

AN ORDINANCE **2006-06-29-0740**

APPROVING A ONE-TIME, CHAPTER 380 ECONOMIC DEVELOPMENT REIMBURSEMENT GRANT WITH LOWE'S HOME CENTERS, INC. OF UP TO \$300,000.00 FOR WATER UTILITY INFRASTRUCTURE AND OTHER RELATED PROJECT COSTS.

* * * * *

WHEREAS, pursuant to Chapter 380 of the Texas Local Government Code, the City is authorized to grant municipal funds in furtherance of public purposes for economic development projects; and

WHEREAS, through City Ordinance No. 100684, the City created an economic development program for the purpose of making such grants available; and

WHEREAS, Lowe's Home Centers, Inc. ("Lowe's") is engaged in an economic development Project that will be located within the City and that will consist of the construction and operation of a data center (the "Center") that will create 22 high-technology jobs with an average wage of \$51,700.00 and generate at least \$1,100,000.00 in annual payroll; and

WHEREAS, the construction of the Center and the creation of jobs will promote local economic development and stimulate business and commercial activity in the City of San Antonio; and

WHEREAS, Lowe's has requested an economic development grant for the purpose of deferring costs associated with the construction and improvement of water utility infrastructure to the Center and the costs of permitting fees for construction activities at the site; and

WHEREAS, the City has identified funds which it desires to grant Lowe's on a reimbursement basis for these purposes; **NOW THEREFORE**:

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The terms and conditions of an Economic Development Grant Agreement with Lowe's Home Centers, Inc. for the reimbursement of costs associated with water utility infrastructure improvements and certain permitting fees are hereby approved.

SECTION 2. The City Manager, or her designee, is authorized to execute an Economic Development Grant Agreement with Lowe's Home Centers, Inc. in an amount not to exceed \$300,000.00. A copy of the Agreement in substantially final form, is attached as

“Attachment I” and made a part of this ordinance. A final copy of the Agreement will be attached when executed.

SECTION 3. An allowance in the amount of \$100,000 is to be established in an account at the Development Services Department to be used for various fees for the construction of the Lowe's Home Center, Inc., Data Center.

SECTION 4. An appropriation and encumbrance in the amount of \$200,000.00 is authorized in general ledger 5201040, entitled “Fees to Pros,” Special One-Time Project number 7001990035 and is authorized to be made payable to Lowe's Home Centers, Inc. to be used for the purpose of reimbursing Lowe's for the costs associated with the construction of a SAWS redundant waterline.

SECTION 5. The financial allocations in this ordinance are subject to approval by the Director of Finance for the City of San Antonio. The Director may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific Cost Centers, WBS Elements, Internal Orders, General Ledger Accounts, and Fund Numbers as necessary to carry out the purpose of this ordinance

SECTION 6. This ordinance shall become effective ten days following its passage.

PASSED AND APPROVED this 29th day of JUNE 2006.



M A Y O R

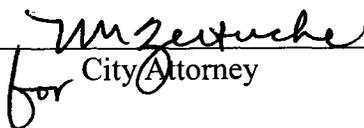
PHIL HARDBERGER

ATTEST:



City Clerk

APPROVED AS TO FORM:



for City Attorney

STATE OF TEXAS

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**ECONOMIC DEVELOPMENT
GRANT AGREEMENT OF THE
CITY OF SAN ANTONIO**

COUNTY OF BEXAR

This Economic Development Grant Agreement (hereinafter referred to as the "Agreement") is made and entered into by and between the City of San Antonio, a municipal corporation of the State of Texas, hereinafter referred to as "CITY", by and through its City Manager or her designee, and LOWES HOME CENTERS, INC., hereinafter referred to as "CONTRACTOR."

