

FORSYTH COUNTY

BOARD OF COMMISSIONERS

BRIEFING DRAFT

MEETING DATE: AUGUST 27, 2020

AGENDA ITEM NUMBER: 16

SUBJECT: RESOLUTION AUTHORIZING EXECUTION OF A CONSTRUCTION AGREEMENT AND GENERAL LEASE TERMS WITH KALEIDEUM FOR THE MUSEUM PROJECT LOCATED AT 120 W. THIRD STREET IN WINSTON-SALEM

COUNTY MANAGER'S RECOMMENDATION OR COMMENTS:

SUMMARY OF INFORMATION:

This is an Agreement between Forsyth County and Kaleideum that contractually clarifies the responsibilities between the two parties for the New Museum construction project located at 120 W. Third Street in Winston-Salem. Additionally, the Agreement specifies terms that will be a part of a subsequent lease upon completion of the New Museum.

ATTACHMENTS: YES NO

SIGNATURE: _____

COUNTY MANAGER

DATE: _____

**RESOLUTION AUTHORIZING EXECUTION OF A CONSTRUCTION AGREEMENT
AND GENERAL LEASE TERMS WITH KALEIDEUM FOR THE MUSEUM PROJECT
LOCATED AT 120 W. THIRD STREET IN WINSTON-SALEM**

WHEREAS on May 8, 2017, the Forsyth County Board of Commissioners authorized execution of an agreement with Gensler Architecture, Design, & Planning, P.C., to provide professional design services for a new Kaleideum museum (New Museum);

WHEREAS on February 1, 2018, the Board of Commissioners authorized execution of an agreement with Frank L. Blum Construction Company to provide Construction Manager At Risk services for the New Museum; and

WHEREAS site demolition is underway, project design development of the New Museum is nearing completion, and the project is at a stage where an agreement is necessary to clarify the parties' construction responsibilities and anticipated lease terms upon completion of construction;

NOW, THEREFORE, BE IT RESOLVED, by the Forsyth County Board of Commissioners that the Chairman or County Manager and Clerk to the Board are hereby authorized to execute, on behalf of Forsyth County, a Museum Construction Agreement, in substantially the same form as the agreement attached hereto and incorporated herein by reference, subject to a pre-audit certificate thereon by the County Chief Financial Officer, if applicable, and approval as to form and legality by the County Attorney.

Adopted this the 27th day of August 2020.

Museum Construction Agreement

THIS AGREEMENT, made and effective this ____ day of _____, 2020, by and between Forsyth County, North Carolina (the "County"), and Kaleideum, a North Carolina non-profit corporation;

WHEREAS Kaleideum operates science and children's museums in Winston-Salem, North Carolina;

WHEREAS Kaleideum will consolidate its museum locations by closing its locations, including the SciWorks location at 400 W. Hanes Mill Rd., Winston-Salem, NC 27105, and opening a new museum ("New Museum") on 0.63 acres of real property located at 120 W. Third Street, Winston-Salem, North Carolina, as further described by Parcel Identification Numbers 6835-16-9644.00 and 6835-16-9563.00 (the "New Museum Site"); and

WHEREAS the opening of the New Museum involves demolition of an existing building at the New Museum Site, design and construction of the New Museum Building, and design, construction, and installation of exhibits;

NOW, THEREFORE, for the purpose and subject to the terms and conditions hereinafter set forth, the County and the Kaleideum hereby agree as follows:

1. **New Museum Building.** The County will be responsible for construction of the New Museum Building shell and related systems, including HVAC, plumbing, and electrical, except that the County shall not be responsible for design and construction of museum exhibits and specialized museum features unless otherwise set forth in this Agreement. The County and Kaleideum shall meet periodically during the design phase to coordinate design. The County, in its sole discretion, shall have final authority on all decisions relating to the design and construction of the New Museum.
2. **Selection of Contractor.** On or before September 1, 2020, Kaleideum will contract with a contractor to undertake its obligations under this Agreement, including but not limited to the construction and installation of exhibits and specialized systems.
3. **Museum Exhibits.** Kaleideum will be responsible for the construction and installation of all exhibits and specialized museum features and furnish all museum-related property and any other business-specific personal property. Design and construction of all exhibits must be compatible with the design of the New Museum Building, not compromise the structural integrity of the New Museum Building, and fit within spaces designated by the County as being

suitable for museum exhibits (the “Exhibit Shell Spaces”). The County shall provide standard plumbing, mechanical, and electrical connections and a code-required lighting and electrical outlet to each exhibit shell space. In the Exhibit Shell Space designated for the Planetarium, County shall provide electrical connections compatible with Kaleideum’s proposed projection system. The Parties shall agree to a detailed Scope Delineation indicating each party’s respective responsibilities.

