



**CITY OF PLANO
COUNCIL AGENDA ITEM**

CITY SECRETARY'S USE ONLY				
<input type="checkbox"/> Consent <input type="checkbox"/> Regular <input type="checkbox"/> Statutory				
Council Meeting Date:		8/22/11		
Department:		Finance		
Department Head		Denise Tacke		
Agenda Coordinator (include phone #): Katherine Crumbley - 7479				
CAPTION				
A Resolution of the City Council of the City of Plano, Texas, approving the terms and conditions of an Economic Development Incentive Agreement by and between O'Neil Digital Solutions, LLC and the City of Plano; authorizing its execution by the City Manager or his authorized designee; and providing an effective date.				
FINANCIAL SUMMARY				
<input checked="" type="checkbox"/> NOT APPLICABLE <input type="checkbox"/> OPERATING EXPENSE <input type="checkbox"/> REVENUE <input type="checkbox"/> CIP				
FISCAL YEAR: 2010-11	Prior Year (CIP Only)	Current Year	Future Years	TOTALS
Budget	0	14,402,910	0	14,402,910
Encumbered/Expended Amount	0	-3,383,793	-6,120,268	-9,504,061
This Item	0		-187,500	-187,500
BALANCE	0	11,019,117	-6,307,768	4,711,349
FUND(S): ECONOMIC DEVELOPMENT FUND				
COMMENTS: Strategic Plan Goal: Providing economic development incentives relates to the City's goal of strong local economy				
SUMMARY OF ITEM				
A request from O'Neil Digital Solutions, LLC for an Economic Development Incentive to relocate its business and commercial activities to the City, thereby generating additional local sales tax revenues and increasing ad valorem tax values to the City. O'Neil Digital Solutions agrees to occupy not less than 218,000 sq. ft of commercial space and agrees to retain, create or transfer at least 96 jobs by 12/31/13. The company also has the option of adding an additional 70 jobs by 12/31/14 and an additional 84 jobs by 12/31/15.				
List of Supporting Documents: Economic Development Incentive Agreement			Other Departments, Boards, Commissions or Agencies	

A Resolution of the City Council of the City of Plano, Texas, approving the terms and conditions of an Economic Development Incentive Agreement by and between O'Neil Digital Solutions, LLC and the City of Plano; authorizing its execution by the City Manager or his authorized designee; and providing an effective date.

WHEREAS, the City Council has been presented a proposed Economic Development Incentive Agreement by and between O'Neil Digital Solutions, LLC and the City of Plano, a substantial copy of which is attached hereto as Exhibit "A" and incorporated herein by reference (hereinafter called "Agreement"); and,

WHEREAS, upon full review and consideration of the Agreement, and all matters attendant and related thereto, the City Council is of the opinion that the terms and conditions thereof should be approved, and that the City Manager or his authorized designee shall be authorized to execute it on behalf of the City of Plano.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF PLANO, TEXAS, THAT:

Section I. The terms and conditions of the Agreement, having been reviewed by the City Council of the City of Plano and found to be acceptable and in the best interests of the City of Plano and its citizens, are hereby in all things approved.

Section II. The City Manager or his authorized designee is hereby authorized to execute the Agreement and all other documents in connection therewith on behalf of the City of Plano, substantially according to the terms and conditions set forth in the Agreement.

Section III. This Resolution shall become effective immediately upon its passage.

DULY PASSED AND APPROVED this the 22nd day of August, 2011.

Phil Dyer, MAYOR

ATTEST:

Diane Zucco, CITY SECRETARY

APPROVED AS TO FORM:

Diane C. Wetherbee, CITY ATTORNEY

ECONOMIC DEVELOPMENT INCENTIVE AGREEMENT

This Economic Development Incentive Agreement (“Agreement”) is made by and between the City of Plano, Texas (the “City”), and O’Neil Digital Solutions, LLC, a Texas company, (“Company”), acting by and through its respective authorized officers and representatives.

