PROJECT PERFORMANCE AGREEMENT BETWEEN THE CITY OF HEWITT AND KIRBY SMITH MACHINERY, INC.

This Project Performance Agreement ("Agreement") is entered into by and between the City of Hewitt, Texas (hereinafter "City") and Kirby Smith Machinery, Inc., an Oklahoma S-corporation (hereinafter "Business").

1. Program Project

1. The Business proposes to construct and operate an approximately 25,500 square foot building to provide heavy equipment sales, service and leasing on an approximately 16.5 acre tract of land located at 1151 Enterprise Blvd., Hewitt, Texas 76643, and being more specifically described as set forth in Exhibit "A" attached hereto and incorporated herein (hereinafter "Property"). The capital investment of the Business in developing and constructing the building and appurtenances shall be at least $9,000,000 (hereinafter "Project"). Land acquisition does not count towards capital investment. Inventory does not count towards capital investment.

The Business shall obtain a Certificate of Occupancy (hereinafter defined) from the City on or before September 1st, 2025 barring extensions required by matters beyond its control (hereinafter "Operations Date").

2. Commitment and Incentives. Business agrees to construct the Project and to obtain a Certificate of Occupancy by the Operations Date (hereinafter "Development Requirements"). In return for the Business' agreement to meet the Development Requirements, the City agrees to pay an economic development grant to the Business as authorized by Chapter 380 of the *Texas Local Government Code* and the City's Chapter 380 Economic Development Program. The Grant is further described in Sections 3 and 4 below.

3. Grant

3.1 Definitions.

"Grant" means a Chapter 380 Economic Development grant as authorized by Chapter 380 of the *Texas Local Government Code* and the City's Chapter 380 Economic Development Program. This Grant is not a sales tax rebate, rather, the amount of the grant is tied to a percentage of sales taxes generated by the Business and received by the City for purposes of providing a logical calculation.

"Agreement Year" means a calendar year within the term of this Agreement.

"Agreement Year Amount" means the total City sales tax collected by operations on the Project during an Agreement Year.

"Base Year" means the calendar year when this Agreement is signed.

"Base Year Amount" means the total City sales tax collected by operations on the Project

Premises during the Base Year.

"Certificate of Occupancy" means a certificate of occupancy (or its local equivalent) issued by the City for the Project.

"City's Sales Tax Rate" The current aggregate sales tax rate in the City as of the date this Agreement is signed is eight and one-quarter percent (8.25%), of which one and one-half percent (1.5%) represents the City's sales tax rate.

"Net Sales Tax Revenues" means the City sales tax revenues collected by the Business in excess of the Base Year Amount, less any refunds required to be made by the Business, or refunds to the Business that are required to be made by the City.

"Annual Grant Amount" is the amount of the grant to be paid to the Business at the end of the Agreement Year.

"Total Grant Amount" is the not-to-exceed total of all grant funds that the Business is eligible to receive under this Agreement, which is $500,000. The Grant shall end when the $500,000 cap is reached, regardless of whether additional time remains on the Grant Term. If the $500,000 cap is reached during an Agreement Year, the Annual Grant Amount payable to the Business will be pro-rated.

"Grant Percentage" means the percentage provided in this Agreement to be applied in each Agreement Year to the Net Sales Tax Revenues to arrive at the Annual Grant Amount. The Grant Percentage is 50%.

"Grant Period" or "Grant Term" means the total number of Agreement Years during which the Business is eligible for the Grant, which is a period of seven (7) calendar years following the Business's obtaining a Certificate of Occupancy.

3.2 Calculation.

City Sales Tax Collections attributable to the Business are calculated as follows: Agreement Year Amount – Base Year Amount and refunds = Net Sales Tax Revenues x Grant Percentage = Annual Grant Amount.

If the Business begins operations during an Agreement Year, the Annual Grant Amount will be determined on a prorated basis for the remainder of that Agreement Year, which shall count as the first Agreement Year against the Grant Period. By written election provided to the City the Business may elect to have the Grant Period start on the next January 1 instead of during a partial calendar year. If such an election is made, Business will not be entitled to any Annual Grant Amount for the partial year.

