

PASS THROUGH AGREEMENT BETWEEN
Port of Bellingham
AND
Silfab Solar
FOR
TRANSFER AND USE OF WASHINGTON STATE STRATEGIC RESERVE FUNDS

THIS Pass Through Agreement ("Pass Through Agreement") is made this ____ day of May 2020 ("Effective Date"), by and between the **Port of Bellingham**, a special purpose municipal district incorporated under the laws of Washington, hereinafter called "**the POB**", and **Silfab Solar**, a company authorized and licensed to do business in Washington, hereinafter called "Company".

WHEREAS, the POB is authorized to conduct business in the State of Washington as a special purpose municipal port district with expertise and statutory authorization in economic development; and

WHEREAS, the Company is a for-profit business licensed to conduct business in the State of Washington; and,

WHEREAS, the Company intends to undertake an expansion of a facility in Bellingham, Washington that is intended to create significant new jobs and private investment; and,

WHEREAS, the Company has sought assistance and support with costs incurred with the design and engineering, building retrofits, and equipment installation, testing and training; and,

WHEREAS, the POB was awarded \$250,000 of Strategic Reserve Funds through Department of Commerce Grant Contract No. SRF20-00020-101 (Office of Financial Management Grant Number GOV K257) from the State of Washington for the benefit of Company; and,

WHEREAS, the POB and the State of Washington, through the State Department of Commerce and Office of Financial Management, executed a Non-Construction Grant agreement governing the terms and conditions of the use of the Strategic Reserve Funds grant by Company, a copy of which is attached hereto as Exhibit A;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein, the parties agree as follows:

Section 1. Strategic Reserve Fund Grant.

1.1 The State of Washington awarded a Strategic Reserve Grant in the amount of \$250,000 (US Dollars) to assist with a \$4,000,196 project to be undertaken by Company to generate \$3,750,196 in private investment and between twenty (20) and forty (40) new full time jobs in Whatcom County through the expansion of Company's facility in Bellingham, WA. The Grant is intended to pass through the POB to Company to reimburse them for design and engineering, equipment installation, testing and training, and building retrofits, designed to create the aforementioned new jobs. The terms and conditions of the pass-through Grant are contained in the Non-Construction Grant agreement ("Grant Agreement") between the State and POB, which is attached hereto and incorporated herein by this reference.

1.2 The POB and Company agree that this Pass Through Agreement between POB and Company is intended to implement and comply with the terms and conditions of the Grant Agreement.

Section 2. Performance By the Port of Bellingham.

2.1 The POB shall reimburse the Company for eligible expenses incurred by Company in creating 20-40 new full time jobs at Silfab Solar in Bellingham, Washington in an amount not to exceed the amount of the Strategic Reserve Funds grant identified above.

2.2 The intent and purpose of the Grant shall be for Company to create jobs and generate private investment in Whatcom County, Washington. Specifically, the Company shall create between twenty (20) and forty (40) new full time jobs within five years from the Effective Date of this Pass Through Agreement and private investment in the amount of \$3,750,196 between the Effective Date and June 30, 2020. The POB will monitor Company's performance per the Grant Agreement requirements.

2.3 Company's reimbursable activities include:

- 2.3.1 Design and Engineering;
- 2.3.2 Equipment install, testing and training;
- 2.3.3 Building retrofits
- 2.3.4 Such other activities that are directly related to the Grant's intent.

2.4 Expenses to be reimbursed by the POB to Company must have been incurred by the Company during the period December 6, 2019 and June 30, 2021. Expenses will only be reimbursed out of, and to the maximum amount of, the Strategic Reserve Funds grant identified above. The POB has no independent obligation to provide funds to Company.

Section 3. Performance by the Company (Consideration).

3.1 In consideration for the reimbursement of eligible expenses as delineated in the Grant Agreement, the Company agrees to invest an estimated \$3,750,196 before June 30, 2021 in creating twenty (20) to forty (40) full time, new jobs in the next five years following the execution of the Agreement (starting on the Effective Date) at Company's Bellingham Campus. If the Company cannot provide this consideration for the Grant funding for any reason, the Company shall immediately notify the POB in writing and provide a complete explanation of why it believes it cannot meet the intended requirements and its plan to remedy the situation. This is a material term of this Pass Through Agreement.

3.2 The Company shall provide the POB with invoices/deliverables, including supporting documentation, for all services in support of its request for reimbursement under this Agreement. The invoice shall include a description of why it is a reimbursable expense.

3.3 The Company shall provide for up to five years after the Effective Date, annual updates on the economic impact of the project at the POB's request. The updates shall be in a format acceptable to the POB and the State of Washington and describe, but not be limited to, the private sector employment and investment activity resulting from the project.

3.4 The Grant Agreement (Exhibit A) requires certain audit requirements in Section 14 that the parties hereto agree to comply with. Accordingly, the parties to this Pass Through Agreement agree that:

3.4.1 The Company shall follow generally accepted accounting procedures in tracking reimbursable expenses hereunder and shall maintain books, records, documents, and other evidence which sufficiently and properly reflects all project specific costs expended in the performance of the Grant;

3.4.2 The POB and/or the authorized representatives of Washington State shall have the right to audit and inspect the Company's supporting documents upon reasonable notice and at a reasonable time and location.

3.4.3 The Company agrees that it will retain all documentation supporting this Grant for a period of six (6) years after the termination of this Grant.

Section 4. Other Terms and Conditions.

