

State of Tennessee
Cheatham County

**TOWN OF ASHLAND CITY
RESOLUTION # 2017-13**

Authorization for the Mayor of the Town of Ashland City to sign an Accountability Agreement with the Department of Economic and Community Development FastTrack Economic Development Program.

NOW, THEREFORE BE IT RESOLVED by the Council of the Town of Ashland City meeting in regular session on this 13 th day of June, 2017 that the Mayor be authorized to sign the Accountability Agreement.

We, the undersigned City Council members, move the adoption of the above Resolution.

Councilmember Clayton moved to adopt the Resolution.

Councilmember Allen seconded the motion.

Voting in Favor 7 Voting Against 0

Approved:

Attest:

Richard Johnson
Mayor Richard Johnson

Kellie Reed
Kellie Reed, City Recorder

**STATE OF TENNESSEE
DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT**

FASTTRACK ECONOMIC DEVELOPMENT PROGRAM

ACCOUNTABILITY AGREEMENT

This Accountability Agreement (this "Agreement") is made and entered into as of April 1, 2017 (the "Effective Date") by and among the Tennessee Department of Economic and Community Development, a department of the State of Tennessee (the "State"), Town of Ashland City (the "Development Authority"), and A.O. Smith Corporation (the "Company") (the State, the Development Authority, and the Company, collectively, the "Parties").

RECITALS

WHEREAS, the purpose of the State's incentive programs is to promote long-term job growth by providing financial assistance to eligible applicants to induce and assist companies to relocate, expand, or construct projects in Tennessee;

WHEREAS, one of the economic development incentives offered by the State is an award from the FastTrack Economic Development Program ("FEDP") and the State has committed to provide an incentive award (the "Award") under the FEDP to the Development Authority for the project summarized in Section 1.2 (the "Project") and more particularly described in the Grant Contract (as defined below), a copy of which is attached hereto as Attachment A and incorporated into this Agreement;

WHEREAS, the Development Authority, in accordance with its statutory purposes, will utilize the Award to participate in the Project to assist the Company;

WHEREAS, in consideration for the Award, the Company has committed to create the number of jobs noted in Section 2.1;

WHEREAS, on or around the date of the execution of this Agreement, the Development Authority has or will execute a grant contract between the State and the Development Authority (the "Grant Contract") that provides the terms of the Award, and the Company has or will execute a grant contract between the Development Authority and the Company with respect to the Award;

WHEREAS, this Agreement obligates the Company to report the employment levels of the Company relevant to the Project and the calculation of the number of Net New Jobs (as defined below) to the State on an annual basis for the period commencing on the Start Date and ending on the End Date (as such terms are defined below).

Now, therefore, upon and in consideration of the respective promises and covenants contained herein and for other good and valuable consideration, the receipt,

adequacy, and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

ARTICLE I – AWARD

- 1.1 Grant Award Amount. Subject to approval of the Grant Contract, the State shall provide to the Development Authority an Award of One Million Two Hundred Thirteen Thousand Six Hundred Fifty Dollars and No/100 (\$1,213,650.00) (the “Award Amount”) for the Project.
- 1.2 Project Description. The Development Authority and the Company shall use the Award to implement the Project, which is summarized as follows:

Construction of a berm at the facility located at 500 Tennessee Waltz Parkway, Ashland City, Tennessee 37015 (the “Facility”).

ARTICLE II – PERFORMANCE REQUIREMENT

- 2.1 Company Commitment. For purposes of this Agreement, a Job is defined as a new, full-time position that is created and filled during the period beginning on July 1, 2014 (the “Start Date”) and ending on June 30, 2021 (the “End Date”) and that is held for a minimum of twenty-six weeks in a calendar year by a Company employee who is offered medical benefits. As consideration for the Award, and as part of the Project, the Company shall create, fill, and maintain One Hundred Fifty (150) new Jobs (“Committed Jobs”) between the Start Date and the End Date in accordance with Section 2.2 (the “Performance Requirement”). The State may, in its sole discretion, extend the End Date (and, if applicable, the interim reporting periods required by Section 3.2) due to an event of Force Majeure. For purposes of this Agreement, the term “Force Majeure” shall mean any of the following events that directly impact the Company’s ability to meet the Performance Requirement: flood, earthquake, storm, lightning, fire, or other Acts of God; sabotage or terrorism. However, an extension of any Interim Date (as defined below) or the End Date shall be for a term no longer than one year following the original Interim Date or End Date.
- 2.2 Compliance with the Performance Requirement. Pursuant to Section 3.2, the State shall, on an annual basis, obtain from the Company a report of the cumulative number of Jobs created and filled (“Net New Jobs”) as of each annual anniversary of the Start Date (each anniversary, an “Interim Date”) during the period commencing on the Start Date and ending on the End Date (and, if the End Date is extended pursuant to Section 2.1, on a stub period basis for the period ending on the End Date). For purposes of determining compliance with the Performance Requirement, Net New Jobs shall only include Jobs created and filled at the Facility. Net New Jobs shall not include positions transferred to the Facility from another Company location in the State of Tennessee. Net New Jobs shall not include positions created as a result of a merger, acquisition, or other business combination unless such positions are new positions in the State of Tennessee. As of the End Date, the number of Net New Jobs as of the fifth, sixth, and seventh Interim Dates shall be added together and divided by