WITNESSETH:

WHEREAS, Company is engaged in the business of data management services and plans to add \$7 Million of real property improvements and \$8.5 Million of business personalty at 3100 East Plano Parkway in Plano; and

WHEREAS, Company agrees to occupy 218,000 commercial square feet of “Property” in Plano and add at least 96 employees and potentially up to 250 employees to be located on the Property for the term of this Agreement; and

WHEREAS, the Company has advised the City that a contributing factor that would induce the Company to relocate its business and commercial activities to the City, thereby generating additional local sales tax revenues and increasing ad valorem tax values for the City, would be an agreement by the City to provide an economic development grant to the Company; and

WHEREAS, the Council finds that the occupancy of 218,000 square feet of Property, and the retention, creation or transfer of up to 250 Job Equivalents within the City will promote economic development, stimulate commercial activity and enhance the tax base and economic vitality of the City; and

WHEREAS, the City has adopted programs for promoting economic development; and

WHEREAS, the City is authorized by TEX. LOC. GOV’T CODE §380.001 *et seq.* to provide economic development grants to promote local economic development and to stimulate business and commercial activity in the City; and

WHEREAS, the City has determined that making an economic development grant to the Company in accordance with the terms and conditions set forth in this Agreement will further the objectives of the City, will benefit the City and its citizens and will promote local economic development and stimulate business and commercial activity in the City.

NOW THEREFORE, in consideration of the foregoing and the premises, mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound, hereby covenant and agree as follows:

Article I Definitions

For purposes of this Agreement, each of the following terms shall have the meaning set forth herein unless the context clearly indicates otherwise:

“Commencement Date” shall mean the earlier of the date of occupancy of the Property by the Company or September 30, 2011, whichever occurs first.

“Company” shall mean O’Neil Digital Solutions, LLC, a Texas Company.

“Effective Date” shall mean the last date on which all of the parties hereto have executed this Agreement.

“Event of Force Majeure” shall mean any contingency or cause beyond the reasonable control of a party including, without limitation, acts of God or the public enemy, war, riot, civil commotion, insurrection, government or de facto governmental action (unless caused by the intentionally wrongful acts or omissions of the party), fires, explosions or floods, strikes, slowdowns or work stoppages any of which event(s) directly and significantly impact the Company’s operations in the City. An economic down turn shall not constitute an event of force majeure.

“Job Equivalent” shall mean one or more Company employees including those employees of Investor’s Business Daily, a California Company, whether individual or combined with other employees, who are located at the Property and each Job Equivalent is paid a total 2080 hours annually and issued an Internal Revenue Service W-2 form by either the Company or Investor’s Business Daily. The term Job Equivalent excludes any remote or contract employee.

“Real Property” shall mean 3100 East Plano Parkway, Plano, Texas 75074.

Article II Term

The term of this Agreement shall begin on the Commencement Date and continue until December 31, 2021, unless sooner terminated as provided herein.

Article III Obligations of Company

In consideration for the grant of public funds as set forth in Section 4.01 below, the Company agrees to perform the following:

- (a) On or before September 30, 2011, occupy not less than 218,000 square feet of commercial space on the Property throughout the term of the Agreement.
- (b) Retain, create or transfer at least 96 Job Equivalents to the Real Property by December 31, 2013. At Company's option it may add up to an additional 70 Job Equivalents for a total of 166 on or before December 31, 2014. If Company adds all 70 Job Equivalents by that date, then, at Company's option, it may add up to 84 Job Equivalents by December 31, 2015. Company must maintain all Job Equivalents on the Real Property throughout the Agreement. The specific schedule for the Job Equivalents is set out in 4.02.
- (c) Use reasonable efforts to place all Company-managed hotel room nights, related to the Company's business activities, at facilities located in the City of Plano.
- (d) Require Investor's Business Daily Newspaper, to place "Printed in Plano, Texas" on the mast head of the newspaper throughout the term of this Agreement.

Article IV Economic Development Grant

4.01 **Grant.** The City agrees to provide the Company a cash grant up to One Hundred Eighty Seven Thousand Five Hundred Dollars (\$187,500) as long as Company meets each of the obligations set out in Article III above and complies with the certification schedule and requirements set out in 4.02 below.

4.02 **Grant Payment Requirements and Schedule** Except as otherwise indicated, the Company shall be entitled to the grant award in accordance with the following requirements and schedule:

(a)(i) By December 31, 2013, Company must have 96 Job equivalents on the Real Property to be eligible to receive the initial payment of Seventy Two Thousand Dollars (\$72,000). This amount will **not** be pro-rated. **Company must submit the Initial Certification form attached hereto as Exhibit "A" verifying compliance with the obligations set forth in Article III above not later than January 31, 2014. A failure to provide this form by that date is an event of default and, if not cured, results in an immediate and complete forfeiture of the entire grant.**

City will make the first payment within thirty (30) days of receipt of the initial certification unless the City reasonably objects to the certification.

(ii) If Company adds up to an additional 70 Job Equivalents on the Real Property above the existing 96 Job Equivalents by December 31, 2014 and is compliance with III and (a)(i) above it is entitled to a second payment up to Fifty-two Thousand Five Hundred Dollars (\$52,500). This amount will be pro-rated at \$750 per Job Equivalent. **Company must submit its second certification not later than January 31, 2015. A failure to provide this certification by that date is an event of default and, if not cured, results in a complete forfeiture of the**

remaining outstanding grant and Company is not eligible for any other payments including those under (iii) below.

