VILLAGE OF KEY BISCAYNE

Office of the Village Manager

Village Council
Franklin H. Caplan, *Mayor*
Mayra P. Lindsay, *Vice Mayor*
Michael W. Davey
Theodore J. Holloway
Michael E. Kelly
Ed London
James S. Taintor

Village Manager
John C. Gilbert

DATE: October 22, 2013

TO: Honorable Mayor and Members of the Village Council

FROM: John C. Gilbert, Village Manager

RE: Art in Public Places Board Recommendation: Artwork Project in the Village Green/Southwest corner

RECOMMENDATION

That the Village Council approve the attached Resolution authorizing the Village Manager to execute the attached contract which retains the services of Jim Drain to construct the "Pleated Gnomon Sundial" artwork and install it in the Southwest portion of the Village Green as shown in the attached location sketch.

BACKGROUND

In January, 2013, the Art in Public Places Board evaluated six (6) artists as candidates for the next project. The Board selected two (2) Miami-based artists to make proposals for an artwork for the Village Green. The artists were Jim Drain and Cristina Lei-Rodriguez. The artists presented initial proposals in April. The Board asked both artists to refine their proposals and provide information on fabricators, installers and relevant technical aspects of their proposals. At the May 14, 2013 meeting the artists presented the additional information. Following extensive discussion, the Board recommended that the Village Council select Jim Drain's proposal which is called "Pleated Gnomon".

Drain's proposal is composed of a steel and terrazzo vertical structure sited on top of a base which can be used as a bench. The structure is sited along the path of the sun and serves as a sundial. It is proposed that "Pleated Sundial" be located in the Southwest corner of the Village Green, next to the tot lot where the sandbox/bocci court was formerly located. The structure's dynamic, changing colors and shadows, and its welcoming bench/base are fitting with the play, observation and learning activities that take place in that corner of the park.

Jim Drain will work with a Miami-based fabricator and general contractor to construct the structure, transport it to the site and install it. He will manage the entire process. The project will cost $69,800. These funds are allocated in the FY13 Capital Improvement Plan (CIP). The Board has made several attempts at securing matching funds; however, none have been realized. The philanthropic sector is not focusing artwork projects. The

Board is continuing its public relations and promotional efforts, including its pages on the Village website to bring a higher profile to Key Biscayne's Public Art Program.

Lillian Arango from Weiss, Serota, Helfman, Pastoriza, Cole & Bronske prepared the Agreement and Resolution which attests to form and legal sufficiency

RESOLUTION NO. 2013-

A CAPITAL PROJECT AUTHORIZING RESOLUTION OF THE VILLAGE COUNCIL OF THE VILLAGE OF KEY BISCAYNE, FLORIDA, APPROVING THE DESIGN AND INSTALLATION OF ARTWORK WITHIN THE VILLAGE GREEN; AUTHORIZING THE VILLAGE MANAGER TO EXECUTE AN AGREEMENT WITH JIM DRAIN RELATED TO THE SAME; PROVIDING FOR A WAIVER OF COMPETITIVE BIDDING; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Village Council of the Village of Key Biscayne (the "Village") created the Art in Public Places Board (the "Board") to recommend artwork for acquisition by the Village; and

WHEREAS, the Board has reviewed several proposals for artwork within the Village Green and has recommended the "Pleated Sundial" designed by Jim Drain as provided in the Board report attached as Exhibit "A" (the "Artwork Proposal"); and

WHEREAS, the Village Council has reviewed the Artwork Proposal and desires to enter into an agreement with Jim Drain for the design and installation of the proposed artwork at a cost not to exceed $69,800; and

WHEREAS, the Village Council finds that this Resolution is in the best interest and welfare of the residents of the Village.

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

Section 1. Recitals Adopted. That each of the recitals stated above is hereby adopted and confirmed.

Section 2. Village Green Artwork Approved. That the Village Council hereby approves the "Pleated Sundial" artwork designed by Jim Drain to be installed within the Village Green at a cost not to exceed $69,800.

Section 3. **Authorization.** That the Village Manager is hereby authorized to execute the attached Agreement with Jim Drain for the design and installation of the above referenced artwork, in substantially the form attached hereto as Exhibit "B," subject to approval as to form, content, and legal sufficiency by the Village Attorney.

Section 4. **Waiver of Competitive Bidding.** That the Village Council finds that this contract is for professional services and waives competitive bidding pursuant to Section 2-87(2) of the Village Code.

Section 5. **Effective Date.** That this Resolution shall be effective immediately upon adoption hereof.

PASSED AND ADOPTED this ___ day of ____, 2013.

_____
MAYOR FRANKLIN H. CAPLAN

ATTEST:

_____
CONCHITA H. ALVAREZ, MMC, VILLAGE CLERK

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

_____
VILLAGE ATTORNEY

LOCATION SKETCH
PLEATED SUN DIAL ARTWORK
FERNWOOD ROAD
COMMUNITY CENTER
PROPOSED ARTWORK
TOT LOT
PAVILLION
SUNTRUST BANK
BATHROOMS
CRANDON BOULEVARD
Google earth
N

EXHIBIT "A"

(Attach Proposal of Jim Drain)

Jim Drain's Artist Statement: "Pleated Gnomon"

"Pleated Gnomon" speaks to the rich history of Key Biscayne and in particular Village Green Park. Inspired by Mashta House, the palatial estate built by W.J. Matheson that as historian Joan Blank commented, "once seemed to float like Cleopatra's barge" on a protected Key Biscayne inlet, artist Jim Drain celebrates both the monumentality of Mashta as well as the light-play of Mashta's golden walls. "Pleated Gnomom" is a site-specific sculpture that utilizes reduced forms to showcase the same tropical light and shadow that once bathed the Moorish style architectural gem.

The sculpture is constructed from stacked blocks of white marble terrazzo embedded with solid rods of colored glass. As daylight passes, the sunlight illuminates the colorful rods creating a matrix of shimmering dots of colored light. This colorful illumination is reflected onto the surface of the stainless steel 'pleats' that repeatedly run the length of the form. The vertical pleats provide the structure for the entire work, separating each column of stacked terrazzo. At night, rows of LEDs embedded flush to the surface of the terrazzo base will continue to spotlight "Pleated Gnomon" and in particular light up the embedded rods of glass.

"Pleated Gnomon" is also an active sundial. After meeting with FIU astronomer, Walter Van Hamme, Drain designed the sculpture so that the work could indicate solar time. As Van Hamme states, "There is one condition that cannot be escaped: the sundial's stylus must be aligned with true North and make an angle with the horizontal equal to the local geographical latitude...these conditions align the stylus with the rotational axis of the Earth". The word *gnomon*, literally meaning "one that knows and examines", refers to the pleated terrazzo structure that casts a shadow, while the metal stylus points north at an angle of 25.69 degrees, the site's exact longitudinal measurement. As a sundial, "Pleated Gnomon" provides possibilities for observation, teaching and engaging audiences of all ages. The terrazzo base and adjacent circular benches allow for seating and contemplation nearby the playground area so as to draw in the public and broaden their outdoor experience.

"Pleated Gnomon" draws from the mysterious spirit and the grandness of form of Mashta House. Drain's work is able to link the richness of history of Key Biscayne while also providing the means for wonderment and learning for future generations of Key Biscayne residents for many years to come.

