



CITY OF MARTINEZ

**CITY COUNCIL AGENDA
September 17, 2014**

TO: Mayor and City Council
FROM: Jim Jakel, Interim City Manager
SUBJECT: Approval of Location Agreement and Operations Covenant with S&S Tool and Supply, Inc.
DATE: September 11, 2014

RECOMMENDATION:

Consider a Resolution approving the Location Agreement and Operations Covenant between the City of Martinez and S&S Tool and Supply Inc. DBA S&S Supplies and Solutions, as it is consistent with the City of Martinez Economic Stimulus Program; and authorize the Interim City Manager to execute said Agreement.

BACKGROUND:

In July of 2014 the City Council approved the City of Martinez economic Stimulus Program. The purpose of this program is to help stimulate the attraction of new business and retain and encourage the expansion of key existing business enterprises.

Attached for the Council’s reference are the Staff Report and Program documents from the July 2, 2014 City Council meeting.

In brief, the program is open only to wholesale or “Business to Business” operations. When adopted the other qualifications in the program reduced the number of local eligible businesses to just two. S&S Tool and Supply is the second of these enterprises to seek Council approval for a tax sharing agreement. It remains an economic development goal of the City to attract other such businesses and enter into similar agreements in an effort to enhance our sales tax base.

The proposed Agreement is the implementing document for the Stimulus Program. It was drafted by the City Attorney’s Office and been reviewed by legal counsel for S&S.

The key financial terms are in Section 4.1 and 4.2. Specifically:

4.1 Rebate Payment. City agrees to provide, during the term of this Agreement and subject to the terms and conditions herein contained, an annual rebate of the Sales and Use Tax attributable to Company’s activities at the Site in accordance with the following (the “Rebate Payment”):

For the first 18 months of the term hereof, the City shall rebate to Company fifty percent (50%) of Sales and Use Tax generated by the Company and actually received by the City (the “Tier 1 Rebate”). Thereafter, the City

shall rebate to Company fifty percent (50%) of any amounts of Sales and Use Tax generated by the Company that exceed \$200,000 in each Fiscal Year and are actually received by City (the “Tier 2 Rebate”).

Notwithstanding the foregoing, the City will have no obligation to provide any Rebate Payment to the Company for any Fiscal Year where it has not received payments from the BOE of the Sales and Use Taxes on which the Rebate Payment is calculated. For the purposes of calculating the Rebate Payment, only Sales and Use Tax generated on or after the Effective Date shall be used.

4.2 Limits on Rebate Payments: Alternative Rebate Payments. Notwithstanding Section 4.1 or any other provision of this Agreement, no Rebate Payment will be due to Company for any Fiscal Year in which the City’s overall Sales and Use Tax revenues (the “Actual Tax Receipts”) falls below \$3.8 million. From the date of this Agreement, in the event the Actual Tax Receipts falls between \$3.8 million and \$4.0 Million for any Fiscal Year during the Operating Term, the Tier 1 and Tier 2 Rebates to Company shall be thirty-five percent (35%) (i.e., not 50%) of Sales and Use Tax generated by the Company and actually received by the City.

Under no circumstances shall a Rebate Payment be due to Company that reflects Sales and Use Tax generated after June 30, 2019.

S&S Tool and Supply is an important business that provides supplies and service to Shell Oil, PG&E and other industrial users. They have been an important source of sales tax revenue and employment in our community. Recent expansion plans for the Company have led them to build a new facility in Fairfield. With that project a significant portion of the sales tax revenue has been transferred. The owners have expressed a willingness to continue to use Martinez as a base for some of their operations. To that end, they have entered into a new lease with Shell Oil at 501 Shell Avenue and are relocating a portion of the operations from another site on Shell property along Shell Ave. By approving this agreement, we will be giving the company a significant incentive to remain in Martinez and consider expansion here and not just in Fairfield.

FISCAL IMPACT:

This Agreement has the potential to retain sales tax that would otherwise be lost. As this time the exact amount to be received is unknown. However, after the first 18 months of the Agreement, rebates are only triggered for sales tax collection in excess of \$200,000. Given that factor, it is likely that the business has as a goal to account for sales tax generation in excess of that amount. Further, the existence of this Agreement with one business can serve as a marketing tool in future efforts to attract similar enterprises.

ACTION:

Motion adopting the Resolution approving the Location Agreement and Operations Covenant between the City of Martinez and S&S Tool and Supply Inc. DBA S&S Supplies and Solutions; and authorizing the Interim City Manager to execute said Agreement.

Attachment:
Resolution
Location Agreement
Economic Stimulus

RESOLUTION NO. -14

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARTINEZ APPROVING A LOCATION AGREEMENT AND OPERATIONS COVENANT WITH S&S TOOL AND SUPPLY INC., DBA S7S SUPPLIES AND SOLUTIONS, AS IT IS CONSISTENT WITH THE CITY OF MARTINEZ ECONOMIC STIMULUS PROGRAM; AND AUTHORIZE THE INTERIM CITY MANAGER TO EXECUTE SAID AGREEMENT

WHEREAS, the City of Martinez adopted an Economic Stimulus Program to enhance the City's ability to expand and diversify the tax bases; and

WHEREAS, the Program is targeted at "Business to Business" industries; and

WHEREAS, S&S Tool and Supply Inc. is an eligible business enterprise under the Program; and

WHEREAS, by entering into this Agreement, the City's sales tax base can be enhanced; and

WHEREAS, sales tax is a major component of the City's unrestricted revenues, representing approximating 20% of the general fund; and

WHEREAS, having this Agreement in place, the City will be in an improved position to attract other similar businesses; and

WHEREAS, the Agreement will make the City of Martinez a more competitive location for S&S Tool and Supply to consider expansion.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Martinez, that the Location Agreement and Operating Covenant with S&S Tool and Supply Inc. is hereby approved as presented to the City Council attached hereto and incorporated herein as reference.

BE IT FURTHER RESOLVED that the Interim City Manager is hereby authorized to execute said Agreement.

* * * * *

I HEREBY CERTIFY that the foregoing is a true and correct copy of a resolution duly adopted by the City Council of the City of Martinez at a Regular Meeting of said Council held on the 17th day of September, 2014, by the following vote:

AYES:

NOES:

ABSENT:

RICHARD G. HERNANDEZ, CITY CLERK
CITY OF MARTINEZ

LOCATION AGREEMENT

AND OPERATIONS COVENANT

between

City of Martinez

and

S & S Tool and Supply, Inc.

dba

S & S Supplies and Solutions

THIS LOCATION AGREEMENT AND OPERATIONS COVENANT ("Agreement"), dated as of _____, 2014 (the "Effective Date"), is entered into by and between the CITY OF MARTINEZ, a municipal corporation (the "City") and S & S Tool and Supply, Inc., a California Corporation, dba S & S Supplies and Solutions (the "Company").

RECITALS

A. Sales tax is a major component of the City's unrestricted revenues (currently representing 20%). Over one-third of sales tax revenue in the City comes from a handful of businesses. This lack of diversification in a major revenue source creates a volatile economic situation for the City and a challenging environment to plan for the future and predict revenue from year to year. In response, the City established its Business to Business Economic Stimulus Program (the "Program") to create a tool to stimulate the attraction and retention of new, existing, or expanded businesses and the resulting growth in the City's tax base. Under the guidelines for the Program adopted by the City Council and attached hereto as Exhibit A (the "Guidelines"), the City provides conditional financial assistance to certain businesses that establish new, retained or expanded facilities in the City and execute covenants to continue operations here. The amount of the assistance is based on the sales and use tax revenue received by the City as a result of the new, retained or expanded operations.

B. The Company is in the business of industrial supply distribution and a portion of its operations are currently located at 501 Shell Avenue, Martinez, CA (the "Site"). The City has determined that the Company has met the Eligibility Criteria (as defined in Section 1.1 below) for the Program.

C. The Company's facility is expected to contribute to the economic vitality of the City, provide additional jobs, preserve the City's tax base, and otherwise improve economic and physical conditions in the City.

D. In order to induce the Company to continue to locate a portion of its operations at the Site, the City is willing to provide contingent financial assistance to the Company pursuant to the Program Guidelines and as described more particularly in this Agreement.

E. The City Council finds and determines that performance of the City's obligations under this Agreement and the undertakings of the Company required by this Agreement will promote the public health, safety, and welfare of the citizens of the City and will be of substantial economic benefit to the City.

F. The City's obligations under this Agreement for any particular Fiscal Year of the City are contingent upon: (i) the Company's remaining in the City during all of such Fiscal Year; (ii) the Company generating Sales and Use Taxes from operations within the City that equal or exceed the levels required by the Program Guidelines; and (iii) the City's actual receipt of such Sales and Use Taxes generated.

AGREEMENT

NOW, THEREFORE, in consideration of the promises set forth in this Agreement, the City and the Company agree as follows:

1. DEFINITIONS

The following terms as used in this Agreement shall have the meanings given unless expressly provided to the contrary:

1.1 "BOE": the California State Board of Equalization.

1.2 "Effective Date": the date on which duly authorized representatives of both parties execute this Agreement.

1.3 "Eligibility Criteria": the applicable minimum requirements for type of business operations and volume of business as set forth in the Program Guidelines.

1.4 "Fiscal Year": the City's fiscal year, which commences July 1 and ends on June 30 of each calendar year.

1.5 "Guidelines": defined in Recital A.

1.6 "Operating Term": the period commencing on the Effective Date and terminating on June 30, 2019.

1.7 "Party": the Company or the City, as applicable; together, the "Parties".

1.8 "Point of Sale": the location where a sale or use transaction occurs and the point at which California State Sales and Use Tax is applied to the transaction

1.9 "Program": defined in Recital A.

1.10 "Quarter": one-fourth of the Fiscal Year. The first Quarter shall commence on July 1 and end on September 30. The second Quarter shall commence on October 1 and end on December 31. The third Quarter shall commence on January 1 and end on March 31. The fourth Quarter shall commence on April 1 and end on June 30.

1.11 "Sales and Use Taxes": the taxes derived from the Company's business conducted on the Site and allocated to and actually received by the City pursuant to the Uniform Local Sales and Use Tax Law, commencing with California Revenue and Taxation Code Section 7200 *et seq.*, as amended. Sales and Use Taxes shall not include penalties, assessments, collection costs, and other costs, fees, or charges resulting from late or delinquent payments, taxes levied by, collected for or allocated to the State of California, the County of Contra Costa, any district or other entity, or any funds paid, granted or allocated to the City by the State of California, the County of Contra Costa, any district or other entity, notwithstanding that such funds received by the City are derived or measured by such other entity based upon taxable sales. For purposes of this Agreement, the term "Sales and Use Taxes" shall not include: (i) any portion of taxes received by the City from the operation of any of the Site that the City may be required to pay, transfer, assign, or allocate to any other entity or entities by virtue of any law now or hereafter

existing, or by virtue of any agreement entered into between City and any other governmental entity under California state law; (ii) the BOE's administrative and processing fee attributable to the City's portion of such taxes (calculated at the same percentage of such taxes as applies city-wide); and (iii) any sales tax "over-rides" for transportation and public safety. "Sales and Use Taxes" shall not be considered to have been received by the City until the City is able to confirm receipt of such taxes from the BOE.

1.12 "Site": 501 Shell Avenue, Martinez, California.

2. OBLIGATIONS OF THE COMPANY

2.1 Operation of Business. At all times during the Operating Term, the Company agrees to: (i) continuously operate its business at the Site in the manner contemplated by both parties upon execution of this Agreement, (ii) cause the Site to be the point of sale for enough Company sales to meet the Eligibility Criteria, (iii) maintain a current business license with the City of Martinez, and (iv) comply with the Program Guidelines.

2.2 Site. The Company has a lease for a term longer than five (5) years for the Site. Company shall not be in default under its lease during the term hereof. The Company may not move its business to another location in the City of Martinez without the prior written consent of City. If such consent is granted, the new location in the City of Martinez shall be deemed to constitute the "Site" for purposes of this Agreement.

2.3 Local, State, and Federal Laws. The Company shall carry out the operation of its business in conformity with all applicable local, state, and federal laws applicable to Company's activities, including but not limited to paying all applicable taxes, assessments and fees.

2.4 Reports. The Company shall provide to the City true and correct copies of all statements and reports filed with the State Board of Equalization by the Company in connection with the Site, including but not limited to Form BOE-401-A, within ten (10) days after filing every such report, in order to allow the City to preliminarily determine the amount of Sales and Use Taxes paid by the Company on account of sales from the Site.

2.5 Indemnification. Subject to the terms of this Agreement, Company shall, to the fullest extent permitted by law, defend, indemnify and hold the City, its directors, officials, officers, employees, volunteers and agents free and harmless from and against any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury of any kind, in law or equity, in any manner arising out of, pertaining to, or incident to any alleged acts, errors or omissions of Company, its officials, officers, employees, subcontractors, consultants or agents in connection with the (i) operation of the Site and (ii) Company's performance of its obligations under this Agreement, including without limitation reasonable attorneys fees and other related costs and expenses.

3. REPRESENTATIONS AND WARRANTIES OF THE COMPANY

The Company makes the following representations and warranties as of the Effective Date:

3.1 Enforceability. The Company has full right, power, and authority to execute and deliver this Agreement and all instruments executed pursuant hereto, and to perform the undertakings of the Company contained in this Agreement and all agreements executed pursuant hereto. This Agreement and all agreements executed pursuant hereto constitute valid and binding obligations of the Company which are legally enforceable in accordance with their terms, subject to the application and effect of all governmental requirements including, without limitation, the laws of bankruptcy, creditor's rights exceptions, and equity.

3.2 Site. The Company has a leasehold interest in the Site until [REDACTED], pursuant to that certain commercial lease with dated.

3.3 Eligibility; Compliance with Program Guidelines. The Company meets the Eligibility Criteria and Company's operations are in full compliance with the Program Guidelines.

3.4 No Breach. None of the undertakings of the Company contained in this Agreement and all agreements executed pursuant hereto violates any applicable governmental requirements, or conflicts with, or constitutes a breach or default under, any agreement by which the Company or the Site is bound or regulated.

3.5 Financial Information. All financial information prepared by the Company and delivered to the City by the Company, including, without limit, information relating to the Company or the Site, fairly and accurately represents such financial condition in all material respects as of the date such financial information was prepared. No material adverse change in such financial condition has occurred as of the date of this Agreement from that disclosed in such financial information.

3.6 Accuracy. To the best of the Company's knowledge, all documents, reports, instruments, papers, data, information and forms of evidence delivered to the City by the Company with respect to this Agreement and all agreements executed by the Company pursuant hereto are accurate and correct in all material respects, are materially complete insofar as completeness may be necessary to give the City true and accurate knowledge of the subject matter thereof, and do not contain any material misrepresentation or omission by the Company. The City may rely on such reports, documents, instruments, papers, data, information, and forms of evidence without any investigation or inquiry.

3.7 Taxes. To the best of the Company's knowledge, the Company has filed all federal, state, county and municipal tax returns required to have been filed by the Company, and has paid all taxes which have become due pursuant to such returns.

3.8 Warranties Against Payment of Consideration for Agreement. The Company represents and warrants that the Company has not employed or retained any Person to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees of the Company. The Company further represents and warrants that no gratuities, in the form of entertainment, gifts or otherwise have been or will be given by the Company or any of its agents, employees, or representatives to any elected or appointed official or employee of the City in an attempt to secure this Agreement or favorable terms or conditions for this Agreement. Breach of the representations or warranties of this Article 3 shall automatically terminate this Agreement, without further notice to or action

by either Party, and the Company shall immediately refund any Rebate Payments (as defined below) made pursuant to this Agreement prior to the date of any such termination.

4. FINANCIAL ASSISTANCE

4.1 Rebate Payment. City agrees to provide, during the term of this Agreement and subject to the terms and conditions herein contained, an annual rebate of the Sales and Use Tax attributable to Company's activities at the Site in accordance with the following (the "Rebate Payment"):

For the first 18 months of the term hereof, the City shall rebate to Company fifty percent (50%) of Sales and Use Tax generated by the Company and actually received by the City (the "Tier 1 Rebate"). Thereafter, the City shall rebate to Company fifty percent (50%) of any amounts of Sales and Use Tax generated by the Company that exceed \$200,000 in each Fiscal Year and are actually received by City (the "Tier 2 Rebate").

Notwithstanding the foregoing, the City will have no obligation to provide any Rebate Payment to the Company for any Fiscal Year where it has not received payments from the BOE of the Sales and Use Taxes on which the Rebate Payment is calculated. For the purposes of calculating the Rebate Payment, only Sales and Use Tax generated on or after the Effective Date shall be used.

4.2 Limits on Rebate Payments; Alternative Rebate Payments. Notwithstanding Section 4.1 or any other provision of this Agreement, no Rebate Payment will be due to Company for any Fiscal Year in which the City's overall Sales and Use Tax revenues (the "Actual Tax Receipts") falls below \$3.8 million. From the date of this Agreement, in the event the Actual Tax Receipts falls between \$3.8 million and \$4.0 million for any Fiscal Year during the Operating Term, the Tier 1 and Tier 2 Rebates to Company shall be thirty-five percent (35%) (i.e., not 50%) of Sales and Use Tax generated by the Company and actually received by City.

Under no circumstances shall a Rebate Payment be due to Company that reflects Sales and Use Tax generated after June 30, 2019.

4.3 Disputes. In the event of any dispute regarding the amounts payable under this Article, the Parties shall promptly meet and confer in good faith to attempt to resolve the dispute.

4.4 Notice of Determination of Rebate Payment. Within fifteen (15) calendar days following the end of each Fiscal Year during the Term hereof, Company shall submit to City: certified copies of Company's quarterly Sales Tax Reports to the BOE which set forth the amount of Sales Tax paid to the BOE during the prior Fiscal Year in connection with the sales and business activities of Company. Within thirty (30) calendar days following its receipt of the foregoing information from Company, the City will determine the Sales Tax Revenues applicable to the Fiscal Year and the Rebate Payment due and provide Company with written notice of the City's determination thereof (the "Notice of Determination").

4.5 Appeal of Rebate Payment: Negotiation Period. Notwithstanding any other provision of law, including, without implied limitation, any statutes of limitation provided therefor in the

California Government Code or the California Code of Civil Procedure, the City's determination of the matters set forth in the Notice of Determination shall be deemed final, conclusive, and non-appealable unless, within fifteen (15) calendar days from the receipt of the Notice of Determination by Company, Company notifies the City in writing that Company appeals one or more of the matters set forth in the Notice of Determination, which notice must specifically identify the matter appealed and all of the bases for such appeal ("Notice of Appeal"). Any matter set forth in the Notice of Determination that is not appealed in the manner and within the time limits set forth above, shall be final and conclusive as against Company and all others claiming by or through it. The provisions of this Section 4.5 shall be strictly construed and Company hereby waives, to the maximum extent permitted by law, any statutory or judicially created right to institute any administrative or judicial proceeding to contest any matter set forth in a Notice of Determination that is not timely appealed in strict accordance with this Section. If Company does not file a Notice of Appeal, the City shall tender the Rebate Payment due within sixty (60) calendar days from the end of the Fiscal Year. If Company files a timely Notice of Appeal with the City, the City and Company shall negotiate in good faith to resolve the dispute for a period of thirty (30) calendar days from the date of the Notice of Appeal (the "Negotiation Period"). The City shall not be required to tender the Rebate Payment until thirty (30) days after the end of the Negotiation Period, and the amount of the Rebate Payment shall be as set forth in the Notice of Determination unless otherwise agreed to by both parties during the Negotiation Period. If, by the end of the Negotiation Period, the City and Company are unable to resolve the dispute set forth in the Notice of Appeal, each of them may exercise any judicial remedy available to them pursuant to this Agreement for the resolution of such dispute; provided, however, that any provision of law to the contrary notwithstanding, such judicial remedy must be instituted (the term "instituted" is defined as the filing of an action in a court of competent jurisdiction in strict accordance with the terms of this Agreement) within one hundred and eighty (180) days following the end of the Negotiation Period or be barred forever.

4.6 No Accrual of Interest on Disputed Rebate Payments. The City and Company hereby agree that any disputed amount of the Rebate Payment shall not accrue interest during the pendency of any Negotiation Period or subsequent legal proceeding (including any appeals filed in connection therewith), unless the court makes a determination that the City acted in bad faith with regard to the dispute, in which case, any amount ultimately determined to be owing by the City shall be deemed to have accrued interest at the rate of Two Percent (2%) simple interest per annum, commencing on the date of the delivery of the Notice of Appeal and continuing thereafter until paid in whole by the City. Company hereby waives, to the maximum extent permitted by law, the right to the imposition of any different rate of interest in accordance with any provision of law.

4.7 BOE Determination of Improperly Allocated Local Sales Tax Revenues. If, at any time during or after the Term of this Agreement, the BOE determines that all or any portion of the Sales Tax Revenues received by the City and shared with Company as provided herein were improperly allocated and/or paid to the City ("Misallocation"), and if the BOE requires repayment of offsets against future Sales Tax payments due to the City, or otherwise recaptures from the City the Misallocation, then Company shall, within thirty (30) calendar days after written demand from the City, repay the amount of the Misallocation theretofore paid to Company. This Section 4.7 shall survive the expiration or termination of this Agreement. Further, if at any time, the BOE fails or refuses to remit to the City all or any portion of any Sales Tax

Revenues applicable to any time period during the Term hereof, then such Sales Tax Revenues retained by the BOE shall not be considered in calculating any Rebate Payment otherwise due and payable under this Agreement, unless and until such retained Sales Tax Revenues are paid to the City.

4.8 Remittance of Rebate Payments as Contingent Obligation of City. The City's obligations under this Article 4 are, on a year to year basis and for each Fiscal Year during the Term hereof, contingent on the City's obligations to make any payments to Company under this Agreement and are expressly contingent upon Company, for the entirety of such Fiscal Year, not being in Default in any of its material obligations under this Agreement. If for any reason, Company fails to authorize the release or use of Sales Tax information in a manner satisfactory to the BOE or provide any information reasonably required by the City to perform the City's obligations under this Agreement, the City shall have no obligation to make any Rebate. Payment with respect thereto to Company for the period during which such information is unavailable to the City or the City is not legally authorized to use such information for the purposes of performing its obligations under this Agreement. Additionally, during any period in which the Sales Tax information of Company is unavailable to the City or the City is not legally authorized to use such information for the purposes of performing its obligations under this Agreement, Rebate Payments with respect thereto shall be deemed suspended.

4.9 (a) State of California Legislation Impact on Rebate Payment. Without limiting the generality of the foregoing paragraph, Company acknowledges that the state legislature has in the past adopted certain legislation which diverted to the State of California a portion of the Sales Tax Revenues which would otherwise be payable to the City. Company acknowledges that it is possible that the state legislature may enact similar legislation in the future which would cause a corresponding reduction of and/or delay in the payment of the Sales Tax Revenues, and that such reduction will cause a corresponding reduction for Company and/or delay in the payment of the Rebate Payments due to Company during such time as such legislation is in effect. Furthermore, Company acknowledges that it is possible that the legislation described above, or some variant thereof, may be enacted and effective during one or more subsequent times during the Term hereof and may materially and negatively impact the amount of Sales Tax Revenues and, accordingly, the Rebate Payments. The City does not make any representation, warranty or commitment concerning the future actions of the State of California legislature with respect to the allocation of Sales Tax Revenues to the City. Company agrees that it is undertaking the obligations under this Agreement after having considered, and expressly assuming the risk of, the possibility of the enactment of such legislation. The City acknowledges that the state legislature or the federal government through Congressional actions or other public entities may provide for the payment to City of other revenues for the purpose of offsetting any losses in Sales Tax Revenues resulting from the enactment of legislation of the type described in this paragraph. The City agrees that should any such offsetting revenues be provided, then for purposes of this Agreement and the computation of any Rebate Payments which may become due to Company hereunder, the City will consider any such offsetting revenues which are (i) indexed to Sales Tax and offset the loss of Sales Tax revenues to the City on a dollar for dollar basis, (ii) actually received by the City, and (iii) not subject to any restrictions on use beyond those which are otherwise generally applicable to Sales Tax revenues received by California municipalities, to be Sales Tax Revenues within the meaning of this Agreement.

(b) In addition, Company acknowledges that the state legislature has in the past adopted certain legislation that prohibits sales tax sharing arrangements between municipalities and certain types of businesses. Company acknowledges that it is possible that the state legislature may enact similar legislation in the future which would prohibit or limit the Rebate Payments Company acknowledges that it is possible that the legislation described above, or some variant thereof, may be enacted and effective during the Term hereof and may materially and negatively impact the amount and/or legality of any Rebate Payments hereunder. The City does not make any representation, warranty or commitment concerning the future actions of the State of California legislature with respect to the future legality of the Rebate Payments hereunder. Company agrees that it is undertaking the obligations under this Agreement after having considered, and expressly assuming the risk of, the possibility of the enactment of such legislation. The Parties hereto acknowledge that if the state legislature or the federal government adopts any law, rule or regulation which would render unlawful any of the Rebate Payments hereunder, this Agreement shall automatically terminate and be of no further force and effect, the City shall not be obligated to make any further Rebate Payments to Company, and the Company shall have no further obligations or duties under this Agreement. In no event shall Company be obligated to refund any Rebate Payments made by the City prior to any legislation contemplated by this Section becoming effective.

5. TERMINATION; CANCELLATION

5.1 Breach and Remedies. If either Party breaches any material obligation under this Agreement and fails to cure the breach within thirty (30) days after receiving notice of the breach from the other Party (unless the breach cannot be cured within thirty days, in which event the cure period shall be extended so long as the Party commences the cure within the thirty-day period and thereafter diligently pursues the cure to completion), the non-defaulting Party may terminate this Agreement, in addition to exercising all other remedies available at law or in equity, including, but not limited to, specific performance.

5.2 Cancellation Option. The Company may at its option cancel this Agreement at any time upon providing the City written notice at least ninety (90) days prior to the effective date of cancellation. Notwithstanding Article 4, the City is under no obligation to provide financial assistance to the Company if the Company cancels this Agreement before the end of the Operating Term.

5.3 Repayment of Rebates. In the event that any representation or warranty of Company is determined to have been false when made, or in the event any report submitted by Company hereunder is determined to contain information that Company knew to have been materially false when provided, City may terminate this Agreement immediately upon written notice and Company shall repay all Rebate Payments that the City made hereunder, together with interest at the rate of five percent (5%) per annum. Repayment shall be due within thirty (30) days of the date of the written notice of termination.

6. GENERAL PROVISIONS

6.1 Construction. The Parties acknowledge that each Party has been advised to have this

Agreement reviewed by counsel, and agree that each Party and its counsel (and/or such other business and financial advisers as each Party desires) have reviewed and revised this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not apply in the interpretation of this Agreement or any amendments or exhibits hereto.

6.2 Recitals. The Recitals of fact set forth preceding this Agreement are true and correct and are incorporated into this Agreement, in their entirety, by this reference.

6.3 No Waiver. Failure to insist on anyone occasion upon strict compliance with any of the terms, covenants or conditions of this Agreement shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any rights or powers under this Agreement at anyone time or more times be deemed a waiver or relinquishment of such right or power at any other time or times.

6.4 No Third Party Beneficiaries. The performance of the Parties' respective obligations under this Agreement is not intended to benefit any Person other than the City and the Company, except as may be expressly provided otherwise in this Agreement. No Person not a signatory to this Agreement shall have any rights or causes of action against any Party to this Agreement as a result of that Party's performance or non-performance under this Agreement, except as otherwise expressly provided in this Agreement.

6.5 Notices, Demands and Communications Between the Parties. Notices, demands and communications between the City and the Company shall be deemed sufficiently given if (i) delivered personally, (ii) dispatched by registered or certified mail, postage prepaid, return receipt requested, or (iii) sent by nationally-recognized reputable overnight delivery service to the principal offices of the City and the Company as set forth below (or to such other address as a Party may from time to time designate by notice in accordance with this Section), and shall be deemed received upon delivery or refusal of delivery, if delivered personally, within 3 business days after deposit of same in the United States mail, if mailed, or one business day after deposit of same with a nationally recognized reputable overnight delivery service if sent by such a delivery service.

To the Company: S & S Supplies and Solutions
 P.O. Box 1111
 Martinez, CA 94553
 (925) 335-4001
 Attn: Tracy M. Tomkovicz

To the City: City of Martinez
 525 Henrietta Street
 Martinez, CA 94553
 Attn: City Manager

With a copy to: Walter & Pistole
 670 W. Napa St., Suite F
 Sonoma, CA 95476

6.6 Release of City Officials. No member, official, agent, employee, or attorney of the City shall be personally liable to the Company or any successor in interest of the Company in the event of any default or breach by the City or for any amount that may become due to the Company or its successors, on any obligations under the terms of this Agreement. The Company hereby waives and releases any claim it may have personally against the members, officials, agents, employees, consultants, or attorneys of the City with respect to any default or breach by the City or for any amount that may become due to the Company or its successors, or on any obligations under the terms of this Agreement. The Company makes such release with full knowledge of Civil Code Section 1542, and hereby waives any and all rights thereunder to the extent of this release, if such Section 1542 is applicable. California Civil Code Section 1542 provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

6.7 Prevailing Wage. In the event that the provisions of this Agreement shall trigger the payment of prevailing wages in accordance with California Labor Code Section 1720 *et seq.*, Company shall comply with, and shall require all contractors doing work on the Premises to comply with all applicable law relating to same. In this regard, Company shall indemnify, hold harmless, release and defend City, its officials, officers, employees and agents from and against any and all actions, claims, demands, damages, disability, losses, failure to comply with any current or prospective laws, expenses including attorney's fees and other defense costs or liabilities of any nature that may be asserted by any person or entity including any contractor, worker or other governmental entity relating to compliance with the California Labor Code for work done at the Premises or work paid for in whole or in part with the Rebate Payment funds.

6.8 Attorneys' Fees. If any Party brings an action to enforce the terms hereof or declare its rights hereunder, the losing party shall reimburse the prevailing Party reasonable attorneys' fees incurred in connection with such action. If the City, without fault, is made a party to any litigation instituted by or against the Company, then the Company shall defend the City and save and hold the City harmless from all costs and expenses including all attorneys' fees incurred in connection with such litigation.

6.9 Venue. In the event of any litigation hereunder, all such actions shall be instituted in the Superior Court of the County of Contra Costa, State of California, or an appropriate Federal District Court in the Northern District of California.

6.10 Applicable Law. The laws of the State of California shall govern the interpretation and enforcement of this Agreement.

6.11 Successors and Assigns. The provisions hereof shall be binding upon, and inure to the benefit of, the City and the Company and their successors and assigns, as the case or context may require; provided, however, that the Company may not assign its rights or obligations under this Agreement without the prior written consent of the City.

6.12 No Joint Venture. Nothing contained herein shall be construed to render the City in any way or for any purpose a partner, joint venture, or associated in any relationship with the Company, nor shall this Agreement be construed to authorize either Party to act as agent for the other.

6.13 Records. The City or any representative or designee thereof may at any time during normal business hours, upon reasonable prior notice, examine the books and records of the Company, or any officer, employee, agent, contractor, affiliate, related person, assignee or franchisee, to the extent that such books and records relate, directly or indirectly, to the determination of Sales and Use Taxes generated from the Site. The Company shall keep the originals or true and correct copies, at the Company's choice, of all such records at the Site or at another location in Solano County, California, reasonably approved by City.

6.14 Waiver. The waiver by City or the Company of any breach by the other Party of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, or condition or any subsequent breach of the same or any other term, covenant, or condition herein contained. Either Party's acceptance of any performance by the other Party after the due date of such performance shall not be deemed to be a waiver by either Party of any preceding breach by the other Party of any term, covenant, or condition of this Agreement, regardless of such Party's knowledge of such preceding breach at the time of acceptance of such performance.

6.15 Entire Agreement, Waivers and Amendments. This Agreement, together with all attachments and exhibits hereto and all documents to be executed and delivered pursuant to this Agreement, constitutes the entire understanding and agreement of the Parties. This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof. Any waiver, amendment, or modification of any provision of this Agreement must be in writing and signed by both Parties.

6.16 Execution in Counterparts. This Agreement may be executed in counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have entered into this Agreement as of the day and year first above written.

CITY:

CITY OF MARTINEZ,
a municipal corporation

BY: _____

ATTEST: _____

COMPANY:

S & S Tool and Supply, Inc., a California
Corporation dba S & S Supplies and
Solutions

By: _____



CITY OF MARTINEZ

CITY COUNCIL AGENDA
July 2, 2014

TO: Mayor and City Council
FROM: Anna Gwyn Simpson, Interim City Manager
SUBJECT: Economic Stimulus Program
DATE: June 25, 2014

RECOMMENDATION:

Adopt the resolution approving the Economic Stimulus Program and direct staff to negotiate an agreement(s) relating thereto with qualifying business(es) for consideration of Council approval at subsequent meeting(s).

BACKGROUND:

The purpose of the proposed Economic Stimulus Program (the "Program") is to help stimulate the attraction of new businesses and expansion of existing businesses resulting in growth and diversification to the City's tax base. Sales tax is a major component of the City's unrestricted revenues representing approximately 20% of the General Fund. Roughly one-third of the City's sales tax revenue comes from a small handful of businesses. This lack of diversification in a major revenue source can create a volatile situation for the City when one of these businesses chooses to relocate to another jurisdiction. Additionally, this situation creates a challenging environment within which to predict and plan revenues from year to year.

In response to this, the proposed Program will provide financial incentives to specific types of businesses with the goals of promoting economic development, creating more opportunities for jobs in the community, and increasing and diversifying the City's tax base.

This Program is only open to specific types of businesses, namely wholesale or "business-to-business" operations. Thirty percent (30%) of California's sales and use tax revenue comes from equipment, materials and supplies used in business operations and construction activities. E-commerce has also made warehouse and distribution a major contributor in growing sales and use tax in local communities. This industry presents an opportunity for Martinez to achieve its goals of diversifying and growing the local tax base. Additionally, Martinez is uniquely positioned for this type of industry due to the location of several major refinery companies in close proximity, such as the Martinez Shell Refinery and Tesoro, which rely on business-to-business companies for delivery and warehousing of supplies and equipment.

The Program would provide financial incentives to business-to-business operations. The description of eligible businesses can be found on page 1 of the attached Program Guidelines. Businesses that meet the eligibility criteria would be eligible for consideration to receive the following incentives.

For new and existing businesses that purchase, construct, own or lease a facility in Martinez:

- For the first 18 months of the Agreement term, the City shall rebate to the business 50% of sales and use tax actually received by the City that is generated by the business.
- From month 19 to the end of the term, the City shall rebate to the business 50% of any amounts of sales and use tax actually received by the City that is generated by the business that exceeds \$200,000 for each Fiscal Year during the term of the Program Agreement with the City.

The program is intended to be short-term in nature and would only operate for a total of 5 years, terminating June 30, 2019. Businesses will have three years from the approval date of the Program to apply. No rebates will be given to any business on sales and use tax generated after the end of the Program on June 30, 2019. Additionally, there are limitations placed on the Program should the City's overall sales and use tax revenue decline substantially. As stated in the Program Guidelines (page 3):

Sales and use tax rebates shall be limited to new and existing businesses based on the overall sales and use tax actually received by the City as follows:

- If at any time during the Agreement the overall sales and use tax of the City falls between \$3.8 to \$4.0 million for the Fiscal Year, the rebate percentage shall be reduced to 35% for that Fiscal Year.
- If at any time during the Agreement the overall sales and use tax of the City falls below \$3.8 million for the Fiscal Year, the eligible business shall receive no rebate for that Fiscal Year.

Participating businesses will be required to enter into an agreement that obligates them to comply with the Program Guidelines and operate continuously in the City in exchange for the rebates. Once a participating business has been identified and verified as eligible based on the criteria set forth in the Program Guidelines, an agreement would be drafted to be brought before the City Council for review and approval.

FISCAL IMPACT:

The Program will have no adverse financial impact to the City at the present time. Currently, there are only two businesses that meet the criteria of a "business-to-business company" operating in Martinez. One of those companies already has a tax sharing agreement with the City that extends beyond the terms of this Program and has more favorable terms for the business. The other business is considering moving to another jurisdiction with a similar program, but is interested in keeping a portion of their business with plans for expansion in Martinez if this Program is approved and they are determined to be an eligible business under this Program. Therefore, the amount to be rebated to new or existing businesses will not affect any sales and use tax the City plans to collect in the next Fiscal Year. In the future, this Program is intended to increase the sales and use tax revenue in the General Fund by attracting new businesses and encouraging existing businesses to expand operations.

ACTION:

Motion to adopt the Resolution Approving the Economic Stimulus Program and directing staff to negotiate an agreement(s) relating thereto with qualifying business(es) for consideration of Council approval at subsequent meeting(s).

Attachment:

Resolution

Economic Stimulus Program – Program Guidelines

RESOLUTION NO. 079-14

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARTINEZS
APPROVING AN ECONOMIC STIMULUS PROGRAM AND PROGRAM GUIDELINES

WHEREAS, sales tax is a major component of the City's unrestricted revenues representing approximately 20% of the General Fund. Roughly one-third of the City's sales tax revenue comes from a small handful of businesses. This lack of diversification in a major revenue source can create a volatile situation for the City when one of these businesses chooses to relocate to another jurisdiction. Additionally, this situation creates a challenging environment within which to predict and plan revenues from year to year; and

WHEREAS, the purpose of the proposed Economic Stimulus Program (the "Program") is to help stimulate the attraction of new businesses and expansion of existing businesses resulting in growth and diversification to the City's tax base; and

WHEREAS, the proposed Program will provide financial incentives to specific types of businesses with the goals of promoting economic development, creating more opportunities for jobs in the community, and increasing and diversifying the City's tax base; and

WHEREAS, thirty percent (30%) of California's sales and use tax revenue comes from equipment, materials and supplies used in business operations and construction activities. E-commerce has also made warehouse and distribution a major contributor in growing sales and use tax in local communities. Attracting and retaining businesses in this industry presents an opportunity for Martinez to achieve its goals of diversifying and growing the local tax base; and

WHEREAS, Martinez is uniquely positioned for growth in the "business-to-business" industry due to the location of several major refinery companies in close proximity, such as the Martinez Shell Refinery and Tesoro, which rely on "business-to-business" companies for delivery and warehousing of supplies; and

WHEREAS, the Program as proposed would only be open to specific types of businesses, namely wholesale or "business-to-business" operations.

NOW, THEREFORE, BE IT RESOLVED by the City Council of Martinez that the Economic Stimulus Program is hereby approved subject to the Program Guidelines attached hereto and incorporated herein by reference.

BE IT FURTHER RESOLVED that said Economic Stimulus Program shall expire and be of no further force and effect as of midnight on June 30, 2019.

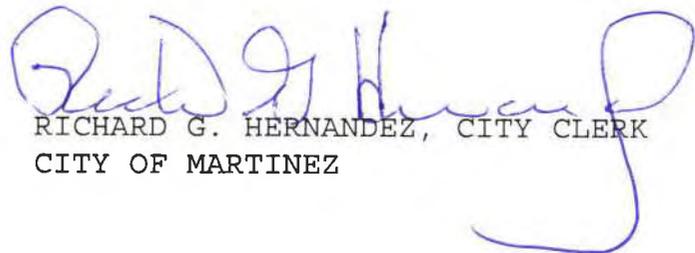
* * * * *

I **HEREBY CERTIFY** that the foregoing is a true and correct copy of a resolution duly adopted by the City Council of the City of Martinez at a Regular Meeting of said Council held on the 2nd day of July, 2014, by the following vote:

AYES: Councilmember AnaMarie Avila Farias, Vice Mayor Michael Menesini and Mayor Rob Schroder

NOES: Councilmember Lara DeLaney

ABSENT: Councilmember Mark Ross


RICHARD G. HERNANDEZ, CITY CLERK
CITY OF MARTINEZ

**City of Martinez
Economic Stimulus Program
Program Guidelines**

Introduction and Background

Sales tax is a major component of a local municipality's unrestricted revenues contained in the General Fund, representing 28% on average statewide and 20% in Martinez. One of the struggles Martinez has faced over the last several years is that roughly one-third of its sales tax revenue comes from a small handful of businesses. This lack of diversification in a major revenue source creates a volatile situation for the City when one of these businesses contemplates relocating their primary business operations to another jurisdiction. While this is not unusual for smaller communities, it creates a challenging environment to plan for the future and predict revenues from year to year.

In response to this, the City of Martinez has developed the Economic Stimulus Program (the "Program") to provide financial incentives to specific types of businesses. The primary purpose of the program is to promote economic development in Martinez by diversifying and growing the City's tax base while at the same time creating more opportunities for jobs in the community. The goals for this program include the following:

- To promote economic development in Martinez
- To diversify and increase the City's tax base
- To create new jobs
- To encourage businesses to establish operations in Martinez instead of other locations
- To encourage expansion of successful established Martinez based businesses

This Program is only open to specific types of businesses, namely wholesale or "business-to-business" operations. Thirty percent (30%) of California's sales and use tax revenue comes from equipment, materials and supplies used in business operations and construction activities. E-commerce has also made warehouse and distribution a major contributor in growing sales and use tax in local communities. This industry presents an opportunity for Martinez to achieve its goals of diversifying and growing the local tax base. Additionally, Martinez is uniquely positioned for this type of industry due to the location of several major refinery companies in close proximity, such as the Martinez Shell Refinery and Tesoro, which rely on business-to-business companies for delivery and warehousing of supplies and equipment.

Examples of "Business-to-Business" Companies

- Over-the-counter suppliers and manufacturers of construction materials including ready mix, concrete roofing shingles, lumber, pipe, windows, doors, cabinets and acoustical materials.
- High tech electronic equipment and supplies, including computers, components, optical recording media, communication equipment and industrial robots.

- Medical equipment and supplies sold to, manufactured for, or distributed to, and used by hospitals and doctors in the course of their business.
- Equipment and supplies used or consumed by restaurants and retailers in the conduct of their business.

Ineligible Companies:

- Home-based businesses
- Non-profit organizations
- Retail businesses
- Gas stations
- Auto related uses
- Any business types for which subsidies are not permitted by law

Eligibility Criteria

New businesses must meet the following criteria:

- Involved in taxable business-to-business transactions
- Move its point of sale to the City of Martinez
- Generate at least \$200,000 per fiscal year of sales and use tax revenues actually received by the City
 - If the business relocates during the fiscal year, the business must demonstrate that it would have been able to generate \$200,000 in sales and use tax actually received by the City if it had been in operations in the City the entire fiscal year.
- Own or lease the property on which the business is located for a minimum of 5 years
- Agree to operate continuously in Martinez for 5 years
- Employ at least 10 full time equivalent employees

Existing Martinez based businesses must meet the following criteria:

- Involved in taxable business-to-business transactions
- Established point of sale in Martinez for at least 1 year
- Generated at least \$200,000 in sales and use tax actually received by the City during the City's previous fiscal year
- Plans to expand the existing business to increase its taxable base
- Agree to continuously operate for 5 years from the date the Agreement is signed
- Plans to generate new jobs as a result of expansion

Financial Incentive Provisions

Applicants must submit a satisfactory Program application package to the City demonstrating their ability to meet the eligibility criteria. Once applicants are deemed eligible, the City may enter into an Agreement to provide financial incentives in the form of tax rebates. The level of financial incentives provided will be differentiated as follows:

For new businesses that purchase, construct, own or lease a facility in Martinez:

- For the first 18 months of the Agreement term, the City shall rebate to the business 50% of sales and use tax actually received by the City that is generated by the business.
- From month 19 to the end of the term, the City shall rebate to the business 50% of any amounts of sales and use tax actually received by the City that is generated by the business that exceeds \$200,000 for each Fiscal Year during the term of the Program Agreement with the City.

For existing businesses that purchase, construct, own or lease a facility in Martinez:

- For the first 18 months of the Agreement term, the City shall rebate to the business 50% of sales and use tax actually received by the City that is generated by the business.
- From month 19 to the end of the term, the City shall rebate to the business 50% of any amounts of sales and use tax actually received by the City that is generated by the business that exceeds \$200,000 for each Fiscal Year during the term of the Program Agreement with the City.

Program Limitations Based on City's Overall Sales and Use Tax Revenue

Sales and use tax rebates shall be limited to new and existing businesses based on the overall sales and use tax actually received by the City as follows:

- If at any time during the Agreement the overall sales and use tax of the City falls between \$3.8 to \$4.0 million for the Fiscal Year, the rebate percentage shall be reduced to 35% for that Fiscal Year.
- If at any time during the Agreement the overall sales and use tax of the City falls below \$3.8 million for the Fiscal Year, the eligible business shall receive no rebate for that Fiscal Year.

Disbursement

The City will disburse the rebates once a year. The City will remit rebates to the eligible business within 60 days from the end of the Fiscal Year.

Term

The Program will begin once approved by the City Council and will end on June 30, 2019. Businesses will have 3 years from the commencement of the Program to apply. **No rebates will be given to any business on sales and use tax generated after the end of the Program on June 30, 2019.**

Program Marketing

City staff will conduct marketing efforts to promote the Program with relevant businesses.

Application Process

1. *Proposal Conference* – The applicant and City staff will meet with the business to review Program guidelines and the applicant’s project. This conference will determine if the prospective business and project is eligible for the Program.
2. *Submission of Program Application* – Once staff has determined that the business is eligible, the applicant will submit a complete Application consisting of the following:
 - a. Program Application Form
 - b. Documentation on the proposed investment
 - c. Payroll roster
 - d. Facility purchase or lease agreement
 - e. Quarterly reports (Form Board of Equalization (BOE)-401-A), and any other supplemental reports, statements, or submissions, actually filed or required to be filed with the BOE relating to or in connection with the collection, remittance and/or calculation of sales and use tax revenues
 - f. Other information requested by the City pertinent to the transaction (i.e. financial statements, tax returns, business plan)
3. *Processing* – City staff will generate an analysis and summary of the proposed project for the City Manager’s review and approval
4. *Documentation* – If the application is determined to meet Program Guidelines, City staff, along with the City Attorney’s office, will prepare the Agreement between the City and the business
5. *Approval of Agreement* – If the business meets all applicable Program Guidelines, the Agreement will be brought before the City Council for approval. If approved, the City Manager will execute the Agreement.
6. *Reimbursement* – Once all documents are executed, City staff will begin reimbursing the business based on the agreed upon terms.