

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

Between the City Of Harker Heights, Texas and Texas A&M University – Central Texas Foundation

Background

A. On or about December 19, 2000, the City Council of the City of Harker Heights adopted an Economic Development Program (the “Program”) as authorized by: (1) the City’s broad and inherent authority as a home-rule municipality under its Charter; (2) Article XI, Section 5, of the Texas Constitution; (3) Article VIII, Section 52-a of the Texas Constitution; and Chapter 380 of the Texas Local Government Code. The Program provides for the City of Harker Heights (the “City”) to provide economic development incentive funds to: support the creation of new jobs or improve wage scales for existing jobs; make the City more attractive to new residents, businesses, and visitors; encourage residential growth and development; expand the City’s tax base; and generally to promote local economic development.

B. Texas A&M University – Central Texas (the “University”) is a state supported university located in the neighboring city of Killeen, Texas. According to a report prepared by TIP Strategies, “*Operation Economic Transformation*,” dated April, 2006, the University may have as many as 3,500 students over the first ten years. If this is the case, the University will have annual operating expenditures of \$36.4 million and 491 faculty and staff members. The annual payroll will be \$26.835 million. Further, the University and students will generate an estimated 27,446 out-of-town visitor days for the area.

C. According to a report dated January, 2009, prepared by Impact DataSource entitled “*A Report of the Economic Impact of Texas A&M-Central Texas on Harker Heights, Texas*,” although the University campus will be in Killeen, the City will receive an estimated 15% of the economic impact generated by the University.

D. The City Council has found and determined that it is in the public interest to support new enrollment by means of certain incentives to be made subject to the terms of this Agreement.

Agreement

1. **Definitions.** In this Agreement:

(a) *Agreement* means this Agreement.

(b) *City* means the City of Harker Heights, Texas, a home rule municipal corporation located in Bell County, Texas.

(c) *Foundation* means Texas A&M University – Central Texas Foundation, a Texas non-profit corporation, having its principal place of business in Killeen, Texas.

(d) *Incentives* means, collectively, all economic development incentives described in Paragraph 4 of this Agreement.

2. City Council Findings. By approval of this Agreement, the City Council of the City of Harker Heights finds and determines that:

(a) The Incentives will facilitate the growth of the University by enabling the University to grow faster, than would be possible absent the Incentives; and

(b) Within the first ten years of being established, the University can reasonably be expected to result in an economic impact on the City of up to:

- (1) 825 new direct and indirect jobs;
- (2) \$373,413,202.00 in salaries to direct and indirect workers;
- (3) \$22,998,171 in taxable sales; and
- (4) \$2,823,406.00 in value of property added to the tax rolls.

3. Foundation Obligations.

(a) *Sustain the University.* The Foundation will work diligently to sustain the growth of the University in Killeen, Bell County, Texas as soon as reasonably possible.

(b) *Incentives to Fund Scholarships.* The Incentives will be used for the sole and exclusive purpose of establishing one or more perpetual scholarship funds ("Funds") subject to the oversight, management and control of the Foundation. The Funds may be administered through one or more existing trusts or funds, and additional contributions to the principal of these Funds may be accepted. The income accruing to the Funds shall be awarded annually to one or more qualified candidates who would not otherwise be financially able to attend the University. An appointing committee approved by the Foundation shall establish additional conditions for the award of one or more scholarships in accordance with acceptable modern standards of scholarship administration and consistent with the purpose of this Agreement, and shall institute rules to assure that all candidates meet and maintain appropriate academic standards.

(c) *Legal Compliance.* The Foundation shall strictly comply with this Agreement and all applicable rules, orders, laws and regulations, as the same may be amended from time to time, concerning the use of the Incentives.

