

ORDINANCE 2021-04-29-0294

AUTHORIZING A LOAN FUNDING AGREEMENT TO PROVIDE FUNDING FOR THE WITTE TO PAY OFF THE LOAN WITH FROST BANK PLUS ANY DEFERRED INTEREST BY PROVIDING CONSIDERATION TO THE WITTE FOR ITS RETURN TO THE CITY PREVIOUSLY TRANSFERRED REAL PROPERTY.

* * * * *

WHEREAS, on September 8, 1997, the City of San Antonio (“the City”) and the Witte entered into a Lease with Operating Standards Agreement (“the Lease”) for use and operation of the Witte Museum as a vital educational and recreational asset for the benefit of the citizens of San Antonio; and

WHEREAS, on December 15, 2016, Amendment No. 6 transferred ownership interest of the Mays Family Center, the Feik Pavilion, and the Admissions Building, excluding the parking lot, which were funded by the Witte thus allowing the Witte to secure financing to cover increased construction costs. On April 16, 2020, Amendment No. 8 transferred ownership interest of the parking lot adjacent to the Mays Family Center, the Feik Pavilion, and the Admissions Building to allow for the Witte to refinance an existing construction loan; and

WHEREAS, in October 2020, the Witte requested assistance from the City with their existing \$15.7 million construction loan (“the Loan”) with Frost Bank because their operations as well as their ability to fundraise was dramatically impacted by COVID-19. The land and most of the buildings at the Witte were used as collateral for the Loan in which operating and fundraising revenues were the projected sources of repayment; and

WHEREAS, the City of San Antonio, Texas Combination Tax and Revenue Certificates of Obligation, Taxable Series 2021 (the “Certificates”) are being issued to provide funding for the Witte to pay off the Loan by providing consideration to the Witte for its return to the City of previously transferred real property. Under the Loan Funding Agreement, the Witte will be required to pay for all costs of financing (including semi-annual debt service) for the City issued debt and will also require that the debt be repaid in full before the Witte moves forward with any major future expansion; and

WHEREAS, Amendment No. 9 to the Lease will return the previously transferred real property including the Mays Family Center, the Feik Family Pavilion, the Admissions Building, and the parking lots associated with those buildings to the City; and

WHEREAS, the Lease amendment also includes the requirement for the City to have two seats on the Witte Board, of which one will be filled by appointment of the Mayor and one will be ex officio filled by the City Manager or his designee;

WHEREAS, additionally, the Witte will continue to identify opportunities to assist other local art agencies in line with its current practices; **NOW THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Manager or designee, or the Deputy Chief Financial Officer or designee, is authorized to execute a Loan Funding Agreement with the Witte Museum for use for use in paying off its construction loan. A copy of the loan funding agreement, in substantially final form, is attached hereto and incorporated herein for all purposes as **Attachment I**.


SECTION 2. The City Manager or his designee or the Deputy Chief Financial Officer or his designee is hereby authorized to (1) take any and all actions, and (2) execute and deliver any and all documents containing terms and conditions approved in advance by the Office of the City Attorney, required to implement all provisions of the Loan Funding Agreement including without limitation the creation of escrow accounts and administrative accounting actions.”

SECTION 3. Any costs pertaining to the proposed transaction will be paid for from the proceeds derived from the issuance and sale of the Certificates and the debt service will be paid from by the Witte Museum.

SECTION 4. The financial allocations in this Ordinance are subject to approval by the Deputy Chief Financial Officer, City of San Antonio. The Deputy Chief Financial Officer may, subject to concurrence by the City Manager or the City Manager’s designee, correct allocations to specific Cost Centers, WBS Elements, Internal Orders, General Ledger Accounts, and Fund Numbers as necessary to carry out the purpose of this Ordinance.

SECTION 5. This Ordinance is effective immediately upon the receipt of eight affirmative votes; otherwise, it is effective ten days after passage.

PASSED AND APPROVED this 29th day of April, 2021.


M A Y O R
Ron Nirenberg

ATTEST:



Tina J. Flores, City Clerk

APPROVED AS TO FORM:



Andrew Segovia, City Attorney



City of San Antonio

City Council

April 29, 2021

Item: 26B

Enactment Number:

File Number: 21-3229

2021-04-29-0294

Ordinance authorizing a Loan Funding Agreement to provide funding for the Witte to pay off the loan with Frost Bank plus any deferred interest by providing consideration to the Witte for its return to the City previously transferred real property.

