

STATE OF TEXAS                               §  
   §  
COUNTY OF LUBBOCK                   §

**PERFORMANCE AGREEMENT**

This Performance Agreement (the "Agreement") is made effective on Aug. 9, 2012, by and between LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC, a Texas non-profit corporation (hereinafter referred to as "LEDA"); LUMMUS CORPORATION (hereinafter referred to as "Lummus" or "Recipient"); and WEST SOUTH PLAINS, LLC, a Delaware limited liability company (herein referred to as "Developer"), by and through their duly authorized officers and affiliate organizations under the terms and conditions that follow.

1.     **Applicable Law:** It is understood by and between the parties that the term "Act," as used herein, is intended to mean the Development Corporation Act of 1979, as amended (Section 501.001 et seq, Texas Local Government Code, formerly Article 5190.6, Texas Revised Civil Statutes.) The parties hereto covenant and agree to comply with the terms of the Act applicable to this Agreement.

2.     **Parties:**

- A.     LEDA, a Texas non-profit corporation as well as a tax exempt 501(c) 4 entity, was created by the City of Lubbock, Texas, as an Industrial Development Corporation under the Act for the purpose of creating and retaining positions and encouraging new businesses to be established in Lubbock, Texas, to stimulate business and commercial activities, as well as all other purposes allowed by the Act.
- B.     Recipient is preparing a new "Project" which shall include its world parts manufacturing headquarters to be located in the Lubbock Business Park (NAICS 333111). The Project is anticipated to result in 33 retained Primary Jobs (as such term is defined in the Act) and 20 new Primary Jobs in the City of Lubbock, with a Target Annual Compensation of \$540,000.00, or a total of \$2,700,000.00 over five years. Total capital investment cost estimate of \$6,000,000.00.
- C.     Recipient is a Delaware corporation authorized to do business in Texas.
- D.     Developer is negotiating a contract with Lummus to build the world parts manufacturing headquarters in the Lubbock Business Park and lease the facility to Lummus on a long term lease.

3.     **Purpose:** The purpose for this Agreement is to formalize the agreements between LEDA, Recipient and Developer for the payment of certain costs associated with Recipient's Project and specifically state the covenants, representations of the parties, and the incentives

associated with Recipient's and Developer's commitment to abide by the provisions of the Act and to abide by the terms of this Agreement which has been approved by the Board of Directors of LEDA as complying with the specific requirements of the Act. It is expressly agreed that this Agreement constitutes a single transaction; although, incentive payments thereunder are divided into multiple installments as annually earned. A failure to perform any obligation by Recipient or Developer may constitute a breach of the entire Agreement and terminate any further commitments by LEDA.

**4. Definitions:**

- A. The "Act" shall refer to the Development Corporation Act of 1979, as amended, as Section 501.001 et seq, Texas Local Government Code, formerly Article 5190.6, Texas Revised Civil Statutes.
- B. "LEDA" shall refer to Lubbock Economic Development Alliance, Inc., a Texas non-profit corporation, created by the City of Lubbock as an "Industrial Development Corporation," pursuant to the Act.
- C. "Recipient" shall refer to LUMMUS CORPORATION, a Delaware corporation, and the Recipient under this Agreement.
- D. "Project" shall mean the project identified in Paragraph 2B, above.
- E. "Recipient Request" means information requested by LEDA or its auditors and may include the identification of the cost of the project by Recipient to the facility and other information pursuant to Section 501.152 of the Act, formerly Section 2(4) of the Act.
- F. "LEDA's Sliding Scale" shall mean the incentive allocation to be utilized in determining compliance with the future employment payments toward the cost of the project confirmed by the establishment of new Primary Jobs. The application of LEDA's incentive sliding scale as to each "full-time equivalent employee" is as follows:

<b>Actual Compensation As Defined Herein</b>	<b>Total Incentive</b>
\$75,000 and above	\$10,000.00
\$60,000 - \$74,999.99	\$7,500.00
\$50,000 - \$59,999.99	\$5,000.00
\$40,000 - \$49,999.99	\$4,000.00
\$30,000 - \$39,999.99	\$3,000.00
\$25,000 - \$29,999.99	\$2,500.00

- G. "Full-Time Equivalent Employee" shall include individuals employed in "Primary Jobs" as defined by the Act, as well as contract or leased employees performing "Primary Jobs" in the City of Lubbock on behalf of Recipient.

