

STATE OF TEXAS §
 §
COUNTY OF LUBBOCK §

PERFORMANCE AGREEMENT

This Performance Agreement (the "Agreement") is made effective on May 30, 2019 by and between LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC., a Texas nonprofit corporation (hereinafter referred to as "LEDA") and South Plains College (SPC), a two-year community college, and its subsidiaries (hereinafter collectively referred to as "Recipient"), by and through their duly authorized officers and affiliate organizations under the terms and conditions that follow.

WHEREAS, Recipient, a two-year community college, desires to purchase the City of Lubbock City Hall building located at 1625 13th Street, Lubbock, Texas, to remodel and put into operation a community college academic and career center and has asked LEDA to provide monetary assistance for such purposes;

WHEREAS, Recipient represents and warrants to LEDA that the academic and career center, when put into operation, will hold classes which will include select core and degree specific courses which will parallel university programs for students who plan to transfer to a university to complete the remaining years of a baccalaureate program;

WHEREAS, LEDA represents and warrants that in conformity with the legislative intent of the Development Corporations Act a community college career center promotes higher education opportunities that encourage and fosters the development and diversification for the economy of Texas and the elimination of unemployment and underemployment;

WHEREAS, LEDA represents and warrants that a community college career center contributes to the economic growth, full employment, welfare and prosperity of the residents of the State of Texas;

WHEREAS, LEDA represents and warrants that this Project has been found by its board of directors to be suitable for use as a career center compliant with §501.105 of the Development Corporations Act.

WHEREAS, based on such representations, LEDA desires to provide monetary support to purchase, remodel, and put into operation the Recipient's Academic and Career Center as set out in this Agreement.

NOW, THEREFORE, in consideration of these presents, which are made a contractual part hereof, LEDA and Recipient agree as follows:

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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 purchase and remodel of the current City of Lubbock City Hall building located at 1625 13th Street, Lubbock, Texas and the establishment of the Property as a community college academic and career center, (hereinafter referred to as "the Project").
- C. Recipient is a two-year community college formed under the laws of the State of 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 and LEDA'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 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. "Measurement Date" shall mean the date upon which the determination is made as to whether Recipient is in compliance with the conditions of this agreement. Measurement Dates shall be:
 - (1) Year One: January 1 of the calendar year of the completion of Construction
 - (2) Year Two: January 1 of the calendar year following Year One
 - (3) Year Three: January 1 of the calendar year following Year Two
 - (4) Year Four: January 1 of the calendar year following Year Three
 - (5) Year Five: January 1 of the calendar year following Year Four
 - (6) Year Six: January 1 of the calendar year following Year Five

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- D. "Payback Provisions" shall mean forfeiture of all unpaid incentives in accordance with the terms of this Agreement.
- E. "Project" shall mean the project identified in Paragraph 2B, above.
- F. "Recipient" shall refer to South Plains College and its subsidiaries, a two-year community college formed under the laws of the State of Texas, having its principal place of business in Levelland, Hockley County, Texas.
- G. "Term", as used herein, shall begin with the Start Date of the date of this Agreement, and end on December 31 in the sixth year following completion of construction of the Project (the "Termination Date") unless earlier breached by Recipient's failure to perform.
- H. "Property", as used herein, shall mean The City of Lubbock City Hall building, located at 1625 13th Street, Lubbock, Texas, also know as the Downtown Center.

5. Representations of Recipient:

- A. Recipient is a duly organized two-year community college.
- B. Recipient represents that it will utilize the incentive for reimbursement of the purchase price of the Property and to offset the costs of operating once the Property is operational as a community college academic campus.
- C. Recipient represents that it is authorized to do business in Texas and has authorization to enter into this Agreement on its behalf.
- D. Recipient represents that it has sought from LEDA economic assistance pursuing Recipient's Project.
- E. Recipient represents that it has conferred with attorneys of its own choosing and is fully knowledgeable of the terms of the Act and agrees to provide data to the Comptroller for the reporting requirements of the Act as set forth in Texas Tax Code Ann. §313.032, as well as all conditions precedent and subsequent as provided herein to be eligible for the incentives offered by LEDA, including the Payback Provisions.
- F. Recipient's performance of this Agreement is not in controversy of any law, rule, or regulation of any of Recipient's provisions by which it may be bound.
- G. 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 enter into a contract and to purchase the Property from the City of Lubbock and begin construction and remodeling on the Property.
- I. Recipient agrees to establish the Property as a community college academic and career center and commence holding classes at the Property beginning the semester following the completion of construction of the Project. The classes offered will include core and degree specific courses which parallel university programs for students who plan to transfer to a university to complete the remaining years of a baccalaureate program.
- J. Recipient agrees to remain operational as a community college academic and career center for a period of at least 10 years from the date the first class is held at the Downtown Center and to meet with LEDA to evaluate progress of the Project as outlined in the Performance Agreement after six (6) years of being operational.