(d) *Reimbursement After Breach of Agreement.* If the City terminates this Agreement because of the Foundation's breach of this Agreement, the Foundation will, within 60 days following termination, return the unused principal and accrued interest of the Funds to the City, and reimburse the City for all Incentives not previously used or returned in accordance with this Agreement. The reimbursement payment must include interest on each payment at the City's weighted average yield of its investment portfolio from the date of the Incentive to the date of Foundation's repayment. The Foundation's obligations under this paragraph shall survive termination of this Agreement.

(e) *Reports and Inspections.*

- (1) Not later than the 20th class day of the Spring and Fall semesters, the Foundation shall provide the City with a detailed report concerning the use and management of the Incentives during the preceding twelve (12) months. In addition, the Foundation will certify to the City that it has complied with the terms of this Agreement and provide sufficient written information, records, and documents, to support its certification of compliance.
- (2) Upon written request of the City, the Foundation will promptly provide to the City any additional information reasonably necessary to determine if the Foundation has complied with this Agreement. The Foundation shall prepare and maintain its records in compliance with good business and accounting practices consistently applied.
- (3) Nothing herein shall be construed to require the Foundation to disclose information made confidential by law.
- (4) All information required to be provided by the Foundation to the City shall be sent to the attention of the City's Finance Director at the address specified for giving notice in this Agreement.

(f) *Foundation Restrictions.* During the term hereof, the Foundation shall not, without the City's prior written consent: (1) change its name or jurisdiction of organization; (2) amend its capital structure, liquidate or dissolve, or become a party to any merger, conversion or consolidation, or otherwise transfer control or ownership of the Foundation, or form or acquire any subsidiary; (3) make any substantial change to its present executive or management personnel; or (4) change the state in which its place of business (or chief executive office if the Foundation has more than one place of business) is located.

(g) It shall be an event of default if, during the term hereof: (1) a receiver is appointed for the Foundation, its general partner or any guarantor hereof; (2) a bankruptcy or insolvency proceeding is commenced against or by the Foundation; or (3) the Foundation is dissolved.

(h) *Notice Required.* The Foundation shall notify the City immediately of any event of default hereunder and of any material change in: (1) the Foundation's name or mailing address, (2) the Foundation's financial condition; (3) the feasibility of establishing the University as contemplated herein; or (4) any representation or warranty made by the Foundation in this Agreement.

4. Economic Incentives to the Foundation. As consideration for Foundation's contractual obligations hereunder and subject to Foundation's strict, faithful and timely performance thereof, the City will upon the execution of this Agreement by all parties make a

single economic incentive payment to the Foundation in the amount of fifty thousand dollars (\$50,000.00.) The incentive shall be paid from current revenues in the City's General Fund.

5. **Term.** This Agreement shall be effective from and after January 15, 2011, regardless of when signed, and shall terminate as provided herein unless extended by mutual agreement of the parties.

6. **Default, Termination, and Remedies.**

(a) *Notice of Default; Termination.* The party alleging a default hereunder will give the other party not less than thirty (30) days' written notice, measured from the date of certified mailing, specifying the nature of the alleged default and, when appropriate, the manner in which the alleged default may be satisfactorily cured. Notwithstanding the foregoing sentence, if the nature of the alleged default is such that the giving of such written notice is impractical due to a threat of harm to life or property then the party alleging the default or breach shall give the other party such notice as may be reasonable under the circumstances. If the defaulting party fails to cure the default within the time allowed, the party giving the notice may terminate this Agreement by written notice specifying the date of termination, or exercise any other available remedy.

(b) *Remedies Cumulative.* The rights and remedies provided in this Agreement or under other laws are cumulative, and the exercise of any particular right or remedy does not preclude the exercise of any other right or remedy.

(c) *Waivers in Writing.* All waivers must be in writing and signed by the party to be bound. Failure or delay in giving notice of default shall not constitute a waiver of any default, nor shall it change the time of default. Except as otherwise expressly provided in this Agreement, any failure or delay by either party to assert any of its rights or remedies as to any default shall not operate as a waiver of the default, nor shall it deprive the party of the right to institute and maintain any actions or proceedings it deems necessary to protect or enforce its rights or remedies.

