VILLAGE OF KEY BISCAYNE

Office of the Village Manager

MEMORANDUM

Village Council
Franklin H. Caplan, *Mayor*
Michael E. Kelly, *Vice Mayor*
Michael W. Davey
Enrique Garcia
Robert Gusman
Mayra P. Lindsay
James S. Taintor

Village Manager
Genaro "Chip" Iglesias

DATE: October 25, 2011

TO: Honorable Mayor and Council Members

FROM: John C. Gilbert, Interim Village Manager

RE: Landscape Design Professional Services Agreement:

RECOMMENDATION

It is recommended that the Village Council approve the attached Resolution allowing the Village Manager to enter into a Professional Services Agreement (attached as Exhibit "A") with Mercedes Porcari to provide landscape design services for the Village.

BACKGROUND

Ms. Porcari will report to the Village Manager and will be responsible for supervising maintenance of landscape in the Village, as well as, coordinating with the maintenance crews.

The funding source for this item will come from the Horticulturist line item in the Public Works Department. Funds will not exceed an annual rate of $35,000, as per Exhibit "A" and "A-1".

RESOLUTION NO. 2011-

A RESOLUTION OF THE VILLAGE COUNCIL OF THE VILLAGE OF KEY BISCAYNE, FLORIDA, APPROVING AN AGREEMENT WITH EXOTICSCAPE INC.–LANDSCAPE ARCHITECTURE FOR LANDSCAPE DESIGN SERVICES; PROVIDING FOR A WAIVER OF COMPETITIVE BIDDING; PROVIDING FOR AUTHORIZATION; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Village of Key Biscayne (the "Village") Village Council desires to retain a landscape design consultant to be provide landscape design services for the Village; and

WHEREAS, the Village Council finds that the approval of the agreement, in substantially the form attached hereto as Exhibit "A," with Exoticscape Inc.- Landscape Architecture for landscape design services is in the best interest and welfare of the residents of the Village.

NOW, THEREFORE, BE IT RESOLVED BY THE VILLAGE COUNCIL OF THE VILLAGE OF KEY BISCAYNE, FLORIDA, AS FOLLOWS:

Section 1. **Recitals Adopted.** Each of the above stated recitals are hereby adopted, confirmed and incorporated herein.

Section 2. **Approval of Agreement.** The Village Council hereby approves the agreement, in substantially the form attached hereto as Exhibit "A," with Exoticscape Inc.-Landscape Architecture for landscape design services.

Section 3. **Waiver of Competitive Bidding.** The Village Council hereby waives competitive bidding as a professional services agreement pursuant to Section 2-87 of the Village Code.

Section 4. **Village Manager Authorized.** The Village Manager is hereby authorized to execute the agreement, in substantially the form attached hereto as Exhibit "A," with Exoticscape Inc.- Landscape Architecture for landscape design services.

Section 5. **Effective Date.** This Resolution shall be effective immediately upon adoption.

PASSED AND ADOPTED this ____ day of October, 2011.

_____
MAYOR FRANKLIN H. CAPLAN

ATTEST:

_____
CONCHITA H. ALVAREZ, MMC, VILLAGE CLERK

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

_____
VILLAGE ATTORNEY

EXHIBIT “A”

PROFESSIONAL SERVICES AGREEMENT
BETWEEN
THE VILLAGE OF KEY BISCAYNE
AND
EXOTICSCAPE INC-LANDSCAPE ARCHITECTURE

THIS AGREEMENT (this "Agreement") is made effective as of the ____ day of _____, 2011 (the "Effective Date"), by and between the **VILLAGE OF KEY BISCAYNE, FLORIDA,** a Florida municipal corporation (hereinafter the "Village"), and **EXOTICSCAPE INC-LANDSCAPE ARCHITECTURE,** a Florida corporation (hereinafter the "Consultant").

WHEREAS, the Consultant and Village, through mutual negotiation, have agreed upon a scope of services, schedule, and fee for professional landscape design services; and

WHEREAS, the Village desires to engage the Consultant to perform the services and provide the deliverables as specified below.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the Consultant and the Village agree as follows:

1. **Scope of Services.**

   1.1. The Consultant shall furnish such professional services (the "Services") as described in Exhibit "A" attached hereto and made a part hereof.

2. **Term/Commencement Date.**

   2.1 This Agreement shall become effective upon the Effective Date and shall remain in effect for a period of one year, unless earlier terminated in accordance with Paragraph 8.

3. **Compensation and Payment.**

   3.1 The Consultant shall be compensated at an annual rate of thirty-five thousand dollars ($35,000). Village shall pay such amount in installments in the same manner as Village employees are paid.

   3.2 In the event of any termination of this Agreement, the Village shall not be liable for any further payments except with respect to those periods in which Consultant actually performed Services under this Agreement.

