

# PERFORMANCE AGREEMENT BETWEEN THE KILLEEN ECONOMIC DEVELOPMENT CORPORATION AND THE CITY OF KILLEEN

On the \_\_\_\_ day of \_\_\_\_\_, 2016, this **PERFORMANCE AGREEMENT** was entered into by the **KILLEEN ECONOMIC DEVELOPMENT CORPORATION** (hereafter called "KEDC") and the **City of Killeen**, (hereafter called "CITY"), on the following terms and conditions:

## **I. Definition.**

The *Army Radar Approach Control (ARAC)* is a facility, located at Robert Gray Army Airfield (RGAAF), which houses equipment that enables qualified personnel to control all aircraft within a sixty (60) mile radius of RGAAF. The ARAC directly controls the restricted airspace and military operating areas around Fort Hood. The ARAC facility also provides support in Fort Hood military deployments, Fort Hood range live-fire training and aviation training as well as Killeen area commercial aviation and Federal Aviation Administration (FAA) radar functions.

- A. Purpose:** The purpose of the *project* is to repair, replace and upgrade all electrical power and distribution systems; replace and upgrade heating, ventilation, and cooling systems; upgrade emergency power systems; rehabilitate floors, walls, ceilings, and roof; and make internal structural improvements to enhance operator efficiency to meet mission requirements. Additionally, this project will bring the structure up-to-date with the latest military and federal installation design standards.
- B. Employment:** This project will retain approximately seven hundred forty-seven (747) full-time military and civilian jobs.

**II. KEDC Responsibilities:** Based upon the representations, inducements and commitments by CITY, as set forth in this Agreement, and for the purposes of obtaining professional services and/or expenses associated with the creation and/or retention of military and/or civilian jobs, KEDC covenants and agrees that:

### **A. Grants.**

- 1. KEDC will fund the amount of Five Hundred Twenty-Five Thousand (\$525,000) Dollars to meet the matching fund requirement as set forth by the Defense Economic Adjustment Assistance Grant (DEAAG) application submitted to the State of Texas in March 2016 and awarded in April 2016.
  - i. The KEDC grant will be disbursed after October 1, 2016 but before September 31, 2017.

- ii. The KEDC grant will be disbursed in quarterly payments within thirty (30) days of receipt of invoice from the City.

KEDC will have no role, other than funding, in the renovation of the ARAC facility.

**III. CITY Responsibilities:** Based upon the representations, inducements and commitments by KEDC, as set forth in this Agreement, the CITY covenants and agrees that:

- A. **Project:** The CITY will design and manage the repair and rehabilitation of the ARAC facility
- B. **Schedule:** The CITY schedule for the project is included as Appendix 1. Deviance from this schedule of more than 30 days will be reported to KEDC.

Failure by the CITY to meet any of these obligations shall be a default under Item VI.

**IV. FINANCIAL DETAILS:** This Performance Agreement will serve as the agreement between both parties and the KEDC commitment to contribute for construction cost for the ARAC project per paragraph II.

- A. **Billing:** The CITY is responsible for submitting bills in an accurate and timely manner, and shall make every reasonable effort to submit quarterly billings to the KEDC, which cover the previous quarter's expenses, so they are received by the KEDC on or before the twentieth (20th) day after the end of each quarter, or if the 20th falls on a weekend or holiday, the next business day. Quarterly reimbursement requests are due: (1) First quarter – December 20; (2) Second Quarter – March 20; (3) Third Quarter – June 20; (4) Fourth Quarter – September 20.

The KEDC will make all reasonable efforts to promptly process and make payments on properly completed billings. The CITY may submit a final invoice not later than the earlier of (1) forty-five (45) calendar days after termination of this Agreement; or (2) forty-five (45) calendar days after the end of KEDC fiscal year. A sample invoice is included in Appendix 2.

- B. **Financial Reporting:** The CITY will provide KEDC with copies of the required project financial reports and pay requests submitted to the Office of the Governor, Texas Military Preparedness Commission.

**V. Access to Records:** The CITY will supply prompt verification of compliance with these obligations to KEDC, as requested, and will promptly provide access

to any records necessary to verify construction progress to upgrade the ARAC facility. To the extent allowed by law, KEDC agrees that it shall maintain all documentation on this project as confidential and that it shall not in any way, manner or form distribute, disclose or publicize any such information provided by the CITY, without first obtaining CITY's written consent, unless it has a legal requirement to do so. KEDC agrees to take all reasonable measures to protect the proprietary and confidential nature of and avoid disclosure or unauthorized use of, any information provided by CITY. KEDC shall furnish such information only to its officers, directors, employees, accountants, attorneys and other agents who need to know the information for the purpose of confirming CITY's compliance with this Agreement and such information may only be provided if such receiving persons agree to maintain the confidentiality of such information in accordance with this paragraph. Nothing stated herein shall be understood to require KEDC to take any action prohibited by law.

The parties to this agreement understand that KEDC is an entity of the City of Killeen and, as such, is subject to the Open Records and Open Meetings laws of the State of Texas.

**VI. Default:** Failure by CITY to execute any of the responsibilities set forth in paragraphs IIIA and IIIB shall constitute a default of this agreement. Upon KEDC's determination of default by CITY, written notice of such default shall be sent to the City of Killeen, Department of Aviation via certified mail or overnight delivery at: 8101 Clear Creek Road, Box C, Killeen, TX 76549. Upon receipt of the notice of default, CITY shall have forty-five (45) days to cure the default.

The penalty for failure to cure a default shall be the termination of payments.

**VII. Notice to KEDC:** All notices by or from CITY to KEDC shall be sent by fax and certified mail to the President of the Greater Killeen Chamber of Commerce at (254) 526-6090 and P.O. Box 548, Killeen, Texas, 76540-0548, respectively.

**VIII. Parties Bound and Assignment:** This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their successors and assigns. Neither party may assign this Agreement or any of its rights hereunder without the prior written consent of the other party which consent shall not unreasonably be withheld.

**IX. Authorization:** The parties acknowledge and represent to each other that the persons who executed this Agreement were duly authorized to do so on behalf of each party and all necessary authorization and approvals have been properly obtained.

**X. Successor Interests:** This Agreement is binding upon the heirs, legal representatives, successors and permitted assigns of each party.

**XI. Headings:** This Agreement's section headings are for convenience only, are not deemed part of its substantive provisions, and are not to be considered in its construction or interpretation.

**XII. Counterparts:** This Agreement may be executed in multiple counterparts, each of which will be deemed an original. All such counterparts together will constitute one instrument. Facsimile signatures shall be deemed originals, if an original is provided within five (5) days of the facsimile signature.

**XIII. Force Majeure:** CITY shall be excused from its obligations hereunder if caused by a force majeure event, including fire, flood, tornado, earthquake, riot, legal enactment, government regulations, Act of God, labor dispute, action or order of any judicial, legislative, governmental or quasi-governmental authority, or any other cause beyond CITY's reasonable control.

**XIV. Texas Law:** This Agreement shall be subject to and governed by the laws of the State of Texas. The Parties agree that for venue purposes, any and all lawsuits, disputes, or causes of action shall be in Bell County, Texas.

**XV. Entire Agreement; Modifications:** This Agreement constitutes the entire agreement between the Parties, and supersedes all previous understandings, commitments or representations concerning the subject matter of this Agreement. Except as provided in this Agreement, this Agreement may not be amended or modified, and none of its provisions may be waived, except by a writing signed by an authorized officer of the party against whom the amendment, modification or waiver is sought to be enforced. If any portion of this Agreement is held to be unenforceable, then the remainder of the Agreement will survive and will be construed to reflect the intent of the parties.

Executed at and performable in Killeen, Bell County, Texas.

**KILLEEN ECONOMIC DEVELOPMENT CORPORATION**

BY: \_\_\_\_\_  
President

DATE: \_\_\_\_\_

**CITY OF KILLEEN**

BY: \_\_\_\_\_  
Lillian Ann Farris, Interim City Manager

DATE: \_\_\_\_\_