Councilmember John Courage made a motion to approve. Councilmember Ana E. Sandoval seconded the motion. The motion passed by the following vote:

Aye: 11 Nirenberg, Treviño, Andrews-Sullivan, Viagran, Rocha Garcia,
Gonzales, Cabello Havrda, Sandoval, Pelaez, Courage and Perry

SW
04/29/21
Item No. 26B

ATTACHMENT I

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

LOAN FUNDING AGREEMENT

This Loan Funding Agreement (this “Agreement”) is hereby made and entered into by and between the CITY OF SAN ANTONIO, a Texas municipal corporation (hereinafter referred to as "City"), acting by and through its City Manager pursuant to Ordinance No. _____ dated _____, and The Witte Museum, a Texas non-profit corporation (hereinafter referred to as "Witte"), acting by and through its officers, hereto duly authorized.

BACKGROUND

- In December 2016 and April 2020 respectively, the City approved Ordinances transferring the ownership interest in certain improvements located on The Witte Campus to Witte (the “Witte Campus”) for the express purpose of collateralizing the improvements as security for a construction loan with Frost Bank (the “Frost Loan”).
- The Frost Loan proceeds were used by Witte to fund improvements for the Phase II renovation and expansion of the Witte Campus.
- The Frost Loan has a current outstanding principal balance of approximately \$15,700,000.00 and is secured by a lien on certain improvements located on the Witte Campus.
- COVID-19 has dramatically impacted the Witte’s operations as well as Witte’s ability to fundraise which was the projected source of revenue to repay the Frost Loan.
- City and Witte wish to enter into this Agreement to provide funding (the “City Loan”) for Witte to pay off the Frost Loan plus any deferred interest by providing consideration to Witte for its return to the City of the Witte Campus.
- City staff is recommending this action to mitigate the risk to City of potential default on the Frost Loan by Witte.
- This action will add additional flexibility and provide a lower cost of borrowing achieved through City financing.

NOW THEREFORE, the Parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described.

I. TERM

1.01 The term of this Agreement shall commence upon execution of the Agreement by the City Manager or designee and continue until all funds are paid back to City but in no case longer than twenty years.

II. GENERAL RESPONSIBILITIES OF WITTE

2.01 Witte shall utilize the City Loan to fully retire the Frost Loan.

2.02 Witte shall pay to the City the full amount of City Loan in accordance with the terms, provisions and conditions of this Agreement.

2.03 Witte will be required to pay all out-of-pocket financing costs incurred by the City in connection with the City Loan and to make semiannual debt service payments. Witte will pay interest only commencing on August 1, 2021 and continuing semiannually until February 1, 2024. Thereafter Witte will make semi-annual payments of principal and interest based upon a 15 year amortization until the Maturity Date, at which time all unpaid principal and accrued interest shall be due and payable. The City Loan shall have a term of 15 years from the date hereof (the "Maturity Date"). Witte may elect to prepay in full or in part the City Loan at any time prior to the Maturity Date without premium or penalty.

2.04 Witte will prioritize fundraising efforts to raise the funds to repay the City Loan. Except for Permitted Improvements (as hereinafter defined), the City Loan must be repaid in full prior to Witte moving forward with any new addition or major future expansion of the Witte Campus. Except for Permitted Improvements, any such new addition or major future expansion of the Witte Campus commenced prior to the complete repayment of the City Loan shall constitute a material breach of this Agreement.

As used herein, "Permitted Improvements" shall mean any addition or expansion of the Witte Campus funded by any gift, donation, or other such contribution, which has received approval by the City Manager or designee.

2.05 The property utilized as collateral by Witte for the Frost Loan will be conveyed to the City.

2.06 Witte will continue to identify opportunities/assist other local art agencies in line with its current practices, which include partnerships with and advocacy for city arts institutions, special building rental rates for nonprofit arts events and opportunities for performing and visual arts collaborations.

III. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS

3.01 Witte warrants and represents that it will comply with all federal, state and local laws and regulations and will use commercially reasonable efforts to ensure said compliance by any and all contractors and subcontractors that may work on the Witte Campus.

IV. FUNDING AND ASSISTANCE BY CITY

4.01 City shall provide Witte sufficient funds to retire the Frost Loan plus any deferred interest.

V. RECEIPT, DISBURSEMENT AND ACCOUNT OF FUNDS BY WITTE

5.01 Witte agrees to maintain readily identifiable records that will provide accurate, current, separate, and complete disclosure (in all material respects) of the status of any funds received pursuant to this Agreement. Witte further agrees:

- (A) That maintenance of said records shall be in compliance with all terms, provisions, and requirements of this Agreement and with all generally accepted accounting practices; and
- (B) That Witte's record system shall contain sufficient documentation to provide, in reasonable detail, reasonable support and justification for each expenditure.

5.02 Witte agrees to retain all books, records, documents, reports, written accounting policies and procedures and all other relevant materials (hereinafter "records") pertaining to activities pertinent to this Agreement for a minimum of four (4) years from the completion of any approved projects undertaken upon the Witte Campus. Records will be retained by Witte in an electronic format and Witte will forward the records to City at the end of the four-year period.

VI. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS

6.01 Witte further represents and warrants that:

- (A) All information, data or reports heretofore or hereafter provided to City is, shall be, and shall remain complete and accurate (in all material respects) as of the date shown on the information, data, or report, and that since said date shown, shall not have undergone any significant change without written notice to City.
- (B) It is financially stable and capable of fulfilling its obligations under this Agreement and that Witte shall provide City prompt written notice of any adverse material change in the financial condition of Witte that may materially and adversely affect its obligations hereunder.

- (C) No litigation or proceedings are presently pending or to Witte's knowledge, threatened (in writing) against Witte.
- (D) None of the provisions contained herein contravene or in any way conflict with the authority under which Witte is doing business or with the provisions of any existing indenture or agreement of Witte.

VII. ACCESSIBILITY OF RECORDS

7.01 At any time and as often as City may deem necessary, upon ten (10) days written notice, Witte shall make all of its records pertaining to this Agreement available to City or any of its authorized representatives and shall permit City or any of its authorized representatives to audit, examine, and make excerpts and/or copies of same.

7.02 Witte agrees and represents that it will cooperate with City, at no charge to the City, to satisfy, to the extent required by law, any and all requests for information received by City under the Texas Public Information Act or related laws pertaining to this Agreement.

VIII. MONITORING AND EVALUATION

8.01 Witte agrees that City may carry out reasonable monitoring and evaluation activities so as to ensure compliance by Witte with this Agreement, and Witte shall provide reasonable access to City related to such activities, and with all other laws, regulations and ordinances related to the performance hereof.

IX. INDEMNITY

9.01 Witte covenants and agrees to FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, the City and the elected officials, employees, officers, directors, volunteers and representatives of the City, individually and collectively, from and against any and all actual costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the City directly or indirectly arising out of resulting from or related to Witte's activities under this Agreement, including any acts or omissions of Witte, any agent, officer, director, representative, employee, consultant or subcontractor of Witte, and their respective officers, agents, employees, directors and representatives while in the exercise of performance of the rights or duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence, gross negligence of City, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. IN THE EVENT WITTE AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND

WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

9.02 The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. Witte shall advise the City in writing within three (3) days of receipt of any written claim or demand against the City or Witte actually known to Witte related to or arising out of Witte's activities under this Agreement and shall defend and such claim or demand at Witte's cost with counsel reasonably acceptable to the City. The City shall have the right, at its option and at its own expense, to participate in such defense without relieving Witte of any of its obligations under this paragraph.

X. POLITICAL ACTIVITY

10.01 None of the activities performed hereunder shall involve, and no portion of the funds received hereunder shall be used, either directly or indirectly, for any political activity including, but not limited to, an activity to further the election or defeat of any candidate for public office or for any activity undertaken to influence the passage, defeat or final content of local, state or federal legislation.

XI. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL

11.01 All finished or unfinished reports, documents, data, studies, surveys, charts, drawings, maps, models, photographs, designs, plans, schedules, or other appended documentation to any proposal or contract, and any responses, inquiries, correspondence and related material submitted by Witte, shall, upon receipt, become the property of City.