WHEREAS, pursuant to Chapter 380 of the Texas Local Government Code, CITY is authorized to grant municipal funds in furtherance of public purposes for economic development projects; and

WHEREAS, in accordance with City of San Antonio City Ordinance No. 100684, CITY created an economic development program for the purpose of making such grants available; and

WHEREAS, CONTRACTOR is engaged in an economic development project that will be located within the city limits of the City of San Antonio and that will consist of the construction and operation of a data center which is anticipated to create 22 high-technology jobs with an average wage of \$51,700.00 and generate at least \$1,100,000.00 in annual payroll; and

WHEREAS, the construction of the data center and the creation of jobs will promote local economic development and stimulate business and commercial activity in the City of San Antonio; and

WHEREAS, CONTRACTOR has requested an economic development grant for the purpose of deferring costs associated with the construction and improvement of infrastructure related to the provision of utilities to the data center and the costs of permitting fees for construction activities at the project site; and

WHEREAS, CITY has identified funds available in the form of an economic development grant for CONTRACTOR to use to carry out this purpose; and

WHEREAS, the City Council of CITY authorized the City Manager or designee to enter into this Agreement with CONTRACTOR as reflected in Ordinance No. _____, passed and approved on June 29, 2006 and CITY now wishes to engage CONTRACTOR to carry out such project; **NOW THEREFORE:**

The parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described:

SECTION 1. AGREEMENT PURPOSE

CONTRACTOR shall complete the construction and start-up of an economic development project, as described in CONTRACTOR's application for tax phase-in assistance, an economic development project consisting of the construction and operation of a data center within the city limits of the City of San Antonio, Texas (hereinafter referred to as the "Facility") that will create 22 high- technology jobs with an average salary of \$51,700.00 which are anticipated to promote local economic development and

stimulate business and commercial activity in the City of San Antonio (hereinafter referred to as the "Project"). The CITY is supporting the Project through an economic development grant to provide funding for the purpose of defraying costs associated with the construction and improvement of infrastructure related to the provision of utilities and the costs of permitting fees for construction at the project site as part of a larger incentive package intended, in part, to attract and retain high-impact companies that support the City's targeted industries and that may be used to leverage private, state or federal funds intended to achieve the same goals.

CITY acknowledges that CONTRACTOR is relying upon the funds to be generated by this Agreement in deciding to locate a national data center in San Antonio over competing cities and that these funds are a material part of a comprehensive economic development package necessary to support CONTRACTOR's location decision.

SECTION 2. PROJECT REQUIREMENTS

- A. Both Contractor and CITY understand and agree that this Agreement is to be executed pursuant to the approval of the City Council of San Antonio by Ordinance Number _____ given on June 29, 2006.
- B. The total number of new, direct, non-temporary, non-seasonal full-time jobs to be created by CONTRACTOR, as a result of the Project, shall be no less than 22.
- C. The total amount of funding that may be granted toward the Project is \$300,000.00, which is to be allocated as follows:

Funding Type	Specific Use	Amount of Funding
COSA Econ. Dev. Grant	Water Utility Infrastructure*	\$200,000.00
COSA Econ. Dev. Grant	Defraying permitting fees	\$100,000.00
Total Project Cost		\$300,000.00 Total

*costs associated with Water Utility Infrastructure shall be those costs as described in Attachment I.

D. The funding provided in Section 2(C) above shall be disbursed or credited thirty days following CONTRACTOR's submission of invoices reflecting actual costs associated with the water utility infrastructure improvements and permitting fees assessed for construction activities at the Facility.

SECTION 3. AGREEMENT PERIOD

This Agreement shall commence upon full execution of this Agreement and shall terminate upon final acceptance of the last disbursement of funds required for the actual costs associated with the water utility infrastructure improvements and permitting fees assessed for construction activities at the Facility so long as such payments do not exceed a cumulative total of THREE HUNDRED THOUSAND DOLLARS as described in Section 2(C) of this Agreement.

SECTION 4. CONTRACTOR PERFORMANCE

A. Contractor shall complete an economic development project consisting of the construction and operation of a data center, as described in CONTRACTOR's application for tax phase-in assistance, subject to all terms and conditions of this Agreement.

B. Contractor shall comply with all applicable laws and regulations, and shall perform all activities in accordance with the terms of the Special Conditions specified in Section 16 of this AGREEMENT, and with all other terms, provisions, and requirements set forth herein.