4.1 The Parties to this Pass Through Agreement agree to be bound to all applicable provisions of the Contract No. SRF20-00020-101 between the POB and the State of Washington as included as Exhibit A of this Agreement and incorporated herein ("Grant Agreement"). The Company acknowledges that it has read the Grant Agreement and understands its obligations contained therein which include, by way of example and not limitation, subcontractor requirements (Section 11), recapture provisions (Section 12), acknowledgement of state funding (Section 14 on page 4), non-discrimination (Section 19), ownership of certain work product (Section 19, page 5), etc.

4.2 If there are inconsistencies between the performance required between this Pass Through Agreement and the Grant Agreement, the Grant Agreement shall control unless specifically stated otherwise herein or agreed to in writing by the parties.

4.3 The POB shall not be considered for any purpose a party to the Company's project to create the requisite number of jobs or expansion of its Bellingham campus. The POB is strictly passing through this State Strategic Reserve Fund grant and has no independent duty or obligation. For example, the Company shall work with the State to determine if any aspects of its building campus expansion that is funded by the State grant funding are subject to prevailing wages (See, Exhibit A, section 20).

4.4 If for any reason, the Strategic Reserve Fund grant funding is not available, reduced, terminated, or otherwise changed by the State or not provided to the POB for pass through to the Company, the POB shall not be liable for any remaining amounts of the Grant. In such a case and upon notice to the Company, this Pass Through Agreement shall terminate and the parties will work to wind down the Pass Through Agreement.

4.5 The Parties recognize that the POB is a public entity governed by Washington State Public Records Act (Chapter 42.56, Revised Code of Washington). If the POB receives such a request for documents related to this Grant, POB will notify the Company and provide the Company a reasonable opportunity to seek an injunction at its cost and liability over any records the POB must release by law.

Section 5. Assignment.

This agreement may not be assigned by either party except by signed amendment hereto with signatories being authorized representatives of both parties and such amendment being signed before the effective date of any assignment.

Section 6. Breach.

6.1. In the event of either party's material breach of the terms or conditions of this Pass Through Agreement, the non-breaching party reserves the right to withhold payments or services until corrective action has been taken or completed. However, the party shall not exercise this right until they have given written notice of such material breach to the breaching party and ten days have passed since the receipt of such notice. This option is in addition to and not in lieu of the parties' right to terminate this Pass Through Agreement or any other right that State law offers for breach of contract.

6.2. If either party shall materially breach any of the covenants undertaken herein or any of the duties imposed upon it by this Pass Through Agreement, such material breach shall entitle the other party to terminate this Contract, provided that the party desiring to terminate for such cause shall give the offending party at least twenty days' written notice, specifying the particulars wherein it is claimed that there has been a violation hereof, and if at the end of such time, the party notified has not removed the cause of complaint, or remedied the purported violation, then the non-breaching party may terminate this Pass Through Agreement.

6.3. Notwithstanding subsections 6.1 and 6.2 of this Section 6 above, in the event Company fails to comply with its obligations, promises, and contract, as set forth in Section 3, it shall be obligated to return any funds received from the State of Washington to the POB for return to the State of Washington. This section shall not limit or otherwise foreclose any available remedy at law or equity.

6.4 The parties intend for this Section 6 to be used and not the Dispute Resolution provisions of Section 23 of the Grant Agreement in a dispute between the POB and Company regarding this Grant.

Section 7. Entire Agreement and Modification.

The parties agree that this Pass Through Agreement is the complete expression of the terms hereto and any oral representation or understanding not incorporated herein is excluded. Further, any modification of this Pass Through Agreement shall be in writing and signed by authorized representatives of both parties.

Section 8. Attorney Fees.

In the event a suit, action, arbitration, or other proceeding of any nature whatsoever, including without limitation any proceeding under the U.S. Bankruptcy Code, is instituted, or the services of any attorney are retained, to interpret or enforce any provisions of this Pass Through Agreement or with respect to any dispute relating to this Pass Through Agreement, the prevailing party shall be entitled to recover from the losing party its attorneys', paralegals', accountants', and other experts' fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith. The amount of such fees, costs, and expenses shall be determined by the judge or arbitrator, shall include fees and expenses incurred on any appeal or review, and shall be in addition to all other amounts provided by law.

Section 9. Counterparts, Photocopies, and Facsimiles.

This Pass Through Agreement may be executed in counterparts, each of which shall constitute an original document, and all of which together shall constitute one and the same instrument. Photocopy, electronic, and facsimile signatures shall have the same force and effect as original signatures.

Section 10. Waiver.

The waiver or failure by either party to enforce any provision of this Pass Through Agreement in the event of a breach shall not constitute a waiver of that party's right to enforce the same or other provisions of this Pass Through Agreement in the event of a subsequent breach or breaches.

Section 11. Governing Law.

This Pass Through Agreement shall be governed by and interpreted and enforced in accordance with the laws of the State of Washington and the venue will be in Whatcom County, Washington. This provision shall prevail of inconsistencies with Section 24 of the Grant Agreement regarding venue being in Thurston County, Washington.

Section 12. Indemnification and hold harmless.

The Company agrees to defend, hold harmless, and indemnify the POB and its commissioners, officers, agents, employees, and assigns against any and all damages or claims for damages resulting or allegedly resulting from the Company's performance or lack of performance in executing the project receiving the grant funding.

IN WITNESS WHEREOF, the parties hereto caused this contract to be executed the day and year first here in above written.

Silfab Solar

Port of Bellingham

By: _____

By: _Rob Fix, Executive Director_____

Date

Date

Exhibit A: Non-Construction Grant Agreement between the State of Washington and the Port of Bellingham