

COMMISSIONER OF CHATTOOGA COUNTY

Post Office Box 211 Summerville, Georgia 30747

Telephone (706) 857-0700

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Statement from Commissioner Blake Elsberry

I am glad to have a resolution to the Try-Con issue and I am ready to move forward from it. Chattooga County has a lot of positive momentum right now and I am looking forward to continuing in that direction.

Although the decisions that led to this audit issue were made before my time in office, I think this stands as a good example of why proper procedures and documentation are important in the economic development process.

The wise investment of taxpayer dollars in economic development projects, the protection of that investment, the promotion of new industry development, and the support of our local industries will always be one of the priorities of my administration.

Any further questions on this issue should be forwarded to Mr. Lester Tate at Akin & Tate Attorneys-at-Law.

AKIN & TATE

ATTORNEYS AT LAW

P.O. BOX 878

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CARTERSVILLE, GA 30120

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AKIN-TATE.COM

ESTABLISHED IN 1836

WM. MORGAN AKIN

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EMMA C. PAIGE, *of counsel*

WARREN AKIN, 1836-1877

T. WARREN AKIN, 1873-1884

JOHN W. AKIN, 1878-1907

PAUL F. AKIN, 1896-1959

WARREN AKIN, 1935-2007

January 3, 2022

Commissioner Blake Elsberry
Chattooga County Commissioner
Post Office Box 211
Summerville, Georgia 30747

**Via First Class Mail and Email:
belsberry@windstream.net**

**In re: Sewer line running from Angus McLeod Park
to Tri-Con Tufter, Inc.**

Dear Commissioner Elsberry,

Earlier this year, you retained me on behalf of Chattooga County to address a finding in the audit prepared by Chrysan Thomas, CPA, PC related to the installation of a sewer line. At the outset, I should note that this audit was for the year ending December 2020, a time prior to you assuming your duties as sole County Commissioner. The audit questioned the legitimacy of an extension of the Lyerly sewer system to accommodate an expansion of Trycon Tufters, Inc. as part of a proposed economic development initiative. Specifically, the question was raised as to whether this expansion—at a cost of approximately \$47,835.00—was a violation of the “gratuities clause” in the Georgia Constitution. *Ga. Const. Art. III, Sec VI, ¶ VI.*

The purpose of this letter is to outline the steps which I took in investigating this matter, apprise you of my findings, and offer my legal opinion on the matters surrounding the expansion.

BACKGROUND

The audit found a bill for \$47,835.00 (a copy of which is attached as Exhibit “A” along with the check paying that bill) that had been paid, but there was no record in the minutes of the County noting what this expenditure was for. Georgia law requires that:

All contracts entered into by the county governing authority with other persons in behalf of the county shall be in writing and entered on its minutes. *O.C.G.A. 36-10-1*

Commissioner Blake Elsberry
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This deviation from the statutory requirements by the prior administration is extremely significant. Not only does it violate Georgia law, it also greatly impaired our investigation into the origin of the expenditure. Had such a notation been made, as required by law, we could have easily ascertained the purpose of the contract. I should note, however, that the fact that the prior administration did not properly handle this matter does not give legal grounds to void the contract and reclaim the expenditure. At this point, the work has been done at the County's request and we would have no right to seek to recover the money from the contractor because the prior administration did not follow Georgia law.

Even without the aid of the minutes, we were able to determine that the work was apparently done in connection with a proposed expansion of TryCon Tufters, utilizing assistance available from the Georgia Department of Economic Development. A copy of the proposed agreement between TryCon and that Department is attached as Exhibit "B". The agreement, however, was never executed by TryCon and the expansion, which would have occasioned the need for a tie-in to the Lyerly sewer system, was never completed.

INVESTIGATION

Given the background, I decided that the first order of business was to try to confirm that the sewer line had actually been installed and try to determine whose property it had been installed on. Towards that end, you and I visited the TryCon site, but were unable to visually locate any of the manholes shown in the diagram of the proposed expansion. We then went to Lyerly City Hall and the Public Works Director there was able to take us to the park in Lyerly and point out where the line connected with the Lyerly system. He was also able to walk us back down the line, which ran adjacent to the railroad tracks and show us where the line ran.