	Key Biscayne: "Pleated Gnomen"		BUDGET:
	fabricator	**items**	
	Miami Nice Floors, Giancarlo Sardone	Cutting the rods of glass to size	
		Casting the 3" x 12" x 12" blocks of glass-embedded terrazzo blocks	
		Coordinating with Smith Parkins in the fabricating the blocks in exact specifications to the other sculptural components.	
		Blocks will consist of: mother-of-pearl, marble, translucent glass rods	**$6,500.00**
		finishing the base and adjacent "stools" with terrazzo	**$7,000.00**
	Smith Parkins	The stainless materials fabricated and finished, ready for assembly at the location.	
		Coordinating transportation of the finished sculpture parts to Key Biscayne.	
		Aiding in guiding the contractor through the various facets of the preparation of the foundation.	
		Guiding the contractor through placing mounts, and lights for the installation.	
		personally overseeing the assembly and the installation of the sculpture itself; including the necessary coordination with Miami Nice Floors, the terrazzo fabricator.	**$27,600.00**
	Lighting:Mike Stern	http://www.sefl.cc/	**$7,200.00**
	Engineer: Frank Prieto	drawings of the work on site	**$2,000.00**

	general contractor: Rey Valdes	permitting framing and pouring, 24" footer (engineer's recommnendation pending), liability insurance	**$4,500.00**
15%	Jim Drain	artist fee	**$7,500.00**
	astronomer: Walter Van Hamme	consulting fee	**$500.00**
	Katerina Llanes	project communication & coordinator	**$3,000.00**
8%	site-work	site preparation: source of electricity, conduits of site, metal photo signage	**$4,000.00**
	actual cost		**$69,800.00**

"Pleated Gnomon" TIMELINE

5 weeks

OFF-SITE FABRICATION:
*stainless steel components
*terrazzo blocks

PREPARATION:
*engineer drawings
*site sampling
*electrical coordination

5 days

ON SITE FABRICATION:
*installing metal and terrazzo block components
*installing light/electrical
*foundation and adjacent stool pour

8 days

TERRAZZO BASE:
terrazzo base finish

EXHIBIT "B"

(Location Sketch - Village Green Park)

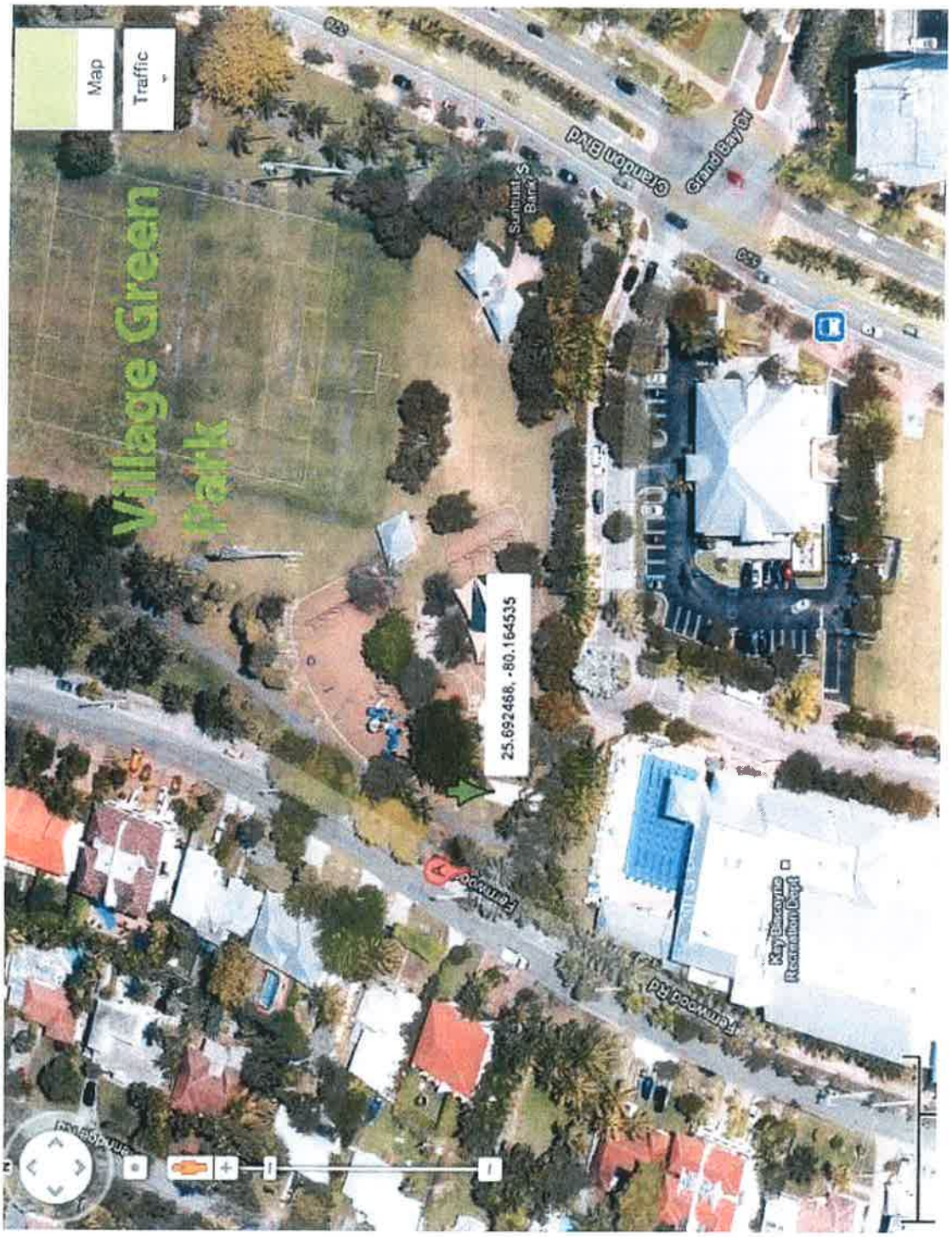

EXHIBIT "B"