(g) *Mediation.* Any dispute between the parties related to this Agreement which is not resolved through informal discussion will be submitted to a mutually acceptable mediation service or provider. The parties to the mediation shall bear the mediation costs equally. This paragraph does not preclude a party from seeking equitable relief from a court of competent jurisdiction.

(d) *Waiver of Jury and Certain Relief.* THE FOUNDATION AND THE CITY EACH WAIVE A TRIAL BY JURY of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Agreement, or any of its provisions. THE FOUNDATION AND THE CITY EACH WAIVE ALL CLAIMS FOR SPECIAL, INDIRECT, INCIDENTAL AND CONSEQUENTIAL DAMAGES.

(e) *Attorney's Fees & Court Costs.* The prevailing party in any legal proceeding related to this Agreement is entitled to recover reasonable attorney's fees and all costs of such proceeding incurred by the prevailing party.

(f) *Force Majeure.* No party may be deemed to be in breach of this Agreement if performance of this Agreement is delayed, disrupted, or becomes impossible because of any act of God, war, earthquake, fire, strike, accident, civil commotion, epidemic, act of government, its agencies or offices, or any other cause beyond the control of the parties during the time, but only for so long as the event of force majeure reasonably prevents performance.

7. Foundation's Representations. As a material inducement to the City to enter into this Agreement, the Foundation warrants and represents to City that the following are true as of the effective date hereof, and will be true throughout the term hereof:

(a) The Foundation has full power and authority to execute and deliver this Agreement and to perform its obligations under it. This Agreement constitutes the valid and legally binding obligation of the Foundation, and all requisite action has been taken to make this Agreement valid and binding on the Foundation in accordance with its terms.

(b) Neither the execution and delivery of this Agreement by Foundation, nor the performance by the Foundation of its obligations hereunder, will violate any statute, regulation, rule, judgment, order, decree, stipulation, injunction, charge or other restriction of any government, governmental agency, or court to which Foundation is subject or any provision of the Certificate of Formation, Bylaws, or other governing instruments of the Foundation.

(c) There are no attachments, executions, or assignments for the benefit of creditors or voluntary or involuntary proceedings in bankruptcy or under any other debtor-in-relief laws pending against the Foundation.

(d) There are no other legal actions, suits, arbitrations, or other legal administrative or other governmental proceedings pending or threatened against the Foundation, its properties, assets, or business that, if adversely determined, could have a material adverse effect on the Foundation's ability to perform its obligations hereunder, and the Foundation is not aware of any facts which to its knowledge might result in any such action, suit, arbitration, or other proceedings.

(e) The Foundation is a non-profit corporation duly organized, validly existing, and in good standing under the laws of the State of Texas, and having authority to do business in Texas, and with full power to carry on its business as now being conducted.

(f) The Foundation possesses all permits, registrations, approvals, consents, licenses, trademarks, trademark rights, trade names, trade name rights, and copyrights needed to conduct its business in the manner contemplated by this Agreement.

(g) The Foundation has the expertise, experience, and resources necessary to perform its obligations hereunder with the highest degree of skill, diligence, efficiency and professionalism normally demonstrated by others engaged in performing similar activities throughout the State of Texas.

(h) All information furnished by or on behalf of the Foundation to the City is true and correct in all material respects.

The Foundation acknowledges that the City has justifiably relied upon the foregoing representations and warranties, and that City would not have entered into this Agreement but for the Foundation's representations as to the truthfulness and accuracy of the same.

8. Miscellaneous Provisions.

(a) *Foundation's Undertaking.* The Foundation's efforts to grow and sustain the University and its obligations hereunder constitute a private undertaking. The Foundation shall have full power over, and exclusive control of, the specific details of its undertaking, subject only to the general limitations and obligations under this Agreement and applicable local, state and federal statutes and regulations. Nothing contained in this Agreement or in any related document shall be construed as making the City and the Foundation joint venturers or partners, nor shall the Foundation be or represent itself to be a contractor, agent or employee of the City.