What was still unclear after this visit, was whose land the sewer pipe ran across. I was later able to clear this fact up by speaking with a representative of the Georgia Department of Transportation ("GDOT"). The railroad leases the track and adjacent land from GDOT and the sewer line, they were able to confirm, runs across their property. Unfortunately, the prior administration also failed to get the proper permitting from DOT to run this line. However, DOT has offered to cooperate to get the proper permitting.

LEGAL OPINION

Legally speaking a “Gratuity” within the meaning of the “Gratuity Clause” of the Ga. Constitution is “[s]omething given freely or without recompense; a gift” or “[s]omething voluntarily given in return for a favor or now especially a service; hence, a bounty; a tip; a bribe.” *McCook v. Long*, 193 Ga. 299, 303 (1942), *Garden Club of Ga., Inc. v. Shackelford*, 266 Ga. 24, 24-25 (1995). In contrast, there is no gratuity where a local government is obtaining substantial benefit in return. *Smith v. Board of Commissioners of Roads and Revenue of Hall County*, 244 Ga. 133 (1979).

Some historic precedent illuminates this latter point. In the early 18th century, the Georgia legislature gave a right of way to a railroad company expecting that, “*a grand trunk line which will be of great benefit to the State of Georgia, forming a most important feeder and, practically, an extension of the Western and Atlantic Railroad, which is the property of the State, and giving to our commerce the advantage of a direct and admirable connection with the railway system of the North and West*” would be built. When ownership of one of the railroads involved changed, the legislature sought to repeal the gift and the case went all the way to the U.S. Supreme Court, with Georgia arguing that the grant violated the gratuity’s clause. Justice Holmes, writing for the Court, held:

Even if the contemplated and invited change of position on the part of the Cincinnati Southern Railway and the benefit to the State expressly contemplated as ensuing from it were not the conventional inducement of the grant, and so, were not technically a consideration, we are of the opinion that the grant was not a gratuity within the meaning of the state constitution. A conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the constitution intended to prevent and in our opinion is not within the meaning of the word as it naturally would be understood.

Georgia v. Trustees of Cincinnati Southern R. Co., 248 US 26 (1918). (*Emphasis supplied*)

Applying these general principles to the transaction at hand, it is my opinion that the expansion of the sewer line does NOT violate the gratuities clause. Evidence surrounding the transaction unmistakably shows that the expansion was occasioned by an economic development project that was supposed to create over 100 jobs in the Chattooga County area. And while it is true that the expenditure for the expansion was not properly documented and

Commissioner Blake Elsberry
January 3, 2022
Page Four

that TryCon did not ultimately expand its operation and hire additional employees, those facts have no bearing on the propriety of the expenditure under the gratuity's clause.

Further, I expect that any legal action to try to recover a portion of the expenditure from TryCon, based on its failure to expand its operation would be fruitless. TryCon never actually executed the expansion agreement, and it would have been prudent on the part of the prior administration to have made sure that happened before making the expenditure. But even had the agreement been executed, the economic wisdom of engaging in litigation would have been questionable. The amount expended to recoup the cost of the expansion, in attorney's fees and costs, could easily exceed the amount sought.

REMAINING ISSUES

The chief remaining issue here is the permitting of the sewer line and its maintenance. I had originally advised that we should seek the permits on behalf of Chattooga County and negotiate a maintenance agreement with TryCon. However, it now appears that TryCon is seeking annexation into the City of Lyerly and that Lyerly will seek the permitting and take over maintenance of the expanded sewer line. This would seem to solve both of these problems.

CONCLUSION

In view of the foregoing, I recommend that Chattooga County take no further action, pending the annexation. Assuming the annexation goes through there should be no further issues to address.