LOCATION SKETCH
PLEATED SUN DIAL ARTWORK
FERNWOOD ROAD
COMMUNITY CENTER
PROPOSED ARTWORK
TOT LOT
PAVILLION
SUNTRUST BANK
BATHROOMS
CRANDON BOULEVARD
Google earth
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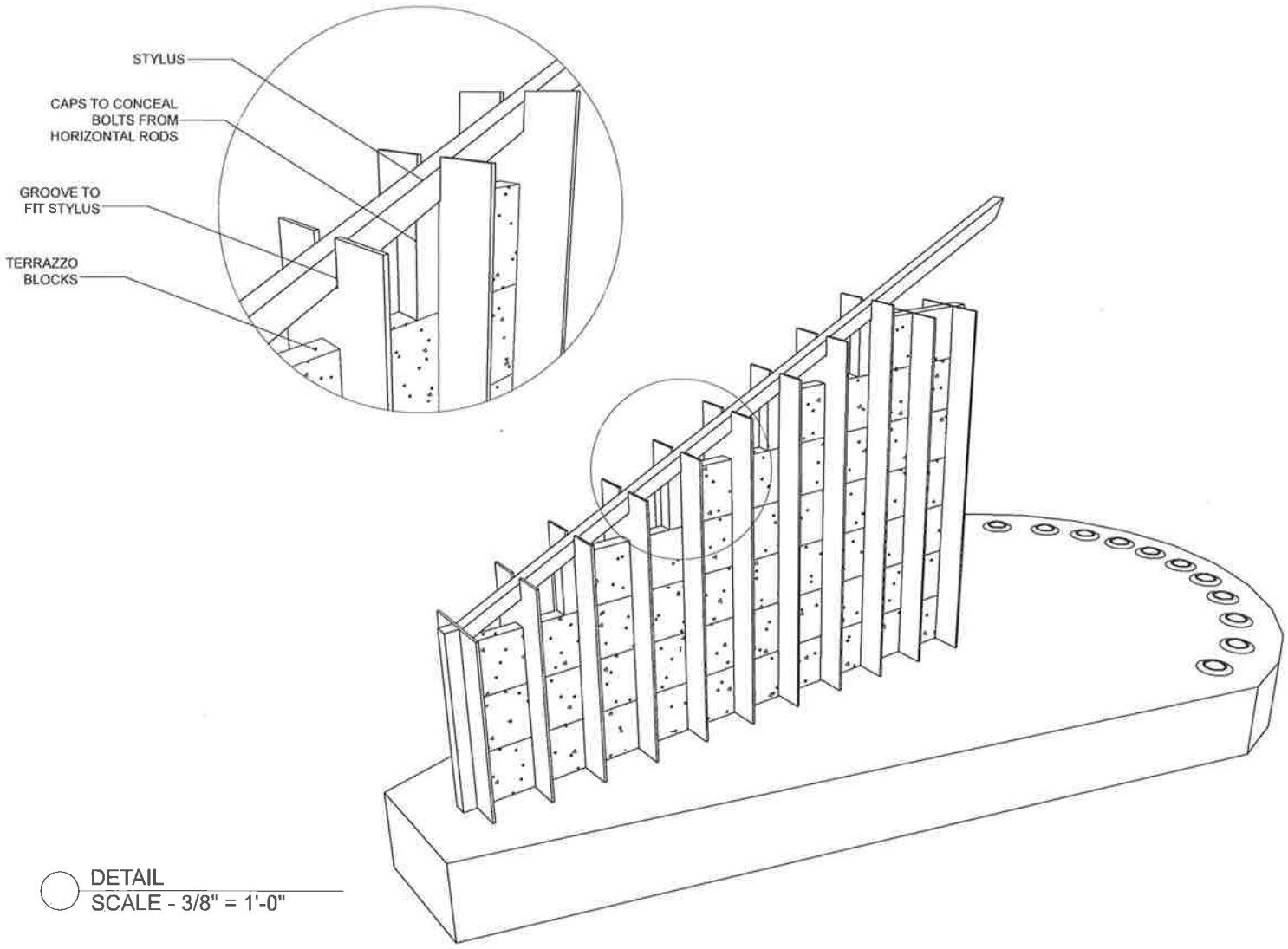
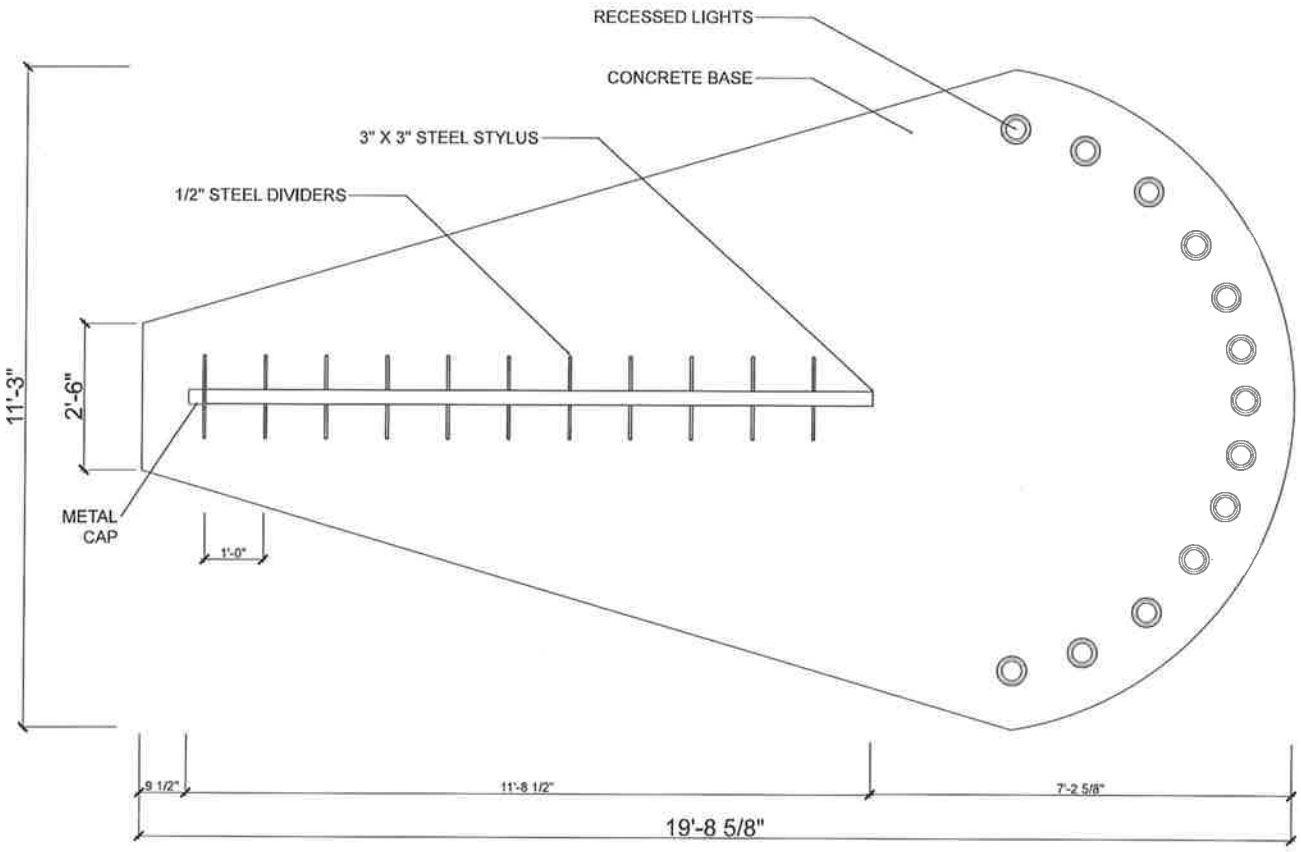
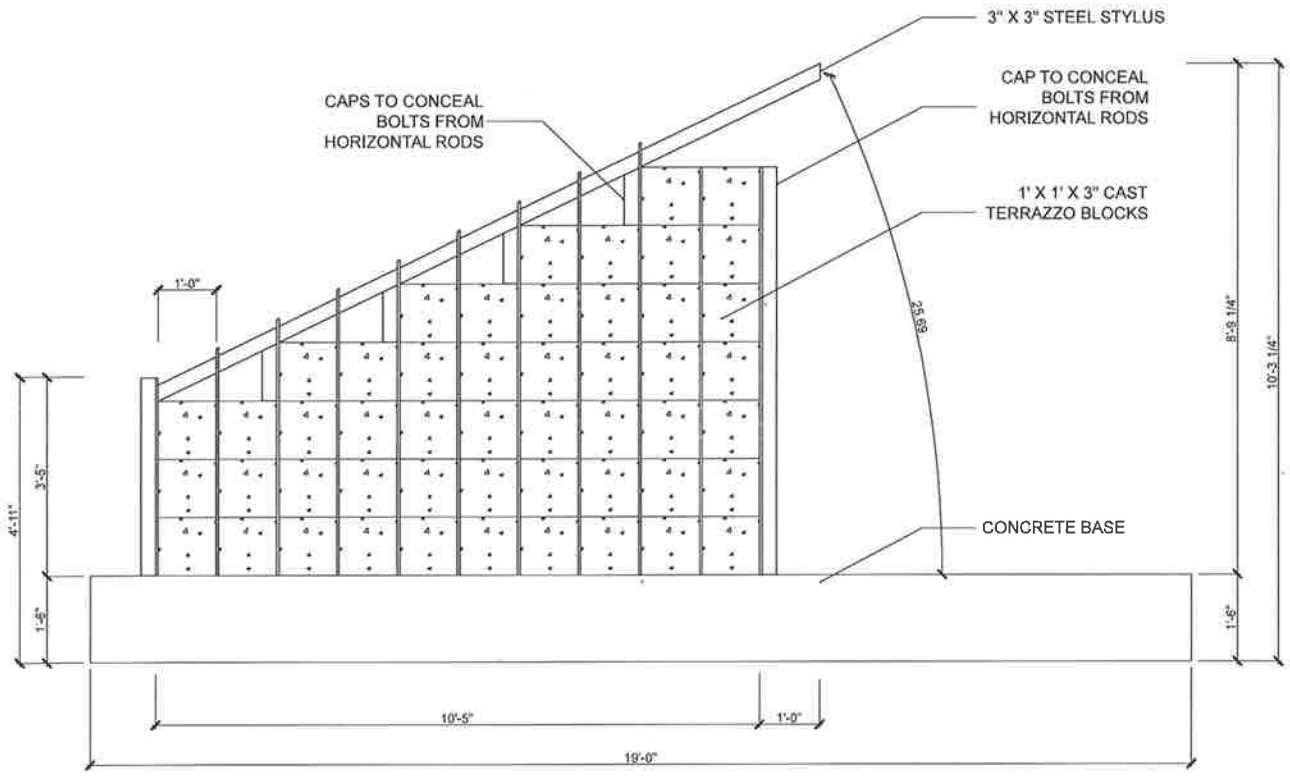


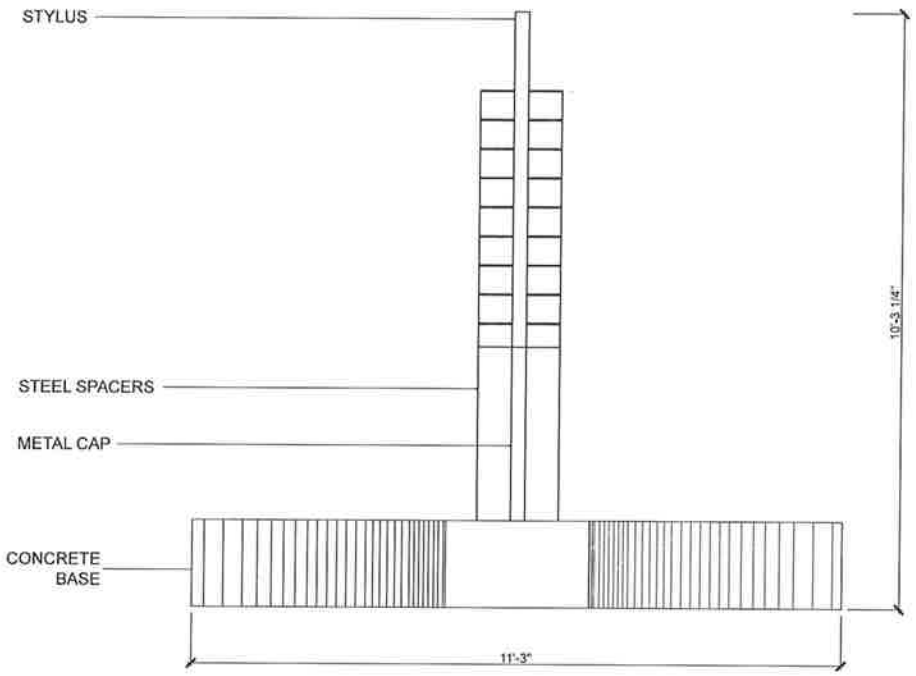
DETAIL
SCALE - 3/8" = 1'-0"



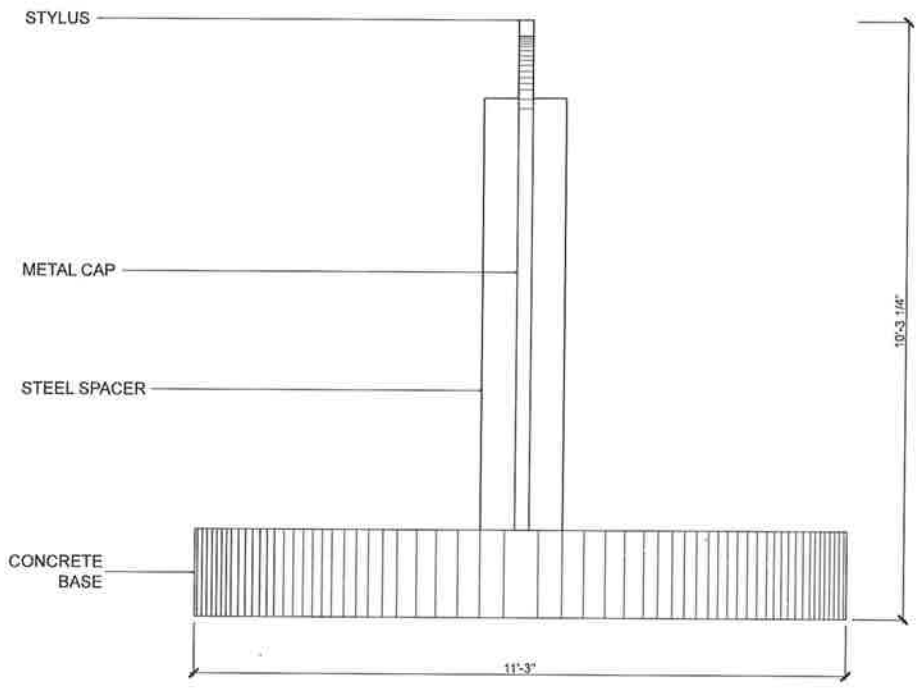
PLAN
SCALE - 3/8" = 1'-0"



SIDE ELEVATION
SCALE - 3/8" = 1'-0"



FRONT ELEVATION
SCALE - 3/8" = 1'-0"



BACK ELEVATION
SCALE - 3/8" = 1'-0"

EXHIBIT "B"

AGREEMENT

BETWEEN

VILLAGE OF KEY BISCAYNE, FLORIDA

AND

JIM DRAIN

THIS AGREEMENT (this "Agreement") is made by and between the **VILLAGE OF KEY BISCAYNE, FLORIDA**, a Florida municipal corporation (hereinafter referred to as the "VILLAGE"), and **JIM DRAIN** (hereinafter referred to as the "CONSULTANT"), whose principal place of business is _____.

RECITALS:

WHEREAS, the VILLAGE desires to engage the CONSULTANT to design and install the artistic "Pleated Gnomon Sundial Structure" at Village Green Park, including the furnishing of all design, engineering, materials, equipment, labor and installation for such work, as more specifically described in the CONSULTANT'S Proposal (the "Proposal") attached to this Agreement as Exhibit "A" (hereinafter, the "Work" or "Project");

WHEREAS, the CONSULTANT will retain and employ a general contractor, fabricator and engineers, as necessary for the on-site fabrication and installation of the Work, in accordance with the Plans/Drawings dated June 2, 2013.

WHEREAS, the Pleated Gnomon Sundial Structure is a site specific sculpture to be installed at a designated location at Village Green Park, as approved by the Village, as indicated on the location sketch attached hereto as Exhibit "B".

WHEREAS, the CONSULTANT is willing and able to perform the Work for the VILLAGE in accordance with the terms and conditions set forth in the Proposal and this Agreement; and

NOW THEREFORE, in consideration of the mutual terms, conditions, promises and covenants set forth below, the VILLAGE and CONSULTANT agree as follows:

SECTION 1. SCOPE OF WORK

1.1 **Agreement Documents**. The Agreement Documents, which comprise the entire agreement between the VILLAGE and the CONSULTANT concerning the Work, consist of this Agreement (including any changes or amendments thereto), the Proposal of the CONSULTANT attached hereto as Exhibit "A", and the Plans/Drawings dated

June 2, 2013, the location sketch attached hereto as Exhibit "B", the Insurance Certificates, and the Notice to Proceed, all of which are deemed incorporated into and made a part of this Agreement by this reference and govern the Project. In the event of a conflict among the foregoing Agreement Documents, this Agreement shall govern and control. The Work as defined in Section 1.2 hereof and to be provided and performed with respect to the Project shall be at all times subject to the requirements of the Agreement Documents.

1.2 **Scope of Work.** Pursuant to the Agreement Documents, the CONSULTANT shall provide and perform the Project. The Project shall include the furnishing of all design, engineering services, labor, materials, tools, equipment, machinery, superintendence, fabrication, installation and work necessary for the Project to provide a turnkey installation and fully functional and operational Pleated Gnomon Sundial Structure. The CONSULTANT'S Work shall be subject to inspection and approval by the VILLAGE, which shall indicate any portion of the Work that needs to be addressed or corrected and the CONSULTANT shall address and complete same in a timely manner.

1.3 The CONSULTANT shall expend all necessary efforts to competently, skillfully and timely implement and complete the Project.

SECTION 2. CONTRACT PRICE; PAYMENTS TO THE CONSULTANT

2.1 **Fees; Payment;** As full compensation for the satisfactory performance and installation of the Work, the VILLAGE shall pay the CONSULTANT the total sum of Sixty Nine Thousand Eight Hundred Dollars ($69,800.00) (the "Contract Price"), which amount represents the Pleated Gnomon Sundial Structure, including off-site and on-site fabrication of the Structure and terrazzo base, preparation of engineering drawings, installation of all lighting and electrical for the structure by a licensed general contractor, and any and all engineering services needed for the Work, as more fully set forth in the Proposal attached hereto as Exhibit "A." The Contract Price shall be full compensation to the CONSULTANT for all services, labor, materials, equipment and costs for the completion of the Project in full conformity with the Agreement Documents. The Contract Price shall be payable in the following manner: (i) 40% Deposit shall be due from VILLAGE to CONSULTANT within five (5) days of Notice to Proceed; and (ii) 30% upon completion of on-site fabrication of structure as inspected and approved by Village; and (iii) upon issuance of a Certificate of Completion and final approval and acceptance by Village.

2.2 **Suspension of Payment.** In the event that the VILLAGE becomes informed that any representations of the CONSULTANT provided pursuant to this Agreement, are wholly or partially inaccurate, or in the event that the CONSULTANT is not in compliance with any terms or conditions of this Agreement, the VILLAGE may withhold payment of sums then or in the future otherwise due to the CONSULTANT until the inaccuracy, or other breach of this Agreement, and the cause thereof, is corrected to the VILLAGE'S reasonable satisfaction.

SECTION 3. TERM/TIME OF PERFORMANCE

3.1 **Term.** The CONSULTANT shall be instructed to commence the Work by written instruction from the VILLAGE in the form of a Notice to Proceed providing the commencement date of this Agreement. This Agreement shall commence on the commencement date indicated on the Notice to Proceed and shall continue in full force and effect for a term of sixty (60) days or until final completion and acceptance by the VILLAGE, unless otherwise sooner terminated pursuant to the terms of this Agreement (the "Term"). All Work shall be fully completed by CONSULTANT, with final acceptance and approval by the VILLAGE, within the Term.

3.2 **Commencement.** The CONSULTANT'S Work under this Agreement and the time frames and schedule applicable to this Agreement shall commence upon the commencement date indicated on the Notice to Proceed. The CONSULTANT shall not incur any expenses or obligations or incur payment to third parties prior to the issuance of a Notice to Proceed for the Project, and the CONSULTANT must receive the Notice to Proceed from the VILLAGE prior to beginning the performance of the Work.

3.3 **Contract Time.** From and after the receipt of the Notice to Proceed, the CONSULTANT shall continuously perform the Work to the satisfaction of the VILLAGE, with faithfulness and diligence and without interruption, for the duration of the Term (the "Contract Time"). Time is of the essence in the performance of the Work and all limitations of time set forth in this Agreement are of the essence.

SECTION 4. TERMINATION OF AGREEMENT

4.1 **Termination.** The VILLAGE has the right to terminate this Agreement for convenience and for any reason or no reason, in whole or in part, upon fifteen (15) days' written notice to CONSULTANT. Upon termination of this Agreement, and final payment of any undisputed outstanding amounts due for the Work rendered by the CONSULTANT prior to and through the date of the notice of termination, copies of all records, charts, sketches, studies, plans, drawings, and other documents related to the Work performed under this Agreement, whether finished or not, shall be turned over to the VILLAGE within ten (10) days.

4.2 **Termination for Default.** If CONSULTANT fails to timely begin the Work, or fails to perform the Work with sufficient workers and equipment or with sufficient materials to insure the prompt completion of the Work according to the Contract Time and this Agreement, or shall perform the Work unsuitably, or cause it to be rejected as defective and unsuitable, or shall discontinue the prosecution of the Work pursuant to the accepted schedule , or if the CONSULTANT shall fail to perform any material term set forth in the Agreement Documents, or if CONSULTANT shall become insolvent or be declared bankrupt, or commit any act of bankruptcy or insolvency, or shall make an assignment for the benefit of creditors, or from any other cause whatsoever shall not carry on the Work in an acceptable manner, VILLAGE may, upon seven (7) days written notice of termination, terminate the Work of CONSULTANT, exclude CONSULTANT from the Project sites,

provide for alternate prosecution of the Work, appropriate or use any or all materials and equipment on the Project site as may be suitable and acceptable, and may perform the Work by whatever methods it may deem expedient. In such case, CONSULTANT shall not be entitled to receive any further payment. All damages, costs and charges incurred by the VILLAGE, together with the costs of completing the Work, shall be deducted from any monies due or which may become due to CONSULTANT. In case the damages and expenses so incurred by VILLAGE shall exceed monies due CONSULTANT from the VILLAGE, CONSULTANT shall be liable and shall pay to VILLAGE the amount of said excess promptly upon demand therefore by VILLAGE. In the event it is adjudicated that VILLAGE was not entitled to terminate the Agreement as described hereunder for default, the Contract shall automatically be deemed terminated by VILLAGE for convenience as described below.

4.3 **Payment after Termination.** Provided that the CONSULTANT has performed in accordance with the terms of this Agreement as of the date of termination pursuant to Sections 4.1 and 4.2 above, CONSULTANT shall receive all payments due to CONSULTANT for Work rendered and accepted prior to and up to the date of termination.

SECTION 5. ADDITIONAL WORK AND CHANGES IN SCOPE OF WORK

5.1 **Changes Permitted.** Changes in the Work or the Project consisting of additions, deletions, revisions, or any combination thereof, may be ordered by the VILLAGE by Change Order (as defined below) without invalidating the terms of this Agreement.

5.2 **Change Order Defined.** "Change Order" shall mean a written order to the CONSULTANT executed by the VILLAGE, issued after execution of this Agreement, authorizing and directing a change in the Work, the Project, the Contract Price, the Contract Time, or any combination thereof.

5.3 **Effect of Executed Change Order.** The execution of a Change Order by the VILLAGE and the CONSULTANT shall constitute conclusive evidence of the CONSULTANT'S agreement to the ordered changes in the Work or the Project, or an adjustment in the Contract Price or the Contract Time, or any combination thereof. The CONSULTANT, by executing the Change Order, waives and forever releases any claim against the VILLAGE for additional time or compensation for matters relating to or arising out of or resulting from the Work included within or affected by the executed Change Order.

SECTION 6. SURVIVAL OF PROVISIONS

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

SECTION 7. VILLAGE'S RESPONSIBILITIES

7.1 The VILLAGE will assist CONSULTANT by placing at its disposal all available information as may be requested in writing by the CONSULTANT relating to the Project and allow reasonable access to all pertinent information relating to the Work to be performed by CONSULTANT.

7.2 The VILLAGE shall furnish to CONSULTANT, at the CONSULTANT'S written request, any available maps, plans, existing studies, reports and other data, pertinent to the Work to be provided by CONSULTANT, that are in possession of the VILLAGE.

7.3 The VILLAGE shall arrange for access to and make all provisions for CONSULTANT to enter upon public property under the control of the VILLAGE as required for CONSULTANT to perform the Work.

SECTION 8. CODE OF ETHICS.

Intentionally Omitted.

SECTION 9. COMPLIANCE WITH LAWS; LICENSES; POLICY OF NON-DISCRIMINATION/WAGES

9.1 The CONSULTANT and any and all of its agents, employees, including the general contractor hired or employed to perform installation as part of the Work, and subcontractors, shall comply with the terms and provisions of this Agreement and all applicable federal, state, county and local laws, ordinances, rules, regulations and procedural requirements applicable to the performance of the Work and operations pursuant to this Agreement, including, but not limited to, Chapter 17 (Noise) of the Village's Code of Ordinances regulating noise. The CONSULTANT is required to enter upon the VILLAGE'S property to perform the Work pursuant to this Agreement and shall obtain all necessary permits, licenses and insurance in connection with such Work and access and right of entry. The CONSULTANT shall comply with all requirements and the VILLAGE'S agreements with any other entity or agency which concern the areas upon which the Work is to be provided.

9.2 The CONSULTANT, and the general contractor hired or employed to perform installation as part of the Work, shall be licensed and certified by all appropriate federal, state, county and local agencies. Prior to the commencement of the Work and at all times during the Term of this Agreement, CONSULTANT, and the general contractor hired or employed to perform installation as part of the Work, shall procure and maintain, at its sole cost and expense, and provide copies to the VILLAGE, all required permits, licenses and certifications for the performance of the Work and the operations set forth in this Agreement.

9.3 The CONSULTANT shall not discriminate on the grounds of race, color, religion, sex, sexual orientation, age, marital status, national origin, physical or mental disability in the performance of the Work under this Agreement. The CONSULTANT shall comply with all equal employment opportunity requirements and any and all applicable requirements established by state and federal law.

SECTION 10. OWNERSHIP OF DOCUMENTS

10.1 Any and all records, drawings and specifications, as instruments of the Work be performed (the "Drawings and Specifications"), are and shall become the property of the VILLAGE whether the Project for which they are made is executed or not. The CONSULTANT shall be permitted to retain copies, including reproducible copies, of the Drawings and Specifications for information and reference in connection with the VILLAGE'S use and occupancy of the Project.

10.2 The CONSULTANT agrees not to divulge, furnish or make available to any third person, firm or organization, without the VILLAGE'S prior written consent, or unless incident to the proper performance of the CONSULTANT'S obligations hereunder, or in the course of judicial or legislative proceedings where such information has been properly subpoenaed, any non-public information concerning the Work to be rendered by the CONSULTANT hereunder, and the CONSULTANT shall require all of its employees, agents, subcontractors and general contractor hired or employed to perform any installation as part of the Work, to comply with the provisions of this paragraph.

SECTION 11. RECORDS/AUDITS

11.1 The CONSULTANT shall maintain and require all subcontractors, including the general contractor hired or retained to perform installation as part of the Work, to maintain, complete and correct records, books, documents, papers and accounts pertaining to the Work. Such records, books, documents, papers and accounts shall be available at all reasonable times for examination and audit by the VILLAGE Manager or any authorized VILLAGE representative with reasonable notice and shall be kept for a period of three (3) years after the completion of the Work. Incomplete or incorrect entries in such records, books, documents, papers or accounts will be grounds for disallowance by or reimbursement to the VILLAGE of any fees or expenses based upon such entries. Disallowed fees will be paid when incomplete or incorrect entries are remedied to the satisfaction of the VILLAGE.

11.2 The CONSULTANT shall comply with Chapter 119, Florida Statutes, as applicable.

11.3 Refusal of the CONSULTANT, and general contractor hired or retained to perform installation as part of the Work, to comply with the provisions of Sections 11.1 or 11.2 shall be grounds for immediate termination for cause by the VILLAGE of this Agreement.

SECTION 12. NO CONTINGENT FEE

The CONSULTANT warrants that he or she 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 he or she has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for the CONSULTANT any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this Agreement. For the breach or violation of this provision, the VILLAGE shall have the right to terminate this Agreement without liability and, at its discretion, to deduct from the Contract Price, or otherwise recover, the full amount of such fee, commission, percentage, gift, or consideration.

SECTION 13. INDEPENDENT CONSULTANT

The CONSULTANT is an independent CONSULTANT under this Agreement. Personnel provided by the CONSULTANT shall be employees of the CONSULTANT and subject to supervision by the CONSULTANT, and not as officers, employees, or agents of the VILLAGE. Personnel policies, tax responsibilities, social security, health insurance, worker's compensation insurance, employee benefits, purchasing policies and other similar administrative procedures applicable to the Work rendered under this Agreement shall be those of the CONSULTANT.

SECTION 14. ASSIGNMENT; AMENDMENTS

14.1 This Agreement or the Work shall not be assigned, sold, transferred or otherwise encumbered, under any circumstances, in whole or in part, by CONSULTANT, without the prior written consent of the VILLAGE, in its sole and absolute discretion.

14.2 No modification, amendment or alteration in the terms or conditions of this Agreement shall be effective unless contained in a written document executed with the same formality as this Agreement by both parties.

SECTION 15. INDEMNIFICATION/HOLD HARMLESS

15.1 The CONSULTANT shall indemnify and hold harmless the VILLAGE, and its officers and employees from liabilities, damages, losses, and costs, including, but not limited to, reasonable attorneys' fees, to the extent caused by the acts, omissions, negligence, recklessness, wrongful conduct, acts, errors or omissions of the CONSULTANT, subcontractors, the general contractor hired or retained to perform installation as part of the Work, or other persons employed or utilized by the CONSULTANT in the performance of the Work pursuant to this Agreement. The CONSULTANT'S obligation under this paragraph shall not be limited in any way by the agreed upon Contract Price, or the CONSULTANT'S limit of, or lack of, sufficient insurance protection.

15.2 The indemnification obligations under this clause shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the CONSULTANT or any subcontractor, general contractors hired or employed to perform any installation as part of the Work, or other persons employed or utilized by the CONSULTANT in the performance of this Agreement, under worker's compensation acts, disability benefit acts, or other employee benefit acts.

15.3 The CONSULTANT shall not specify or allow any subcontractor, the general contractor hired or retained to perform installation as part of the Work, or other persons employed or utilized by the CONSULTANT in the performance of this Agreement to specify a particular design, process or product that infringes upon any patent. The CONSULTANT shall indemnify and hold VILLAGE and its officers and employees harmless from any loss, cost or expense, including reasonable attorney's fees and costs incurred, on account thereof if the CONSULTANT violates the requirements of this Section 15.

SECTION 16. INSURANCE

CONSULTANT, all subcontractors hired or employed for the Work, including the general contractor hired or retained to perform any installation as part of the Work, shall secure and maintain throughout the duration of this Agreement insurance of such types and in such amounts not less than those specified below as satisfactory to the VILLAGE, naming the VILLAGE as an Additional Insured, underwritten by a firm rated A-X or better by A.M. Best and qualified to do business in the State of Florida. The insurance coverage shall be primary insurance with respect to the VILLAGE, its officials, employees, agents and volunteers naming the VILLAGE as additional insured. 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 at a minimum the following amounts set forth in this Section 16:

(a) Commercial General Liability coverage with limits of liability of not less than a $1,000,000 per Occurrence combined single limit for Bodily Injury and Property Damage. This Liability Insurance shall also include Completed Operations and Product Liability coverages and eliminate the exclusion with respect to property under the care, custody and control of CONSULTANT. The General Aggregate Liability limit (including Products/Completed Operations) shall be in the amount of $2,000,000.

(b) Workers Compensation and Employer's Liability insurance, 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 $1,000,000.00 each accident. No employee, subcontractor or agent of the CONSULTANT shall be allowed to provide Work pursuant to this Agreement who is not covered by Worker's Compensation insurance.

(c) Business Automobile Liability with minimum limits of $1,000,000 per Occurrence, combined single limit for Bodily Injury and Property Damage. Coverage must be afforded on a form no more restrictive than the latest edition of the Business

Automobile Liability policy, without restrictive endorsements, as filed by the Insurance Service Office, and must include Owned, Hired, and Non-Owned Vehicles.

(d) Builder's Risk property insurance upon the entire Work to the full replacement cost value thereof. This insurance shall include the interest of Village and CONSULTANT and shall provide All-Risk coverage against loss by physical damage including, but not limited to, Fire, Extended Coverage, Theft, Vandalism and Malicious Mischief, Windstorm and Flood.

(e) CONSULTANT acknowledges that it shall bear the full risk of loss for any portion of the Work damaged, destroyed, lost or stolen until final completion has been achieved for the Project, and all such Work shall be fully restored by the CONSULTANT, at its sole cost and expense, in accordance with the Agreement Documents.

(f) **Certificate of Insurance.** On or before the Effective Date of this and prior to commencing of any Work, Certificates of Insurance as required by this Section shall be provided to the VILLAGE, reflecting the VILLAGE as an Additional Insured. Each certificate shall include no less than (30) thirty-day advance written notice to VILLAGE prior to cancellation, termination, or material alteration of said policies or insurance. The CONSULTANT and general contractor hired or employed to perform any installation as part of the Work, shall be responsible for assuring that the insurance certificates required by this Section remain in full force and effect for the duration of this Agreement, including any extensions or renewals that may be granted by the VILLAGE. 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 inspect and return 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 Work, renewal Certificates of Insurance shall be furnished thirty (30) calendar days prior to the date of their policy expiration. Acceptance of the Certificate(s) is subject to approval of the VILLAGE.

(g) **Additional Insured.** The VILLAGE is to be specifically included as an Additional Insured for the liability of the VILLAGE resulting from Work performed by or on behalf of the CONSULTANT, and the general contractor hired or retained by CONSULTANT to perform installation Work, in performance of this Agreement. The 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 the CONSULTANT'S insurance. The CONSULTANT'S and general contractor hired or employed to perform any installation as part of the Work, 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 (for applicable policies) in the same manner as if separate policies had been issued to each.

(h) **Deductibles.** All deductibles or self-insured retentions must be declared to and be reasonably approved by the VILLAGE. The CONSULTANT shall be responsible for the payment of any deductible or self-insured retentions in the event of any claim.

(i) The provisions of this section shall survive termination of this Agreement.

(j) All insurance coverages and requirements set forth in this Section 16 shall be applicable and required of any subcontractor or general contractor hired or retained by CONSULTANT to perform any part of the Work.

SECTION 17. REPRESENTATIVE OF VILLAGE AND CONSULTANT

17.1 **VILLAGE Representative**. It is recognized that questions in the day-to-day conduct of this Agreement will arise. The VILLAGE designates the VILLAGE Manager or his or her designee, as the person to whom all communications pertaining to the day-to-day conduct of this Agreement shall be addressed.

17.2 **CONSULTANT Representative**. Before commencing any Work, CONSULTANT shall designate a competent, authorized representative ("Authorized Representative") acceptable to the VILLAGE to represent and act for CONSULTANT and shall inform the VILLAGE, in writing, of the name and address of such representative together with a clear definition of the scope of his authority to represent and act for CONSULTANT. Such representative shall be present or duly represented at the Project sites at all times when Work is actually in progress. All notices, determinations, instructions and other communications given to the Authorized Representatives of Consultant shall be binding upon the Consultant. The Authorized Representative, project managers, superintendents and supervisors for the Project are all subject to prior and continuous approval of Village. If, at any time during the Term of this Agreement, any of the personnel either functionally or nominally performing any of the positions named above, are, for any reasonable cause whatsoever, unacceptable to VILLAGE, CONSULTANT shall replace the unacceptable personnel with personnel acceptable to the VILLAGE.

SECTION 18. PREVAILING PARTY COST AND ATTORNEY'S FEES/WAIVER OF JURY TRIAL

18.1 If either the VILLAGE or CONSULTANT is required to enforce the terms of this Agreement by court proceedings or otherwise, whether or not formal legal action is required, the prevailing party shall be entitled to recover from the other party all costs, expenses, and reasonable attorney's fees in any state or federal administrative, circuit court and appellate court proceedings.

18.2 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.

SECTION 19. ALL PRIOR AGREEMENTS SUPERSEDED

This document incorporates and includes all prior negotiations, correspondence, conversations, agreements or understandings applicable to the matters contained in this Agreement and the parties agree that there are no commitments, agreements or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly it is agreed that no deviation from the terms of the Agreement shall be predicated upon any prior representations or agreements whether oral or written.

SECTION 20. CONSULTANT'S RESPONSIBILITIES

20.1 CONSULTANT warrants that the Work to be performed hereunder shall be performed by the CONSULTANT'S own staff or employees, unless otherwise approved in writing by the VILLAGE. The VILLAGE shall approve any and all subcontractors, including the general contractor hired or retained to perform any installation as part of the Work, providing Work to the VILLAGE pursuant to this Agreement. Said approval shall not be construed as constituting an agreement between the VILLAGE and said other person or firm. The CONSULTANT'S Work shall be performed in a manner consistent with that degree of skill and care ordinarily exercised by practicing professionals performing similar Work in the same locality and under the same or similar circumstances and conditions.

20.2 CONSULTANT represents that it possesses the requisite skills and shall follow the professional standards and the standard of conduct for CONSULTANTS or vendors in performing all Work under this Agreement. The CONSULTANT agrees to use its skill and judgment in furthering the VILLAGE'S interests hereunder and CONSULTANT shall perform the Work in accordance with the practice of the pertinent industry and as expeditiously as is consistent with reasonable skill and care. The VILLAGE shall have the right to reject or disapprove Work which the Village finds to be defective or non-conforming. If at any time during the term of this Agreement or the Project for which the CONSULTANT has provided Work under this Agreement, it is determined that the CONSULTANT'S Work is incorrect, defective, non-conforming or fail to conform to the terms of this Agreement, upon written notification from the VILLAGE, the CONSULTANT shall immediately proceed to correct the Work, re-perform Work which failed to satisfy the foregoing standard of care and shall pay all costs and expenses associated with correcting said incorrect or defective work, including any additional inspections, and installation and reimbursements to the VILLAGE for any other Work and expenses made necessary thereby, save and except any costs which the VILLAGE would have otherwise paid absent the CONSULTANT'S error or omission. The VILLAGE'S approval, acceptance, use of or payment for all or any part of the CONSULTANT'S Work shall in no way alter the CONSULTANT'S obligations or VILLAGE'S rights hereunder.

20.3 CONSULTANT agrees, within seven (7) calendar days of receipt of a written request from the VILLAGE, to promptly remove and replace any personnel

employed or retained by the CONSULTANT, any subcontractor or general contractors hired or retained to perform any installation as part of the Work, or other persons employed or utilized by the CONSULTANT in the performance of this Agreement or any personnel of any such subcontractor or other persons employed or utilized by the CONSULTANT to provide and perform the Work or work pursuant to the requirements of this Agreement, whom the VILLAGE shall request in writing to be removed, which request may be made by the VILLAGE.

20.4 If CONSULTANT allows any work to be performed knowing, or when with the exercise of due care the CONSULTANT should have known, it to be contrary to any such applicable laws, ordinances, rules, regulations or restrictions and fails to give VILLAGE written notice thereof prior to performance thereof, CONSULTANT shall bear all costs, liabilities, and expenses arising therefrom, which costs, liabilities and expenses shall not be considered a part of CONSULTANT'S fees or any other amounts due hereunder.

20.5 CONSULTANT hereby represents and warrants that it has reviewed all necessary Project documents, specifications, and that the Agreement Documents, when taken together, fully and accurately describe the Work needed to complete the Project in accordance with the requisite standard of care, and that CONSULTANT is not aware of any additional work, labor or Work that will be required to complete the Project. CONSULTANT warrants and represents that it has visited and inspected the Project Sites and become familiar with and is satisfied as to the general and local conditions and site conditions that may affect performance or progress of the Work, and the cost of the Work.

20.6 CONSULTANT, including any subcontractor and/or general contractor hired or retained to perform the installation or any part of the Work, hereby represents and warrants that all Work shall comply with all applicable federal, state and local laws, ordinances and building codes.

20.7 CONSULTANT shall be responsible for promptly notifying the VILLAGE of any damage to irrigation systems, buildings or other structures, vehicles, or property or possessions, which occur as a result of the Work performed by CONSULTANT pursuant to this Agreement, or the improper or negligent activities of the CONSULTANT.

20.8 CONSULTANT warrants that it, and any subcontractors and/or general contractors hired or retained by CONSULTANT to perform any part of the Work, shall have, prior to commencement of Work under this Agreement and at all times during said Work, all required permits and licenses, whether federal, state, County or Village. CONSULTANT acknowledges that it is the obligation of CONSULTANT to obtain all permits and licenses required for this Project.

20.9 CONSULTANT'S obligations under this Section 20 shall survive termination of this Agreement.

SECTION 21. TAXES.

CONSULTANT shall pay all taxes, levies, duties and assessments of every nature which may be applicable to the Work under this Agreement. The pricing and any agreed variations thereof shall include all taxes imposed by law at the time of this Agreement. CONSULTANT shall make any and all payroll deductions required by law. CONSULTANT herein indemnifies and holds the VILLAGE harmless from any liability on account of any and all such taxes, levies, duties and assessments.

SECTION 22. SAFETY.

CONSULTANT shall be fully and solely responsible for safety and conducting all operations under this Agreement at all times in such a manner as to avoid the risk of bodily harm to persons and damage to property. CONSULTANT shall continually and diligently inspect all Work, materials and equipment to discover any conditions which might involve such risks and shall be solely responsible for discovery and correction of any such conditions. CONSULTANT shall have sole responsibility for implementing its safety program. VILLAGE shall not be responsible for supervising the implementation of CONSULTANT'S safety program, and shall not have responsibility for the safety of CONSULTANT'S or its subcontractor's employees. CONSULTANT shall maintain all portions of the Project sites and Work in a neat, clean and sanitary condition at all times. CONSULTANT shall assure that subcontractors performing Work comply with the foregoing safety requirements.

SECTION 23. CLEANING UP.

CONSULTANT shall, at all times, at its expense, keep the Project sites in a neat, clean and safe condition. Upon completion of any portion of the Work, CONSULTANT and general contractor hired or employed to perform any installation as part of the Work, shall promptly remove all of its equipment, construction materials, temporary structures and surplus materials not to be used at or near the same location during later stages of the Work. Upon completion of the Work, CONSULTANT and general contractor hired or employed to perform any installation as part of the Work, shall, at its expense, satisfactorily dispose of all rubbish, unused materials and other equipment and materials belonging to it or used in the performance of the Work and CONSULTANT shall leave the Project in a neat, clean and safe condition. In the event of CONSULTANT'S failure to comply with the foregoing, the same may be accomplished by the VILLAGE at CONSULTANT'S expense

SECTION 24. DEFECTIVE WORK/WARRANTY.

24.1 The VILLAGE shall have the authority to reject or disapprove Work which the VILLAGE finds to be defective. If required by the VILLAGE, CONSULTANT shall promptly either correct all defective Work or remove such defective Work and replace it with non-defective Work. CONSULTANT shall bear all direct, indirect and consequential costs of such removal or corrections.

24.2 The CONSULTANT shall unconditionally warrant and guarantee all materials and equipment furnished and Work performed. If any of the Work is found to be defective or not in accordance with the Agreement Documents, CONSULTANT, after receipt of written notice from VILLAGE, shall promptly correct such defective or nonconforming Work without cost to VILLAGE. CONSULTANT shall provide and assign to VILLAGE any and all material and equipment warranties upon completion of the Work hereunder.

SECTION 25. NOTICES

Whenever either party desires to give notice to the other, it must be given by hand delivery or written notice, sent by certified United States mail, with return receipt requested or a nationally recognized private mail delivery service, addressed to the party for whom it is intended, at the place last specified, and the place for giving of notice in compliance with the provisions of this paragraph. For the present, the parties designate the following as the respective places for giving of notice, to-wit:

FOR CONSULTANT:

Jim Drain

_____

_____

_____

Phone: ( ) _____

Facsimile: (___) _____

FOR VILLAGE:

Village of Key Biscayne, Florida
Attn: John C. Gilbert, Village Manager
88 West McIntyre Street
Key Biscayne, Florida 33149
Phone: (305) 365-5514

With a copy to:

Stephen J. Helfman, Esq.
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
Village Attorney
2525 Ponce de Leon Blvd.
Suite 700
Coral Gables, FL 33134
Phone: (305) 854-0800
Facsimile: (305) 854-2323

SECTION 26. TRUTH-IN-NEGOTIATION CERTIFICATE

Intentionally Omitted.

SECTION 27. CONSENT TO JURISDICTION

The parties submit to the jurisdiction of any Florida state or federal court in any action or proceeding arising out of relating to this Agreement. Venue of any action to enforce this Agreement shall be proper exclusively in Miami-Dade County, Florida.

SECTION 28. GOVERNING LAW

This Agreement shall be construed in accordance with and governed by the laws of the State of Florida.

SECTION 29. HEADINGS

Headings are for convenience of reference only and shall not be considered in any interpretation of this Agreement.

SECTION 30. EXHIBITS

Each Exhibit referred to in this Agreement forms an essential part of this Agreement. The Exhibits if not physically attached, should be treated as part of this Agreement, and are hereby incorporated by reference.

SECTION 31. NO WAIVER OF BREACH

The failure of a party to insist on strict performance of any provision of this Agreement shall not be construed to constitute a waiver of a breach of any other provision or of a subsequent breach of the same provision.

SECTION 32. SEVERABILITY

If any provision of this Agreement or the application thereof to any person or situation shall to any extent, be held invalid or unenforceable, the remainder of this Agreement, and the application of such provisions to persons or situations other than those as to which it shall have been held invalid or unenforceable shall not be affected thereby, and shall continue in full force and effect, and be enforced to the fullest extent permitted by law.

SECTION 33. COUNTERPARTS

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

IN WITNESS WHEREOF, the parties hereby execute this Agreement on the date set forth below their signature.

VILLAGE:

ATTEST

VILLAGE OF KEY BISCAYNE, FLORIDA, a Florida municipal corporation

_____
Village Clerk

By:_____
John C. Gilbert, Village Manager

Date Executed: _____

Approved as to Form and Legal Sufficiency:

_____
Village Attorney

IN WITNESS WHEREOF, the parties hereby execute this Agreement on the date set forth below their signature.

CONSULTANT:

Witnesses:

_____ _____

Print Name: _____ JIM DRAIN

_____

Print Name: _____ Date: Executed: _____