

## CONTRACT BETWEEN PROJECT IRONMAN AND THE CITY OF DURHAM REGARDING INCENTIVES FOR JOB CREATION WITHIN THE CITY LIMITS

THIS CONTRACT (“Contract” or “Agreement”) is dated, made, and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2015, by the City of Durham (“City”) and Project Ironman (“Company” or “contractor”), organized and existing under the laws of the State of Delaware and authorized to transact business in the State of North Carolina, and the City of Durham (the “City”), a North Carolina municipal corporation.

**Background and Purpose.** The Company is a subsidiary of a telecommunications company which offers voice, broadband, video, wireless Internet data access, data security solutions, bundled offerings, specialized bundles for small businesses and home offices, and advanced business communications for medium and large businesses. This project includes the creation of 150 jobs within the city limits in Durham, North Carolina. The jobs to be created by the Company are within the category of investment emphasized in the “Resolution Establishing an Economic Development Financial Assistance and Incentive Policy for Job Creation, Job Retention and Capital Investment” adopted by City Council on April 21, 2014 (“Resolution”). Through adoption of the Resolution, the City finds that the use of City funds to promote job creation will increase taxable property and the business prospects of the City of Durham. The Company represents the incentives proposed by this Agreement constitute a bonafide inducement for the Company to relocate and/or remain in the City of Durham, without which inducements the Company would be less likely to relocate and/or remain in the City.

By authorizing the execution of this Contract, the City Council of the City of Durham finds (i) that in order to aid and encourage the creation of jobs in the city, it is necessary and desirable to provide an incentive to the Company for creating jobs inside the corporate limits of the City of Durham (as defined by the Durham City/County Planning Department on the date of the Contract), (ii) that the proposed expansion by the Company is a qualified business for job creation as defined by the Resolution and increases the business prospects and supports the taxable property of the City, contributes significantly to economic conditions in Durham, provides workers with continuing employment opportunities, diversifies the local economy, and (iii) that this Contract otherwise complies with the Resolution.

### **THEREFORE, IT IS AGREED AS FOLLOWS:**

#### Sec. 1. Definitions.

(a) “Affiliate” – any corporation or other entity under common control with or which controls the Parent Company, whether directly or indirectly; where the term “control” means possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity, whether through the ownership of voting interests, by contract, or otherwise; provided, however, the term “Affiliate” shall not include any Subsidiary.

(b) “Approved Assignee” – any corporation or other entity duly authorized to conduct business in the State of North Carolina and which is a Subsidiary or Affiliate of the Parent Company. The City shall receive written notice within ten (10) calendar days of an assignment of this Agreement to an Approved Assignee.

(c) “Capital Investment” – facility construction and improvements, including equipment, machinery, fiber and cable installation, required for the Project and as defined under Section 3 of the Resolution, including the requirement that all qualifying property improvements be subject to City and County property taxes from the time when the Capital Investment is installed or constructed and continuing until the final incentive payment by the City is made.

(d) “Certificate of Compliance” – the official document issued by the local governing authority certifying that a newly constructed or renovated building or structure is in compliance with applicable building codes, regulations and laws, such that said building or structure may be lawfully occupied.

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(e) “Contract End Date” – the last possible effective day of the life of the Contract, except for termination for other cause.

(f) “Effective Date” – the date this Contract is approved by City Council.

(g) “Parent Company” – Project Ironman.

(h) “Project” – refers to the activities to be performed by the Company under this Agreement according to Section 2, “Required Capital Investment and Job Creation” as necessary for the Company to be eligible for the City incentive payments described under Section 3, “City Incentive Payment Schedule” below.

(i) “Qualified Job” – full-time, permanent positions filled by employees that Company has in its employ as of the date of its physical relocation to the City (if employees are relocated or transferred from outside the City of Durham), plus additional full-time, permanent employment positions that are created after the effective date of this Contract and retained for at least 1-year after creation, which pay a salary equal to or greater than the City’s livable wage rate (pursuant to Section 18-23 of the City Code), and which are evidenced by the Company’s quarterly wage reports of employee wages filings with the North Carolina Department of Commerce and documentation as necessary to establish such positions and employment for the applicable duration. Retention of all Qualified Jobs is cumulative until the final City Incentive Payment is made. In other words, the first Qualified job(s) created must be retained for the full period (more than the 1-year minimum, if necessary) until the final City Incentive Payment is made in order to be counted as a Qualified Job. If the Company is already located in the City of Durham, any Company positions filled by employees already existing in the City of Durham prior to the execution of this Agreement shall not be counted as “Qualified Jobs”. So long as the Company creates and retains a position to the extent required hereunder, the Company may replace the employee filling such position from time to time in Company’s discretion. For all such positions and employment created after the date of Company’s relocation, such jobs shall be posted with the NCWorks Career Center in Durham. Except for the business travel requirements of Company, a Qualified Job under this Contract shall require that the employee holding such job to spend a majority (at least 51 percent) of his or her working time in the ordinary course of employment within the city limits of Durham, North Carolina.

(j) “Subsidiary” – any corporation or other entity controlled, directly or indirectly, by the Parent Company, or one or more Subsidiaries of the Parent Company, or a combination thereof.

Sec. 2. Required Capital Investment and Job Creation. The City agrees to pay Company up to an overall total of \$64,500.00 in incentive payments for creation of 150 Qualified Jobs (“City Incentive Payments”) in accordance with the schedule provided under Section 3 below. Payments are conditioned upon the Company meeting the following requirements:

(a) Minimum Capital Investment - the Company shall complete the installation or construction of at least \$4,300,000.00 in Capital Investment within three (3) years of City Council Approval of this Agreement. Completion of the minimum Capital Investment shall be evidenced by the following:

- (i) (Certificate of Compliance) - issuance of a certificate of compliance (sometimes referred to as a Certificate of Occupancy) from the Durham City-County Inspections Department allowing occupancy or use of the facility in which the minimum Capital Investment was made; and
- (ii) (Accounting) - Company shall provide to the City a full and accurate accounting of Capital Investment expenditures with such detail as the City may reasonably require to verify that such expenditures qualify as Capital Investment; and,
- (iii) (Certification) - If required by the City, Company shall deliver to the City a written certification, in such form as the City reasonably requires, that the Company has satisfied all applicable requirements of this Agreement.

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- (b) Job Creation Requirements – the Company shall create at least 150 Qualified Jobs within three (3) years of the Effective Date. Company shall create an annual minimum number of Qualified Jobs as specified in Section 3 below to maintain eligibility for each City Incentive Payment. Creation of each Qualified Job is conditioned upon the following:
- (i) (Workforce Development Plan agreement) - Upon execution of this Agreement, the Company shall complete, execute, and return the document entitled “Workforce Development Plan” (attached hereto as Attachment A) and substantially comply with its provisions.
  - (ii) (Employment Records) - The number of Qualified Jobs created will be verified by using a listing of Qualified Job positions created and employees which held those positions which comprise the Qualified Jobs. Listing(s) will contain wages of employees which comprised the Qualified Jobs, will be created by the Company, and must be attested to and notarized by the Company. Verification of wages will be based upon Company’s quarterly wage reports of employee wages as filed with the NC Department of Commerce and any other documentation or evidence as the City reasonably requires to verify the creation of a Qualified Job as defined by this Agreement.
  - (iii) (Healthcare Coverage) -For each Qualified Job, Company shall maintain, at a minimum, the same level of health care benefits or better (on balance) throughout the term of this Contract that it provides at the time of first creating the Qualified Job.

Sec. 3. City Incentive Payment Schedule. The Company’s entitlement to payment from the City under this Agreement is conditioned upon the Company sending an invoice to the City, which documents the completion of Capital Investment and creation of Qualified Jobs pursuant to this Agreement. By complying with the requirements of Section 2 and all other applicable provisions of this Agreement, the Company shall be eligible to receive the City Incentive Payments according to the following payment schedule:

<u>INCENTIVE PAYMENT YEAR</u>	<u>CITY INCENTIVE PAYMENT AMOUNT</u>	<u>PAYMENT CONDITIONS</u>	<u>EARLIEST TIMING OF PAYMENT</u>
<u>YEAR 1</u>	<u>\$64,500.00</u>	<u>Completion of minimum Capital Investment of \$4,300,000.00 pursuant to Section 2(a) and creation and cumulative retention of at least 150 Qualified Jobs.</u>	<u>January 1<sup>st</sup> after the first calendar year that begins after Company has complied with the payment conditions for Year 1.*</u>

\* By way of example, if the Year 1 Payment Conditions are met on March 1, 2016, the Year 1 City Incentive Payment would be made after January 1, 2018 (which is the first January after the 1st anniversary date of the completion of the Year 1 Payment Conditions).

Sec 4. Job Posting and Reporting Requirements. Company shall comply with the job posting and reporting requirements of the Workforce Development Plan agreement attached hereto as Attachment A.

Sec. 5. Contract End Date. Notwithstanding any other termination provision contained in this Contract, the City shall have no obligation to, and shall not, make any payment to the Company pursuant to this Agreement after December 31, 2021, upon which time the Contract shall terminate, if not terminated earlier.

Addresses. The payments by the City pursuant to this Agreement shall be mailed to:

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Or to such other address as the Company may specify by written notice to the City. When a notice is required or permitted by this Contract, it shall be given by written notice to the City by delivery to:

Mr. Kevin Dick  
Director - Office of Economic and Workforce Development  
City of Durham  
807 E. Main St., Suite 5-100  
Durham, North Carolina 27701

and to the Company by delivery to:

Either party may change the address by giving notice of the change to the other party.

Sec. 6. Change of Address. Date Notice Deemed Given. Any notice or other communication under this Contract shall be deemed given at the time of actual delivery or expressly rejected by the recipient, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail (postage pre-paid), it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

Sec. 7. EEO Provisions. During the performance of this Agreement the Company agrees as follows: (1) The Company shall abide by the terms of the Equal Employment Practices Act, N.C. Gen. Stat section 143-422, *et. al.* (2) The Company shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions. (3) The Company shall in all solicitations or advertisement for employees placed by or on behalf of the Company, state that its hiring practices conform with the Equal Employment Practices Act. (4) In the event of the Company's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this Contract, in whole or in part. (5) Unless exempted by the City Council of the City of Durham, the Company shall include these EEO provisions in every purchase order for goods to be used in performing this Contract and in every subcontract related to this Contract.

Sec. 8. City Policy. THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

Sec. 9. Default. Termination. Clawback Provision.

(a) If the Company fails to fulfill any of its material obligations under the Contract, the City may hold the Company in default and terminate this Agreement and make no further payments to the Company.

(b) If, however, any required certification or representation made by the Company is determined by the City to be materially false when made and known to be false by the Company, the City may hold the Company in default and (i) terminate this Agreement and make no further payments to Company and (ii) recover all prior payments related to the alleged falsified Capital Investment or Qualified Jobs. If, after removing said falsely represented Capital Investment or Qualified Jobs from the level of Capital Investment or Qualified Jobs required by the Contract, the Company fails to meet the thresholds required under this Agreement, the Company shall reimburse the City all prior payments made during that relevant period. The determination of the City that the Company has defaulted pursuant to this Section 9(b) may be challenged by the Company in a court of competent jurisdiction consistent with Section 13 below. If the Company does not deliver to the City the certification(s) and information required under Section 2, and does not seek payment under Section 2, the Company shall not be considered in default for failing to deliver the certification. The aforementioned clawback is intended to apply only in the case where the Company has knowingly provided such materially false certification.

(c) In the event the Company shall fail to meet certain target numbers for the creation, relocation

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or retention of Qualified Jobs and (i) such failure is due to general economic conditions and (ii) the Company has otherwise previously qualified for certain payments hereunder, the City and the Company agree to enter into good faith negotiations to amend this Contract (with City Council approval, if necessary) in order to preserve the economic benefits and incentives created by this Agreement.

Sec. 10. Agreement Subject to Resolution. This Agreement is made pursuant to the Resolution, and is subject to the procedures, limitations, and restrictions set forth therein.

Sec. 11. Attachments. The following attachments are made a part of this Contract:

Attachment A, "Workforce Development Plan," containing 4 pages.

Attachment B, "Durham-Based Business Plan," containing 5 pages.

In case of conflict between an attachment and the text of this Contract excluding the attachment, the text of this Contract shall control.

Sec. 12 Indemnification. (a) To the maximum extent allowed by law, the Company shall defend, indemnify, and save harmless Indemnitees from and against all Charges that arise in any manner from, in connection with, or out of this Contract as a result of acts or omissions of the Company that may arise out of this Agreement. In performing its duties under this subsection "a," the Company shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. In no event shall the Company's expenses exceed \$64,500. (b) Definitions. As used in subsections "a" above and "c" below -- "Charges" means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements, and expenses (included without limitation within "Charges" are interest and reasonable attorneys' fees assessed as part of any such item. "Indemnitees" means City and its officers, officials, independent contractors, agents, and employees, excluding the Company. (c) Other Provisions Separate. Nothing in this section shall affect any warranties in favor of the City that are otherwise provided in or arise out of this Contract. This section is in addition to and shall be construed separately from any other indemnification provisions that may be in this Contract. (d) Survival. This section shall remain in force despite termination of this Contract (whether by expiration of the term or otherwise) and termination of the services of the Company under this Contract for one (1) year following such expiration or termination. (e) Limitations of the Company's Obligation. If this section is in, or is in connection with, a contract relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, then subsection "a" above shall not require the Company to indemnify or hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of Indemnitees. Notwithstanding the foregoing, in no event shall Company be liable to Indemnitees hereunder to the extent of any negligence on the part of any Indemnitees or for any consequential, special or indirect damages.

