

**BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY**

Meeting Date: November 16, 2011
Bulk Item: Yes XX No

Division: Airports
Staff Contact Person: Pedro Mercado/Peter Horton

AGENDA ITEM WORDING: Approval of Artist Loan Agreement with The Sculpture Foundation for the sculpture "New Friends" at the Key West International Airport.

ITEM BACKGROUND: The County and The Sculpture Foundation originally entered into an agreement to display the sculpture entitled "New Friends" on November 18, 2008. The sculpture consists of seven life-size figures and a marine buoy and have been on display above the entrance into the passenger arrival area at Key West International Airport. The display has proven to be a popular site for arriving passengers and the artwork is again being offered on loan to the County at no cost.

PREVIOUS RELEVANT BOCC ACTION:

Approved the original loan agreement at the November 18, 2008 regularly scheduled BOCC meeting,
Approved a one year renewal agreement at the December 2009 regularly scheduled BOCC meeting.

CONTRACT/AGREEMENT CHANGES:

N/A

STAFF RECOMMENDATIONS:

Approval

TOTAL COST: \$ _____

BUDGETED: Yes XX No

COST TO COUNTY: _____ \$0 _____

SOURCE OF FUNDS: _____

REVENUE PRODUCING: Yes No **AMOUNT PER MONTH** _____ **Year** _____

APPROVED BY: County Atty OMB/Purchasing Risk Management

DOCUMENTATION: Included XX Not Required _____

DISPOSITION: _____

AGENDA ITEM # _____

Artist Loan Agreement

This agreement entered into this 16th day of November, 2011 by and between The Sculpture Foundation (The Owner), whose address is 2525 Michigan Avenue, Suite A-6, Santa Monica, California 90404 and the Monroe County Board of County Commissioners (The Client), whose address is 1100 Simonton St., Key West, Fl., 33040.

WHEREAS, the Artist has created a sculpture entitled “New Friends”; and

WHEREAS, the Client is the owner of the Key West International Airport; and

WHEREAS, since November 19, 2008 the Artist and the Client have agreed to display the sculpture at the Key West International and the parties desire to continue this arrangement.

NOW, THEREFORE The Client and The Owner agree as follows;

Section 1. Rights, Duties and Responsibilities of The Artist

1.01 The Three-dimensional Work of art (the Artwork) is described as follow;

A bronze and aluminum sculpture titled “New Friends”, consisting of seven (7) life-scale figures and a buoy.

1.02 The Owner warrants, represents and covenants that:

- a. The Artwork is a unique and original product of the Artists’ creative efforts.
- b. The Artwork is free and clear of any claims.

1.03 The Owner has exclusive rights to the Artwork, including but not limited to retention of the copyright of the artwork, reproduction rights and all other reproduction rights in and to the artwork, subject, however to such rights that are granted to the Client in Section 2.01 of this agreement.

1.04 In the event the Sculpture is needed by the Owner during the exhibition period, the Owner reserves the right to retrieve the Sculpture for its use, without obligation to replace it. In the event the Owner retrieves the Sculpture, Owner shall be responsible for the shipping arrangements and the associated costs.

1.05 The Owner shall be responsible for any loss or damage of the Artwork.

1.06 The Owner will maintain an insurance policy of at least \$100,000.00 USD or the value of the artwork, whichever is greater, covering all possible damages during the Artwork rental, including but not limited to windstorm damage.

Section 2. Rights, Duties and Responsibilities of The Client.

2.01 It is understood that The Sculpture Foundation, Inc. is the copyright owner of the Work and shall retain copyright ownership of the Work, including the exclusive right to complete the limited edition. The Collector agrees to never contest the copyright of the Foundation and/or its successor(s), heir(s), and/or assign(s) in the Work. It is understood that any photographic or other image, including any derivative, (collectively referred to as "Image(s)") of the Work may not be used for any commercial purpose without prior written consent of the Foundation. If the Collector desires to use an Image, a request must be submitted in writing to the Foundation for approval. All approved images and use of the Sculpture must show the following credit line:

"New Friends" by J. Seward Johnson © 2007 The Sculpture Foundation (hereinafter referred to as "Credit Line").

