable control.

The Council may, by written notice, extend the Timeline for any reason.

Nothing in this clause 23 will oblige the Council to pay extra costs for delay or disruption which have already been included in the value of a variation or other payment under the Agreement, or limit a claim by the Council for damages for breach of the Agreement.

## **24. Order of precedence**

This Agreement comprises of the following documents, which to the extent of any conflict, govern in the order specified:

- (a) Special Conditions of Contract SC-3 (if applicable);
- (b) the Schedule of Terms;
- (c) these Terms and Conditions; and
- (d) Schedule A (Request For Quote - Newcastle Beach Pedestrian Subway Mural)
- (e) Artist Proposal

## **25. General terms**

- (a) **Progressing the Agreement:** Each party must do anything (including execute any document), that the other party may reasonably require to give full effect to this Agreement.
- (b) **Clauses survive termination:** Clauses that by their nature continue in effect beyond termination of this Agreement survive such termination. Such clauses include, without limitation, clauses 8, 13 and 15.
- (c) **Changes to Agreement:** This Agreement may only be varied in writing, signed by the parties. No waiver, election, renunciation or affirmation by the Council will be effective unless it is expressly stated in writing and signed by the Council.
- (d) **Entire Agreement:** This Agreement contains the entire understanding and representations between the parties as to the subject matter of this Agreement and supersedes all prior representations and understandings between the parties.
- (e) **Electronic signing:** This Agreement may be signed electronically. Transmission of the executed Agreement by email (in JPEG, PDF, or other agreed format) shall be taken as valid delivery.
- (f) **Counterparts:** This Agreement may be signed in any number of counterparts. All counterparts together make one instrument.
- (g) **No representations or warranties outside Agreement:** Each party acknowledges that it has not relied on any representation, warranty, undertaking, covenant or assurance from the other party which is not set out in this Agreement, and waives all remedies and rights of action which, but for this subclause, might otherwise be available to it in respect of such representations, warranties, undertakings, covenants and assurances.

- (h) **Severability:** Any provision of this Agreement which is prohibited or unenforceable will be severed to the extent of the unenforceability without affecting the validity of the remaining provisions of this Agreement.
- (i) **Artist and Principal relationship:** You are engaged under this Agreement as an independent contractor and are not entitled to any benefits that might apply to an employee of the Council. Each party agrees that it is not, and agrees not to claim or imply that it is, a partner, employee, representative or agent of the other party or otherwise able to bind or represent the other party.
- (j) **Expenses relating to negotiating Agreement:** Each party will bear its own expenses in relation to the preparation or negotiation of this Agreement.
- (k) **Governing law:** This Agreement is governed by the laws of New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of New South Wales.
- (l) In this Agreement, unless the contrary intention appears:
  - (i) a reference to this Agreement or other instrument includes any variation or replacement of either of them;
  - (ii) the singular includes the plural and vice versa;
  - (iii) the word 'includes' in any form is not a word of limitation;
  - (iv) a reference to a party includes the party's executors, administrators, successors, permitted assignees and substitutes;
  - (v) a reference to a third person or a third party is a reference to a person who is not a party to this Agreement;
  - (vi) a reference to a business day means a day which is not a Saturday, Sunday or public holiday in NSW;
  - (vii) a reference to a person includes a natural person, company, body politic, body corporate, partnership or any other entity recognised by law;
  - (viii) if a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning;
  - (ix) headings are for convenience only and do not affect the construction or interpretation of this Agreement;
  - (x) a reference to any legislation, or legislative provision, includes any statutory modification, substitution or re-enactment of that legislation or legislative provision;
  - (xi) the language in all parts of this Agreement shall be in all cases construed in accordance with its fair and common meaning and not strictly for or against either of the parties;
  - (xii) a reference to writing is a reference to any representation of words, figures or symbols, whether or not in a visible form and includes electronic transmission; and

- (xiii) a reference to a clause, term or schedule is to a clause of, term of, or schedule to, this Agreement.

## 26. Definitions

In this Agreement:

**Agreement** means:

- (a) the Schedule of Terms (starting on page 1);
- (b) The Terms and Conditions (starting on page 5); and
- (c) Schedule A (starting on page 16);

**Agreement Date** has the meaning given to it in Item 1 of the Schedule of Terms;

**Agreement Term** has the meaning given to it in Item 1 of the Schedule of Terms;

**Artist / you** has the meaning given to it in Item 2 of the Schedule of Terms;

**Artist Fee** has the meaning given to it in Item 3 of the Schedule of Terms;

**Artwork** means the obligations and Deliverables to be provided by the Artist in accordance with the Agreement and includes, but is not limited to, the supply of any materials related to the Artwork and all other things required to be carried out by this Agreement.

**Author** has the meaning provided for in the *Copyright Act, 1968* (Cth).

**Deliverables** has the meaning given to it in Item 4 of the Schedule of Terms;

**End Date** has the meaning given to it in Item 1 of the Schedule of Terms;

**Force Majeure Event** has the meaning given to it in clause 12 of the Terms and Conditions;

**Council / we** means Newcastle City Council (ABN 25 242 068 129);

**Council Representative** is the person nominated in Item 5 of the Schedule of Terms;

**Council Safety Management** means Council's special conditions of contract SC-3 Safety Management;

**Goods and Services Tax** or **GST** means any tax imposed by any government or regulatory authority which is a tax on goods and services, a tax on consumption, a value-added tax or any similar impost;

**ICIP** means Indigenous Cultural Intellectual Property;

**Intellectual Property** includes all intellectual proprietary rights including copyright and neighbouring rights and all proprietary rights in relation to inventions (including patents) registered and unregistered trademarks (including service marks), registered designs, confidential information (including trade secrets and know how) and circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields as

defined in Article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967;

**Moral Rights** means:

- (a) the right of integrity of authorship;
- (b) the right of attribution of authorship; and
- (c) the right not to have authorship falsely attributed,

including those rights as conferred by the *Copyright Act 1968* (Cth), and rights of a similar nature anywhere in the world whether existing before, on or after the commencement of this Agreement.

**Timeline** has the meaning given to it in Item 6 of the Schedule of Terms;

**WHS Laws** means the *Work Health and Safety Act 2011* (NSW), the *Work Health and Safety Regulation 2017* (NSW) and all other legislative requirements relating to health and safety.



**EXECUTED** as an Agreement:

**SIGNED** for & on behalf of the **Artist** by its authorised delegate:

---

Authorised delegate's Name

---

Signature

---

Date:

**SIGNED** for & on behalf of the **Council** by its authorised delegate:

---

Authorised delegate's name

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Signature

---

Date:

## Schedule A

### **Request For Quote - Newcastle Beach Pedestrian Subway Mural**