

STATE OF TEXAS

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COUNTY OF LUBBOCK

PERFORMANCE AGREEMENT

This Performance Agreement (the "Agreement") is made effective on December 18, 2019 by and between LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC., a Texas nonprofit corporation (hereinafter referred to as "LEDA") and Simmons Pump and Supply, LLC, a domestic for-profit corporation, (hereinafter referred to as "Recipient"), 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. (Sec 501.001 et seq, Local Government Code, formerly Sec 5190.6, VACS.) 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 the building of a new warehouse facility located at 2805 Interstate 27, Lubbock, Texas (NAICS 423830) with projected employment of 17 new employees. Its business project is anticipated to result in 17 new Primary Jobs for the City of Lubbock, with a Target Annual Compensation of \$737,040, in the aggregate, or a total of \$4,469,358 over five years. Total capital investment is estimated to be \$2,850,000.
- C. Recipient is a domestic for-profit corporation authorized to do business in Texas.

3. **Purpose:** The purpose for this Agreement is to formalize the agreements between LEDA and Recipient 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 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. A failure to perform any obligation by Recipient 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 Sec 501.001 et seq, Local Government Code, formerly Sec 5190.6, VACS.
- 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 Simmons Pump and Supply, LLC, a domestic for-profit corporation authorized to do business in Texas, and the recipient party to this Agreement.
- D. "Project" shall mean the project identified in Paragraph 2B, above.
- E. "Recipient Request" may include the identification of the cost of the project by Recipient to the facility or other purpose within Section 2(4) of the Act.

5. **Representations of Recipient:**

- A. Recipient represents that it will utilize the incentive provided towards costs involved and associated with the Project.
 - B. Recipient represents that it is authorized to do business in Texas and has authorization to enter into this Agreement on its behalf.
 - C. Recipient represents that it has sought from LEDA economic assistance pursuing Recipient's Project.
 - 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.
 - 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 could result in payment adjustments.
 - F. Recipient understands and agrees that any variations as to any term of this Agreement or any terms or conditions of the incentives as stated must be mutually agreed to in written supplements or addenda since no oral agreements, amendments, or representations will be binding on either party.
 - H. Recipient agrees to participate in any LEDA sponsored wage and benefit surveys, as well as any marketing materials that focus on economic development for the City of Lubbock.
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6. **Representations by LEDA:**

- A. LEDA represents that it is established as an Industrial Development Corporation under the Act and further represents that 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 have determined the Project 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 commitment by Recipient will only be binding if mutually agreed to in writing.

7. **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 \$9,311.00 with payments to be expressly made under the following terms and conditions:

- A. LEDA agrees to pay as set forth herein up to \$9,311.00 of Project costs, payable in one lump sum, conditioned upon LEDA's receipt of the certificate of occupancy for their new "Project" and verification from Recipient of the cost associated with moving electric poles as required to complete construction of the "Project".

8. **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 must maintain a business location in the City of Lubbock or Lubbock County and its legal status under federal and state law duly and remain qualified to do business in the State of Texas.
 - C. The operations or activities of Recipient and its employees shall be performed and
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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 which may have jurisdiction over operations and activities.

- D. Recipient certifies that the Recipient does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Recipient is convicted of a violation under 8 U.S.C. § 1324a(f), Recipient shall repay the amount of the public subsidy provided under this Agreement, with interest at the legal pre-judgment interest rate, with attorney's fees, not later than the 120th day after the date LEDA notifies Recipient of the violation.
- E. 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, 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. Such information shall be considered confidential and beyond the scope of any Open Records request as proprietary information.

9. **Payback Provisions and Events of Default:** Recipient acknowledges that LEDA and Recipient are required to remain in conformance with the statutory provisions of the Act. The parties hereto agree that in the event Recipient fails to comply with the provisions of this Agreement, including but not limited to Paragraphs 5E, 8C, 8D, 8E or 11, and after written notice and failure to cure the violation, then LEDA, in its sole discretion, may terminate this Agreement. Payments made through this agreement are paid after verification of completed project; therefore, payback provisions do not apply to this agreement.

10. **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 shall not disqualify the remaining or new entity from applying to LEDA for new incentive consideration.

11. **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 and Recipient 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. 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.

13. **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.

14. **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:

(1) John Osborne
CEO and President
LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC.
1500 Broadway, 6th Floor
Lubbock, TX 79401

(2) With a copy to:

Ann Manning
UNDERWOOD LAW FIRM, P.C.
111 West Loop 289
Lubbock, Texas 79416

(3) With a copy to:

Joe Riker
Simmons Pump and Supply, LLC
2805 Interstate 27
Lubbock, Texas 79404

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.

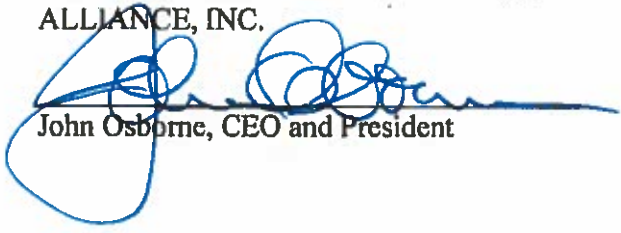
B. **Entire Agreement:** This instrument constitutes the entire agreement between the parties hereto and neither this Agreement nor any of the Exhibits attached hereto, if any, can be altered, changed, or amended in any respect except by an instrument in writing duly executed by both parties.

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.

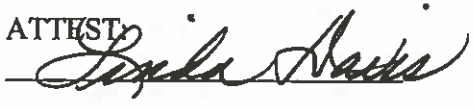
- D. Partial Invalidity: In the event that any portion of this Agreement should be found or declared to be invalid for any reason, the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the parties. The parties agree that it is their intent for this 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.

EXECUTED in multiple counterparts, each of which is an original, on this 18th day of December, 2019.

LUBBOCK ECONOMIC DEVELOPMENT
ALLIANCE, INC.



John Osborne, CEO and President

ATTEST:


RECIPIENT:

Simmons Pump and Supply, LLC

By: 

Its: 

ATTEST:
