

# **CONTRIBUTION IN AID OF CONSTRUCTION AGREEMENT**

As of October 20, 2015, this Contribution In Aid of Construction Agreement (“Agreement”) is entered into between the City of San Marcos, Texas (the “City”), a Texas municipal corporation, and Amazon.com.kydc LLC, a limited liability company organized in the State of Delaware (“Amazon”) and duly authorized to conduct business in the State of Texas (the “State”). The City and Amazon may also be referred to collectively as the “Parties” or individually as a “Party.” Capitalized terms not otherwise defined have the meaning given them in Article II.

## **ARTICLE I RECITALS**

**Section 1.01.** Amazon is an electronics products and internet retail sales company with distribution and fulfillment centers in locations in the United States and other countries.

**Section 1.02.** City and Amazon previously entered into a Chapter 380 Economic Development Incentive Agreement on July 21, 2015 under which Amazon agreed to build (or cause to be built) and operate an approximately 855,000 square-foot fulfillment center with a capital investment of approximately \$60,000,000 in building improvements, and approximately \$131,000,000 in personal property, furniture, fixtures, equipment and inventory at the Project in the City, and in which Amazon will provide at least 350 Jobs and an aggregate annual payroll of at least \$11,284,000.

**Section 1.03.** The fulfillment center is currently under construction and will require, before completion, the extension of electric service at an estimated cost of \$342,546 for a three phase radial Electric Service.

**Section 1.04.** The San Marcos Electric Utility Rules and Regulations allow the City to participate in the cost of electric service extensions where it can be determined that annual revenues to be paid by a large commercial or industrial electric customer (excluding pass through Fuel and Power Cost Recovery) will generate margins above the cost of constructing the extensions.

**Section 1.05.** Amazon has projected that it will use 108,077,340 kWh of electric power during the five year term of this Agreement which the City has determined would generate annual revenues exceeding the cost of constructing the extensions.

**Section 1.06.** For the reasons stated in these Recitals and in consideration of the mutual benefits to and promises of the Parties set forth below, the Parties are entering into this Agreement and agree to the terms and conditions set forth in this Agreement.

## **ARTICLE II DEFINITIONS**

**Section 2.01.** “*Affiliate*” means any entity that directly or indirectly controls, is controlled by, or is under common control with, Amazon.com Inc. or Amazon.

**Section 2.02.** “*Business*” means the operation by Amazon or its Affiliate of an approximately 855,000 square-foot fulfillment center in San Marcos, Texas.

**Section 2.03. “Effective Date”** means the date that Amazon begins drawing electric power at the fulfillment center through the Electric Service.

**Section 2.04. “Electric Service”** means the three phase electric power service provided to the fulfillment center through either a dual feed or radial feed configuration, to be selected by Amazon.

**Section 2.05. “Extension Cost Estimate”** means \$342,546 for a three phase radial feed Electric Service.

**Section 2.06. “Incentive”** means the City’s cost participation in the amount of \$252,115 in the cost of extending Electric Service.

**Section 2.07. “Incentive Repayment”** means a payment in the amount of \$126,057.50 to be paid by Amazon to City under Section 4.02 of this Agreement if Amazon fails to use at least 97,269,606 kWh of electric power at the fulfillment center during the Term of this Agreement or fails to maintain an annual average Power Factor of at least 97% in any year during the Term hereof.

**Section 2.08. “Power Factor”** is the ratio of kilowatts to kilovolt-amperes (kW / kVA). kW (true power) is the demand; kVA is the apparent power.

**Section 2.09. “Term”** of this Agreement shall be a period of five years from the Effective Date unless sooner terminated under Section 4.02. However, the Term of this

Agreement shall be extended thereafter for the limited purpose of Amazon making the Incentive Repayment if one is required under Section 4.02.

### **ARTICLE III**

#### **CITY'S CONTRIBUTION IN AID OF CONSTRUCTION**

**Section 3.01. Consideration.** City's agreement to make a contribution in aid of construction as provided for in this Article III is made in consideration for Amazon's performance of its obligations under Article IV of this Agreement.

**Section 3.02. City's Capital Contribution.** City agrees to contribute the sum of \$252,115 toward the actual cost of the Electric Service. Prior to commencement of construction, Amazon shall pay City the balance of the Extension Cost Estimate to be determined by subtracting \$252,115 from \$342,546, the estimated cost of a three phase radial feed Electric Service).