SECTION 5. DEPARTMENT OBLIGATIONS

A. In consideration of full and satisfactory performance of activities required by Section 2 of this Agreement, CITY will disburse grant funds not to exceed \$300,000.00 as described in Section 2(C) to Contractor in the amounts and at the times specified by Section 3 of this Agreement, and subject to the limitations set forth in this Section 5 and in Sections 14 and 15 below. Notwithstanding any other provision of this Agreement, the total of all grant payments and other obligations incurred by CITY under this Agreement will not exceed the sum of THREE HUNDRED THOUSAND and NO/100 DOLLARS (\$300,000.00).

B. CITY will not be liable to Contractor or other entity for any costs incurred by Contractor.

C. Contractor is only entitled to funds for the costs of actual expenses incurred and not in any amounts exceeding the allocations in Section 2(C) of this Agreement. Allowable costs will be determined in accordance with this Agreement by CITY's Economic Development Department and are defined as direct costs incurred in the construction and improvement of infrastructure related to the provision of utilities to the data center and the costs of permitting fees for construction activities at the Facility. Should CITY determine after payment that a cost is unallowable under this Agreement CONTRACTOR shall reimburse CITY for such payment not later than 30 days after notification by CITY.

SECTION 6. RETENTION AND ACCESSIBILITY OF RECORDS

A. Contractor shall maintain the fiscal records and supporting documentation for all expenditures of funds to be reimbursed or credited to CONTRACTOR under this Agreement in a manner that conforms to this Agreement. Contractor shall retain such records, and any supporting documentation, for the greater of: (1) four [4] years from the end of the Agreement period; or (2) the period required by other applicable laws and regulations.

B. Contractor shall give the CITY, its designee, or any of their duly authorized representatives, access to and the right to examine all books, accounts, records, audit reports, reports, files, documents, written or photographic material, videotape and other papers, things, or property belonging to or in use by Contractor pertaining to the funds expended by CONTRACTOR which are reimbursed or credited under this Agreement. Such rights to access shall continue as long as the records are retained by Contractor. Failure to provide reasonable access to authorized CITY representatives shall give the CITY the right to suspend or terminate the Agreement as provided for in Section 15 and 16, or any portion thereof, for reason of default. All records and other information shall be retained by Contractor for a period of four (4) years after all performance requirements are achieved for audit purposes until such audits or other administrative, civil or criminal matters including, but not limited to, investigations, lawsuits, administrative inquiries and open record requests are completed. Contractor agrees to maintain such records in an accessible location and to provide citizens reasonable access to such records consistent with the Texas Public Information Act.

SECTION 7. MONITORING

A. CITY reserves the right to confirm Contractor's compliance with the terms and conditions of this Agreement. CITY will provide Contractor with a written report of the monitor's findings. If the monitoring report notes deficiencies in Contractor's performances under the terms of this Agreement, the monitoring report shall include a listing of requirements for the correction of such deficiencies by Contractor and a reasonable amount of time in which to attain compliance. Failure by Contractor to take action specified in the monitoring report may be cause for suspension or termination of this Agreement, in accordance with Sections 14 and 15 herein.

B. Contractor shall provide to CITY a statement with reasonable supporting information evidencing the creation of and filling of the number of jobs required by this Agreement.

SECTION 8. INDEPENDENT CONTRACTOR

It is expressly understood and agreed by the parties hereto that CITY is contracting with Contractor as an Independent Contractor, and that Contractor, its employees and subcontractors are not employees of the CITY.

SECTION 9. CONFLICT OF INTEREST

A. Contractor shall ensure that no employee, officer, or agent of Contractor shall participate in the selection, award or administration of a subcontract supported by funds provided hereunder if a conflict of interest, real or apparent, would be involved. Such conflict of interest would arise when: (1) the employee, officer, or agent; (2) any member of his or her immediate family; (3) his or her partner; or, (4) any organization which employs, or is about to employ any of the above, has a financial or other interest in the firm or person selected to perform the subcontract. Contractor shall comply with Chapter 171, Texas Local Government Code as well as the CITY's Code of Ethics.