(c) *Law Governing and Venue.* The laws of the State of Texas govern this Agreement without regard to any conflict of laws provision and no lawsuit may be prosecuted on this Agreement except in a court of competent jurisdiction located in Bell County, Texas. The Foundation specifically consents to and waives any objections to *in personam* jurisdiction in Bell County, Texas.

(d) *Notices.* Any notice required to be given by one party to another must be given in writing addressed to the party to be notified at the address set forth below, (1) by delivering the notice in person, (2) by depositing the notice in the U. S. Mail, certified or registered, return receipt requested, postage prepaid, (3) by depositing the notice with Federal Express or another nationally recognized courier service for next day delivery, or (4) by sending the notice by telefax with confirming copy sent by mail. Notice deposited in the U.S. Mail is deemed effective on the date of deposit. Notice given in any other manner is effective when received by the party to be notified. For the purposes of notice, the addresses of the parties to whom notice is to be given, until changed by given notice to the other as provided herein, is as follows:

If to the City: City of Harker Heights
ATTN.: City Manager
P.O. Box 2518
Harker Heights, TX 76548
Fax: (254) 953-5612
scarpenter@ci.harker-heights.tx.us

If to Foundation: Texas A&M University – Central Texas Foundation
ATTN.: Pete Taylor
5004 Oak Park Circle N.E.
Atlanta, GA 30324
Email: ptaylor03@aol.com

(e) *Assignment.* The Foundation may not assign this Agreement to any other person or entity unless the City consents in writing to the assignment, and any attempted or purported assignment in the absence of such consent shall be void.

(f) *City Authority.* The City's City Manager or any employee authorized in writing by the City Manager is authorized to act on behalf of the City in the administration or enforcement of this Agreement.

(g) *Severability.* If any provision hereof shall be finally declared void or illegal by any court or administrative agency having jurisdiction, the entire Agreement shall not be void, but the remaining provisions shall continue in effect as nearly as possible in accordance with the original intent of the parties.

(h) *Binding Effect.* This Agreement shall be binding upon, and shall inure to the benefit of, the parties' respective successors and permitted assigns.

(i) *Third Party Beneficiaries.* There are no third-party beneficiaries of this Agreement.

(j) *Interpretation.* Each party has carefully read this entire Agreement, understands the meaning and effect of each and every provision contained herein, and acknowledges that it has relied on its own judgment in entering into this Agreement. Each party executes this Agreement only after first having obtained, or having had the opportunity to obtain, competent legal advice. The use of the masculine or neuter genders herein shall include the masculine, feminine and neuter genders. The singular form shall include the plural when the context requires. Headings used throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held to explain, restrict, modify, amplify or aid in the interpretation or construction of the meaning of the provisions of this Agreement. The terms "hereof," "hereunder" and "herein" shall refer to this Agreement as a whole, inclusive of all exhibits, except as otherwise expressly provided. This Agreement represents the result of extensive discussion between the parties, and thus should not be construed strictly for or against either party.

(k) *Entire Agreement.* This Agreement is executed in multiple originals, each of which is deemed to be an original. This Agreement, including all exhibits, constitutes the entire understanding and agreement of the parties and supersedes all other agreements, negotiations, and understandings between the parties. The parties acknowledge that neither has made any representation to induce execution of this Agreement, except such representations as are specifically set forth herein. This Agreement may be cancelled or amended by mutual consent of the parties, and to be effective an amendment or agreed cancellation must be in writing and signed by each party in a form suitable for recording in the official records of Bell County. The exhibits, attachments and addenda which are a part of this Agreement are: None.

CITY OF HARKER HEIGHTS

TEXAS A&M UNIVERSITY – CENTRAL TEXAS FOUNDATION

By: 
Steve Carpenter, City Manager

By: 

Title: Chairman

Date: 5-2-11

Date: 28 April 2011

ATTEST:


Patricia Brunson, City Secretary