3.3 Payment. The Annual Grant Amount for an Agreement Year does not become payable until the City receives full payment from the state comptroller of its share of sales taxes for the preceding calendar year constituting the Agreement Year. Payment shall be made to the

Business by the City within 30 days after receipt of payment in full of the City's share of sales taxes for the preceding Agreement Year. The total of all Annual Grant Amounts shall not exceed the Total Grant Amount.

3.4 Compliance with Development Requirements. Payment to Business of an Annual Grant Amount under this Agreement is subject to the Business complying with its Development Requirements. The effect of non-compliance is addressed in Section 6 below.

4. Grant Period and Percentage. The Annual Grant Amount provided to the Business by the City under this Agreement shall:

a) Be for the Grant Period; and

b) Be at a Grant Percentage of fifty (50%) percent, subject to the Total Grant Amount.

Once the Total Grant Amount is reached, this Agreement shall automatically terminate, even if years remain under the Grant Period. In no circumstance will the total of all Annual Grant Amounts paid to the Business exceed the Total Grant Amount. If the Total Grant Amount is reached during an Agreement Year, the Grant does not apply to the rest of the year.

5. Reporting and Provision of Information.

5.1 General. The Business must meet its Development Requirements for payments described herein to begin, and the City must receive Construction Reports (hereinafter defined) from the Business during the construction and development of the Project, and before the Operations Date.

5.2 Reports During Development and Construction. At least quarterly during the development and construction of the Project, the Business shall provide a written report to the City Manager ("Construction Reports") showing the percentage of completion of the Project, the estimated completion date of the Project, and whether the Business is still on target for the Operations Date.

5.3 Capital Investment Verification. Prior to the Operations Date, the Business shall provide the City Manager with an itemized summary of Project costs to verify that the capital investment of the Business for the Project (i.e., $9,000,000) has been attained. The City Manager or his/her designee shall have the right to inspect records supporting the cost summary upon reasonable request.

5.4 Extension of Operations Date. The Operations Date is fixed as set forth above and shall only be extended when required due to matters clearly outside of the control of the Business. The Business must submit a written request for extension to the City Council which identifies in detail the reasons that the extension is needed. The City Council will not unreasonably withhold an extension however, it may deny an extension if the Business fails to show that the matter(s) requiring the extension were clearly beyond its reasonable control. The total of all extensions may not exceed 180 days.

6. Breach by Business.

6.1 General. If the Business builds nothing and/or does not begin operations by the Operations Date, as extended, payments described herein shall not begin and such non-commencement of payments described herein shall be the City's sole remedy for the breach, therefore, the breaches addressed hereunder are less than complete breaches. These are:

a. failure to meet the $9,000,000 capital investment requirement;
b. failure to begin operations by the Operations Date (including any extensions granted);
c. failure to provide required Construction Reports; and/or
d. failure to provide a Project cost summary to verify capital investment or to allow a review of supporting documents as required herein.

In the instance of one or more of these breaches the Total Grant Amount will be reduced as set forth in this paragraph 6.

6.2 Breach of Capital Investment Requirement. Failure to provide at least 75% of the capital investment is a complete breach and shall result in termination of this Agreement. Reductions in the Total Grant Amount for capital investment equal to or more than 75% of the required capital investment, but less than 100% will be addressed by reducing the Total Grant Amount by the percentage deficiency in capital investment. For example, if the Business achieves 90% of its capital investment requirement, the Total Grant Amount is reduced by 10%.

6.3 Failure to Begin Operations by the Operations Date (including any extensions granted). Failure to meet the Operations Date (plus approved extensions) will result in reductions to the Total Grant Amount as follows:

a. 1-12 months of delay—reduction of 1% per month; and
b. Delay exceeding 12 months---reduction of 5% per month.

6.4 Failure to Provide Construction Reports. The City Manager and the Business shall set a date when the first Construction Report is due. Thereafter, a Construction Report is due every three (3) months. The City Manager shall send the Business a notice that its Construction Report is due at least ten (10) days before the due date. If the Business has been given the notice and still fails to provide a Construction Report, a warning will be given in writing to the Business by the City Manager that if it fails to provide a report within ten (10) days of the warning, a 1% reduction will be made to the Total Grant Amount. If the Business still fails to provide a Construction Report, an additional 5% reduction will be made to the Total Grant Amount.

6.5 Failure to Provide Cost Summary Verification or Allow Review of Supporting Documents. If the Business fails to provide a Project cost summary verifying its capital investment or refuses to allow the City Manager or designee to review the supporting documents on reasonable request, the Annual Grant Amount shall be suspended until such time as the Business complies.

6.6 Reductions are Cumulative. The reductions to the Total Grant Amount set forth

above are cumulative of one another.

7. Breach by City. Should the City fail to comply with or to perform any term, obligation, covenant or condition contained in this Agreement shall be a breach of this Agreement. In the event of a breach by the City, the Business shall have the right to terminate this Agreement, enforce specific performance as appropriate, or maintain a cause of action for damages caused by the breach.

8. Additional Requirements and Terms.

8.1 Business shall keep the Project insured against loss or damage by fire or any other casualty.

8.2 Inventory does not count as capital investment.

8.3 The City, by approving this Agreement, assumes no liability or responsibility therefore or for any defect in said Project. The relationship between parties at all times shall NOT be deemed a partnership or joint venture for purposes of this Agreement, or any other purpose.

8.4 If, on account of any breach of a party's obligations under the terms, conditions, or covenants of this Agreement, it shall be necessary for the non-breaching party to employ or engage an attorney or attorneys to enforce or defend any of the rights or remedies hereunder, and should the non-breaching party prevail, the non-breaching party shall be entitled to any reasonable attorney's fees, costs, or expenses it incurs in connection herewith.

8.5 If any provision of this Agreement is held to be illegal, invalid, or unenforceable under the present or future laws effective while this agreement is in effect, such provision shall be automatically deleted from this agreement and the legality, validity and enforceability of the remaining provisions of this agreement shall not be affected thereby.

8.6 This Agreement shall be construed under and in accordance with the laws of the State of Texas and all obligations of the parties created hereunder are performable in McLennan County, Texas. Venue of any dispute under or arising out of this Agreement shall be in a court of competent jurisdiction in McLennan County, Texas.

8.7 This Agreement and its attachments constitute the sole and only Agreement of the parties hereto and supersede any prior understandings or written or oral agreements between the parties respecting the subject matter hereof. No representations outside of this Agreement are being relied upon by the parties.

8.8 No amendment, modification or alteration of the terms hereof shall be binding unless the same shall be in writing, dated subsequent to the date hereof and duly executed by the parties hereto.

8.9 The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by either party shall not preclude or waive its rights to use any or all other

remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

8.10 This Agreement is binding on the parties and their respective successors, heirs and assigns.

8.11 This Agreement may not be assigned without the express written consent of the other party, which shall not be unreasonably withheld, conditioned or delayed. Any restrictions herein on the transfer or assignment of Business's interest in this Agreement shall not apply to and shall not prevent the assignment of this Agreement to a subsidiary or affiliate of Business, an acquirer of substantially all of Business's assets, or any corporation or other entity with which Business may merge or consolidate or that may succeed to a controlling interest in the Business or in which Business owns more than a twenty percent (20%) equity interest.

8.12 Business and City have participated in negotiating and drafting this Agreement, and agree that the Agreement is to be construed as if drafted jointly. The parties agree that the Agreement will not be interpreted or construed against either party should a need for interpretation or resolution of any ambiguity arise.

