

BUSINESS INCENTIVE AGREEMENT

THIS BUSINESS INCENTIVE AGREEMENT (the "Agreement") is made and entered into effective this ___ day of _____, 2011, by and between the CITY OF COMMERCE CITY, COLORADO, a home rule municipality whose address is 7887 East 60th Avenue, Commerce City, Colorado 80022 (the "City"), and DIA TECH CENTER HOTEL I, LLC, a Colorado limited liability company whose principal business address is 5753 Shasta Circle, Littleton, CO 80123 ("Business").

WHEREAS, Business desires to locate within the City in the area known as the DIA Tech Center;

WHEREAS, Business has committed to construction and installation, beginning on or before June 1, 2013, of certain capital improvements, including fixed assets, on property located within Planning Area 8 of the DIA Tech Center development in Commerce City, Colorado (the "Capital Improvements");

WHEREAS, Business estimates that the Capital Improvements will equal approximately Six Million Four Hundred Fifty Thousand dollars (\$6,450,000.00) (hereinafter, the "Capital Investment");

WHEREAS, Business intends to create twenty-four (24) jobs, approximately eight (8) of which will be paid above the average wage for Adams County, Colorado;

WHEREAS, all expenditures related to the Capital Investment will be completed and/or made by Business not later than June 1, 2014.

WHEREAS, the City has established various Business Incentive Programs to encourage business development and expansion within the City;

WHEREAS, Business has applied for one or more incentives under the Business Incentive Programs, and the City has agreed to provide one or more incentives to Business as provided herein; and

WHEREAS, based on the foregoing, the City has determined that Business is eligible to receive economic development incentives totaling approximately Two Hundred Thirty-four Thousand Four Hundred Thirty-four dollars (\$234,434.00).

NOW, THEREFORE, in consideration of the mutual promises and conditions herein contained, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

I. INCENTIVES. Subject to the terms and conditions of this Agreement, the City shall provide the following economic development incentives (collectively, the "Incentives") to Business in accordance with the applicable Business Incentive Program(s):

A. Incentives for Prospective Business.

1. The City shall rebate to Business ten percent (10%) of the sales and/or use taxes remitted to the City, either directly by Business or indirectly through its vendors and/or contractors, in conjunction with construction-related Capital Improvements.
2. The City shall rebate to Business fifty percent (50%) of City building permit and plan check fees associated with the Capital Investment.

B. Incentives for Job Creation.

1. For each new FTE¹ job created, for which the pay is *above* the average wage for Adams County, Colorado, the City shall to Business provide Five Hundred dollars (\$500.00) in tax rebates.
2. For each new FTE job created, for which the pay is *above* the average wage for Adams County, Colorado, AND the job position is filled by a Commerce City resident, the City shall to Business provide an additional Five Hundred dollars (\$500.00) in tax rebates.
3. New jobs must be created and position filled within 12 months from completion of construction and/or commencement of business operations in the facility.

C. Strategic Incentives.

1. The City shall rebate to Business fifty percent (50%) of the sales and/or use taxes remitted to the City, either directly by Business or indirectly through its vendors and/or contractors, in conjunction with non-construction-related Capital Improvements.
2. The City shall rebate to Business one hundred percent (100%) of taxes imposed pursuant to Article IX of Chapter 20 of the Commerce City Revised Municipal Code (the "Code"), which are remitted by Business to the City (the "Lodging Tax Rebate"). The Lodging Tax Rebate shall not exceed Two Hundred Thousand dollars (\$200,000.00) or extend beyond the first twenty-four (24) months of operation, whichever occurs first. In addition, the Lodging Tax Rebate shall not exceed the current tax rate of four percent (4%).

II. PAYMENT OF INCENTIVES – CONDITIONS AND LIMITATIONS.

A. Payment of Incentives.

1. This Agreement sets forth only the terms and conditions under which the Incentives will be paid and does not constitute an agreement by Business to meet the terms and conditions set forth herein. Failure of Business to meet any of the the terms, conditions and limitations set forth herein may subject the Incentives to reduction or elimination, as appropriate under the applicable Business Incentive Program.
2. The City shall pay the Incentives to Business as follows:
 - a. Construction-Related Rebates. Rebates of construction-related fees and construction-related sales/use tax will be paid within sixty (60) days of written notice from Business to the City that a Certificate of Occupancy has been issued for the building.
 - b. Lodging Tax Rebate. Notwithstanding anything in this Agreement to the contrary, the Lodging Tax Rebate shall be paid as follows; provided, however, that all such taxes must be remitted in a timely manner:

¹ "FTE" is calculated as follows: number of positions in the particular pay category earning above average wage multiplied by the total number of hours to be worked per week by all positions in such category, divided by 40 (hours).

i. For the first six (6) months Business is open to the public, the Lodging Tax Rebate shall be paid to Business within thirty (30) days after remittance of the sixth (6th) month of such taxes has been received by the City.

ii. Rebates of Lodging Taxes assessed subsequent to the first six (6) months of operation shall be paid on a quarterly basis within thirty (30) days after remittance of such taxes at the end of the applicable quarter.

c. All Other Incentives. Incentives awarded, but not addressed in subsections a. and b. of this Section II(A)(2), shall be paid in accordance with the terms and conditions of this Agreement and the applicable Business Incentive Program under which such Incentives have been awarded.

B. Conditions and Limitations. Except as otherwise expressly provided herein, the City shall provide the Incentives to Business in the form of rebates of identified fees paid and taxes remitted to the City in conjunction with the Capital Investment, subject to the following (including, as applicable, any and all appeals thereof):

1. The amount of the Capital Investment shall be calculated based on the actual cost of construction and installation beginning on or before June 1, 2013, of Capital Improvements at property located within Planning Area 8 of the DIA Tech Center development in Commerce City, Colorado.

2. Business must complete and/or make all expenditures related to the Capital Investment not later than June 1, 2014, and all Capital Improvements shall be completed not later than June 1, 2014.

3. In no event shall the amount of the Incentives paid to Business exceed the amount of fees and taxes identified herein and collected by the City in direct relation to the Capital Investment.

4. The City shall have the full and exclusive discretion to determine whether Capital Improvements are “construction-related” or “non-construction-related.”

5. Business, either directly or indirectly through its vendors and/or contractors, must timely pay to the City all applicable sales and use taxes and City fees related to the Capital Investment, which payment must be verified through applicable and appropriate sales and use tax audits or such other means as determined by the City’s Finance Department.

6. New jobs must be maintained for at least twenty-four (24) months from position start date, and an additional audit will be performed to ensure the job(s) created were maintained for the mandatory 24-month period. Business will be required to return to the City any monies received as job creation incentives for any job that is not maintained for the required 24-month period.

7. If required by the City, final approval of the Capital Improvements shall be made by the City confirming that construction and installation thereof is in compliance with all City building codes.

8. A final determination must be made by the City’s Finance Department, through applicable sales and use tax audits by the City or such other means as determined by the

City's Finance Department, of the amount of sales and use taxes remitted to the City, either directly by Business or indirectly through its vendors and/or contractors, in conjunction with the Capital Investment.

9. Business must fulfill or satisfy all other obligations and/or debts owed to the City, whether monetary or otherwise, including, but not limited to, any and all fees, fines, taxes, judgments, liens and dedications, whether or not related to the Capital Investment.

10. Business hereby acknowledges and agrees that the Incentives awarded herein are based on representations Business has made to the City regarding the amount, nature, caliber, quality, quantity, size, scope, etc., of the Capital Investment and the Capital Improvements. In the event the final Capital Investment is a lesser amount than estimated, or in the event the Capital Improvements are of a different nature, caliber, quality, quantity, size, scope, etc., the City reserves the right to re-evaluate any and all Incentives provided herein, and Business agrees that the City may thereafter amend or rescind this Agreement to account for any such changes to the Capital Investment or Capital Improvements and that the City may do so without any liability whatsoever to the City.

III. NOTICES.

A notice, demand or other communication under this Agreement by either party to the other shall be in writing and sufficiently given if delivered in person or if it is delivered by Certified Mail, Return Receipt Requested, postage prepaid, or by facsimile transmission with a confirmation thereof as follows:

To the City:

Economic Development Manager
City of Commerce City
7887 E. 60th Avenue
Commerce City, Colorado 80022

To Business:

Chris Thompson
DIA Tech Center Hotel I, LLC
5753 Shasta Circle
Littleton, CO 80123

IV. GENERAL.

A. Governing Law and Venue; Recovery of Costs. This Agreement shall be governed by the laws of the State of Colorado, and venue shall be in Adams County, Colorado. In the event legal action is brought to resolve any dispute among the parties related to this Agreement, the prevailing party in such action shall be entitled to recover reasonable court costs and attorney fees from the non-prevailing party.

B. Governmental Immunity Act. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.*

C. Independent Contractor Relationship – No Partnership or Agency. Notwithstanding any language in this Agreement or any representation or warranty to the contrary, neither the City nor the Business shall be deemed or constituted a partner or joint venture of the other. Neither the City nor the Business shall be the agent of the other, and any actions taken pursuant to this Agreement shall be deemed actions as an independent contractor of the other.

D. No Third-Party Beneficiaries. It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement shall be

strictly reserved to the parties. It is the express intention of the parties that no person other than the City and the Business shall be deemed to be a beneficiary under this Agreement.

E. No Waiver. No waiver by either party of any covenant, term, condition or agreement contained herein shall be deemed or construed as a waiver of any other covenant, term, condition or agreement nor shall a waiver of any breach hereof be deemed to constitute a waiver of any subsequent breach whether of the same or of a different provision of this Agreement.

F. Integrated Contract; Amendments. This Agreement is intended as the complete integration of all understandings among the parties concerning the subject matter hereof. No prior or contemporaneous addition, deletion or other amendment hereto shall have any force or effect whatsoever unless in writing and signed by both parties.

G. Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon the parties, their successors and assigns.

H. Authority. Each party represents and warrants that it has taken all actions that are necessary or required by its procedures, bylaws or applicable law to legally authorize the undersigned signatory to execute this Agreement on behalf of the parties and to bind the parties to its terms.

[The remainder of this page intentionally left blank. Signature page(s) follow(s).]