three to determine the average number of Net New Jobs (“Net New Jobs (Average)”); provided, however, that if the End Date (and, if applicable, an Interim Date) has been extended pursuant to Section 2.1, the number of Net New Jobs as of the extended End Date or extended Interim Date shall be used in this calculation. In accordance with the formula on Item 3 of Exhibit A, the Net New Jobs (Average) shall be divided by the number of Committed Jobs to determine the performance percentage (the “Performance Percentage”) as of the End Date. The Company shall be deemed in compliance with the Performance Requirement if the Performance Percentage as of the End Date is equal to or greater than eighty percent (80%). The Company’s failure to be in compliance with the Performance Requirement as of the End Date shall result in the repayment to the State of all or a portion of the Award Amount that has been received by the Development Authority in accordance with Section 4.1.

ARTICLE III – REPORTING REQUIREMENTS

- 3.1 **Baseline Report.** On or before the 60th day following the Effective Date (or such later date as shall have been approved by the State), the Company shall deliver to the State a report substantially similar to Exhibit C (the “Baseline Report”) that provides the number of the Company’s Jobs existing as of the Start Date. Notwithstanding the provisions of Section 2.1 that limit the definition of the term “Job” to positions that are created and filled between the Start Date and the End Date, for purposes of the Baseline Report and of establishing the number of Jobs that the Company had as of the Start Date, persons employed prior to the Start Date and who otherwise meet the requirements to be included as a “Job” will be included in the calculation of the number of Jobs as of the Start Date.
- 3.2 **Performance Reports.** On or before the 60th day following each Interim Date (or such later date as shall have been approved by the State), the Company shall deliver to the State a report substantially similar to Exhibit D (a “Performance Report”) that provides the number of Net New Jobs existing as of the Interim Date applicable to such report (and, if an Interim Date is extended pursuant to Section 2.1, on or before the 60th day following the extended Interim Date, or such later date as shall have been approved by the State). Each Performance Report will be signed by a duly authorized representative of the Company and will certify the number of Net New Jobs as of the Interim Date applicable to such Performance Report (or, if an Interim Date has been extended pursuant to Section 2.1, as of the extended Interim Date). The Baseline and Performance Reports shall include appropriate back-up data for the Jobs reported. Back-up data shall provide reasonable assurance that information provided to the State pursuant to this Agreement is true and correct in all material respects.

ARTICLE IV – DEFAULT

- 4.1 **Event of Default and Repayment Amount.** For purposes of this Agreement, the term “Event of Default” shall mean the occurrence of any of the following events: (i) the Company fails to satisfy the Performance Requirement as of the End Date pursuant to Article II, (ii) the Company fails to provide the Baseline Report or all of the Performance Reports required pursuant to Sections 3.1 and 3.2 or the back-up data

applicable to such Baseline Report or Performance Reports on or before the due date established in Sections 3.1 and 3.2 (or such later date as shall have been approved by the State pursuant to Section 2.1) within thirty (30) days after written notice of such failure and opportunity to cure, or (iii) the Company ceases to operate or fails to complete the Project described in Section 1.2 between the Start Date and the End Date (unless the End Date has been extended pursuant to Section 2.1).

In the case of an Event of Default, the Company shall repay directly to the State all or a portion of the Award Amount (the "Repayment Amount") as calculated in this Section 4.1. The Repayment Amount for an Event of Default under Section 4.1(i) above shall be determined by (A) multiplying the Award Amount by the Performance Percentage (the "Adjusted Award Amount"), then (B) subtracting the Adjusted Award Amount from the Award Amount that has been received by the Development Authority. (See Exhibit B.) The Repayment Amount for an Event of Default under Sections 4.1(ii) or 4.1(iii) above shall be one-hundred percent (100%) of the Award Amount that has been received by the Development Authority.

- 4.2 Notification and Repayment. In the event the Company has failed to meet the Performance Requirement or has otherwise defaulted as described in Sections 4.1(ii) or 4.1(iii) of this Agreement, the State shall deliver written notice (a "Notification Letter") to the Development Authority and the Company of such failure or default that will include a summary of the basis of the State's claim and shall include a demand that the Company pay the State the Repayment Amount (in which case such Notification Letter shall include the State's determination of the Repayment Amount).

No later than forty-five (45) days after the date of its receipt of a Notification Letter in which the State demands such repayment, the Company shall submit the Repayment Amount to the State. Any portion of the Repayment Amount that remains unpaid after the end of such forty-five (45) day period shall accrue interest from and after such period at the rate provided under T.C.A. §47-14-105 plus 200 basis points, and should the Company fail to remit the Repayment Amount to the State, the State shall have the right to seek any and all remedies available to it through its administrative processes or to seek remedies available at law or equity. Notwithstanding the foregoing, if the Company believes that the State has improperly demanded payment of the Repayment Amount (either in whole or in part), the Company shall have the right to remit the Repayment Amount demanded by the State pursuant to the State's Notification Letter under protest, in which case (i) the Company shall provide to the State a written explanation of the nature of the protest (the "Protest Letter"); (ii) the Repayment Amount paid by the Company shall not be subject to interest as described in this Section 4.2 if paid within the forty-five (45) day period described above; and (iii) the Company shall not be deemed to have waived any rights or defenses with respect to the Award Amount or the Repayment Amount (including, without limitation, any rights or defenses the Company may have under this Agreement or the Grant Contract with respect to the Award); provided, however, that the Company shall not be entitled to file a claim against the State with respect to funds repaid pursuant to this Section 4.2 after the first anniversary of the date on which the

Company receives the Notification Letter pursuant to which the Company shall have repaid such funds. Further, any such claim against the State shall be made to the Tennessee Claims Commission in accordance with Title 9, Chapter 8 of the Tennessee Code Annotated and shall be limited to disputes relating to matters described in the Protest Letter.

ARTICLE V - MISCELLANEOUS

- 5.1 **Records.** The Company shall maintain documentation regarding the reporting requirements of Sections 3.1 and 3.2 for the later of (i) three years following the End Date or extended End Date or (ii) one year after the resolution of any claim against the State filed pursuant to Section 4.2. The documentation shall be subject to audit by the State or its duly appointed representative at any reasonable time and upon reasonable notice. In the event that any audit conducted pursuant to this Section 5.1 reveals that the Company has inaccurately calculated or reported the number of Jobs consistent with the intent of this Agreement, the State may adjust the number of Jobs as reported by the Company to a number of Jobs consistent with the intent of this Agreement and adjust the Performance Percentage and Repayment Amount accordingly.
- 5.2 **Change of Control.** Change of Control is defined as (i) a reorganization, merger, consolidation or other transaction that will result in the transfer of ownership of more than 50% of the Company's shares; or (ii) the liquidation or dissolution of the Company or sale of substantially all of the Company's assets; or (iii) a change in the majority of members of the board within a 24-month period unless the election or nomination for election by the Company stockholders of each new director was approved by a vote of two-thirds of the directors then still in office who were in office at the beginning of the 24-month period.

In the event of a Change of Control that occurs during the period between the Start Date and the End Date, (A) the Company must notify the State of such Change of Control promptly following the approval of the Change of Control pursuant to corporate, partnership, limited liability company, or other similar proceedings applicable to the Change of Control event and (B) either the new owner or other successor entity resulting from the Change of Control (the "Successor Company") following the completion of the applicable transaction must assume the obligations contained in this Agreement by executing an assumption agreement in a form acceptable in all reasonable respects to the State (the "Assumption Agreement"). However, if the Company continues as a legal entity after a Change of Control, the Company and the Successor Company shall be jointly and severally liable for the obligations contained in this Agreement. In lieu of executing an Assumption Agreement, the Company or the Successor Company may elect to pay the State the Award Amount that has been received by the Development Authority pursuant to the Grant Contract.

- 5.3 **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee. The Company agrees that it will be subject to

the exclusive jurisdiction of the courts of the State of Tennessee in actions that may arise under this Agreement. The Company acknowledges and agrees that any rights or claims against the State of Tennessee or its employees hereunder, and any remedies arising therefrom, shall be subject to and limited to those rights and remedies, if any, available under *Tennessee Code Annotated*, Sections 9-8-101 through 9-8-407.

- 5.4 **Exhibits.** The Exhibits and Attachment hereto attached will be construed to be a part of this Agreement by such reference or other mention at each point at which such reference or other mention occurs, in the same manner and with the same effect as if each Exhibit and Attachment were set forth in full and at length every time it is referred to or otherwise mentioned. In the event of a discrepancy or ambiguity regarding the grant of funds from the State to the Development Authority under the Grant Contract, the terms of the Grant Contract shall govern.
- 5.5 **Severability.** If any one or more of the provisions contained herein will for any reason be held by any court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect any other provision hereof, and this Agreement will be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.
- 5.6 **Authorized Signatures.** Each of the individuals executing this Agreement represents that they are authorized to execute this Agreement on behalf of their respective entities.
- 5.7 **Execution in Counterparts.** 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.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have hereunto set their signatures the day and year first written above.

Tennessee Department of Economic and Community Development

By: _____

Title: _____

Date: _____

A.O. Smith Corporation

By: B. Keith O'Neil

Title: Director of operations

Date: 3/14/17

Town of Ashland City

By: Richard J. [Signature]

Title: Mayor

Date: June 13, 2017

EXHIBIT A

Performance Percentage Calculation

For purposes of determining compliance with the Performance Requirement, the Performance Percentage shall be calculated in accordance with Section 2.2 and as illustrated below.

1. Committed Jobs pursuant to Section 2.1

Committed Jobs _____

2. Net New Jobs Created

	<u>5th Interim Performance Report</u>	<u>6th Interim Performance Report</u>	<u>7th Interim Performance Report</u>
Net New Jobs	_____	_____	_____
<u>Total Net New Jobs (5th Interim + 6th Interim + 7th Interim Date) = Net New Jobs (Average)</u>			
3			

3. Performance Percentage

Net New Jobs (Average) = _____ % (Performance Percentage)
Committed Jobs

EXHIBIT B

Repayment Amount Calculation (Required only if Performance Percentage is less than 80%)

STEP 1

Award Amount * Performance Percentage = Adjusted Award Amount

STEP 2

Award Amount - Adjusted Award Amount = Repayment Amount

Example A – Repayment Required

A \$1,500,000 Award to retrofit a building was part of Company A's consideration to locate in Tennessee. As part of the deal, Company A committed to create 800 jobs. At the End Date, Company A created an average of 528 Jobs.

- Award Amount = \$1,500,000
- Commitment = 800 jobs
- Net New Jobs (Average) created = 528 (66% actual Performance Percentage)
- Adjusted Award Amount = \$990,000
- \$1,500,000 - \$990,000 = \$510,000
- Repayment Amount = \$510,000 (34% of Award Amount)

Example B – No Repayment Necessary

A \$500,000 Award to retrofit a building was part of Company B's consideration to locate in Tennessee. As part of the deal, Company B committed to create 600 jobs. At the End Date, Company B created an average of 498 Jobs.

- Award Amount = \$500,000
- Commitment = 600 jobs
- Net New Jobs (Average) created = 498 (83% actual Performance Percentage)
- No repayment required

EXHIBIT C

Baseline Report

Development Authority: _____
Company: _____
Grant Number: _____
Date: _____

Unless the State agrees to an extension, this report must be submitted to the State no later than 60 days following the Effective Date of the Accountability Agreement among the State, the Development Authority and the Company.

Please attach back-up data for each Job existing within the Company as of the Start Date.

[insert date]:	Existing Employees
[Company]	

I hereby certify that each Job listed above complies with the definition provided in Article II and Section 3.1 of the Accountability Agreement and that all information contained in this Baseline Report is true and accurate. I understand that the information provided in this Baseline Report will be used to determine the number of Net New Jobs.

A.O. Smith Corporation

By: _____
Title: _____
Date: _____

EXHIBIT D

Performance Report

Development Authority: _____

Company: _____

Grant Number: _____

Date: _____

Check the applicable reporting period:

- 1st Interim 2nd Interim 3rd Interim 4th Interim 5th Interim
 6th Interim 7th Interim

Unless the State agrees to an extension, this report must be submitted to the State no later than 60 days following each Interim Date for the period commencing on the first anniversary of the Start Date under the Accountability Agreement and ending on the End Date. Net New Jobs shall be calculated according to Article II of the Accountability Agreement.

Please attach back-up data for each Net New Job created by the Company.

<i>[insert date]:</i>	Net New Jobs (Reporting Period)	Net New Jobs (Cumulative)
[Company]		

I hereby certify that each Job listed above complies with the definition provided in Article II of the Accountability Agreement and that all information contained in this Performance Report is true and accurate.

A.O. Smith Corporation

By: _____

Title: _____

Date: _____

ATTACHMENT A

Grant Contract