B. Except for eligible administrative costs, no employee, agent, consultant, officer, or elected or appointed official, of either Contractor or of a subcontractor, who exercises or has exercised any functions or responsibilities or is in a position to participate in decision-making or gain inside information in regard to the activities involved in the Project, shall be permitted to have or obtain a financial interest in or benefit from the Project or any contract, subcontract or agreement with respect thereto, or the proceeds thereunder, either for themselves or those with whom they have family or business ties. This prohibition shall remain in effect for the duration of the prohibited relationship plus one calendar year thereafter.

SECTION 10. NONDISCRIMINATION AND SECTARIAN ACTIVITY

A. Contractor shall ensure that no person shall, on the ground of race, color, national origin, religion, sex, age or handicap, be excluded from participation in, be denied the benefits of, be subjected to discrimination under, or be denied access to any program or activity funded in whole or in part with funds made available under this Agreement.

B. None of the performances rendered by Contractor under this Agreement shall involve, and no portion of the funds received by Contractor under this Agreement shall be used in support of, any sectarian or religious activity, nor shall any facility used in the performance of this Agreement be used for sectarian instruction or as a place of religious worship.

C. Contractor shall include the substance of this Section 10 in all subgrant agreements.

SECTION 11. LEGAL AUTHORITY

A. Each party assures and guarantees to the other that they possesses the legal authority to enter into this Agreement, to receive/deliver the funds authorized by this Agreement, and to perform their obligations hereunder.

B. The person or persons signing and executing this Agreement on behalf of each party or representing themselves as signing and executing this Agreement on behalf of a party, do hereby guarantee that he, she or they have been duly authorized to execute this Agreement on behalf of that party and to validly and legally bind that party to all terms, performances and provisions herein set forth.

C. CITY will have the right to suspend or terminate this Agreement in accordance with Sections 14 and 15 herein if there is a dispute as to the legal authority, of either Contractor or the person signing this Agreement, to enter into this Agreement, any amendments hereto or failure to render performances hereunder. Contractor is liable to CITY for any money it has received from CITY for performance of the provisions of this Agreement if CITY suspends or terminates this Agreement for reasons enumerated in this Section 11.

SECTION 12. LITIGATION AND CLAIMS

A. Contractor shall give CITY immediate notice in writing of any action, including any proceeding before an administrative agency, filed against Contractor arising out the performance of any subcontract hereunder. Except as otherwise directed by CITY, Contractor shall furnish immediately to CITY copies of all pertinent papers received by Contractor with respect to such action or claim. Contractor shall notify the CITY immediately of any legal action filed against the Contractor or any subcontractor, or of any proceeding filed under the federal bankruptcy code. Contractor shall submit a copy of such notice to CITY within 30 calendar days after receipt. No funds provided under this Agreement may be used in the payment of any costs incurred from violations or settlements of, or failure to comply with, federal and state regulations.

B. CITY and Contractor acknowledge that CITY is a political subdivision of the State of Texas and is subject to, and complies with, the applicable provisions of the Texas Tort Claims Act, as set out in the Civil Practice and Remedies Code, Section 101.001 et. seq., and the remedies authorized therein regarding claims and causes of action that may be asserted by third parties for accident, injury or death.

C. This Agreement shall be interpreted according to the Constitution and the laws of the State of Texas. Venue of any court action brought directly or indirectly by reason of this Agreement shall be in Bexar County, Texas.

SECTION 13. CHANGES AND AMENDMENTS

A. Except as specifically provided in Section 13(C) of this Agreement, any alterations, additions, or deletions to the terms of this Agreement shall be by amendment hereto in writing and executed by both parties to this Agreement upon CITY approval and authorization of Contractor.

B. It is understood and agreed by the parties hereto that performances under this Agreement shall be rendered in accordance with the laws and rules governing the Economic Development Program as set forth this date, and the terms and conditions of this Agreement.

C. Any alterations, additions, or deletions to the terms of this Agreement required by changes in state law or regulations are automatically incorporated into this Agreement without written amendment hereto, and shall become effective on the date designated by such law or regulation.