4. **Subconsultants.**

   4.1 The Consultant shall be responsible for all payments to any subconsultants and shall maintain responsibility for all work related to the Services.

4.2 Consultant may only utilize the services of a particular subconsultant with the prior written approval of the Village Manager, which approval may be granted or withheld in Village Manager's sole discretion.

5. **Village's Responsibilities**

5.1 Village shall make available any maps, plans, existing studies, reports and other data pertinent to the Services and in possession of the Village.

5.2 Upon Consultant's request in writing, Village shall reasonably cooperate in arranging for access to any real property as required for Consultant to perform the Services.

6. **Consultant's Responsibilities**

6.1 The Consultant shall exercise the same degree of care, skill and diligence in the performance of the Services as is ordinarily provided by a consultant under similar circumstances.

6.2 The Consultant hereby warrants and represents that at all times during the term of this Agreement it shall maintain in good standing all required licenses, certifications and permits required under Federal, State and local laws applicable to and necessary to perform the Services for Village as an independent contractor of the Village.

7. **Conflict of Interest.**

7.1 To avoid any conflict of interest or any appearance thereof, Consultant shall not, for the term of this Agreement, provide any consulting services to any private sector entities (developers, corporations, real estate investors, etc.), with any adversarial issues in the Village. For the purposes of this section "adversarial" shall mean any development application where staff is recommending denial or denied an application, or an administrative appeal or court action wherein the Village is a party.

8. **Termination.**

8.1 The Village Manager, without cause, may terminate this Agreement upon thirty (30) days written notice to the Consultant. The Village Manager, with cause, may terminate this Agreement upon Consultant's failure to cure such cause within thirty (30) days after written notice was received.

8.2 Upon receipt of the Village's written notice of termination, Consultant shall immediately stop work on the Services unless directed otherwise by the Village Manager.

8.3 In the event of termination by the Village, the Consultant shall be paid up to the date of termination, provided that the Consultant has first complied with the provisions of Paragraph 8.4.

8.4 The Consultant shall transfer all books, records, reports, working drafts, documents, maps, and data pertaining to the Services to the Village, in a hard copy and electronic format within fourteen (14) days from the date of the written notice of termination or the date of expiration of this Agreement.

9. **Insurance.**

9.1 Consultant shall secure and maintain throughout the duration of this Agreement, insurance of such type and in such amounts necessary to protect its interest and the interest of the Village against hazards or risks of loss as specified below. The underwriter of such insurance shall be qualified to do business in Florida, be rated AB or better, and have agents upon whom service of process may be made in the State of Florida. The insurance coverage shall be primary insurance with respect to the Village, its officials, employees, agents and volunteers. Any insurance maintained by the Village shall be in excess of the Consultant's insurance and shall not contribute to the Consultant's insurance. The insurance coverages shall include a minimum of the amounts set forth in this Section 9.

9.2 **Worker's Compensation and Employer's Liability Insurance.** Coverage to apply for all employees for statutory limits as required by applicable State and Federal laws. The policy(ies) must include Employer's Liability with minimum limits of $500,000.00 each accident.

9.3 **Comprehensive Automobile and Vehicle Liability Insurance.** This insurance shall be written in comprehensive form and shall protect the Consultant and the Village against claims for injuries to members of the public and/or damages to property of others arising from the Consultant's use of motor vehicles or any other equipment and shall cover operation with respect to onsite and offsite operations and insurance coverage shall extend to any motor vehicles or other equipment irrespective of whether the same is owned, non-owned, or hired. The limit of liability shall not be less than $300,000 per occurrence, combined single limit for Bodily Injury Liability and Property Damage Liability. Coverage must be afforded on a form no more restrictive that the latest edition of the Business Automobile Liability Policy, without restrictive endorsement, as filed by the Insurance Services Office.

9.4 **Commercial General Liability.** This insurance shall be written in comprehensive form and shall protect the Consultant and the Village

against claims arising from injuries to members of the public or damage to property of others arising out of any act or omission to act of the Consultant or any of its agents, employees, or subcontractors. The limit of liability shall not be less than $500,000 per occurrence, combined single limit for Bodily Injury Liability and Property Damage Liability. Coverage must be afforded on a form no more restrictive than the latest edition of the Commercial General Liability Policy, without restrictive endorsements, as filed by the Insurance Services Office, and must include: (1) Premises and/or Operations; (2) Independent contractors and Products and/or completed Operations; (3) Broad Form Property Damage, Personal Injury and a Contractual Liability Endorsement, including any hold harmless and/or indemnification agreement.