- H. "Annual Compensation" shall mean the higher of actual compensation or annualized base pay or actual annualized payment as determined within the reasonable discretion of LEDA's auditor/representative.
- I. "Term", as used herein, shall begin with the Start Date of May 1, 2013, and end on April 30, 2019, (the "Termination Date") unless earlier breached by Recipient's failure to perform.
- J. "Payback Provisions" shall mean forfeiture of all unpaid incentives or a conviction under 8 U.S.C. § 1324a(f).
- K. "Baseline Employment Level" is defined to mean the employee census on the day preceding the Term of the contract.
- L. "Baseline Measurement Date" shall mean the day preceding the Start Date of the contract.
- M. "Operations Arm" shall mean the Recipient or its affiliate in charge of day to-day operations and hiring decisions (if different than Recipient).
- N. "Census" is defined as a compilation listing of the employee name, address, date of hire, date of termination, position, base pay, and indication of full-time or part-time status. (Such information is preferred to be presented in Excel format) which shall be made available to the Auditor in performing the audit.
- O. "Measurement Date" shall mean the date upon which the determination is made as to whether Recipient is in compliance with creating and/or maintaining the Primary Job positions represented by Recipient. Measurement Dates shall be:
  - (1) Year One: May 1, 2013 to April 30, 2014
  - (2) Year Two: May 1, 2014 to April 30, 2015
  - (3) Year Three: May 1, 2015 to April 30, 2016
  - (4) Year Four: May 1, 2016 to April 30, 2017
  - (5) Year Five: May 1, 2017 to April 30, 2018
- P. The "Developer" shall refer to WEST SOUTH PLAINS, LLC, a Delaware limited liability company.

**5. Representations of Recipient:**

- A. Recipient represents that it will utilize the incentive provided towards cost involved and associated with the Project. Developer represents that it will utilize the Property for the development of the facilities involved and associated with the Project as contemplated herein.

- B. Recipient represents that it is registered to do business in Texas and has authorization to enter into this Agreement. Developer represents that it is authorized to do business in Texas and has the authority from its Manager and Members to enter into this Agreement.
- C. Recipient represents that it has sought from LEDA economic assistance pursuing Recipient's Project by completing an Application for Assistance.
- D. Recipient represents that it has conferred with attorneys of its own choosing and is fully knowledgeable of the terms of the Act and understands the reporting requirements of the Act, as well as all conditions precedent and subsequent as required to be eligible for the incentives offered by LEDA, including the Payback Provisions. Developer represents that it has conferred with attorneys of its own choosing and is fully knowledgeable of the terms of the Act applicable to the Project.
- E. Recipient represents that it acknowledges that its failure to perform any reporting requirements within a reasonable period of time after the request is made and/or its failure to maintain the Baseline Employment Level could result in payment adjustments.
- F. Recipient and Developer, by signing this Performance Agreement, certify that Recipient and Developer do not and will not knowingly employ any undocumented workers and have read and agree to comply with the provisions of § 2264.001 of the GOVERNMENT CODE OF TEXAS.
- G. In the event new construction is involved in the Project, Recipient and Developer agree to timely submit building plans to LEDA's Architectural Review Committee.

**6. Representations by LEDA:**

- A. LEDA represents that it is established as an Industrial Development Corporation under the Act and further represents that the Project and the costs applied toward Recipient's Project as stated in this Agreement have been found by the Board of Directors of LEDA sitting as fact finders to be in compliance with the requirements and purposes of the Act, the provisions of LEDA's charter, as well as for the benefit of the City of Lubbock, Lubbock County, Texas, and trade area.
- B. LEDA represents that it has authority to enter into this Agreement. LEDA understands and agrees that any variation in terms of this Agreement or the incentives offered to Recipient or Developer or commitment by Recipient or Developer will only be binding if mutually agreed to in writing.

7. **Real Property:** LEDA shall convey the surface estate of Lot 11, Lubbock Business Park (the "Property") to Developer or its designee. The Property will be in "building condition" (i.e., raw land without the existence of structures or underground pipes or other impediments to building). LEDA will provide a plat survey and see that utilities (water, gas, electric, sewer, fiber optics, telephone, etc.) are provided adjacent to the property line of the Property. The conveyance of the Property shall be by special warranty deed with only such exceptions to title as are reasonably acceptable to Developer or its designee. Prior to conveyance of the Property, Developer and Recipient shall provide to LEDA a copy of its construction contract for construction of the Project as well as a list of machinery being purchased for the Project. Should the Property be conveyed and construction not commence within one year from the date of conveyance, the Property shall be reconveyed to LEDA for no consideration. The Property will be conveyed subject to the covenants, restrictions and rules of the Lubbock Business Park. Developer, Recipient and their successors in interest, if any, in their respective capacities, shall comply with such covenants, restrictions and rules.