SECTION 14. SUSPENSION

A. Notwithstanding the provisions of Chapter 2251 of the Texas Government Code, in the event Contractor fails to comply with the terms of any Agreement with the CITY, CITY shall provide Contractor with written notification as to the nature of the non-compliance. CITY shall grant Contractor a sixty (60) day period from the date of the CITY's written notification to cure any issue of non-compliance under such Agreement. Should Contractor fail to cure any default within this period of time, the CITY may, upon written Notice of Suspension to Contractor, suspend this Agreement in whole or in part and withhold further payments to Contractor, and prohibit Contractor from incurring additional obligations of funds under this Agreement. Such Notice of Suspension shall include: (1) the reasons for such suspension; (2) the effective date of such suspension; and, (3) in the case of partial suspension, the portion of the Agreement to be suspended.

B. In the case of default for causes beyond Contractor's reasonable control, which cannot with due diligence be cured within such sixty (60) day period, the CITY may, in its sole discretion, extend the cure period provided that Contractor shall: (1) immediately upon receipt of Notice of Suspension advise CITY of Contractor's intention to institute all steps necessary to cure such default and the associated time frame; and (2) institute and thereafter prosecute to completion with reasonable dispatch all steps necessary to cure same.

C. A suspension under this Section 14 may be lifted only at the sole discretion of the CITY upon a showing of compliance with or written waiver by CITY of the term(s) in question.

D. With the exception of payment for work in progress or materials ordered prior to receiving a Notice of Suspension, CITY shall not be liable to Contractor or to Contractor's creditors for costs incurred during any term of suspension of this Agreement.

SECTION 15. TERMINATION

A. CITY shall have the right to terminate this Agreement for non-compliance, in whole or in part, at any time before the date of completion specified in Section 4 of this Agreement whenever CITY determines that Contractor has failed to comply with any term of any Agreement with the CITY. CITY will provide Contractor with written notification as to the nature of the non-compliance, and grant Contractor a sixty (60) day period from the date of the CITY's written notification to cure any issue of non-compliance under such Agreement. Should Contractor fail to cure any default within this period of time, the CITY may, upon issuance to Contractor of a written Notice of Termination, terminate this Agreement in whole or in part and withhold further payments to Contractor, and prohibit Contractor from incurring additional obligations of funds under this Agreement. Such notification shall include: (1) the reasons for such termination; (2) the effective date of such termination; and, (3) in the case of partial termination, the portion of the Agreement to be terminated.

B. In the case of default for causes beyond Contractor's reasonable control, which cannot with due diligence be cured within such sixty (60) day period, the CITY may, in its sole discretion, extend the cure period provided that Contractor shall: (1) immediately upon receipt of Notice of Termination advise CITY of Contractor's intention to institute all steps necessary to cure such default and the associated time frame; and (2) institute and thereafter prosecute to completion with reasonable dispatch all steps necessary to cure same.

C. Except as provided in Section 15(A), awards may be terminated in whole or in part only as follows:

1. By the CITY (with the consent of the Contractor) in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated; or
2. By the Contractor upon written notification to the CITY, setting forth the reasons of such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of partial termination, the CITY determines in its sole discretion that the remaining portion of the award will not accomplish the purpose for which the award was made, the CITY may terminate the award in its entirety under Section 15(A).

D. Upon receipt of Notice of Termination for non-compliance under Section 15(A), Contractor shall, to the extent possible under its other contractual obligations, cancel, withdraw or otherwise terminate any outstanding orders or subcontracts related to the performance of this Agreement or the part of this Agreement to be terminated and shall cease to incur costs thereunder. Any other work or materials under or part of this Agreement shall be terminated and CITY will not be liable to Contractor or to Contractor's creditors for any costs incurred subsequent to receipt of a Notice to Terminate.