4. **Kaleideum’s Liability for Delay and Failure to Coordinate.** Kaleideum shall release, defend, hold harmless, and indemnify the County from any claims of damages, including damages due to delays in construction, caused by its failure to coordinate with the County, its architect, and its construction manager at risk or by Kaleideum’s breach of this Agreement or failure to perform its duties in a timely fashion. Kaleideum shall cause its contractor to be liable for and to release, defend, hold harmless, and indemnify the County from any claims of damages, including damages due to delays in construction, caused by its failure to coordinate with the County and its construction manager at risk or by its breach of contract or failure to perform its duties in a timely fashion.
5. **Kaleideum Fundraising Obligation.** Kaleideum shall raise at least \$10,000,000.00 from non-County sources, to be used exclusively for museum exhibits, specialized features, and furniture, fixtures, and equipment to be located within, or affixed to, the New Museum. Kaleideum shall certify to the County that it has met at least 80% of its fundraising obligation prior to the County undertaking construction of the New Museum Building. Kaleideum shall provide the County with, and certify the accuracy of, receipts showing its total expenditures on museum exhibits, specialized systems, and furniture, fixtures, and equipment to be located within the New Museum Building prior to taking possession of the New Museum Building. Without limiting the foregoing, Kaleideum shall certify that it has fully funded their exhibits, design, and installation, even if such amount exceeds or is less than \$10,000,000. During the construction of the New Museum Building, the County and Kaleideum shall each provide the other party with the amounts spent on construction of the New Museum Building and its exhibits. Except as set forth in this Agreement, the County shall have no obligation to pay any amount attributable to exhibits or specialized features, including but not limited to the Planetarium and staff- or patron-occupied roof space, that are the obligation of Kaleideum. If Kaleideum spends less than \$10,000,000 on its museum obligations in this Agreement, the unspent balance shall be used solely for capital improvements at the New Museum Building or the design or installation of exhibits to be housed at the New Museum Building.
6. **Noncompletion of Project.** Should the New Museum Building fail to be built for any reason, including but not limited to non-allocation of funds or occurrence of a force majeure event, this Agreement shall terminate and the Parties shall have no further obligations or liabilities arising under this Agreement.

7. **Lease.** Upon completion of the New Museum Building, the parties shall negotiate a lease agreement for leasing of the premises. The lease shall generally be a Triple Net Lease and shall contain the following terms:
- a. A complete description of the premises to be leased, to be developed after design of the New Museum Building is complete, provided that it is anticipated that the New Museum Building shall be built entirely within the area indicated in red on the attached Exhibit A;
 - b. A term not to exceed 20 years;
 - c. An annual base rent of \$1.00/year;
 - d. A provision providing that New Museum Building shall be used solely for the purposes of operating a museum and other ancillary activities associated with museum uses, which may include a gift shop and commissary, or other ancillary uses if approved by the County.
 - e. A provision that Kaleideum may not sublet the New Museum Building (or any part thereof, including any restaurant) without the express written consent of the County, which is under the sole discretion of the County.
 - f. Kaleideum will be solely responsible for all operating costs of the Premises. Operating costs include but are not limited to all utilities, including hookup fees, fees assessed by an authority having jurisdiction, lawn maintenance including snow removal and removal of trash, general building maintenance, and custodial services.
 - g. The County shall not be responsible for maintenance or repair of any part of the Premises except for ordinary roof maintenance. The County shall not be responsible for maintenance or repair of any roof areas used as event or museum space, or that are made available for Kaleideum staff or patron use.
 - h. Kaleideum will be solely responsible for all capital repairs except for those related to ordinary roof repair and replacement as set forth in subsection (g). Kaleideum shall provide routine and recurring preventative maintenance services to all major facility systems on an annual basis or as otherwise needed.
 - i. The County shall not be required to provide any on-site or off-site parking. Kaleideum shall be solely responsible for securing off-site parking for its staff and patrons.

8. **Insurance.** Kaleideum shall maintain Commercial General Liability Insurance, Commercial Property Insurance and meet other insurance requirements as required by the County's Risk Manager.
9. **Right to Terminate.** In the event that Kaleideum breaches this Agreement, the County may demand in writing that Kaleideum cure the breach. If Kaleideum has not cured the breach within 30 days of receiving such notice, the County may terminate this Agreement.
10. **Independent Contractor.** Kaleideum shall operate as an independent contractor, and the County shall not be responsible for any of the Kaleideum's acts or omissions. The Kaleideum, its employees, and subcontractors shall not be treated as an employee with respect to its obligations or the services performed hereunder for federal or state tax, unemployment or workers' compensation purposes. Neither federal, state, nor payroll tax of any kind shall be withheld or paid by the County on behalf of Kaleideum or the employees of Kaleideum. Kaleideum is fully responsible for the payment of any and all taxes arising from the payment of monies under this Agreement. Kaleideum shall comply with the North Carolina Workers' Compensation Act and shall ensure that its subcontractors also comply. Kaleideum shall not be treated as an employee with respect to the services performed hereunder for purposes of eligibility for, or participation in, any employee pension, health, or other fringe benefit plan of the County. Kaleideum has no authority to enter into contracts or agreements on behalf of the County. The County shall not be liable to Kaleideum for any expenses paid or incurred by Kaleideum unless otherwise agreed in writing. Kaleideum shall supply, at its sole expense, all equipment, tools, materials, and/or supplies required to provide contracted services unless otherwise agreed in writing.
11. **Indemnification.** Kaleideum agrees to indemnify, defend, and hold the County harmless from and against any and all claims, expenses (including attorney fees), costs or liability for acts or omissions of Kaleideum relating to this Agreement or its obligations hereunder.
12. **County Property.** Kaleideum agrees that it shall be responsible for the proper custody and care of any property furnished to it by the County for use in connection with the performance of this contract and will reimburse the County for loss of, or damage to, such property. Any information, data, documents, studies, or reports given to or prepared or assembled by Kaleideum under this Agreement shall be kept confidential and not divulged or made available to any individual or organization without prior written approval of the County.
13. **Notice.** All notices permitted or required to be given by one party to the other party shall be addressed and delivered in writing as follows:

For the County:

J. Dudley Watts, County Manager
201 N Chestnut St
Winston-Salem, NC 27101
fcmanager@forsyth.cc
(336) 703-2020

For Kaleideum:

Elizabeth Dampier
400 W. Hanes Mill Rd.
Winston-Salem NC 27105
edampier@kaleideum.org

14. **Assignment.** Kaleideum may not assign its obligations under this Agreement unless it has received prior written approval from the County, which may be withheld at the sole discretion of the County.
15. **Waiver.** No action or failure to act by the County shall constitute a waiver of any of its rights or remedies or as approval or acquiescence in a breach thereunder, except as may be specifically agreed in writing.
16. **Governing Law.** This Agreement shall be governed by North Carolina law, except that provisions regarding conflicts of laws shall not apply. The venue for any legal proceeding shall be in Forsyth County, North Carolina.
17. **Nonappropriation.** Notwithstanding anything to the contrary herein, in the event that public funds are unavailable and not appropriated for the performance of the County's obligations under this Agreement, then this Agreement shall automatically expire without penalty to the County 30 days after written notice of the unavailability and non-appropriation of public funds. In the event of a change in the County's statutory authority, mandate, or mandated functions by state or federal legislative or regulatory actions, which adversely affects the County's authority or duty to continue its obligations under this Agreement, then this Agreement shall automatically terminate without penalty to the County 30 days after written notice of such limitation or change in the County's legal authority or duty.
18. **Survival of Provisions.** All obligations arising prior to termination of this Agreement and all provisions of this Agreement allocating responsibility or liability between the parties shall survive the completion of services and termination of this Agreement.

19. **Modification.** This Agreement may only be modified in writing and signed by both Kaleideum and by the County Manager or other authorized County official.
20. **Conflict with Attachments.** In the event of any conflict between the provisions in this Agreement and any provisions in an attachment thereto, the provisions in this Agreement shall take precedence over any provision in an Attachment.
21. **Miscellaneous.** Kaleideum shall comply with all applicable laws and regulations including but not limited to federal, state and local laws regarding business permits, certificates, and licenses that may be required to carry out the services to be performed under this Agreement and all federal immigration laws in its hiring and contracting practices. Kaleideum and its subcontractors shall comply with Article 2 of Chapter 64 of the North Carolina General Statutes relating to the required use of the federal E-Verify program to verify the work authorization of newly hired employees. Failure of Kaleideum to comply with this provision or failure of its subcontractors to comply could render this contract void under North Carolina law. Kaleideum hereby certifies that it is not on the North Carolina State Treasurer's lists of persons engaging in business activities in Sudan (Darfur), Iran, or boycotting Israel, prepared pursuant to NCGS §§ 147-86.43, 147-86.58, and 147-86.81, nor will Provider utilize for this Agreement any subcontractor on such lists. This Agreement is intended for the benefit of the County and Kaleideum and not for any other party. If any provision of this Agreement shall be unenforceable, the remainder of the Agreement shall be enforceable to the extent allowed by law.

[Signatures to Follow on Next Page]

IN WITNESS WHEREOF, the authorized officials of the County and Kaleideum have set their hands and seals as of the day and year first above written.

FORSYTH COUNTY, NORTH CAROLINA

(SEAL)

By: _____
J. Dudley Watts, Jr, County Manager

Date: _____

ATTEST:

Ashleigh M. Sloop, Clerk to the Board

Date: _____

KALEIDEUM

(SEAL)

By: _____

Printed Name: _____

Title: _____

Date: _____