

Contract #

**JOB CREATION INCENTIVE PROGRAM
GRANT AGREEMENT**

Between

THE CITY OF CLEVELAND (the “City”)

And

THE SHERWIN-WILLIAMS COMPANY (the “Grantee”)

Dated: _____

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JOB CREATION INCENTIVE PROGRAM GRANT AGREEMENT

This JOB CREATION INCENTIVE PROGRAM GRANT AGREEMENT (“Agreement”) is made and entered into this ___ day of _____, 2020, effective as of the ___ day of _____, 2020 (the “Effective Date”), by and between THE SHERWIN-WILLIAMS COMPANY, an Ohio corporation (“Grantee”) and the CITY OF CLEVELAND, OHIO (“City”), a municipal corporation duly organized and validly existing under the Constitution and laws of the State of Ohio, under the authority of City Ordinance No. ____ - __ passed on _____, 2020 and attached as EXHIBIT A (the “Ordinance”).

RECITALS

A. Grantee was founded in 1866 and today, including its affiliated entities (The Sherwin-Williams Headquarters Company, The Sherwin-Williams Manufacturing Company and others (any entity that controls the Grantee, is controlled by Grantee, or is under common control with Grantee is an “Affiliate”)), is a global leader in the manufacture, development, distribution and sale of paint, coatings and related products to professional, industrial, commercial and retail customers.

B. Grantee, itself or through one or more Affiliates, intends to acquire or cause to be acquired, or has acquired or caused to be acquired, ownership or leasehold interests in certain parcels of real property located in the City and shall develop or cause to be developed, construct or cause to be constructed (in one or more phases), and operate on the real property a new headquarters facility and possibly facilities for other business activities and supporting or complementary buildings, structures, infrastructure and appurtenances (the “Project Site”).

C. Grantee and the City entered into that certain Development Agreement dated as of _____, 2020 (the “Development Agreement”), attached hereto as Exhibit B, which Development Agreement more specifically describes the development of the Project Site and the anticipated operations at the Project Site.

D. In accordance with the Ordinance, which authorizes the City’s Director of Economic Development to enter into an agreement with Grantee to partially finance the relocation of Grantee to the Project Site, the City desires to offer a fifteen (15) year grant to Grantee (the “Grant Term”) with an estimated value of \$2,922,031 (the “Estimated Total”) and a maximum value of \$11,500,000.

E. The City and Grantee enter into this Agreement for the benefit and improvement of the economic welfare of the City's citizens as authorized in Article VIII, Section 13 of the Ohio Constitution.

NOW THEREFORE, in consideration of the mutual covenants contained in this Agreement, the parties to this Agreement agree as follows:

Section 1. Project As set forth in the Development Agreement, Grantee, itself or through itself and its Affiliates, employs three thousand one hundred thirty-eight (3,138) full-time equivalent employees at and/or domiciled out of its current headquarters in the City and other facilities in the City as of March 31, 2019, and the parties have agreed that the annual payroll in the City is \$347,219,356 (the “Baseline Payroll”). The Baseline Payroll Amount includes the base compensation and bonuses paid to Current City Employees (as defined below) during the twelve month period ending March 31, 2019, and does not include benefits, the exercise of stock options or restricted stock. For the purpose of this Agreement, “jobs” are calculated on a full-time equivalent basis, obtained by dividing the total number of hours for which employees were compensated for employment in the Project by two-thousand eighty (2080) hours. The Grantee, itself or through itself and its Affiliates, has employed full-time exempt employees that it records at 37.5 hours per week, 38.75 hours per week and 40 hours per week. The full-time equivalent employee number listed is calculated based on the number of hours reported divided by 2,080 hours. The hours allotted for exempt employees could change in the future and, as a result, the Grantee’s head count for employees could remain the same while the calculation of full-time equivalent employees could change.

Grantee requires additional space for its current and future operations. Grantee intends to relocate its current headquarters and possibly certain operations to the Project Site, as more specifically described in the Development Agreement (the “Project”). Grantee will relocate, retain and create one hundred forty (140) new jobs in the City in order to substantially meet the total job and payroll levels set forth in Exhibit C attached hereto during the fifteen (15) year term (each calendar year a “Term Year”).

Grantee and the City agree that increases over the Baseline Payroll (the “New Payroll”) will be supported with this Agreement.