9.5 **Certificate of Insurance.** Consultant shall provide the Village Manager with Certificates of Insurance for all required policies. The Certificates of Insurance shall not only name the types of policy(ies) provided, but also shall refer specifically to this Agreement and shall state that such insurance is as required by this Agreement. The Village reserves the right to require the Consultant to provide a certified copy of such policies, upon written request by the Village. If a policy is due to expire prior to the completion of the Services, renewal Certificates of Insurance or policies shall be furnished thirty (30) calendar days prior to the date of their policy expiration. Each policy certificate shall be endorsed with a provision that not less than thirty (30) calendar days' written notice shall be provided to the Village before any policy or coverage is cancelled or restricted. Acceptance of the Certificate(s) is subject to approval of the Village Manager.

9.6 **Additional Insured.** The Village is to be specifically included as an Additional Insured for the liability of the Village resulting from operations performed by or on behalf of Consultant in performance of this Agreement. Consultant's insurance, including that applicable to the Village as an Additional Insured, shall apply on a primary basis and any other insurance maintained by the Village shall be in excess of and shall not contribute to Consultant's insurance. Consultant's insurance shall contain a severability of interest provision providing that, except with respect to the total limits of liability, the insurance shall apply to each Insured or Additional Insured in the same manner as if separate policies had been issued to each.

9.7 **Deductibles.** All deductibles or self-insured retentions must be declared to and be approved by the Village Manager. The Consultant shall be responsible for the payment of any deductible or self-insured retentions in the event of any claim.

10. **Nondiscrimination.**

10.1 During the term of this Agreement, Consultant shall not discriminate against any of its employees or applicants for employment because of their race, color, religion, sex, or national origin, and to abide by all Federal and State laws regarding nondiscrimination

11. **Attorneys Fees and Waiver of Jury Trial.**

11.1 In the event of any litigation arising out of this Agreement, the prevailing party shall be entitled to recover its attorneys' fees and costs, including the fees and expenses of any paralegals, law clerks and legal assistants, and including fees and expenses charged for representation at both the trial and appellate levels.

11.2 In the event of any litigation arising out of this Agreement, **each party hereby knowingly, irrevocably, voluntarily and intentionally waives its right to trial by jury**.

12. **Indemnification**.

12.1 Consultant shall defend, indemnify, and hold harmless the Village, its officers, agents and employees, from and against any and all demands, claims, losses, suits, liabilities, causes of action, judgment or damages, arising out of, related to, or any way connected with Consultant's performance or non-performance of any provision of this Agreement, including, but not limited to, liabilities arising from contracts between the Consultant and third parties made pursuant to this Agreement. Consultant shall reimburse the Village for all its expenses including reasonable attorneys fees and costs incurred in and about the defense of any such claim or investigation and for any judgment or damages arising out of, related to, or in any way connected with Consultant's performance or non-performance of this Agreement.

12.2 The provisions of this section shall survive termination of this Agreement.

13. **Notices/Authorized Representatives.**

13.1 Any notices required by this Agreement shall be in writing and shall be deemed to have been properly given if transmitted by hand-delivery, by registered or certified mail with postage prepaid return receipt requested, or by a private postal service, addressed to the parties (or their successors) at the following addresses:

For the Village: John Gilbert
Interim Village Manager
Village of Key Biscayne

88 West McIntyre Street
Key Biscayne, FL 33149

With a copy to: Stephen J. Helfman, Esq.
Village Attorney
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
2525 Ponce de Leon Blvd.
Coral Gables, Florida 33134

For The Consultant: Exoticscape, Inc.
181 Harbor Drive
Key Biscayne, FL 33149
Tel: (305) 785-8250
Fax: (305) 361-9453

14. **Governing Law**.

14.1 This Agreement shall be construed in accordance with and governed by the laws of the State of Florida. Venue for any litigation arising out of this Agreement shall be proper exclusively in Miami-Dade County, Florida.

15. **Entire Agreement/Modification/Amendment.**

15.1 This writing contains the entire Agreement of the parties and supercedes any prior oral or written representations. No representations were made or relied upon by either party, other than those that are expressly set forth herein.

15.2 No agent, employee, or other representative of either party is empowered to modify or amend the terms of this Agreement, unless executed with the same formality as this document.

15.3 Consultant represents that is an entity validly existing and in good standing under the laws of Florida. The execution, delivery and performance of this Agreement by Consultant have been duly authorized, and this Agreement is binding on Consultant and enforceable against Consultant in accordance with its terms. No consent of any other person or entity to such execution, delivery and performance is required.

16. **Ownership and Access to Records and Audits.**

16.1 Consultant acknowledges that all inventions, innovations, improvements, developments, methods, designs, analyses, drawings, reports and all

similar or related information (whether patentable or not) which relate to Services to the Village which are conceived, developed or made by Consultant during the term of this Agreement ("Work Product") belong to the Village. Consultant shall promptly disclose such Work Product to the Village and perform all actions reasonably requested by the Village (whether during or after the term of this Agreement) to establish and confirm such ownership (including, without limitation, assignments, powers of attorney and other instruments).