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.
- C. LEDA represents that this Performance Agreement is fully compliant with the requirements and purposes of the Act, the provisions of LEDA's charter and has been approved by the governing board of LEDA's authorizing unit(s).

7. **Recipient's Contingency on Board of Regents Approval.** The validity of Recipient's execution, delivery, and performance of this Agreement is subject to the due authorization of the South Plains College Board of Regents as evidenced by written minutes or other written approval thereof.

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

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

LEDA hereby grants to Recipient a potential incentive of \$13,000,000 with payments to be expressly made under the following terms and conditions:

- A. Property by the Recipient
 - a. LEDA agrees to pay Recipient \$10,000,000 as set forth herein, payable in 2 equal payments of \$5,000,000 each. The first payment being made

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simultaneous with the closing of the acquisition of the Property by the Recipient. The second payment being made upon the receipt of permits from the City of Lubbock to begin construction and remodeling of the Property, or in LEDA's next fiscal year following the first Five Million Dollar (\$5,000,000) payment, , whichever is later.

- b. LEDA and Recipient acknowledge that due to age of the building identified for the Project, construction cost could substantially exceed incentives received by Recipient. In such case, LEDA agrees to in good faith endeavor to assist Recipient in provision of additional funding. LEDA shall have the right to audit project construction cost should Recipient request additional funding pursuant to this paragraph.

B. Business operations by the Recipient:

1. LEDA agrees to pay Recipient \$3,000,000 as set forth herein, payable in 6 equal payments of \$500,000 each. The first payment being made upon LEDA's receipt of proof of commencement of classes at the Property. The subsequent payments being made on an annual basis on anniversary of the first payment date.

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.
- B. Recipient shall have delivered to LEDA evidence of its authority for the execution and performance of this Agreement, as well as timely delivery of all other information expressly called for in this Agreement.
- C. For the duration of this Agreement, in order to receive benefits hereunder, Recipient must maintain educational operations resulting in academic classes; its legal status under federal and state law duly and remain qualified to do business in the State of Texas.
- D. The operations or activities of Recipient and its employees 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 which may have jurisdiction over operations and activities of the Project and the Recipient.
- F. 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.

10. **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 5H, 5J, 9C, 9D, or 11, and after written notice and failure to cure the violation within a reasonable period of time after such notice, then LEDA, in its sole discretion, may terminate this Agreement and permanently suspend all future payments to Recipient. Should the provisions of paragraph 5H fail to be met by the Recipient, LEDA reserves the right to request reimbursement of any amount paid to the Recipient for the Project. Should the provisions of paragraph 5I fail to be met by the Recipient, LEDA reserves the right to request reimbursement of any amount paid to Recipient for the Project. Should the provisions of paragraph 5J fail to be met by the Recipient, LEDA reserves the right to request reimbursement of any amount paid to the Recipient for the Project in an amount proportionate to the years remaining of the 10 year period the Recipient is not operational at the Property. This provision survives the termination of this Agreement.

11. **Assignment:** This Agreement shall not be assignable, either in whole or in part, except this Agreement may be assigned to any successor or assign of Recipient by merger, consolidation or transfer of all or substantially all of the assets. Any assignment not authorized by this Agreement shall not disqualify the remaining or new entity from applying to LEDA for new incentive consideration.

12. **No Joint Venture:** It is specifically agreed that there shall be no 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
Attorney at Law
Underwood Law Firm, PC
P.O. Box 16197
Lubbock, Texas 79490

(3) Dr. Robin Satterwhite
President
South Plains College
1401 College Ave.
Levelland, Texas 79336

With a copy to:

Will Cabler JD/CPA
The Fowler Law Firm
8310 N. Capital of Texas Hwy, Ste. 150
Austin, Texas 78731
(wcabler@thefowlerlawfirm.com)

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. Notwithstanding anything contained herein to the contrary, should it be determined by a court of law that LEDA cannot legally provide the benefit described in this Agreement then all future obligations of the Recipient shall be terminated.

- E. Binding Effect: This Agreement shall be binding upon the undersigned, their successors and assign by merger, 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 and all timeframes for performance under this Agreement shall be extended accordingly.
- G. Time is of the Essence: The parties agree that time is of the essence in the execution of this Agreement.

[signature page follows]

EXECUTED in multiple counterparts, each of which is an original, on this 22 day of May, 2019.

LUBBOCK ECONOMIC DEVELOPMENT
ALLIANCE, INC.


John Osborne, CEO and President

ATTEST:



RECIPIENT:

South Plains College

By: 

Its: President
5/30/19