**Section 3.03. City's Construction Obligation.** City shall make best effort to construct or cause the Electric Service to be constructed on or before February 1, 2016 subject to Amazon's performance of its obligations under Section 4.01 of this Agreement and subject to any delays caused by the occurrence of a Force Majeure Event. If a Force Majeure Event occurs, the construction deadline in this Section 3.03 shall be extended by a period of time mutually and reasonably agreed upon by the Parties. "Force Majeure Event" means any event or occurrence that is not within the control of City and prevents it or its contractor from completing the construction of the Electric Service including without limitation, any act of God; act of a public enemy; war; riot; sabotage; blockage; embargo; failure or inability to secure materials, supplies or labor through ordinary sources; labor strike, lockout or other labor or industrial disturbance

(whether or not on the part of City or its contractor); civil disturbance; terrorist act; power outage; fire, flood, windstorm, hurricane, earthquake or other casualty; any law, order, regulation or other action of any governing authority other than the City; any action, inaction, order, ruling moratorium, regulation, statute, condition or other decision of any governmental agency other than the City having jurisdiction over the City or the City's operations.

#### **ARTICLE IV AMAZON'S OBLIGATIONS**

**Section 4.01. Payment of Construction Cost Estimate Balance and Excess Construction Cost.** On or before October 20, 2015 Amazon shall notify City of its selection of either a dual feed or radial feed Electric Service for the fulfillment center and shall pay City the balance of the Extension Cost Estimate due after subtracting \$252,115 from \$342,546 (the estimated cost of a three phase radial feed Electric Service). If the actual cost of construction of the Electric Service exceeds the Extension Cost Estimate, and such increase in cost does not arise out of or is not related to the negligence or misconduct of the City or the City's employees, officials or officers, Amazon shall pay the difference to City before the Electric Service to the fulfillment center will be energized.

**Section 4.02. Incentive Repayment.** Amazon acknowledges that City's agreement to cost participate in the construction of the Electric Service in the amount of \$252,115 is an incentive that is based upon Amazon's estimate of the electric power usage at the fulfillment

center and the resulting revenue to be received by the City over the five year Term of this Agreement based on the current Large General Service-Secondary electric rate. Amazon shall make an Incentive Repayment to City in the amount of \$126,057.50 if Amazon fails to use at least 97,269,606 kWh (90% of estimated consumption) of electric power during the five year Term of this Agreement or fails to maintain an annual average Power Factor of at least 97% during any calendar year within the Term hereof. The Incentive Repayment shall be made by Amazon within thirty (30) days of City's notification that the payment is due. Amazon's failure to make the Incentive Repayment when due shall constitute an event of default under this Agreement and a cross-default event that entitles City to exercise the same rights and remedies provided in Section 9.04(b) of Chapter 380 Economic Development Agreement made between City and Amazon on July 21, 2015.

## **ARTICLE V REPRESENTATIONS AND WARRANTIES OF AMAZON**

As of the Effective Date, Amazon represents and warrants to the City, as follows:

**Section 5.01. Organization.** Amazon is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware and authorized to conduct business in the State. The activities that Amazon and its Affiliates propose to carry on at the Land may lawfully be conducted by Amazon and its Affiliates.

**Section 5.02. Authority.** The execution, delivery and performance by Amazon of this Agreement are within Amazon's powers and have been duly authorized.

**Section 5.03. Valid and Binding Obligation.** This Agreement is the legal, valid and binding obligation of Amazon, enforceable against Amazon in accordance with its terms except

as limited by applicable relief, liquidation, conservatorship, bankruptcy, moratorium, rearrangement, insolvency, reorganization or similar laws affecting the rights or remedies of creditors generally, as in effect from time to time.

**Section 5.04. No Defaults.** To the actual knowledge of the individual signing this Agreement, the persons authorizing this Agreement, and the Amazon representatives that negotiated this Agreement, Amazon is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any agreement or instrument to which Amazon is a party or by which Amazon or any of its property is bound that would have any material adverse effect on Amazon's ability to perform under this Agreement.

## **ARTICLE VI**

### **PERSONAL LIABILITY OF PUBLIC OFFICIALS**

#### **AND LIMITATIONS ON CITY OBLIGATIONS**

**Section 6.01. Personal Liability of Public Officials.** No employee or elected official of the City shall be personally responsible for any liability arising under or growing out of this Agreement.