E. Notwithstanding any exercise by CITY of its right of suspension under Section 14 of this Agreement, or of early termination pursuant to this Section 15, Contractor shall not be relieved of any liability to CITY for damages due to CITY by virtue of any breach by Contractor of any Agreement with CITY. CITY may withhold payments to Contractor until such time as the exact amount of damages due to CITY from Contractor is agreed upon or is otherwise determined.

SECTION 16. SPECIAL CONDITIONS AND TERMS (RESERVED)

SECTION 17. SUBAGREEMENTS

A. Contractor shall ensure that the performance rendered under all subcontracts complies with all terms and provisions of this Agreement as if such performance were rendered by Contractor. Contractor shall bear full responsibility for performance by all subcontractors.

B. Contractor, in subcontracting any of the performances hereunder, expressly understands that in entering into such subcontracts, CITY is in no way liable to Contractor's subcontractor(s).

C. Contractor assures and shall obtain assurances from all of its subcontractors where applicable, that no person shall, on the grounds of race, creed, color, disability, national origin, sex or religion, be excluded from, be denied the benefit of, or be subjected to discrimination under any program or activity funded in whole or in part under this Agreement.

D. As subcontracts and supplier Agreements become necessary to carry out the requirements of this Agreement, Contractor covenants to comply with the CITY's SBEDA Program, currently identified under Ordinance No. 96754, and as amended.

SECTION. 18. DEBARMENT

By signing this Agreement, Contractor certifies that it will not award any funds provided under this Agreement to any party which is debarred, suspended or otherwise excluded from or ineligible for participation in assistance programs.

SECTION 19. RIGHTS UPON DEFAULT

It is expressly understood and agreed by the parties hereto that any right or remedy provided for in this Agreement shall not preclude the exercise of any other right or remedy under any Agreement between Contractor and the CITY or under any provision of law, nor shall any action taken in the exercise of any right or remedy be deemed a waiver of any other rights or remedies. Failure to exercise any right or remedy hereunder shall not constitute a waiver of the right to exercise that or any other right or remedy at any time.

SECTION 20. NON-ASSIGNMENT

This Agreement is not assignable. Notwithstanding any attempt to assign the Agreement, Contractor shall remain fully liable on this Agreement and shall not be released from performing any of the terms, covenants and conditions herein. Contractor shall be held responsible for all funds received under this Agreement.

SECTION 21. ORAL AND WRITTEN AGREEMENTS

All oral and written agreements between the parties to this Agreement relating to the subject matter of this Agreement that were made prior to the execution of this Agreement have been reduced to writing and are contained in this Agreement.

SECTION 22. AUTHORIZED RELIEF FROM PERFORMANCE (*Force Majeure*)

CITY shall grant relief from performance of the Agreement if the Contractor is prevented from compliance and performance by an act of war, order of legal authority, act of God, or other unavoidable cause not attributed to the fault or negligence of the Contractor. The burden of proof for the need for such relief shall rest upon the Contractor. To obtain release based upon *force majeure*, the Contractor must file a written request with the CITY.

SECTION 23. SURVIVAL OF CERTAIN AGREEMENT PROVISIONS

The following provisions of the Agreement, concerning Contractor's obligations, shall survive the termination of the Agreement after completion of the Project:

- A. Section 2B (Job Creation)
- B. Section 6 (Records Retention and Accessibility of Records)

Signatures appear on next page.

WITNESS OUR HANDS, EFFECTIVE as of _____, 200__:

Accepted and executed in two duplicate originals on behalf of the City of San Antonio pursuant to Ordinance Number _____, dated June 29, 2006, and Lowes Home Centers, Inc. pursuant to the authority of its _____.

LOWES HOME CENTERS, INC.
A _____ Corporation

CITY OF SAN ANTONIO,
a Texas Municipal Corporation

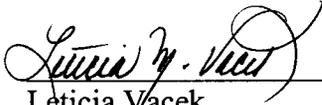
BY: _____
Name: _____
Title: _____

Sheryl L. Sculley
CITY MANAGER

ATTEST:

Name: _____
Title: _____

ATTEST:



Leticia Vacek
CITY CLERK

APPROVED AS TO FORM:



Michael D. Bernard
CITY ATTORNEY