The Foundation's consent is not required for non-commercial, two-dimensional (such as photograph) uses of any Image. All non-commercial use by the Exhibitor must include the Credit Line.

2.02 The Client shall credit the artwork as the product of Seward Johnson and on loan from the and with copyright held by The Sculpture Foundation.

2.03 The Client will not undertake nor permit any intentional destruction, damage, or modification to the sculpture. Any damage to the Sculpture shall be reported in writing to the Owner. The Owner shall be the only authorized party to restore the Sculpture.

2.04 The Client shall either store the shipping platform for use of the return of the sculpture to the Owner or his designee or shall rebuild the platform at the Client's cost in order to return the sculpture to the Owner.

Section 3, Compensation.

3.01 The Client shall pay no fee of any kind, whether for rental, preparation, handling or reproduction rights, or any other purpose, to the Owner, but shall provide the Owner with a display venue above the entrance to the terminal form the commercial ramp as consideration under this Agreement.

Section 4. Term of Agreement

4.01 The Term of this Agreement is a one (1) year period beginning on November 16, 2011, and ending on November 15, 2012, at the conclusion of which, the Client shall return the sculpture to the Owner in the same appearance and condition as when received, unless the agreement is extended by written agreement executed by both parties. By signing below, the Parties explicitly agree that the rules set forth in section 265.565, Florida Statutes, dealing with circumstances under which works of art shall be treated as unclaimed property, do not apply.

Section 5. Termination of Agreement

5.01 This Agreement may be terminated prior to the expiration of the term of the Agreement by either party, but if the Owner is the terminating party, the Owner shall give to the Client sixty (60) days' prior written notice during which time the Client shall return possession of the artwork to the Owner. The Client likewise shall give no less than sixty (60) days' written notice informing the Owner of the premature return of the Artwork.

5.02 Termination shall also occur should the sculpture at any time be removed from the display pedestal without the Client's prior written consent.

Section 6. Right of Entry. At all time during the regular hours of Airport business, the Owner or his designated representative shall have the right to enter the Airport for the purpose of inspecting the artwork.

Section 7. Governing Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida applicable to contracts made and to be performed entirely within the State. Venue for any legal action which may arise out of or under this Agreement shall be in Monroe County, Florida.

Section 8. Dispute Resolution. The parties agree that if a dispute arises between them related this Agreement, neither shall be required to enter into any arbitration proceeding.

a. **Disputes Regarding Interpretation.** The Parties agree that, in the event of a dispute between them regarding interpretation of the Agreement, the Parties shall attempt to resolve the dispute by means of a meet and confer session between representatives of Client and Owner. If the issue or issues are not resolved to the satisfaction of both Parties within thirty (30) days after the meet and confer session, then either party shall have the right to terminate the Agreement upon ten (10) business days' notice in writing to the other party.

b. **Legal or Administrative Proceedings.** In the event any administrative or legal proceeding is instituted against either Client or Owner relating to the formation, execution, performance, or breach of this Agreement, both parties agree to participate, to the extent required by the other, in all proceedings, hearings, processes, meetings, and other activities related to the substance of this Agreement. Institution of any administrative or legal proceeding shall constitute immediate termination of this Agreement and Client shall return the sculpture in the same manner as specified in paragraph 2, above. Client agrees to forward copies of all documents in its possession related to the matter which is the subject of this Agreement to Owner at the time of filing any administrative or legal proceeding.

c. **Attorneys' Fees and Costs.** In the event any administrative proceeding or cause of action is initiated or defended by Client or Owner relative to the

enforcement or interpretation of this Agreement, the prevailing party shall be entitled to an award of reasonable attorneys' fees, and court costs as an award against the non-prevailing party. Mediation proceedings initiated and conducted pursuant to this Agreement or as may be required by a court of competent jurisdiction shall be conducted in accordance with the Florida Rules of Civil Procedure and the usual and customary procedures required by the circuit court of Monroe County and shall take place in Monroe County.