**Section 6.02. Limitations on City Obligations.** The Incentive Payment and any other financial obligation of the City hereunder shall be paid solely from lawfully available funds that have been budgeted and appropriated each year during the Term by the City as provided in this Agreement. Under no circumstances shall the City's obligations hereunder be deemed to create any debt within the meaning of any constitutional or statutory provision.

## **ARTICLE VII**

### **MISCELLANEOUS**

**Section 7.01. Entire Agreement.** This Agreement, including any exhibits hereto, contains the entire agreement between the parties with respect to the transactions contemplated herein.

**Section 7.02. Amendments.** This Agreement may only be amended, altered, or terminated by written instrument signed by all parties.

**Section 7.03. Assignment.** Neither Party may assign this Agreement without the prior written consent of the other Party, except that Amazon may assign this Agreement in whole or in part to an Affiliate or in connection with any merger, reorganization, sale of all or substantially all of its assets or any similar transaction; provided that Amazon provides the City with written notice promptly after any such assignment. The Agreement will be binding upon, inure to the benefit of, and be enforceable by the Parties and their respective successors and assigns.

**Section 7.04. Waiver.** No term or condition of this Agreement shall be deemed to have been waived, nor shall there be any estoppel to enforce any provision of this Agreement, except by written instrument of the Party charged with such waiver or estoppel.

**Section 7.05. Notices.** Notices under this Agreement are sufficient if given by nationally recognized overnight courier service, certified mail (return receipt requested), facsimile with electronic confirmation, or personal delivery to the other Party at the address below. If no address is listed for a Party, notice to such Party will be effective if given to the last known address. Notice is effective: (a) when delivered personally, (b) three business days after sending by certified mail, (c) on the business day after sending by a nationally recognized courier service, or (d) on the business day after sending by facsimile with electronic confirmation to the sender. Each Party may update its contact information by notice to the other. Routine business



and technical correspondence must be in English, and may be in electronic form. The contact information for each Party is as follows:

Amazon: Amazon.com.kydc LLC  
Attn: Director of Economic Development  
410 Terry Avenue North  
Seattle, Washington 98109  
Fax: (206) 266-7010  
Email: economicdevelopment@amazon.com

With a copy to: Attn: General Counsel (Real Estate)  
410 Terry Avenue North  
Seattle, Washington 98109  
Fax: (206) 266-7010  
Email: contracts-legal@amazon.com

City: City of San Marcos, Texas  
c/o City Manager  
630 E. Hopkins  
San Marcos, Texas 78666  
Telephone: (512) 393- 8100

**Section 7.06. Applicable Law and Venue.** This Agreement is made, and shall be construed and interpreted under the laws of the State. Venue for any legal proceedings shall lie

in State courts located in Hays County, Texas. Venue for any matters in federal court will be in the United States District Court for the Western District of Texas, Austin Division.

**Section 7.07. Severability.** In the event any provision of this Agreement is illegal, invalid, or unenforceability under the applicable present or future laws, then, and in that event, it is the intention of the Parties that the remainder of this Agreement shall not be affected thereby, and it is also the intention of the parties to this Agreement that in lieu of each clause or provision that is found to be illegal, invalid, or unenforceable a provision be added to this Agreement which is legal, valid and enforceability and is a similar in terms as possible to the provision found to be illegal, invalid or unenforceable.

**Section 7.08. Third Parties.** The City and Amazon intend that this Agreement shall not benefit or create any right or cause of action in or on behalf of any third-party beneficiary, or any individual or entity other than the City and Amazon or permitted assignees of the City and Amazon, except that the indemnification and hold harmless obligations by Amazon provided for in this Agreement shall inure to the benefit of the indemnitees named therein.

**Section 7.09. No Joint Venture.** Nothing contained in this Agreement is intended by the parties to create a partnership or joint venture between the Parties, and any implication to the contrary is hereby expressly disavowed. It is understood and agreed that this Agreement does not create a joint enterprise, nor does it appoint either Party as an agent of the other for any purpose whatsoever. Except as otherwise specifically provided herein, neither Party shall in any way assume any of the liability of the other for acts of the other or obligations of the other.

**Section 7.10. Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be considered an original, but all of which constitute one instrument.

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**EXECUTED** in duplicate originals to be effective as of the Effective Date.

**CITY OF SAN MARCOS, TEXAS:**

By: \_\_\_\_\_

Jared Miller, City Manager

**AMAZON.COM.KYDC LLC:**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_