8.13 Any notice or other communication required or permitted by this Agreement (hereinafter referred to as the "Notice") is effective when in writing and (i) personally delivered by nationally recognized next business day delivery service or by hand or (ii) three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified with return receipt requested. The parties agree to keep the other party or parties informed of their address at all times during the Grant Term. The Notices shall be addressed as follows:

If to the City: City of Hewitt, Texas
Attn: City Manager
200 Patriot Court
Hewitt, Texas 76643

With a Copy To:
Mike Dixon
100 N. Ritchie Road
Waco, Texas 76712

If to the Company: Kirby-Smith Machinery, Inc.
Attn: Cody Ward
9658 North May Avenue, Ste. 200
Oklahoma City, Oklahoma 73120

With a Copy To: Joplin Hendricks, PLLC
Attn: Joanna R. Joplin
225 E. Virginia St., Suite 3
McKinney, Texas 75069
joanna@joplinhendricks.com

8.14 Upon written request by Business to City, City will provide Business with a certificate stating, as of the date of the certificate, (i) whether this Agreement is in full force and effect and, if Business is in breach of this Agreement, the nature of the breach, and (ii) a statement as to whether this Agreement has been amended and, if so, the identity and substance of each amendment.

8.15 Business represents and warrants that: (1) it has sufficient legal authority to conduct business in the State of Texas; (2) it has full capacity and authority to grant all rights and assume all obligations that it has granted and assumed under this Agreement; and (3) that the person or persons executing this Agreement on its behalf has been duly authorized to do so.

8.16 City represents and warrants that it has full capacity and authority to grant all rights and assume all obligations that it has granted and assumed under this Agreement; and that the person or persons executing this Agreement on its behalf has been duly authorized to do so.

8.17 This Agreement may be executed in multiple counterparts, each of which constitutes an original.

AGREED:

Kirby Smith Machinery, Inc.