Section 2. Job Creation Grant

A. During the Grant Term, the City shall pay to the Grantee, as a grant payment from non-tax revenues (each a “Grant Payment” and, collectively, the “Grant Payments”), as follows:

(i) A sum equal to Fifty Percent (50%) of the total amount of Cleveland Municipal Income Tax withheld by the Grantee and its Affiliates from the New Payroll during the applicable Term Year (the “New Payroll Withholding Tax”); and

(ii) In the event that the City increases its income tax above the current 2.5%, then the City further agrees to provide a retention grant to Grantee equal to the product of the Baseline Payroll multiplied by 50% of the increase in City income tax. For example, in 2022, if City income tax increases from 2.5% to 3%, and if New Payroll is \$72,000,000 and Baseline Payroll is \$245,000,000, then the applicable Grant Payment would be $1.5\% * \$72,000,000 = \$1,080,000$ plus $\$245,000,000 * .25\% = \$612,500$, for a total Grant Payment of \$1,692,500.

B. The Grant Payments shall be paid for Term Years 2021-2035. The Grant Term shall begin in Term Year 2021 (January 1, 2021) and terminate at the end of Term Year 2035 (December 31, 2035) so long as the Grantee, during the Grant Term, through itself or its Affiliates, maintains operations in the City. Grantee shall be entitled to the Grant Payments subject to compliance with the terms of this Agreement. Each Grant Payment is subject to annual appropriation by the Cleveland City Council (“City Council”).

C. In order to qualify for and receive any Grant Payment:

(i) Grantee or an Affiliate shall own the Project Site or shall have executed a lease for the Project Site with a term of no less than fifteen (15) years (including any lease extensions/options).

(ii) By the end of March following each Term Year, Grantee must submit a Certification and Application for Payment to the City in the form attached as Exhibit D, which will certify that, to the best of its knowledge:

a. The total number of full-time equivalent employees (as set forth in Section 1 of this Agreement) at the Project Site, represented by the Current City Payroll (“Current City Employees”); and

b. Grantee's total payroll (base compensation plus bonus but not including benefits, stock options or restricted stock awards) for all employees which is income taxable by the City for the prior Term Year, including that of any Affiliate (“Current City Payroll”); and

c. That Grantee is not delinquent on any portion of its municipal taxes, including employee withholding, due and owing to the City (unless such taxes are in dispute and in the appeals process); and

d. The Grantee’s average hourly wage it pays its then-Current City Employees meets or exceeds the City's then-current fair employment wage, regardless of the legal applicability of Chapter 189 of the City Codified Ordinances.

(iii) The Grantee, through itself or its Affiliates, must employ a minimum of 5 full-time non-1099 W-9 employees in each year.

D. There shall be no restriction or qualification as to the use by Grantee of any Grant Payment once earned.

E. Upon certification that a Grant Payment is to be made to Grantee, the City shall make the Grant Payment to Grantee in the form of a check (or such other customary payment method used by the City at the time of the applicable Grant Payment) on or before April 30 of the calendar year following the applicable Term

Year (or such later date reasonably determined by the City, if the City requires additional information or clarification regarding any Certification and Application for Payment) and shall endeavor to provide Grantee written notice (sent by electronic mail) that the Grant Payment has been made; provided that failure by the City to provide written notice that the Grant Payment has been made shall not be deemed a default under this Agreement.

F. Notwithstanding anything in this Agreement to the contrary, the obligations of the City under this Agreement shall not be general obligations of the City and Grantee shall have no right to have excises or taxes levied by the City for the City's performance of any obligation under this Agreement. Any payments or advances required to be made by the City under this Agreement shall be made solely from the City's non-tax revenues.

Section 3. Confidential Information The City agrees to keep confidential, to the maximum extent allowable by law, any and all business, financial or tax information of the Grantee. All such information provided to the City or its designee by the Company shall be considered confidential only if such materials are clearly marked as CONFIDENTIAL. The City will endeavor to immediately notify Grantee of any request for confidential information about this Agreement or any other confidential information about Grantee. Notwithstanding anything contained herein to the contrary, the City may disclose any confidential information delivered to the City in connection with this Agreement (collectively, the "Confidential Information") as required to comply with orders of governmental entities with jurisdiction over it, including as required in response to a valid subpoena or court order, or for a public records request (to the extent required by law); the City, however, agrees to (i) give the Grantee prior written notice sufficient to allow the Grantee to seek a protective order or other remedy (except to the extent that the City's compliance would cause it to violate an order of the governmental entity or other legal requirement), (ii) disclose only such information as is required by the governmental entity and/or the State public records law, and (iii) request and seek confidential treatment for any Confidential Information so disclosed. Upon request of the Grantee and at the Grantee's expense, including reimbursement to the City of any fines or costs incurred by the City (including reasonable legal fees), the City will use reasonable efforts to cooperate with the Grantee's efforts to obtain a protective order, restraining order, or other reasonable assurance to maintain the confidentiality of Confidential Information, and to resist or refuse disclosure thereof. If, in the absence of a protective order or restraining order, the City is compelled as a matter of law to disclose Confidential Information then the City will disclose only that portion of said information or documents as is required by law. The Grantee will defend and indemnify the City in any challenge to the City's refusal to release certain information based on the Grantee's claim that the information is confidential and not subject to release (each a "Public Records Challenge").

Section 4. Events of Default and Recovery of Grant Funds

A. Grantee Events of Default:

- (i) It shall be a default under this Agreement for Grantee to knowingly provide materially incorrect or fraudulent information to the

City in the application for Grant approval, in the negotiation of this Agreement, and/or in the submission of documentation for payments under this Agreement;

(ii) Prior to the end of the Grant Term, Grantee fails to maintain operations, through itself or its Affiliates, in the City substantially in accordance with the terms of the Development Agreement, subject to the Maintenance of Operations Threshold (as defined in the Development Agreement).

B. At any time, upon learning that Grantee has provided materially incorrect information, Grantee must promptly notify the City and provide corrected information. The total amount of all Grant Payments which were paid based on incorrect information shall be due and payable to the City within ten (10) business days after Grantee learns that it has provided materially incorrect information, without any other notice or demand of any kind.

C. Upon learning of an event of default and determining that such event of default has not been corrected to the reasonable satisfaction of the City, the City may exercise, concurrently or successively, any one or more of the following rights or remedies, upon forty-five (45) days prior written notice, during which period the Grantee will have an opportunity to cure the event of default to the reasonable satisfaction of the City:

(i) Wholly or partially terminate this Agreement and the rights given to Grantee in this Agreement.

(ii) Wholly or partially suspend this Agreement and the rights given to Grantee in this Agreement.

(iii) Temporarily or permanently withhold or reduce Grant Payments not yet earned by Grantee.

(iv) Recover any or all Grant Payments previously paid to Grantee which were not earned as of the time the Certification and Application for Payment to the City was submitted and for which the Grantee would not have been paid but for the breach (the "Repayment Amount"), except that with respect to default under Section 4(A)(ii), all Grant Payments may be recovered, less an amount to be determined in good faith by the City that takes into account, on a proportional basis, the Applicable Market Conditions (as defined in the Development Agreement).

D. City Event of Default: It shall be a City Event of Default under this Agreement if the City fails to appropriate and pay the Grant Payment in accordance with the terms of this Agreement, and such failure continues for forty-five (45) days after written notice from the Grantee; provided that such failure is not due to a good faith dispute regarding any Grant Payment. Upon a City Event of Default, Grantee

shall have all rights and remedies available against the City, including but not limited to claims for damages.

E. This Section 4 shall survive the Grant Term for a period of three (3) years.

Section 5. Indemnification Grantee agrees to indemnify the City and hold the City, its agents, employees and members of City Council (the “Indemnified Parties”) harmless as against any third party liability, damages or loss of any kind brought against or incurred by the Indemnified Parties, whether at law or in equity, arising out of or in connection with this Agreement, other than any third party liability, damages or loss caused by the gross negligence or willful misconduct of the City. In case any claim or demand is at any time made, or action or proceeding is brought, against the City in respect of which indemnity may be sought hereunder, the City will give prompt written notice of that action or proceeding to the Grantee, and the Grantee upon receipt of that notice will have the right, but not the obligation, to assume the defense of the action or proceeding. In addition to the other limitations herein, the aggregate payments that may be due from the Grantee under this Section will not exceed the total of the Grant Payments (except for claims related to a Public Records Challenge). Notwithstanding any other provision in this Agreement, the Grantee will not be required to indemnify the Indemnified Parties for any settlements reached with respect to a third party claim unless the Grantee has provided its prior written consent for such settlement.

This Section 5 shall survive the termination of this Agreement.

Section 6. Payment of Fees Grantee agrees to pay a non-refundable fee in the amount of \$11,500.00 payable to the “City of Cleveland” due upon application for the Grant.

Section 7. No-Default Certification Grantee certifies that, to the best of its knowledge, there shall exist as of the Effective Date of this Agreement no event or condition that constitutes an event of default as set forth in Section 4, or that, after notice or lapse of time or both, would constitute such an event of default.

Section 8. Miscellaneous Provisions

A. All notices, demands, requests, consents or approvals given, or required to be given under this Agreement, shall be in writing and shall be deemed sufficiently given if actually received or if hand-delivered or if sent by recognized overnight delivery service or by certified mail, postage pre-paid return receipt requested, provided that it is addressed to the other party at the following addresses, or at such other address as the recipient may later provide in writing:

To City at:

Director of Economic Development
City of Cleveland
601 Lakeside Ave., Room 210

File No. 287-2020-B

Cleveland, OH 44114

and

Director of Law
City of Cleveland
601 Lakeside Ave., Room 106
Cleveland, OH 44114

and

McDonald Hopkins LLC
600 Superior Avenue, Suite 2100
Cleveland, Ohio 44114
Attention: Teresa Metcalf Beasley

To Grantee at: The Sherwin-Williams Company
101 W. Prospect Ave.
Cleveland, OH 44115
Attention: Senior Vice President, General
Counsel and Secretary, Mary L. Garceau

and

The Sherwin-Williams Company
101 W. Prospect Ave.
Cleveland, OH 44115
Attention: Vice President – Taxes, Lawrence J.
Boron

and

Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43215
Attention: Scott J. Ziance

B. No official executing or approving this Agreement shall be personally liable under this Agreement or be subject to any personal liability or accountability by reason of authorizing this Agreement. The City agrees that the Grantee's liability in connection with this Agreement shall be limited to, and not exceed, the aggregate amount of the Grant Payments, and the City agrees that in no event shall the City claim or seek consequential, punitive, lost business or other damages from the Grantee or seek any claims or damages against the Grantee's officers, directors, agents or representatives under this Agreement; provided, however, that the foregoing limitation of liability shall not apply to any Public Records Challenge.

C. This Agreement may be amended only by written agreement between the parties, duly executed by the parties and approved by the City Council if necessary.

D. During the term of this Agreement and for a period of at least three (3) years after the expiration of this Agreement, the Grantee shall maintain records reasonably sufficient to document the Grantee's performance under this Agreement (the "Records"). The Grantee shall permit the City and/or its designee(s) to review the Records, upon not less than ten (10) business days prior written notice, provided that such review shall: (i) not be disruptive to the Grantee's business, (ii) take place at a mutually agreed time during the Grantee's normal business hours; (iii) be completed within sixty (60) days from commencement; (iv) not be engaged with a contingent fee structure; and (v) to the extent practicable, rely on inspection and review of documents and not require the removal of any documents. In the event the City's examination reveals a deficiency or discrepancy, the Parties will cooperate in good faith to address and resolve any such deficiency or discrepancy. Records reviewed by the City in connection with any such audit shall be treated as confidential information of the Grantee and the City agrees to maintain the confidentiality of such information to the maximum extent permitted by applicable law. Notwithstanding the foregoing or any other provision of this Agreement, the Grantee will not be required to disclose, permit the inspection of or examination of, or discuss, any information that: (i) contains trade secrets, or (ii) is subject to attorney-client or similar privilege. Nothing in this Agreement shall be interpreted as contrary to the Ohio Public Records Act (Ohio Revised Code Section 149.43).

E. In the case of an event of Force Majeure (defined below), all deadlines and obligations of the parties shall be tolled and extended for a time period equal to the delay. "Force Majeure" means any of the following events outside of the parties' control that impact a party's ability to meet its deadlines or other obligations: flood, earthquake, storm, lightning, fire, or other acts of God; act of a public enemy; war; riot; sabotage; blockage; embargo; failure or inability to secure materials, supplies or labor through ordinary sources by reason of shortages or priority; labor strike, lockout or other labor or industrial disturbance (whether or not on the part of agents or employees of the Grantee); civil disturbance; terrorist act; power outage; governmental permitting or other governmental delays. Each party agrees that it cannot invoke Force Majeure for a delay the party itself causes.

F. This Agreement and all rights and benefits of the Grantee under this Agreement may be transferred and assigned by the Grantee, in whole or in part, to any Affiliate or to any successor of the Grantee, with written notice to the City.

G. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions of this Agreement. The remaining provisions of this Agreement shall be read together to preserve the intent of the parties to the fullest extent possible.

H. Notwithstanding anything to the contrary herein, Grantee may terminate this Agreement effective upon sixty (60) days prior written notice to the City, in which event the City will be released from any liability or obligation to Grantee except to make payment to Grantee of any valid Grant Payment which has accrued prior to such effective date of termination; provided, however, that any written notice of termination shall not be effective if such notice is delivered to avoid the occurrence of an Event of Default under Section 4(A) of this Agreement, as determined by the City in its reasonable discretion.

I. In the event that any law, rule, or regulation applicable to this Agreement or the Grantee or any policy, decision or interpretation thereof at any time during the term of this Agreement is modified, issued, implemented or determined to prohibit or materially restrict the terms of this Agreement, then the parties to this Agreement shall negotiate in good faith to amend this Agreement to minimum degree necessary in a manner consistent with such change and the intent of the parties.

J. This Agreement may be executed in any number of counterparts and by different parties in separate counterparts. Each counterpart when so executed shall be deemed to be an original and all of which together shall constitute one and the same Agreement.

[Remainder of page intentionally left blank]

[Signature Page to Follow]

File No. 287-2020-B

AFTER DUE AUTHORIZATION, the parties have each caused this Agreement to be duly executed as of the day of and year first written above.

CITY OF CLEVELAND

Department of Economic Development
601 Lakeside Avenue, Room 210
Cleveland, OH 44114
Phone: (216) 664-3611

By: _____
David Ebersole, Director of
Economic Development

Date: _____

Approved as to Form:
Barbara Langhenry
Director of Law

By: Steven Martinek
Its: Assistant Director of Law
Date:

THE SHERWIN-WILLIAMS
COMPANY

By: _____
Name, Title

Date: _____

FISCAL OFFICER'S CERTIFICATE

As fiscal officer for the City of Cleveland, I hereby certify that funds sufficient to meet the obligations of the City in this Agreement (including specifically the funds required to meet the obligation of the City in the year 2020) have been lawfully appropriated for the purposes thereof and are available in the treasury, and/or are in the process of collection to the credit of an appropriate fund, free from any previous encumbrances. This certificate is given in compliance with Ohio Revised Code Sections 5705.41 et seq.

Dated: _____, 2020

Director of Finance
City of Cleveland
Cuyahoga County, Ohio

EXHIBIT A

ORDINANCE NO. 1__-__

EXHIBIT B
DEVELOPMENT AGREEMENT

See attached.

EXHIBIT C

JOB AND PAYROLL PROJECTIONS

Current FTE Employees: 3,138

Baseline Payroll: \$347,219,356

Projected New FTE Employees: 140 (over four (4) years following occupancy)

Projected New Payroll: $\$89,500 \times 140 = \$12,530,000$

EXHIBIT D

**ANNUAL JOB CERTIFICATION FORM FOR
JOB CREATION INCENTIVE PROGRAM
GRANT PAYMENT**

Pursuant to the Job Creation Incentive Program Grant Agreement ("Agreement") dated _____, 2020, with an effective date of _____, 2020 (the "Effective Date") between the CITY OF CLEVELAND, OHIO ("City") and THE SHERWIN-WILLIAMS COMPANY ("Grantee"), Grantee hereby certifies the following to the best of its knowledge:

1. The attachment (Attachment 1) for the prior calendar year states the number of Current City Employees, demonstrated by taking total hours worked (per Section 1 of the Agreement) and dividing it by 2,080 hours; and
2. Grantee has also attached (Attachment 2) a true copy of the Current City Payroll, which includes Grantee's total payroll (base compensation plus bonuses but not including benefits, stock options or restricted stock awards) for all employees which is income taxable by the City, including that of any Affiliate, for the prior calendar year; and
3. Grantee is not delinquent on any portion of its municipal taxes, including employee withholding, due and owing to the City (unless such taxes are in dispute and in the appeals process); and
4. The Grantee's average hourly wage it pays its then-Current City Employees meets or exceeds the City's then-current fair employment wage, regardless of the legal applicability of Chapter 189 of the City Codified Ordinances.

The Sherwin-Williams Company

By: _____
Name ; Title

Date: _____