XII. CHANGES AND AMENDMENTS

12.01 Except when the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof shall only be by amendment in writing executed by both City and Witte under authority granted by formal action of the Parties' respective governing bodies.

12.02 It is understood and agreed by the Parties hereto that changes in local, state and federal rules, regulations or laws applicable hereto may occur during the term of this Agreement and that any such changes shall be automatically incorporated into this Agreement without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.

XIII. ASSIGNMENTS

13.01 Witte shall not transfer, pledge or otherwise assign this Agreement, any interest in

and to same, or any claim arising thereunder, without first procuring the written approval of City. Any attempt at transfer, pledge or other assignment shall be void *ab initio* and shall confer no rights upon any third person.

XIV. SEVERABILITY OF PROVISIONS

14.01 If any clause or provision of this Agreement is held invalid, illegal or unenforceable under present or future federal, state or local laws, including but not limited to the City Charter, City Code, or ordinances of the City of San Antonio, Texas, then and in that event it is the intention of the Parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of the Parties hereto that in lieu of each clause or provision of this Agreement that is invalid, illegal, or unenforceable, there be added as a part of the Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

XV. NON-WAIVER OF PERFORMANCE

15.01 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification, or discharge by either Party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

15.02 No act or omission of either Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to either Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

15.03 No representative or agent of City may waive the effect of the provisions of this Article without formal action from the City Council.

XVI. ENTIRE AGREEMENT

16.01 This Agreement constitutes the final and entire agreement between the Parties hereto and contains all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the Parties hereto unless same be in writing, dated subsequent to the date hereof and duly executed by the Parties.

XVII. NOTICES

17.01 For purposes of this Agreement, all official communications and notices among the Parties shall be deemed sufficient if in writing and mailed, registered, or certified mail, postage prepaid, to the addresses set forth below:

CITY: Deputy Chief Financial Officer
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

And Director of Parks and Recreation
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

WITTE: The Witte Museum
3801 Broadway
San Antonio, Texas 78209

Notice of change of address by either Party must be made in writing and mailed to the other Party's last known address within five (5) business days of such change.

XVIII. PARTIES BOUND

18.01 This Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, legal representatives, successors, and assigns, except as otherwise expressly provided herein.

XIX. RELATIONSHIP OF PARTIES

19.01 Nothing contained herein shall be deemed or construed by the Parties hereto, or by any third party, as creating the relationship of principal and agent, partners, joint venturers or any other similar such relationship between the Parties hereto.

XX. TEXAS LAW TO APPLY

20.01 This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the Parties created hereunder are performable in Bexar County, Texas.

XXI. GENDER

21.01 Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.

XXII. CAPTIONS

22.01 The captions contained in this Agreement are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this Agreement.

XXIII. LEGAL AUTHORITY

23.01 Witte represents, warrants, assures, and guarantees that it possesses the legal authority, pursuant to any proper, appropriate, and official motion, resolution or action passed or taken, to enter into this Agreement and to perform the responsibilities herein required.

23.02 The signer of this Agreement for Witte represents, warrants, assures, and guarantees that he or she has full legal authority to execute this Agreement on behalf of Witte and to bind Witte to all terms, performances and provisions herein contained.

XXIV. DEFAULT

24.01 Upon default by Witte in the performance of its obligations hereunder, City shall give Witte notice of the same, and Witte shall have thirty (30) days following receipt of written notice of default from City (or such reasonably longer time as may be necessary provided Witte commences the cure within thirty (30) days and continuously and diligently pursues the cure to completion) to cure such default. If Witte fails to timely cure such default, City may pursue all remedies available in law or at equity and/or other rights City may have in this Agreement; provided that it is expressly agreed that neither Party hereto shall have the right to seek consequential or punitive damages against the other for any default under this Agreement.

24.02 Witte understands and agrees that default under this Agreement shall constitute and be deemed a default under that certain Lease Agreement between Witte and City for the Witte Museum in Brackenridge Park.


[Signature pages follow]

EXECUTED IN DUPLICATE ORIGINALS, each of which shall have the full force and effect of an original this the ___ day of _____, 2021.

CITY OF SAN ANTONIO

THE WITTE MUSEUM

By: _____

By: 

Marise McDermott
President & CEO

APPROVED AS TO FORM:

CITY ATTORNEY