Section 9. Entire Agreement. The entire agreement between Client and Owner with respect to the subject matter hereof is contained in this Agreement. This Agreement supersedes all prior oral and written proposals and communications between Client and Owner related to this Agreement. This Agreement shall be binding upon and inure to the benefit of the Parties hereto, their permitted successors and assigns.

Section 10. Florida Government-In-The-Sunshine Law. The Owner agrees that, unless specifically exempted or accepted by Florida law, the provisions of Chapter 120, Florida Statutes, generally require full and public discussion of matters to be voted upon by the Board of County Commissioners.

Section 11. Florida Public Records Law. Owner agrees that, unless specifically exempted or accepted by Florida law or Rules and Regulations of The Florida Bar, the provisions of Chapter 119, Florida Statutes, generally require public access to all records and documents which may be made or received under this Agreement.

Section 12. No Assignments. Neither party shall assign or subcontract its obligations under this Agreement, except in writing and with the prior written approval of the other party, which approval shall be subject to such conditions and provisions as the required signor may deem necessary. This paragraph shall be incorporated by reference into any assignment or subcontract and any assignee or subcontractor shall comply with all of the provisions of this Agreement. Unless expressly provided for therein, such approval shall in no manner or event be deemed to impose any additional obligation upon either party.

Section 13. Severability. If any term, covenant, condition or provision of this Agreement shall be declared invalid or unenforceable to any extent by a court of competent jurisdiction, the remaining terms, covenants, conditions and provisions of this Agreement shall not be affected thereby; and each remaining term, covenant, condition and provision of this Agreement shall be valid and shall be enforceable to the fullest extent permitted by law unless the enforcement of the remaining terms, covenants, conditions and provision of this Agreement would prevent the accomplishment of the original intent of this Agreement. Client and Owner agree to reform the Agreement to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision.

Section 14. Captions. The captions set forth herein are for convenience of reference only and shall not define, modify, or limit any of the terms hereof.

Section 15. Monroe County Ethics Provisions. Owner warrants that no person has been employed, retained or otherwise had act on its behalf any former Monroe County officer or employee in violation of Section 2 of Ordinance No. 10-1990 or any County officer or employee in violation of Section 3 of Ordinance No. 10-1990. For breach or violation of this provision client may, at its discretion, terminate this Agreement without liability and may also, at its discretion, deduct from the sums owed under the Agreement, or otherwise recover, the full amount of any fee, commission, percentage, gift or consideration paid to the former or present County officer or employee. County employees and officers are required to comply with the standards of conduct delineated in section 112.313, Florida Statutes, regarding, but not limited to, solicitation or acceptance of gifts, doing business with one's agency, unauthorized compensation, and misuse of public position, conflicting employment or contractual relationship, and disclosure of certain information.

Section 16. Public Entity Crime Statement. Florida law provides that any person or affiliate who has been placed on the convicted vendor list following a conviction for public entity crime may not submit a bid on an agreement to provide any goods or services to a public entity, may not submit a bid on an agreement with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under an agreement with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in Section 287.017, for CATEGORY TWO for a period of thirty-six (36) months form the date of being placed on the convicted vendor list. Artist warrants that neither Artist nor any authorized agent has been named to the convicted vendor list.

Section 17. Anti-Kickback. Owner warrants that no person has been employed or retained to solicit or secure this Agreement upon any contract or understanding for a commission, percentage, brokerage or contingent fee, and that no employee or officer of Client has any interest, financially or otherwise, in this Agreement, except as expressly stated herein. For breach or violation of this warranty, Client shall have the right to annul this Agreement without liability or, in its discretion, to deduct any sums to be paid by Client under this Agreement, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

Section 18. Modifications and Amendments. This Agreement may not be modified in any way without the express, written consent of both parties. Any and all modifications and Amendments of the terms of this Agreement shall be in writing and executed by the Board of County Commissioners for Monroe County and by Owner in the same manner as this Agreement.