8. **Capital Incentive to be Awarded and Terms of Award**

Initial Capital Investment (exclusive of Real Property, if any):

LEDA hereby grants to Recipient a potential incentive of \$50,000.00 with payments to be expressly made under the following terms and conditions:

- A. LEDA agrees to pay up to \$50,000.00 of Project costs, payable over five (5) years, conditioned upon the creation of Primary Jobs pursuant to and in compliance with LEDA's Sliding Scale after Recipient's written substantiation of such employment and under the following terms and conditions:

Recipient agrees to establish a Baseline Employment Level and Census (as defined herein) and shall timely provide such information to LEDA or its designated audit representative when requested. Recipient agrees to maintain the Baseline Employment Level through the term of this Agreement and create and maintain the additional full-time job positions intended to qualify for the additional Project cost incentive, as offered by LEDA. Recipient shall earn one-fifth (1/5) of the additional Project cost incentive at each Measurement Date. Such earned portion shall be paid within a reasonable time following the completion of a yearly audit by LEDA or its designated representative, which payment shall be made within fifteen (15) days after LEDA's board review and approval of the audit. LEDA and its representative agree to maintain confidentiality of all of Recipient's records and to return all such records promptly to Recipient unless other mutually agreeable arrangements are made regarding record retention by Recipient or inspection access to LEDA.

- B. Recipient understands and agrees that in the event, other than as a result of a force majeure (as defined in Section 15.F below), there is a failure to meet its Target

Annual Compensation in the aggregate or attain its Target Job Positions, then LEDA shall have the right to make all necessary adjustments according to LEDA's Sliding Scale, not to exceed the sums as approved by LEDA's Board of Directors.

- C. In evaluating Recipient's Request and pursuant to Section 40(b) of the Act, it is the intention of the parties that, assuming Recipient is successful in total completion of Recipient's Project, its total Target Job Positions of 20 in number would ultimately result in a Target Annual Compensation of \$540,000.00 in the aggregate, or a total of \$2,700,000.00 over five years. Total capital investment cost estimate is \$6,000,000.00.

Each annual incentive installment shall be considered as earned in one-fifth (1/5) increments as of each Measurement Date during the Agreement when, by audit, it is confirmed that Recipient attained the Target Job Positions and the Target Annual Compensation.

**9. Conditions for Payment of Incentives:**

It is specifically agreed and understood by and between the parties that LEDA has agreed to make the Project payments strictly upon the following terms and conditions:

- A. Any use of LEDA's name for publicity in connection with Recipient's business or activities must be approved in advance by LEDA. It is understood that LEDA may make known its contributions to Recipient in whatever public manner LEDA deems appropriate.
- B. Recipient and Developer shall provide to LEDA resolutions or consents, authorizing the execution and performance of this Agreement, as well as timely delivery of all other information expressly called for in this Agreement.
- C. Recipient must maintain a business location in the City of Lubbock or Lubbock County; its legal status under federal and state law; and remain qualified to do business in the State of Texas.
- D. The operations or activities of Recipient, Developer and their employees at the Property shall be performed and conducted in a professional and businesslike manner and shall be in keeping with federal and state laws and regulations, and any ordinances of the City of Lubbock, and/or governmental entities (including Lubbock Business Park) which may have jurisdiction over operations and activities at the Property.
- E. Recipient shall provide for confidential review by LEDA's auditors all material reasonably necessary to insure compliance with the conditions of the incentive payments (including a base salary, overtime, and fringe benefits) and Recipient shall provide a sworn and certified statement by an officer of Recipient that the

information provided to LEDA is true and correct to the best of each officer's knowledge.

- F. Any information obtained by LEDA or its agents or assigns during negotiations leading up to the execution of the Agreement or otherwise about the business of Recipient have or will be returned upon the execution of this Agreement, subject to a right to a continuing examination by LEDA in order to comply with LEDA's reporting obligations, if any.
- G. It is agreed that Recipient intends for the acquisition and development of the Property to be by Developer and that the Developer will construct the improvements on the Property and lease the Property and improvements to Recipient on a 15 year lease with two 5 year options to extend the lease. LEDA shall be furnished with a signed copy of the lease agreement and a signed copy of the construction contract before the land is conveyed (and both of which may be a condition precedent to such conveyance).