Sec. 13. Choice of Law and Forum. This Contract shall be deemed made in Durham County, North Carolina. This Contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this Contract shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This section shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

Sec. 14. Waiver. No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

Sec. 15 Performance of Government Functions. Nothing contained in this Contract shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

Sec.16. Severability. If any provision of this Contract shall be unenforceable, the remainder of this Contract shall be enforceable to the extent permitted by law.

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Sec. 17. Assignment. Successors and Assigns. Without the City's written consent, the Contractor shall not assign (which includes to delegate) any of its rights (including the right to payment) or duties that arise out of this Contract. The City Manager may consent to an assignment without action by the City Council. Unless the City otherwise agrees in writing, the Company and all assignees shall be subject to all of the City's defenses and shall be liable for all of the Company's duties that arise out of this Contract and all of the City's claims that arise out of this Contract. Without granting the Company the right to assign, it is agreed that the duties of the Company that arise out of this Contract shall be binding upon it and its heirs, personal representatives, successors, and assigns.

Sec. 18. Compliance with Law. In performing all of its obligations under the Contract, the Company shall comply with all applicable laws.

Sec. 19. No Third Party Rights Created. This Contract is strictly intended for the benefit of the City and the Company and not any other third party, person or entity. Nor shall any contractual or other rights of any kind arise under law as to any such third parties, persons or entities as to this Contract.

Sec. 20. Principles of Interpretation and Definitions. In this Contract, unless the context requires otherwise: (1) The singular includes the plural and the plural the singular. The pronouns "it" and "its" include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words "include," "including," etc. mean include, including, etc. without limitation. (2) References to a "Section" or "section" shall mean a section of this Contract. (3) "Contract" and "Agreement," whether or not capitalized, refer to this instrument. (4) Titles of sections, paragraphs, and articles are for convenience only, and shall not be construed to affect the meaning of this Contract. (5) "Duties" includes obligations. (6) The word "person" includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (7) The word "shall" is mandatory. (8) The word "day" means calendar day.

Sec. 21. Modifications. Entire Contract. A modification of this Contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless the City Manager or a deputy or assistant City Manager signs it for the City. This Contract contains the entire Agreement between the parties pertaining to the subject matter of this Contract. With respect to that subject matter, there are no promises, Contracts, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this Contract.

Sec. 22. City's Manager's Authority. To the extent, if any, the City has the power to suspend or terminate this Contract or the Company's services under this Contract, that power may be exercised by City Manager or a deputy or assistant City Manager without City Council action.

Sec. 23. No Joint Venture. Nothing in this Contract shall create a joint venture or partnership between the City and the Company.

Sec. 24. E-Verify compliance under 143-133.3. The contractor and its subcontractors shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (NCGS). This E-Verify compliance under 143-133.3 section is intended to apply to only the contracts to which NCGS 143-133.3(a) applies and shall be construed in accordance with that statute. Any clause in this contract included under the authority of NCGS 160A-20.1(b) shall be of no effect; provided, however, to the extent (if any) required to comply with NCGS 143-129(j), a clause in this contract requiring the contractor and its subcontractors to comply with the requirements of Article 2 of Chapter 64 shall remain in effect if this contract is subject to NCGS 143-129. This E-Verify compliance under 143-133.3 section is valid only if House Bill 318, which was ratified on 29 September 2015, is signed into law by the Governor of North Carolina.

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IN WITNESS WHEREOF, the City and the Company have caused this Contract to be executed under seal themselves or by their respective duly authorized agents or officers.

CITY OF DURHAM

ATTEST:

\_\_\_\_\_

By: \_\_\_\_\_

Preaudit certificate

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PROJECT IRONMAN

By: \_\_\_\_\_ (SEAL)

Title of officer: \_\_\_\_\_  
(Affix corporate seal.)

State of \_\_\_\_\_  
County of \_\_\_\_\_

ACKNOWLEDGEMENT BY  
PROJECT IRONMAN

I, a notary public in and for the aforesaid county and state, certify that \_\_\_\_\_ personally appeared before me this day and stated that he or she is (~~strike through the inapplicable:~~) chairperson/ president/ chief executive officer/ vice-president/ assistant vice-president/ treasurer/ chief financial officer of PROJECT IRONMAN, and that by authority duly given and as the act of the corporation, he or she signed the foregoing Contract with the City of Durham and the corporate seal was affixed thereto. This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

My commission expires:

\_\_\_\_\_

\_\_\_\_\_

Notary Public