16.2 All records, books, documents, maps, data, deliverables, papers and financial information (the "Records") that result from the Consultant providing the Services to the Village under this Agreement shall be the property of the Village.

16.3 The Village Manager or his designee shall, during the term of this Agreement and for a period of three (3) years from the date of termination of this Agreement, have access to and the right to examine and audit any Records of the Consultant involving transactions related to this Agreement.

16.4 The Village may cancel and terminate this Agreement immediately for refusal by the Consultant to allow access by the Village Manager or his designee to any Records pertaining to work performed under this Agreement that are subject to the provisions of Chapter 119, Florida Statutes.

17. **Nonassignability.**

17.1 This Agreement shall not be assignable by Consultant unless such assignment is first approved by the Village Manager. The Village is relying upon the apparent qualifications and expertise of the Consultant, and such firm's familiarity with the Village's area, circumstances and desires.

18. **Severability**.

18.1 If any term or provision of this Agreement shall to any extent be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each remaining term and provision of this Agreement shall be valid and be enforceable to the fullest extent permitted by law.

19. **Independent Contractor.**

19.1 The Consultant and its employees, volunteers and agents shall be and remain an independent contractor and not an agent or employee of the

Village with respect to all of the acts and services performed by and under the terms of this Agreement. This Agreement shall not in any way be construed to create a partnership, association or any other kind of joint undertaking, enterprise or venture between the parties.

20. **Compliance with Laws.**

20.1 The Consultant shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of public authorities in carrying out Services under this Agreement, and in particular shall obtain all permits from all jurisdictional agencies to perform the Services under this Agreement.

21. **Waiver**

21.1 The failure of either party to this Agreement to object to or to take affirmative action with respect to any conduct of the other which is in violation of the terms of this Agreement shall not be construed as a waiver of the violation or breach, or of any future violation, breach or wrongful conduct.

22. **Survival of Provisions**

22.1 Any terms or conditions of either this Agreement that require acts beyond the date of the term of the Agreement, shall survive termination of the Agreement, shall remain in full force and effect unless and until the terms or conditions are completed and shall be fully enforceable by either party.

23. **Prohibition of Contingency Fees.**

23.1 The Consultant warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the Consultant, to solicit or secure this Agreement, and that it has not paid or agreed to pay any person(s), company, corporation, individual or firm, other than a bona fide employee working solely for the Consultant, any fee, commission, percentage, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement.

24. **Public Entity Crimes Affidavit**

24.1 Consultant shall comply with Section 287.133, Florida Statutes (Public Entity Crimes Statute), notification of which is hereby incorporated herein by reference, including execution of any required affidavit.

25. **Counterparts**

25.1 This Agreement may be executed in several counterparts, each of which shall be deemed an original and such counterparts shall constitute one and the same instrument.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF the parties hereto have executed this Agreement on the day and date first above written.

VILLAGE:

VILLAGE OF KEY BISCAYNE

By:_____
John Gilbert, Interim Village Manager

Attest:_____
Conchita Alvarez, Village Clerk

Approved as to Form and Legal Sufficiency:

_____
Village Attorney

CONSULTANT:

EXOTICSCAPE INC. - LANDSCAPE ARCHITECTURE

By: _____
Name: _____
Title: _____

EXHIBIT "A-1"

Mercedes Beale Porcari

Landscape Supervisor

10/18/2011

Village of Key Biscayne Landscape Supervision Proposal

1. Weekly check around the sections of the Island, either by me or with the maintenance contractor, to locate problem areas and give instructions as to how to solve them.

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Identify damaged plant material and give the list to the maintenance contractor to replace them.

2. Prepare the plant list for each area according to the Landscape Committee design criteria including prices & suppliers.

Find best prices & quality and procure the purchase order.

Review Landscape proposal(s) given by installer to assure prices are competitive.

Arrange for delivery of plants either by Village installer or third party.

3. Present the design, plant list & prices to the Landscape Committee for approval.

4. Supervise the installation of the plant material to insure proper installation and correct plant specs.

5. I will be on call at any time so I can answer any questions or problems that the installer or maintenance contractor might have.

6. Try to minimize the supervision of the Horticulturist so as to save funds.

Since we already have the Horticulturist report, I will make sure the instructions are followed so as to maintain the plants in proper shape and health.

7. Make sure the Village Maintenance Contractor follows the following instructions & procedures:

Operation:
-Maintenance Contractor rep. has to supervise his crew constantly.
-Have daily schedule of location and scope of work.(Maintenance/Trimming)
-Follow Lisa Hammer manual (Fertilization & Pest Control Schedule)

Fee for these services will be $ 35,000.00 for one year.

Mercedes Beale Porcari
Landscape Designer

181 Harbor Dr., Key Biscayne, FL, 33149 mercedesporcari@aol.com (305) 785-8256 Fax (305) 361-5784