**10. Payback Provisions and Events of Default:**

- A. Recipient and Developer acknowledge that LEDA and Recipient are required to remain in conformance with the statutory provisions of the Act and the GOVERNMENT CODE OF TEXAS. The parties hereto agree that in the event Recipient fails to comply with the provisions of this Agreement, then LEDA, in its sole discretion, may terminate this Agreement and permanently suspend all future payments to Recipient. Further, as statutorily mandated, if Recipient or Developer is found guilty of violating 8 U.S.C. § 1324(a)(f) and under the provisions of § 2264 *et seq.*, GOVERNMENT CODE OF TEXAS, the guilty party agrees to repay to LEDA the amount or value of all sums or items received under this Agreement, plus attorneys fees and legal pre-judgment interest, as required by statute.
- B. Should Recipient abandon or vacate the Property within 10 years from the date of conveyance by LEDA to Recipient, Recipient shall pay to LEDA the value of the Property at the time of the conveyance to Developer, which is stipulated to be the sum of \$66,000 per acre. Should Recipient fail and refuse to pay to LEDA that sum within one year from the date that Recipient vacates the Property, LEDA shall have the right to bring suit against Recipient for the value of the Property at the time of conveyance to Developer plus reasonable attorney fees. It is understood that should Recipient vacate the Property, the Property may only be used in a manner that satisfies the use of the restrictions of Lubbock Business Park and is included in one of the North American Industry classification System ("NAICS") sectors described in Section 501.002(12) of the Texas Local Government Code in effect on the date of this Agreement or as such list of sectors may be expanded from time to time. These restrictions shall be restrictions contained in the deed from LEDA to Developer and shall run with the land.

**11. Assignment, Merger, and Termination Due to Merger, Etc.:** This Agreement shall not be assignable, either in whole or in part. Termination as the result of assignment or merger or change in business form where Recipient is not the surviving entity shall not disqualify the remaining or new entity from applying to LEDA for new incentive consideration.

Notwithstanding anything herein to the contrary, this Agreement may be assigned, transferred or sold by Recipient or Developer without any approval or consent of LEDA to any principal, affiliate, or subsidiary of Recipient or to any entity which acquires all or substantially all of Recipient's assets by merger, acquisition or other business reorganization. As to other parties, this Agreement may not be assigned, transferred or sold without the written consent of LEDA, which such consent will not be unreasonably withheld, delayed or conditioned. No change of stock ownership, partnership interest or control of Recipient or transfer upon partnership or corporate dissolution of Recipient shall constitute an assignment hereunder.

**12. Insurance/Hold Harmless:** Recipient and Developer covenant and agree to provide, assign, and include LEDA as an additional insured to Recipient's and Developer's policies of commercial general liability insurance with a minimum limit of \$2,000,000 regarding Recipient's and Developer's ownership and operations on the Property whereby LEDA is provided insurance coverage against all liability for injury or damages caused by Recipient, Developer, their employees, customers, clients, patrons, visitors, or guests. Additionally, Recipient and Developer agree to indemnify and hold LEDA harmless from all loss, cost, or expenses (including attorneys fees) arising out of the existence of this Performance Agreement or any interpretation, application, or performance thereunder except to the extent caused by the negligence or willful misconduct of LEDA.

**13. No Privity of Endeavor Nor Joint Venture:** It is specifically agreed that there shall be no privity of endeavor nor joint venture whatsoever between LEDA, Recipient and Developer and the sole connection between the parties is the contribution of the economic assistance by LEDA under the restricted conditions as set forth herein and that such contributions as stated herein are for the sole purposes as set forth herein and it shall in no way be construed as a continuing basis of financial support by LEDA to Recipient or Developer. The parties hereto have entered into this Agreement in an arms-length transaction. No agency relationship or fiduciary relationship is intended to be created by this Agreement and no such relationship shall be determined to exist.

**14. Good Faith – Normal Business Operations:** The parties agree that this Agreement has been entered into in good faith and that each party shall act in good faith in complying with its provisions. The parties further agree to transact all their business under and that which relates to this Agreement in accordance with their normal business operations.