With kind regards, I remain

Yours very truly,

AKIN & TATE


S. Lester Tate, III

SLT/dt
Enclosures

EXHIBIT A

B & J Construction Billing Statement
and
Chattooga County Commissioner
Check number 2696

CHATTOOGA COUNTY COMMISSIONER 01/86

2696

SALES TAX REVENUE

64-141611

PO BOX 211

SUMMERVILLE GA 30747

PH: (706) 887-0700

DATE 11-20-2020

PAY TO THE ORDER OF

B & J Construction

\$ 47835.00

Forty seven thousand eight hundred thirty five and no/100

DOLLARS

Security Features included inside on back

SOUTHEAST

1st

NATIONAL BANK

MEMO

Spedy Sewer Project

[Signature]

⑆002696⑆ ⑆061401414⑆ 1121 199 4⑆

EXHIBIT B

Georgia Project Development
Financial Assistance

Proposed
Memorandum of Understanding



Georgia Project Development Financial Assistance

Memorandum of Understanding

- I. This Memorandum of Understanding ("MOU") is entered into by **Try-Con Tufters, Inc.** ("Company"), the **Chattooga County Development Authority** ("Development Authority") and the **Georgia Department of Economic Development** ("GDEcD"), an agency within the executive branch of the State of Georgia ("State"), this date _____
- II. **PURPOSE:** The purpose of this MOU is to describe, commit and commend the Company's investment project ("Project") for the Community and State, and the general economic benefits thereof, and to jointly undertake an efficacious application for an **Economic Development Growth and Expansion ("EDGE")** award, administered by the Georgia Department of Community Affairs ("DCA") within an agreed upon timeframe.
- III. **"PROJECT" DESCRIPTION:** The economic development investment project opportunity for **Chattooga County** ("Community") is described as:

The Company will construct an additional 109,000 square foot building to expand its current operations located at 5569 GA-114, Lyerly, GA 30730 (the "Expanded Facility") to accommodate additional production capacity for its carpet tufting operations. The Company will invest a total of \$5,000,000 in site development, building construction, and other capital expenditures, and will create 104 net new full-time jobs¹ with an average salary of \$20,140 plus benefits over a sixty month performance period. The Company will also maintain 130 existing full-time jobs at the Expanded Facility.
- IV. **STATE ASSISTANCE:** A critical component of the Project described above is a requirement of state assistance, in the form of a grant ("Project Development Grant") in order to secure the Project investment for the Community and State. The Project Development Grant required for this Project's success is described as follows: **A \$200,000 EDGE grant will be used to offset the expense for site preparation and sewer upgrades at the Expanded Facility.**
- V. **COMPANY COMMITMENT:** As part of the Project described above in Section III, Company commits to invest **\$5,000,000** in land, construction and/or building, equipment and other real and personal property, as well as create **104 net-new full-time jobs** within **sixty (60)** months from the earlier of (i) the date of the issuance of the Certificate of Occupancy for the Expanded Facility, or (ii) the anticipated start-date of **January 1, 2022**. The company will also maintain 130 existing jobs at the Expanded Facility. Company may begin counting jobs and investment on **March 24, 2020**.

¹ Net new full time job is defined as a new job that did not previously exist within the State of Georgia which has a minimum of 35 hours per week, with the opportunity for access to, but not necessarily paid or subsidized, medical benefits.

² Any assets funded or partially funded with the Award Amount ("Grant-funded Assets") must be publicly titled for the life of this grant. Furthermore, the Company shall not use publicly titled machinery and equipment as collateral for financing or to grant a security interest in the machinery and equipment to any other entity other than the Development Authority.



The Company also intends to maintain operations at the Expanded facility in the Community for a minimum of 10 years. Furthermore, before the Project Development Grant is disbursed, the Company shall participate in a joint press release with the State and Community announcing the Project. Also, the Company agrees to provide the following to DCA within 30 days from the date of this signed agreement:

1. A designated official Company contact, including title and all contact information, in order to further clarify Project activities related to the Project Development Grant and subsequent application, as well as facilitating the items listed below.
2. Description of the anticipated timeline for completion of the Project investment;
3. Description of the Company and type of business activity that will be conducted at this operation;
4. Primary NAICS Code for Company, and if different, the NAICS Code specific to the proposed operation or expansion;
5. Expected average wage rate(s) for the total number of jobs detailed above;
6. Description of the types and quality of jobs to be created by the operation or expansion and a list of benefits the Company offers to employees;
7. Copy of two most recent years-worth of Company's 10k reports, OR if privately owned, two most recent years of federal tax returns or audited company financials; and
8. A signed version of Georgia's Performance Accountability Agreement noted in Section VII (to be provided by the Georgia Department of Economic Development).

A Grant Documentation Checklist which identifies documentation required by DCA is attached hereto as **Exhibit A**.

- VI. **DEVELOPMENT AUTHORITY COMMITMENT:** The Development Authority, as part of the Project described above (Section III), commits to filing a formal application for an **EDGE award** in the amount of **\$200,000** with DCA for the Project Development Grant described above (Section IV), being as the Project is expected to provide public economic development benefits in the form of increased local employment opportunities, the potential for increased local sales and property taxes collected, and an infusion of a new capital investment(s) made to the Community, as described in the Project description and Company commitments detailed above.

The Development Authority additionally commits to submitting a fully completed application to DCA within 30 days from the date of this signed agreement, including but not limited to the following information:

1. Evidence that the Project property to be financed or improved with State financial assistance funds is currently publicly owned and controlled, or in the process of being acquired;
2. Details of the Development Authority or Community's investment in, or contribution to, the Project as a key component to attracting the Project investment; and
3. Site maps and/or building illustrations and/or equipment descriptions depicting the property to be acquired or improved.



VII. **GDEcD COMMITMENT:** GDEcD, as part of the Project described above (Section III), commits to providing DCA with a formal Letter of Recommendation from the GDEcD Commissioner within 14 days of a signed MOU, recommending the Project to receive **EDGE** funds in the amount of **\$200,000** for the Project Development Financial Assistance purpose and use of funds described above in Section IV.

1. Along with a Letter of Recommendation, GDEcD will also provide DCA within 20 business days a Summary of Economic Benefits from the Project for the State and Community, including an estimated net present value and expected payback period to the State specific to the grant or loan amount, and based on the expected local and statewide economic impacts of the Project.
2. Additionally, GDEcD will provide DCA with a Performance and Accountability Agreement, to be signed by the DCA Commissioner and authorized officials from both the Company and Development Authority hereto. This signed document will also be forwarded to DCA within 30 days.

VIII. **TESTIMONY OF COMPETITION:** But for the State assistance described in Section IV of this document, the Company may have decided to locate the Project described in Section III at a site in the competing state of **Alabama**.

IX. **ADDITIONAL DOCUMENTS REQUIRED:** All parties understand and agree that upon approval of the financial assistance award, the following items may be required by the Development Authority (or associated applicant) before the award will be released:

1. Independent cost estimates, engineering estimates or appraisals of property to be acquired or improved by Development Authority as part of the Project Development Financial Assistance award;
2. Copy of the lease between the Development Authority and the Company; and
3. Copy of Inducement Resolution, including Validation, as applicable.

X. **APPLICATION APPROVAL:** While a timeline for application approval cannot be guaranteed and is often dependent upon a financial risk analysis, if all deadlines are met by each of the three parties above: Company, Development Authority and GDEcD, DCA will make every effort to render an official opinion on the Project Development Financial Assistance application within 20 business days of receipt of all items and documents detailed within this MOU.

Disclaimer: This document does not guarantee grant or loan application approval. However, a fully completed and signed MOU, the information contained herein, and the additional disclosure items detailed in this document provide much of the information and commitments necessary to ensure an expedited and successful Project Development application approval.

[SIGNATURES ON FOLLOWING PAGE]



Signature Page
Memorandum of Understanding
Try-Con Tufters, Inc. Project in Chattooga County, Georgia

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

Try-Con Tufters, Inc.

Chattooga County Development Authority

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

Seal

Georgia Department of Economic Development

By: _____

Title: _____

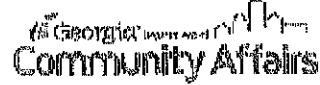
Date: _____

Seal



Exhibit A-Grant Documentation Checklist

REBA and OneGeorgia EDGE Programs



Application Documentation

The Georgia Department of Community Affairs (DOA) assists with the administration of funding for REBA and OneGeorgia EDGE projects. Based on the type of project, varying documentation is required. Below are general guidelines to assist with the collation of documentation for the application. While this is a comprehensive list, it is not intended to be all-inclusive. Additional detail may be required based on the complexity of the project.

Awards are generally made to a local Development Authority, as recipient, with the private entity as the beneficiary. State-funded assets must be held in public ownership for the duration of the State-funded grant period.

Land Acquisition Projects:

For land to be purchased with State funds, the recipient must submit to DOA at the time of application:

Evidence of Land Acquisition Costs and Fair Market Value

- appraisal of the land by a State Certified General Real Property Appraiser
- executed purchase agreement or similar document
- executed settlement statement(s)
- executed and recorded warranty deed(s)
- executed lease agreement

Site Preparation Projects*:

- recorded warranty deed(s)
- executed lease agreement
- copy of fully-executed Form AIA document(s) showing the period-billed site preparation line items in an amount at least equal to the amount of State funding

Construction / Infrastructure / Machinery & Equipment Projects*:

For construction, infrastructure or machinery & equipment projects, the recipient must submit to DOA at the time of application:

- construction contracts or machinery and equipment quotes or invoices for the asset(s) to be acquired with State funds.
- invoices for machinery and equipment projects must show the project location as the "ship to" address and clearly detail the asset(s) being purchased
- executed Bill of Sale for the State-funded asset(s)
- executed lease agreement

**Invoices and payment verification is required prior to the drawdown of funds. Clear documentation of payment for the State-funded asset is required in the form of cancelled checks or EFT verification.*

PERFORMANCE & ACCOUNTABILITY AGREEMENT

Georgia Incentive Programs

EDGE FUND AWARD NO. _____

This Performance & Accountability Agreement (this "Agreement") made and entered into as of _____ by and among the **Chattooga County Development Authority**, a public body corporate and politic created pursuant to the laws of the State of Georgia (the "**Development Authority**"), the **Georgia Department of Community Affairs**, an agency within the executive branch of the State of Georgia ("**DCA**") and the administering agency for the **OneGeorgia Authority**, an instrumentality of the state and a public corporation ("**OneGeorgia**") (hereinafter referred to as the "**Administering Agency**"), and **Try-Con Tufters, Inc.** (the "**Company**").

RECITALS

1. The purpose of the State of Georgia's incentive programs, administered through DCA, is to provide financial assistance to eligible applicants to assist the applicant to induce and assist companies to relocate, expand or construct projects in Georgia rather than a competing state; and
2. The incentive programs include, but are not limited to, the Department of Community Affairs's Regional Economic Business Assistance ("**REBA**") program and the OneGeorgia Authority's EDGE Fund program ("**EDGE**"); and
3. The Development Authority has been awarded either REBA or EDGE funding ("**Financial Assistance**") and, in accordance with the Development Authority's statutory purposes, will utilize the Financial Assistance to participate in a project to assist the Company; and
4. In consideration for the benefit of such Financial Assistance the Development Authority and Company must, in addition to other requirements: i) complete a project that creates and/or maintains a defined number of jobs; **and** ii) invest a defined amount of new private capital into the Company. (The defined job and private capital investment requirements shall hereinafter be collectively referred to as the "**Performance Standards**").; and
5. The Development Authority and Company's relocation or expansion project for which the Financial Assistance was awarded is more particularly described in the EDGE Fund Award or REBA Fund Award, and that description is incorporated herein by reference, (hereinafter the "**Project**"); and

Now, therefore, in consideration of the covenants and agreements herein contained, the parties agree as follows:

1. Award. The Development Authority and the Company's obligations under this Agreement are contingent upon the Administering Agency awarding Financial Assistance in the form of an **EDGE grant** in the amount of **\$200,000** ("Award Amount") to the Development Authority to offset the cost of **site preparation and sewer upgrades at the expanded facility located at 5569 GA-114, Lyerly, GA 30730**. Any assets funded or partially funded with the Award Amount ("Grant-funded Assets") must be publicly titled for the life of this grant. Additionally, the Company shall not use publicly titled machinery and equipment as collateral for financing or to grant a security interest in the machinery and equipment to any other entity other than the Development Authority. Furthermore, disbursement of the Award Amount is contingent upon the Company participating in a joint press release with the State and the Development Authority announcing the Project. Should the Award include or consist of a loan, the terms of such loan will be set forth in a separate agreement, promissory note and other appropriate documents.

2. Project Description. Pursuant to the Award, the Development Authority shall use the Award Amount to implement the Project to assist the Company, which is more particularly described in the application and summarized as:

The Company will construct an additional 109,000 square foot building to expand its current operations located at 5569 GA-114, Lyerly, GA 30730 (the "Expanded Facility") to accommodate additional production capacity for its carpet tufting operations. The Company will invest a total of \$5,000,000 in site development, building construction, and other capital expenditures, and will create 104 net new full-time jobs¹ with an average salary of \$20,140 plus benefits over a sixty month performance period. The Company will also maintain 130 existing full-time jobs at the Expanded Facility.

3. Performance Standards. In consideration for the Development Authority's assistance, the Company shall meet the following Performance Standards:

A. The Company shall create 104 net-new full-time jobs located in **Chattooga County** (the "Committed Jobs"). The Company shall also maintain 130 full-time permanent jobs located in **Chattooga County** and the Expanded Facility (the "Baseline");

B. The Company shall make or cause to be made a private capital investment in the Project of at least \$5,000,000 in the form of expenditures as noted in the Award ("Committed New Investment");

C. The start date for the Committed Jobs and Committed New Investment to be counted will be **March 24, 2020**;

¹ Net new full time job is defined as a new job that did not previously exist within the State of Georgia which has a minimum of 35 hours per week, with the opportunity for access to, but not necessarily paid or subsidized, medical benefits.

- D. The Company shall be in full compliance with the Performance Standards within **sixty (60)** months from the earlier of (i) the date of the issuance of the Certificate of Occupancy for the Expanded Facility to be operated by the Company, or (ii) the date in paragraph 3E of this Agreement (the "Performance Period"), and failure to do so shall be an immediate event of default under this Agreement. In the event the Performance Standards are met prior to the expiration of the Performance Period, then the Company must maintain such jobs and investment until the expiration of the Performance Period and failure to do so shall be an immediate event of default under this Agreement. At the request of the Development Authority and for good cause shown, the expiration of the Performance Period may be extended, at the sole discretion of the Administering Agency; provided, however, that any such request shall be accompanied by supporting documentation from the Development Authority and Company deemed satisfactory to the Administering Agency;
- E. The start-date for the Performance Period shall be no later than **January 1, 2022**, which is the date that the Company reasonably expects the Expanded Facility or the incentive-funded asset to be operational; and
- F. The Company shall maintain documentation to evidence the number of full-time permanent jobs created and maintained and the amount of private investment in the Project until such time as the Performance Standards have been met and the Administering Agency has certified compliance pursuant to Section 5 of this Agreement.
4. **Compliance Threshold and Repayment Amount.** In the event the Company fails to i) meet the Performance Standards; ii) maintain operations for the entirety of the Performance Period; or iii) locate in or operate the business forming a part of the Project funded with the Award, the Company shall repay directly to the Administering Agency all (in the case of the happening of the event of default identified in Section 4 (ii) or (iii) above) or a portion of the Award Amount in all other cases (in each case, the "Repayment Amount"). For purposes of events of default under Section 4(i) above, the Repayment Amount shall be determined as follows:
- A. **Compliance Threshold.** The Company will be determined to have complied with the Performance Standards if the results of the threshold calculation conducted in accordance with the formula on **Exhibit "A"** ("Average Actual Performance") are equal to or greater than eighty percent (80%) ("Compliance Threshold"). The threshold calculation formula is the average of the percentage of created jobs to Committed Jobs over the Performance Period and the percentage of actual capital investment to Committed New Investment as of the expiration of the Performance Period. In terms of the threshold calculation, the Company may receive up to 110% credit for its Committed Jobs and 100% credit for its Committed New Investment at the end of the Performance Period. In no event shall the Company be entitled to receive more than 100% credit for its investment commitment or 110% credit for its job commitment in the event that the Company exceeds either of these commitments. **In the event of an expansion project, the Baseline shall be subtracted from the total number of full-time permanent jobs in place at the time of the expiration of**

the Performance Period in calculating Committed Jobs for the Compliance Threshold.

- B. Adjusted Award Amount. Should the Company's Average Actual Performance be less than eighty percent (80%) of the Performance Standards, the Company's Award will be adjusted proportionately by multiplying the Award Amount by the Average Actual Performance. The resulting number will then be subtracted from the Award Amount to determine what amount the Award will be adjusted to, after taking into account under performance ("Adjusted Award Amount"). The Company shall repay to the Administering Agency the difference between the Award Amount and the Adjusted Award Amount. See illustrations in Exhibit "B": Repayment Calculation. The Award Amount will only be adjusted in the event Company does not meet the Compliance Threshold.
5. Reporting Requirements. The Company and the Development Authority shall provide semi-annual reports to the Administering Agency concerning the progress of the creation of jobs and investments. The Company shall file with the Development Authority, no later than thirty (30) days after the expiration of the Performance Period, documentation to evidence the actual number of full-time jobs created and total amount of private capital invested in the Project. No later than sixty (60) days after the expiration of Performance Period, the Development Authority shall file with the Administering Agency, a report documenting the Company's performance. Within a reasonable time after receipt of the report from the Development Authority, the Administering Agency will notify the Development Authority of the Company's compliance or noncompliance with the Performance Standards. The Development Authority shall then provide the Company with such notification. The Company and the Development Authority agree to keep an updated point of contact for the person(s) responsible for providing any reports owed to the Administering Agency. In the event that the person(s) responsible for providing reports changes, the Company and/or the Development Authority agree to notify the Administering Agency as soon as possible.
6. Notification and Repayment. In the event the Company has failed to meet the Compliance Threshold, the Administering Agency will notify the Development Authority and Company of the Adjusted Award Amount and the Repayment Amount. The Company shall submit the Repayment Amount to the Administering Agency no later than forty-five (45) days after the date of the notification letter from the Administering Agency indicating that the Company has failed to meet the Compliance Threshold. Should the Company fail to remit the Repayment Amount to the Administering Agency in a timely matter, the Administering Agency shall have the right, in its sole discretion, to impose any and all remedies available to it through its administrative processes or to seek remedies available at law or equity.
7. Adjustment in the Performance Standards. In the event a force majeure or other extraordinary circumstance, as will be determined in the sole discretion of Administering Agency, prevents the Company from meeting the Compliance Threshold, the Company may request that Administering Agency adjust the Company's Compliance Threshold. In the sole discretion of Administering Agency, the Compliance Threshold may be adjusted

provided that the adjustment will have a direct relationship to the impact that the extraordinary circumstance had on the Company's ability to meet the Performance Standards.

8. Sale or Change of Ownership of Company. If, during the Performance Period, the Company makes a change in its ownership by sale, merger, or other method of ownership transfer, then the Company must notify the Development Authority and Administering Agency of such a change in ownership. Additionally, the new owner ("the Acquiring Company") must assume the obligations contained in this Agreement by executing an Assumption Agreement. The Administering Agency shall approve and be a party to the Assumption Agreement, along with the Company, the Development Authority and the Acquiring Company. In lieu of executing an Assumption Agreement, the Company or Acquiring Company may elect to make the Repayment Amount to the Administering Agency.
9. Transfer and Assignment of Repayment. The Development Authority hereby transfers and assigns to Administering Agency all of the Development Authority's rights, title and interest to the Repayment Amount. The Development Authority acknowledges that, pursuant to the terms of the Agreement, the Company shall remit all Repayment Amounts to the Administering Agency. In the event the Development Authority receives such Repayment Amounts, the Development Authority shall hold such payments in trust for the benefit of the Administering Agency provided that no later than five (5) days after receipt thereof, the Development Authority will deliver, by courier or regular U. S. Mail, such Repayment Amounts to the Administering Agency. Provided the Development Authority requires the Company to meet the Performance Standards, uses its best effort to assist the Company in meeting the Performance Standards, and assists the Administering Agency in collecting Repayment Amount when due, the Administering Agency shall have no recourse against the Development Authority for the Company's failure to meet the Performance Standards unless the Development Authority explicitly accepts such recourse.
10. Acceptance and Assumption by Administering Agency. The Administering Agency hereby accepts the transfer and assignment of the Development Authority's rights, title and interest in, to the Repayment Amount; provided, however, that Administering Agency has not, and shall not have, accepted or assumed any obligations or liabilities of Development Authority that the Development Authority may have with regards to the Project or the Company.
11. Exhibits. The exhibits hereto 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 were set forth in full and at length every time it is referred to or otherwise mentioned.
12. 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.

13. Authorized Signatures. Each of the individuals executing this Agreement represents that they are authorized to execute this Agreement on behalf of their respective entities.

[SIGNATURES ON FOLLOWING PAGE]

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Signature Page
Performance & Accountability Agreement
Try-Con Tufters, Inc. Project in Chattooga County, Georgia

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

Chattooga County Development Authority

**Georgia Department of
Community Affairs**

By: _____

By: _____

Title: _____

Title: Commissioner

Date: _____

Date: _____

Seal

Try-Con Tufters, Inc.

By: _____

Title: _____

Date: _____

Seal

PERFORMANCE & ACCOUNTABILITY AGREEMENT

EXHIBIT "A" - Average Actual Performance for Projects

The Average Actual Performance for projects shall be determined by the following formula:

STEP 1

$$\frac{(\text{Total Jobs at end of Perfor. Period} - \text{Baseline}^{\wedge})}{\text{Committed Jobs}} = \text{Percentage of Committed Jobs Created}$$

$$\frac{\text{Actual Capital Investment}}{\text{Committed New Investment}} = \text{Percentage of Committed New Investment}^{\wedge\wedge}$$

STEP 2

$$\begin{aligned} & \text{Percentage of Committed Jobs Created}^* \\ + & \text{Percentage of Committed New Investment}^{\wedge\wedge} \\ = & \text{Percentage of Commitments Met} \end{aligned}$$

STEP 3

$$\frac{\text{Percentage of Commitment Met}}{2} = \text{Average Actual Performance}$$

** This percentage shall in no event exceed 110%, even if the Company exceeds 110% of its Job Commitment.*

^The baseline applies only to expansion projects. The baseline for new projects is zero.

^^ This percentage shall in no event exceed 100%, even if the Company exceeds 100% of its Committed Investment.

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EXHIBIT "B" - Repayment Amount Calculation

(Required only if Average Actual Performance is less than 80%)

STEP 1

Award Amount
X Average Actual Performance
Adjusted Award Amount

STEP 2

Award Amount
- Adjusted Award Amount
Repayment Amount

Example A – Repayment Required

A \$500,000 Award to assist with site development was part of Company A's consideration to locate in Georgia rather than an out-of-state location. As part of the deal, Company A committed to create 600 jobs and make a \$5,000,000 new investment to construct and operate a new production facility in Georgia. At the end of the Performance Period, Company A has actually created 400 jobs and invested \$3,500,000 into a smaller facility.

- Award Amount \$500,000
- Commitment – 600 jobs and \$5,000,000 new investment
- Actual jobs delivered – 400 (66% of Commitment)
- Actual investment delivered -- \$3,500,000 (70% of Commitment)
- $66\% + 70\% = 136/2 = 68\%$ [Average Actual Performance]
- \$340,000 (68%) Adjusted Award Amount
- \$160,000 (32%) Repayment Amount

Example B – No Repayment Necessary

A \$500,000 Award to assist with the purchase of production equipment was part of Company B's consideration to locate in Georgia rather than an out-of-state location. As part of the deal, Company B committed to create 600 jobs and make a \$5,000,000 capital investment to construct and operate a new manufacturing facility in Georgia. At the end of the Performance Period, Company B has actually created 600 jobs and invested \$4,250,000 into a redesigned facility that saved \$750,000 in capital investment.

- Award Amount \$500,000
- Commitment – 600 jobs & \$5,000,000 investment
- Actual jobs delivered – 600 (100%)
- Actual investment delivered -- \$4,250,000 (85%)
- $100\% + 85\% = 185/2 = 92.5\%$ Benefit
- No repayment required

Example C – No Repayment Necessary

A \$500,000 Award to assist with the purchase of production equipment was part of Company C's consideration to locate in Georgia rather than an out-of-state location. As part of the deal, Company C committed to create 600 jobs and make a \$5,000,000 capital investment to construct and operate a new manufacturing facility in Georgia. At the end of the Performance Period, Company C has actually created 700 jobs and invested \$3,500,000 into a redesigned facility that saved \$1,500,000 in capital investment.

- Award Amount \$500,000
- Commitment – 600 jobs & \$5,000,000 investment
- Actual jobs delivered – 700 (117% but limited to 110% credit)
- Actual investment delivered -- \$3,500,000 (70%)
- $110\% + 70\% = 180/2 = 90.0\%$ Benefit
- No repayment required