BY: _____
JOHN ARAPIDIS

ITS: PRESIDENT AND CEO

DATE: 10/3/2024

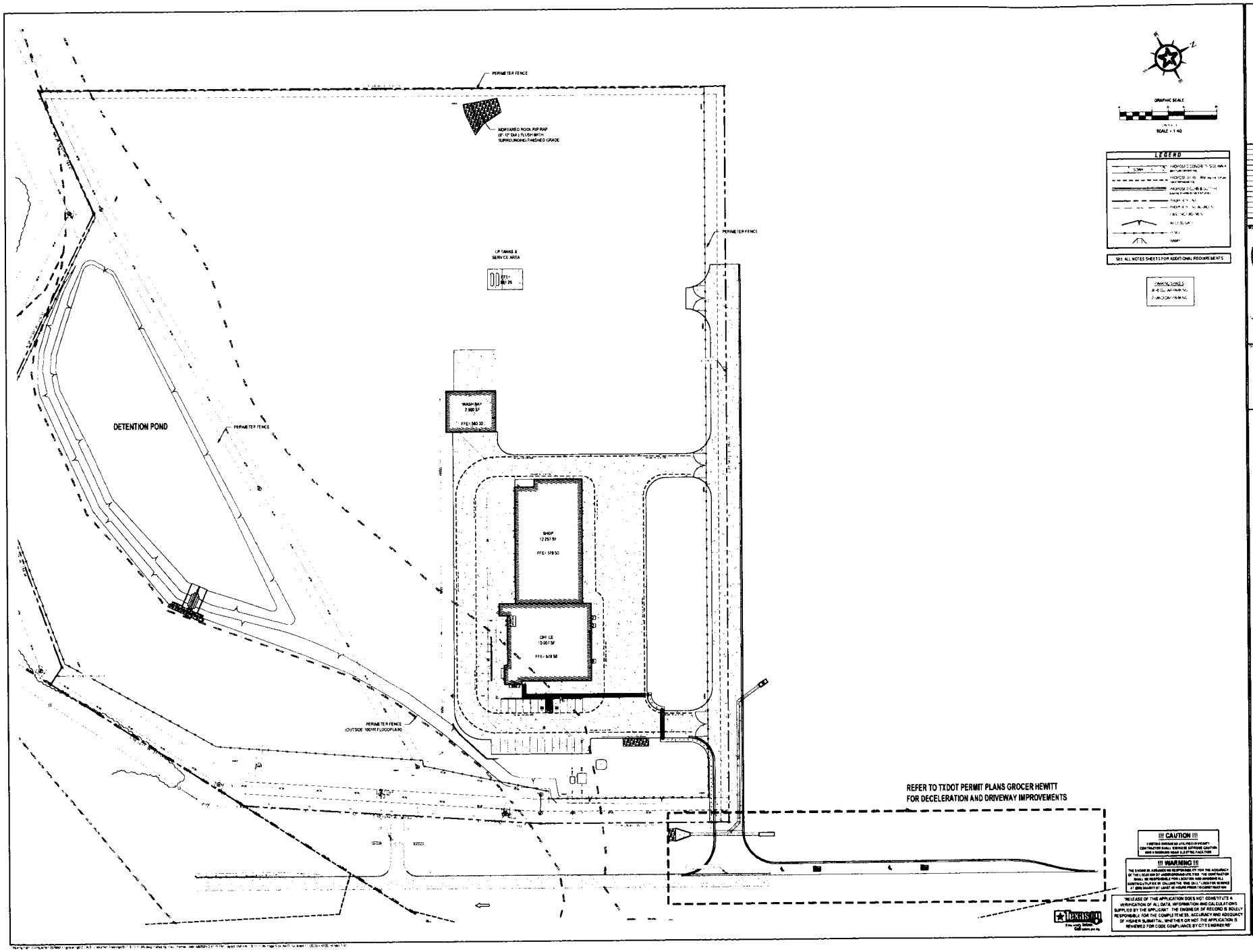
City of Hewitt, Texas

BY: _____
BO THOMAS
ITS: CITY MANAGER

DATE: 10-23-24

Attest:

_____
LYDIA LOPEZ, CITY SECRETARY



Walker Partners
engineers | surveyors

STATE OF TEXAS
BRIAN M. ROBY
117716
Licensed
PROFESSIONAL ENGINEER

04/09/2024

KIRBY-SMITH MACHINERY HEWITT

IH 35 SOUTHBOUND FRONTAGE RD
HEWITT, TEXAS 76643

OVERALL SITE PLAN

C5

Resolution No. 2024-10

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HEWITT, TEXAS, APPROVING CHAPTER 380 PROGRAM PROJECT AGREEMENT BETWEEN THE CITY OF HEWITT AND KIRBY-SMITH MACHINERY, INC.

WHEREAS, the City Council passed an ordinance under Chapter 380 of the Texas Local Government Code to allow the City to utilize economic development incentives to stimulate, encourage, and develop business location and commercial activity in the City of Hewitt and

WHEREAS, Kirby-Smith Machinery, Inc. approached the City about economic development incentives for its possible location of a Kirby-Smith Machinery, Inc. in Hewitt and

WHEREAS, $9,000,000 of capital investment, new jobs, significantly increased sales taxes, and serving as an anchor for other development are some of the benefits to the City and

WHEREAS, Kirby-Smith Machinery, Inc. is willing to enter into a Program Project Agreement for the promised development in return for an economic development grant to be paid over time, based on the volume of sales achieved by the store and

WHEREAS, the City Council finds that the proposed project will develop and diversify the economy and commerce of Hewitt and this State, eliminate unemployment or underemployment, and spur additional growth as an anchor store and

WHEREAS, the City Council finds that the proposed Program Project Agreement will stimulate, encourage, and develop the location of business and commercial activity in the City of Hewitt.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF HEWITT, TEXAS THAT:

1. The previous recitals are incorporated herein and made findings of the City Council;

2. The proposed Chapter 380 Program Project Agreement with Kirby-Smith Machinery, Inc. is APPROVED and

3. The City Manager is authorized to execute the Project Performance Agreement on the City's behalf.

Passed and approved this 21st day of October 2024.

CITY OF HEWITT, TEXAS

Steve Fortenberry, Mayor

Attest:

Lydia Lopez, City Secretary

Approved:

Michael W. Dixon, City Attorney