Section 19. Non-Discrimination. Owner and Client agree that there will be no discrimination against any person, and it is expressly understood that upon a determination by a court of competent jurisdiction that discrimination has occurred, this Agreement automatically terminates without any further action on the part of any party, effective the date of the court order. Artist and Client agree to comply with all Federal and Florida statutes, and all local ordinances, as applicable, relating to nondiscrimination. These include but are not limited to: 1) Title VI of the Civil Rights Act of 1964 (PL 88-352), which prohibits discrimination on the basis of race, color or national origin; 2) Title IX of the Education Amendment of 1972, as amended (20 USC §§1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; 3) Section 504 of the Rehabilitation Act of 1973, as amended (20 USC § 794), which prohibits discrimination on the basis of handicaps; 4) The Age Discrimination Act of 1975, as amended (42 USC §§ 6101-6107) which prohibits discrimination on the basis of age; 5) The Drug Abuse Office and Treatment Act of 1972 (PL 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; 6) The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (PL 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; 7) The Public Health Service Act of 1912, §§ 523 and 527 (42 USC §§ 690dd-3 and 290ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; 8) Title VIII of the Civil Rights Act of 1968 (42 USC §§ 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or finance of housing; 9) The Americans with Disabilities Act of 1990 (42 USC §§ 1201), as maybe amended from time to time, relating to nondiscrimination in employment on the basis of disability; 10) Monroe County Code Chapter 13, Article VI, which prohibits discrimination on the basis of race, color, sex, religion, national origin, ancestry, sexual orientation, gender identity or expression, familial status or age; and 11) any other nondiscrimination provisions in any Federal or state statutes which may apply to the parties to, or the subject matter of, this Agreement.

Section 20. Authority. Each party represents and warrants to the other that the execution, delivery and performance of this Agreement have been duly authorized by all necessary action by each respective party. The Client, by executing this Agreement warrants that the agreement has been approved by the Board of County Commissioners of Monroe County, Florida. The Client's performance and obligations under this contract is contingent upon an annual appropriation by the Board of County Commissioners.

Section 21. No Personal Liability. No covenant or obligation contained in this Agreement shall be deemed to be a covenant or obligation of any member, officer, agent or employee of the Board of County Commissioners of Monroe County in his or her individual capacity and no member, officer, agent or employee of the Board of County Commissioners of Monroe County shall be liable personally on this Agreement or be subject to any personal liability or accountability by reason of the execution of this Agreement.

Section 22. Execution in Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be regarded as an original, all of which taken together shall constitute one and the same instrument and Client and Artist may execute this Agreement by signing any such counterpart.

Section 23. Notice Requirement. Any notices required or permitted to be sent under this Agreement shall be in writing and shall be hand delivered or sent via certified mail, return receipt requested, to the following addresses:

For Client: County Administrator
Monroe County
1100 Simonton Street
Key West, FL 33040

With a copy to:

County Attorney
Monroe County
P.O. Box 1026
Key West, FL 33040

For Owner: The Sculpture Foundation
2525 Michigan Ave. A-6
Santa Monica, Ca. 90404

With a copy to:

Gallery On Greene
606 Greene St.
Key West, Fl. 33040

Section 24. GOVERNMENTAL IMMUNITY: The Owner agrees to be fully responsible for its own negligent acts or omissions, or intentional tortious acts, which result in claims or suits against either the Owner or the Client.

The Client, as a political sub-division of the State of Florida, as defined in Section 768.28, Florida Statutes, agrees to be fully responsible to the limits set forth in such statute for its own negligent acts or omissions, or intentional tortious acts, which result in claims or suits against either the Owner or the Client, and agrees to be liable to the statutory limits for any damages proximately caused by said acts or omissions, or intentional tortious acts.

Nothing herein is intended to serve as a waiver of sovereign immunity by Client nor shall anything included herein be construed as consent to be sued by third parties in any matter arising out of this Agreement or any other contract.

IN WITNESS THEREOF, each party has caused this agreement to be executed on the date first indicated above.

ATTEST: DANNY L. KOLHAGE, CLERK BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

By _____
Deputy Clerk

By: _____
Mayor/Chairman

By: _____
Paula Stoeke,
The Sculpture Foundation

STATE OF FLORIDA

COUNTY OF MONROE

The foregoing instrument was acknowledged before me this ____ day of _____, 2011, by Paula Stoeke, who is personally known to me or has produced _____, as identification.

Notary Public
State of Florida at Large
My Commission Expires: