

**CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: Office of Economic Development
AGENDA DATE: Regular Agenda March 31 09
CONTACT PERSON/PHONE: Kathryn Dodson, PhD, Director 541-4670
DISTRICT(S) AFFECTED: [All]

SUBJECT:

[Discussion and Action that the City Manager be authorized to execute a Chapter 380 Economic Development Program Agreement by and between the City of El Paso and Kolmar Laboratories, Inc. Source of Funding: General Fund][All Districts][Economic Development, Kathryn Dodson, Ph.D. (915) 541-4670]

BACKGROUND/DISCUSSION:

The creation of a Pharmaceuticals and Cosmetics manufacturing facility and headquarters will encourage increased economic development in the City, provide significant increases in the City's property tax revenues, and improve the City's ability to provide for the health, safety and welfare of its citizens.

PRIOR COUNCIL ACTION:

Has the Council previously considered this item or a closely related one?

No

AMOUNT AND SOURCE OF FUNDING:

How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?

380 grant agreement - General Fund

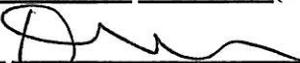
BOARD/COMMISSION ACTION:

Enter appropriate comments or N/A.

LRC Feb. 27 2009

*****REQUIRED AUTHORIZATION*****

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD:  _____

(Example: If RCA is initiated by Purchasing, client department should sign also). *Information copy to appropriate Deputy City Manager*

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to execute a Chapter 380 Economic Development Program Agreement by and between the City of El Paso and Kolmar Laboratories, Inc., a Delaware Corporation ("Applicant"), in relation to the Applicant's development of a Pharmaceuticals and Cosmetics manufacturing facility and headquarters in El Paso, Texas.

APPROVED AND ADOPTED this _____ day of _____ 2009.

CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Marie A. Taylor
Assistant City Attorney

APPROVED AS TO CONTENT:



Kathryn B. Dodson, Ph.D., Director
Economic Development Department

- A. Agreement. The word "Agreement" means this Chapter 380 Economic Development Program Agreement, together with all exhibits and schedules attached to this Agreement.
- B. Applicant. The word "Applicant" means Kolmar Lab Groups, LLC, a Delaware Corporation.
- C. City. The word "City" means the City of El Paso, Texas.
- D. Development. The word "Development" means the Pharmaceuticals and Cosmetics manufacturing facility and headquarters, including all real and personal property, as more fully described on Exhibit "A", which is attached hereto and incorporated herein for all purposes.
- E. Full-Time Employment. The words "Full-Time Employment" mean a job requiring a minimum of two thousand and eighty (2,080) hours of work averaged over a twelve (12) month period, including allowance for vacation and sick leave, with full company benefits, including company paid health insurance (Employee must not be required to pay a more than fifty percent (50%) of the premium) with such jobs being located at the Development, within the City of El Paso, Texas. These requirements are more completely described in Exhibit "B" which is attached hereto and incorporated herein for all purposes.
- F. Grant. The word "Grant" means a payment on a yearly basis to Applicant under the terms of this Agreement computed with reference to the City's portion of property taxes generated by the Development and payable from the City's general revenue fund.
- G. Grant Submittal Package. The words "Grant Submittal Package" mean the documentation required to be supplied to City on a yearly basis as a condition of receipt of any Grant, with such documentation more fully described in Exhibit "C" which is attached hereto and incorporated herein for all purposes.
- H. Qualified Expenditures. The words "Qualified Expenditures" means those costs incurred by Applicant in the acquisition, construction or furnishing of the Development.

SECTION 2. TERM AND GRANT PERIOD.

The term of this Agreement shall be ten (10) years from the Effective Date of this Agreement. The Effective Date of this Agreement shall be the date upon which both parties have fully executed this Agreement, as noted below. However, the Applicant's eligibility for Grant payments shall be limited to five (5) consecutive years (the "Grant Period") within the term of this Agreement. The Grant Period shall begin with the first year being the first tax year that begins: (i) no later than 4 (four) years after the issuance of the Certificate of Occupancy for the Development; and, (ii) after the Applicant having met all Full Time Employment job requirements noted in Exhibit "B", which is attached hereto and incorporated herein for all purposes. Failure of the Applicant to receive its Certificate of Occupancy and meet its Full Time Employment job requirements within five (5) years of the Effective Date of this Agreement shall result in the

immediate termination of this Agreement. The City shall review Applicant's eligibility for Grant Payments on an annual basis during the Grant Period.

SECTION 3. OBLIGATIONS OF APPLICANT.

During the term of this Agreement, Applicant shall comply with the following terms and conditions:

- A. Applicant agrees to develop, construct, and operate, at its sole cost, the Development. Applicant shall commence construction and or improvements of the Development within eighteen (18) months of the Effective Date of this Agreement. Applicant shall begin operations within four (4) years from receipt of the Certificate of Occupancy for the Development. Applicant agrees that it shall make Qualified Expenditures of not less than Fifty Three Million Dollars (\$53,000,000) in the Development. The City shall be permitted to review Applicant's receipts of Qualified Expenditures to evidence the expenditure of a minimum amount of Fifty Three Million Dollars (\$53,000,000).
- B. Applicant agrees that it shall create, staff, and maintain the Full-Time Employment positions described in Exhibit "B" for the Development as soon as reasonably possible from the Effective Date of this Agreement, and shall maintain the Full-Time Employment positions for the Development through the entire Grant Period of this Agreement. Applicant shall maintain the Full-Time Employment positions for each quarter of each fiscal year with the total per day hours worked averaged over each fiscal quarter.

Applicant shall provide the City with an annual report by April 30th of each year during the term of this Agreement, certifying the status of compliance through the preceding year. Such annual report shall include the number of new jobs created and retained for the Development, information on any new investments in the Development, and any other information relevant to the Development and the City's economic development goals. Documentation for jobs may be in the form of quarterly IRS 941 returns, Texas Workforce Commission Employer Quarterly Reports, or employee rosters that show the hours worked and the positions filled. Applicant shall also provide the City with such other reports as may reasonably be required. At Applicant's election, the City will inspect at Applicant's principal place of business in El Paso, the requisite documentation to certify Applicant's compliance with the job creation and retention requirements, rather than requiring submission of such documentation to the City. If Applicant elects to proceed with physical inspection of its employment records on site, such inspection will be conducted under the same terms and conditions as the City's inspection of business records for verification purposes under this Agreement.

Applicant, during normal business hours, at its principal place of business in El Paso, shall allow the City or its agents reasonable access to Applicant's employment records and books, and other records that are related to the economic development considerations and incentives described herein, to verify employment records and any other records related to the City's economic development considerations and incentives provided

- herein. The confidentiality of such records will be maintained in accordance with and subject to all applicable laws and in accordance with Section 6 (G) of this Agreement.
- C. Unless otherwise agreed by the City and Applicant, each Grant Submittal Package shall be in the form provided in Exhibit "C". If Applicant fails to timely submit a Grant Submittal Package for a particular year, the City may give Applicant written notice of its failure to timely submit such Grant Submittal Package, and Applicant shall have thirty (30) calendar days from the date on which such written notice is given in which to submit such Grant Submittal Package. The City's determination of the amount of the Grant payment due to Applicant is final; provided, however, that the Applicant may appeal to the City Council within thirty (30) days of payment. The City Council shall hear the appeal within thirty (30) days of request for appeal and the City Council's determination of the amount of the Grant payment shall be final. Nothing herein shall limit (or be construed to limit) Applicant's rights and remedies as described in Section 5 of this Agreement.
- D. Applicant shall pay by January 31 of each year all of the real and business personal ad valorem taxes due for the previous tax year on the Development and any other property within the City of El Paso. The parties to this Agreement agree that the City's valuation of taxable value of the Development, after completion of all construction and improvements, will have a minimum base value of Fifty Three Million Dollars (\$53,000,000). Applicant shall have the right to contest the appraised value of the Development as provided by law. However, Applicant covenants and agrees that during the term of this Agreement it shall not challenge or permit anyone else to take actions on its behalf to challenge any assessments of the City's valuation by the Central Appraisal District at \$53,000,000 or lower. It is the intent of the parties that the assessed value of the Development on the City tax rolls shall have a minimum base value of \$53,000,000 during the term of this Agreement and any affirmative act by Applicant to reduce the City's assessed value to amount below \$53,000,000 will be deemed an event of default that will result in termination of this Agreement. Notwithstanding the foregoing, Applicant's use of any Freeport exemption shall not be an event of default under this Agreement.
- E. Applicant's obligations under this Section 3 may be satisfied by an Affiliate provided Applicant first obtains the prior written consent of the City, which shall not be unreasonably withheld. As used herein, an "Affiliate" of Applicant shall mean any partnership, corporation, trust or other entity controlling, controlled by, or under common control with Applicant.
- F. It is understood that Applicant will be seeking additional financial assistance or incentives from other taxing entities, and in the event that Applicant fails to secure such other financial assistance or incentives within eighteen (18) months from the Effective Date of this Agreement and provided that no Grant payments have been issued to Applicant, this Agreement may be terminated by the Applicant and both parties will be mutually released from any and all obligations or liabilities.

- G. Applicant agrees that before jobs are announced to and filled by the general public, Applicant will commit to first utilizing the job posting/announcement opportunities of the RioGrande Workforce Development Board and its job placement programs in El Paso, Texas.

SECTION 4. OBLIGATIONS OF CITY.

During the term of this Agreement and so long as an event of default has not occurred and is continuing as set forth herein (provided, however, an event of default hereunder shall not be deemed to have occurred until after the expiration of the applicable notice and cure period), City shall comply with the following terms and conditions:

- A. The City agrees to process any Grant Payments to Applicant within ninety (90) days after its approval of the Applicant's Grant Submittal Package.
- B. The City shall determine the total amount of Grant Payments due to the Applicant, if any, on an annual basis. The minimum amount of the Grant Payment the Applicant shall be eligible for each year shall be as set forth in Exhibit "B".

SECTION 5. EVENTS OF DEFAULT.

Each of the following shall constitute an Event of Default under this Agreement:

- A. Failure to Maintain Development and Job Requirements. Applicant's failure or refusal to operate the Development and maintain required Full Time Employment pursuant to this Agreement through the entire Grant Period of this Agreement, and Applicant's failure or refusal to cure within thirty (30) days after written notice from the City describing such failure, shall be deemed an event of default. However, if such failure cannot be cured within such thirty (30) day period in the exercise of all due diligence, but the Applicant has not yet commenced such cure within such thirty (30) day period or fails to continuously thereafter diligently prosecute the cure of such failure, such actions or omissions shall also be deemed an event of default.
- B. False Statements. In the event the Applicant provides any written warranty, representation or statement under this Agreement or any document(s) related hereto that is/are false or misleading in any material respect, either now or at the time made or furnished, and Applicant fails to cure same within thirty (30) days after written notice from the City describing the violation shall be deemed an event of default. If such violation cannot be cured within such thirty (30) day period in the exercise of all due diligence, and Applicant fails to commence such cure within such thirty (30) day period or fails to continuously thereafter diligently prosecute the cure of such violation, such actions or omissions shall also be deemed an event of default. Further, if Applicant obtains actual knowledge that any previously provided warranty, representation or statement has become false or misleading after the time that it was made, and Applicant fails to provide written notice to the City of the false or misleading nature of such warranty, representation or statement within ten (10)

days after Applicant learns of its false or misleading nature, such action or omission shall be deemed an event of default. In the event this Agreement is terminated pursuant to this Section, all Grant Payments previously provided by the City pursuant to this Agreement shall be recaptured and repaid by Applicant within sixty (60) days from the date of such termination.

- C. Insolvency. The dissolution or termination of Applicant's existence as a going business or concern, Applicant's insolvency, appointment of receiver for any part of Applicant's portion of the Property, any assignment of all or substantially all of the assets of Applicant for the benefit of creditors of Applicant, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Applicant shall all be deemed events of default. However, in the case of involuntary proceedings, if such proceedings are discharged within sixty (60) days after filing, no event of default shall be deemed to have occurred.
- D. Construction of Development. Applicant's failure to comply with its construction obligations set forth in this Agreement and Applicant's failure to cure same within thirty (30) days after written notice from the City shall be deemed an event of default. If such failure cannot be cured within such thirty (30) day period in the exercise of all due diligence but Applicant fails or refuses to commence such cure within such thirty (30) day period or fails or refuses to continuously thereafter diligently prosecute such cure, except to the extent such failure is caused by any act or failure to act on the part of the City, such actions or omissions shall be deemed events of default.
- E. Property Taxes. In the event Applicant allows any property taxes owed to the City to become delinquent and fails to timely and properly follow the legal procedures for protest and/or contest of such taxes and to cure such failure or post a satisfactory bond within thirty (30) days after written notice thereof from the City and/or El Paso Central Appraisal District, such actions or omissions shall be deemed an event of default. Subject to the restrictions noted herein, Applicant shall have the right to contest the appraised value of the Development.
- F. Other Defaults. Failure of Applicant or City to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any related documents, and Applicant or City fails to cure such failure within thirty (30) days after written notice from the other party describing such failure shall be deemed an event of default. If such failure cannot be cured within such thirty (30) day period in the exercise of all due diligence, but if Applicant or City also fails or refuses to commence such cure within such thirty (30) day period or fails or refuses to continuously thereafter diligently prosecute the cure of such failure, such act or omission shall be deemed an event of default.
- G. Failure to Cure. If any event of default by Applicant shall occur, and after Applicant fails to cure same in accordance herewith, then this Agreement is terminated without any further action required of the City and the City's obligations end at that time. If a default has not been cured within the time frame stated herein, the non-defaulting party shall have all rights and remedies under the law or in equity.

SECTION 6. MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- A. Amendments. This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by both parties.
- B. Applicable Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in El Paso County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of El Paso County, Texas.
- C. Assignment of Applicant's Rights. Applicant understands and agrees that the City expressly prohibits Applicant from selling, transferring, assigning or conveying in any way any rights to receive the Grant proceeds without the City's prior written consent. Any such attempt to sell, transfer, assign or convey without the City's prior written consent shall result in the immediate termination of this Agreement, with no ability for the Applicant to cure.
- D. Applicant's Sale or Transfer of the Development. Prior to any sale or other transfer of ownership rights in the Development, Applicant shall notify the City in writing of such sale or transfer within thirty (30) business days of the effectiveness of such sale or transfer. This provision is a material term of this Agreement and the failure to notify the City of such sale or transfer within the applicable period shall constitute an event of default.
- E. Binding Obligation. This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. City warrants and represents that the individual executing this Agreement on behalf of City has full authority to execute this Agreement and bind City to the same. The individual executing this Agreement on Applicant's behalf warrants and represents that he or she has full authority to execute this Agreement and bind Applicant to the same.
- F. Completion of Development. As consideration for the agreements of the City as contained herein, Applicant agrees that it will diligently and faithfully in a good and workmanlike manner pursue the completion of the Development and that the construction of same will be in accordance with all applicable federal, state and local laws and regulations.
- G. Confidentiality Obligations. The confidentiality of such records employment records and any other records related to the City's economic development considerations and incentives provided herein will be maintained in accordance with and subject to all applicable laws, including the Public Information Act, Chapter 552, Texas Government

Code. Specifically, the City will maintain the confidentiality of any proprietary information to the extent permitted by law and agrees that, as required by the Public Information Act, it will notify Applicant if a request relating to such proprietary information is received. Applicant represents that it understands that the Public Information Act excepts disclosure of trade secret and confidential commercial information and that it will need to assert the proprietary interest of Applicant as a basis for nondisclosure.

- H. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- I. Execution of Agreement. The El Paso City Council has authorized the City Manager to execute this Agreement on behalf of the City.
- J. Employment of Undocumented Workers. During the term of this Agreement, Applicant agrees not to knowingly employ any undocumented workers as defined in Texas Government Code Section 2264.001. If convicted of a violation under 8 U.S.C. Section 1324a(f), Applicant shall repay the amount of the Grant payments received by Applicant from the City as of the date of such violation not later than one hundred twenty (120) days after the date Applicant is notified by City of a violation of this section, plus interest from the date the Grant payment(s) was paid to Applicant, at the rate of seven percent (7%) per annum. The interest will accrue from the date the Grant payment(s) were paid to Applicant until the date the reimbursement payments are repaid to City. City may also recover court costs and reasonable attorney's fees incurred in an action to recover the Grant payment(s) subject to repayment under this section. Applicant is not liable for a violation by its subsidiary, affiliate, or franchisee, or by a person which whom Applicant contracts.
- K. Filing. The City shall file this Agreement in the deed records of El Paso County, Texas.
- L. Force Majeure. It is expressly understood and agreed by the parties to this Agreement that if the performance of any obligations hereunder is delayed by reason of war, civil commotion, acts of God, inclement weather, fire or other casualty, or court injunction, the party so obligated or permitted shall be excused from doing or performing the same during such period of delay, so that the time period applicable to such obligation or requirement shall be extended for a period of time equal to the period such party was delayed.
- M. Notices. All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or when deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the addresses shown below. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, each party agrees to keep the other informed at all times of its current address.

City: City of El Paso
City Manager
2 Civic Center Plaza
El Paso, Texas 79901

Copy To: City of El Paso
Economic Development Department Director
2 Civic Center Plaza
El Paso, Texas 79901

Applicant: Kolmar Lab Groups, LLC
20 West King St.
Port Jervis, NY 12771

- N. Ordinance Applicability. The signatories hereto shall be subject to all ordinances of the City, whether now existing or in the future arising; provided however no ordinance shall reduce or diminish the contractual obligations contained herein. This Agreement shall confer no vested rights on the Development unless specifically enumerated herein.
- O. Severability. In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, the Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.

(SIGNATURES BEGIN ON THE FOLLOWING PAGE)

IN WITNESS WHEREOF, the parties have executed this Agreement on this ____ day of _____, 2009.

CITY OF EL PASO, TEXAS

Joyce A. Wilson
City Manager

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Marie Taylor
Assistant City Attorney

Kathryn Dodson, Director
Economic Development Department

ACKNOWLEDGMENT

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the ____ day of _____, 2009, by Joyce A. Wilson, as City Manager of the City of El Paso, Texas (City).

Notary Public, State of Texas

My Commission Expires:

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

EXHIBIT B
[Employment Requirements & Grant Payment Eligibility]

SECTION 1. MINIMUM JOB RETENTION AND CREATION REQUIREMENTS.

In order to be eligible for any Grant Payments, Applicant is required to create and retain the number of jobs in the table below:

Table B-1

Year	Year 2	Year 3	Year 4	Year 5
479	566	698	698	698

In addition, Applicant is required to report the number of Jobs each year that fall within the following percentages of the Median County Wage (MCW) for El Paso County, Texas (currently at \$11.50/hr, subject to change).

	Year 1	Year 2	Year 3	Year 4	Year 5
Below 70% of MCW					
71-89% of MCW					
90%-100% of MCW					
Over 100% of MCW					

Table B-2

Applicant must certify that the creation and retention of the Corporate & Research & Development Jobs listed below result in an annual payroll of at least 2.687 Million Dollars.

CORPORATE HQ & OTHER POSITIONS

- Executive
- Sr VP Sales
- VP Sales - Western
- V/P Cust. Serv. & New Bus. Dev.
- Process Engineer Manager
- Director Supply Chain
- Director of R&D
- Information Technology Manager
- Director of Operations
- Plant Controller
- Director - Human Resources
- Manager R & D
- Purchasing Manager
- New Business Project Manager
- Plant Manager
- Gen Accounting Mgr.
- Director Of Product Integrity
- Operations Manager
- Operations Manager -Mfg
- Logistics Manager

Building / Facilities Manager
Plant Engineer
Operations Supervisor 1
Mach. Shop Suprv.

SECTION 2. ELIGIBILITY FOR GRANT PAYMENTS.

The Applicant's eligibility for Grant Payments and any subsequent Grant Payments made by the City to the Applicant shall be determined pursuant to and in accordance with the following:

- A. Grant Payments shall be made equivalent to a ninety percent (90%) of the taxes collected on the Development's personal and real property tax account(s) for the tax year covered by the Grant Submittal Package, upon Applicant's certification of the creation and retention of jobs on tables B-1: and
- B. Eligibility for Any Grant Payments is expressly contingent on the creation and retention of 100% of the Jobs listed in Table B-2.