**15. Miscellaneous Provisions:**

**A. Notices:**

For the purposes of any notices to be given, pursuant to the terms of this Agreement, the parties shall use the following addresses or any other address as may be changed by the parties, upon written notice to the other party, as follows:

As to LEDA:

- (1) John Osborne  
CEO and President  
LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC.  
1500 Broadway, 6<sup>th</sup> Floor  
Lubbock, TX 79401
  
- (2) With a copy to:  
  
William F. "Pete" Baker  
Tommy J. Swann  
MCCLESKEY, HARRIGER, BRAZILL & GRAF, L.L.P.  
5010 University Avenue, 5<sup>th</sup> Floor  
P. O. Box 6170  
Lubbock, TX 79493

As to Lummus:

- (3) Stephen H. Marbut, President and CEO  
P. O. Box 0929  
Savannah, Ga. 31322-0929  
Physical Address:  
225 Bourne Boulevard  
Savannah, Ga. 31408-9586
  
- (4) Martin J. Amlung, VP and CFO  
P. O. Box 0929  
Savannah, Ga. 31322-0929  
Physical Address:  
225 Bourne Boulevard  
Savannah, Ga. 31408-9586

As to Developer:

- (5) Michael P. Ibe, Sole Member  
West South Plains, LLC  
10525 Vista Sorrento Parkway, Suite 110  
San Diego, CA 92121

Notices shall be deemed to be given upon the placing in the United States Mail, Certified Mail, Return Receipt Requested, to the above-described addresses or as may be changed, pursuant to the terms and conditions hereof.

- B. Entire Agreement: This instrument constitutes the entire agreement between the parties hereto and this Agreement cannot be altered, changed, or amended in any respect except by an instrument in writing duly executed by both parties.
- C. Governing Law and Performance: This Agreement shall be governed by the laws of the State of Texas and shall be deemed to be executed in and performance called for in Lubbock, Lubbock County, Texas.
- D. Partial Invalidity: In the event that any portion of this Agreement should be found or declared to be invalid for any reason, the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the parties. The parties agree that it is their intent for this Agreement to be determined as being an indivisible obligation of the parties.
- E. Binding Effect: This Agreement shall be binding upon the undersigned, their successors and assigns, subject to the express terms of this Agreement concerning assignment.
- F. Force Majeure: If any default or performance of any other covenant or term of this Agreement is delayed by reason of strike, riots, shortages of labor, materials, supplies, or transportation, war, civil commotion, act of God, governmental restrictions, regulations, or interference, fire, or other casualty, or any other circumstances beyond a signatory party's control, then the duty to do or perform the term or covenant, regardless of whether the circumstance is similar to any of those enumerated above or not, is excused during the delay period.
- G. Time is of the Essence: The parties agree that time is of the essence in the execution of this Agreement.
- H. Confidentiality. Except as otherwise required to be made available under Texas State Law, LEDA will keep the contents of this Agreement, as well as other communications and discussions with respect to the Project, strictly confidential,

and will consult with and obtain approval of Recipient prior to issuing any press release or otherwise making any public announcement or statement with respect to the transactions contemplated hereby. Recipient and Developer understand that this Agreement is subject to public disclosure under the Texas Public Information Act after the Agreement is entered into by all parties hereto.

EXECUTED on this 9<sup>th</sup> day of August, 2012.

LUBBOCK ECONOMIC DEVELOPMENT  
ALLIANCE, INC.

By: \_\_\_\_\_  
John Osborne, CEO and President

Date: \_\_\_\_\_

RECIPIENT:

LUMMUS CORPORATION

By: \_\_\_\_\_  
Stephen H. Marbut, President and CEO

Date: \_\_\_\_\_

WEST SOUTH PLAINS, LLC

By:   
Michael P. Ibe, Sole Member

Date: 8/9/12

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EXECUTED on this 9<sup>th</sup> day of August, 2012.

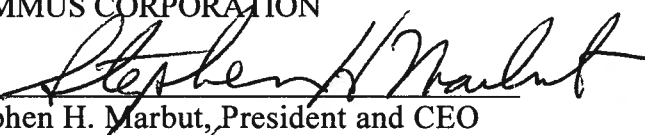
LUBBOCK ECONOMIC DEVELOPMENT  
ALLIANCE, INC.

By:   
John Osborne, CEO and President

Date: 08/09/12

RECIPIENT:

LUMMUS CORPORATION

By:   
Stephen H. Marbut, President and CEO

Date: 8/9/12

WEST SOUTH PLAINS, LLC

By: \_\_\_\_\_  
Michael P. Ibe, Sole Member

Date: \_\_\_\_\_