City will make the second payment within thirty (30) days of receipt of this certification unless the City reasonably objects to the certification.

(iii) If Company adds up to an additional 84 Job Equivalents above the existing 166 Job Equivalents on the Real Property by December 31, 2015, it is entitled to a third payment up to Sixty Three Thousand Dollars (\$63,000). This amount will be pro-rated at \$750.00 per Job Equivalent in the event that less than 84 Job Equivalents are added. Company must have complied with III and 4.02(a) (i) & (ii) above and have added up to additional 84 Job Equivalents to receive this portion of the grant award. **Company must submit its third certification not later than January 31, 2016. A failure to provide this certification by that date is an event of default and, if not cured, results in an immediate and complete forfeiture of the remaining outstanding grant.**

City will make the third payment of not to exceed Sixty Three Thousand Dollars (\$63,000) within thirty (30) days of receipt of this certification unless the City reasonably objects to the certification; the exact amount will be based on the number of Job Equivalents at \$750.00 per job.

(b) For each year thereafter following the full grant payment, Company must submit an annual certification not later than January 31st verifying compliance with Article III above. The certification must be based upon the number of Job Equivalents for which the Company has received a grant. A failure to file the annual certification by the January 31st deadline during the remaining years of the Agreement shall result in a default and a right to a full refund of all grant amounts previously paid as set out in 4.03.

(c) All certifications must be verified by the Company's chief executive or financial officer.

4.03 **Refund/Default**

(a) If following the receipt of a grant payment, the Company fails to meet the required number of Job Equivalents for which it has received payment for more than 180 consecutive days at any time during the term of this Agreement and the loss is not the result of an Event of Force Majeure, the Company shall refund to the City an amount equal to Seven Hundred and Fifty Dollars (\$750.00) for each lost Job Equivalent. For the purposes of determining whether the City is due a refund under this section, the Company shall certify to the City as set out in Section 4.02 above the actual number of Job Equivalents at the Real Property for the compliance period using the applicable forms that are attached hereto.

(b) At any time during the term of this Agreement if Company is convicted of a violation under 8 United States Code Section 1324a(f) regarding the employment of undocumented workers, that shall constitute an event of default and Company shall reimburse all grant funds paid pursuant to this Agreement.

(c) All refunds under this Agreement shall be due within thirty (30) days of written demand for payment. A failure to make the refund payment within thirty (30) days shall constitute an event of default. If a refund is due for one or more Job Equivalent(s), Company is not entitled to any future payment for that lost Job Equivalent(s) notwithstanding that it subsequently complies with the Job Equivalent requirements of this Agreement.

(d) In the Event of a Force Majeure, the Company shall notify the City in writing not less than sixty days of the onset of the Event with adequate supporting documentation of the reasons for the Event, anticipated duration, and actions that the Company will take to alleviate the Event with a request for an extension. The City Manager shall consider such request and may grant such extension, such approval shall not be unreasonably withheld.

(e) If the Company defaults on the payment of any refund or fails to timely provide any certification as required by Section 4.02, the full amount of the Grant paid shall be refunded by Company to the City. City may use any efforts to collect such sums owed and Company agrees to pay any and all interest, and expenses, including attorney fees and costs incurred by City.

Article V Termination

5.01 This Agreement terminates upon any one or more of the following:

(a) By expiration of the term and where no defaults have occurred.

(b) If a party defaults or breaches any of the terms or conditions of this Agreement, including those not described as an event of default, and such default or breach is not cured within thirty (30) days after written notice thereof by the non-defaulting party unless a longer period is provided.

The City Manager is authorized on behalf of the City to send notice of default and to terminate this Agreement for any default that is not cured.

5.02 **Effect of Termination/Survival of Obligations**. The rights, responsibilities and liabilities of the parties under this Agreement shall be extinguished upon the applicable effective date of termination of this Agreement, except for any obligations or default(s) that existed prior to such termination or as otherwise provided herein and those liabilities and obligations shall survive the termination of this Agreement, including the refund provision, maintenance of records, and access thereto.

Article VI Retention and Accessibility of Records

6.01 Company shall maintain the fiscal records and supporting documentation for expenditures of funds associated with this Agreement. Company shall retain such records, and

any supporting documentation for the greater of: (1) Five [5] years from the end of the Agreement period; or (2) the period required by other applicable laws and regulations.

6.02 Company gives City, its designee, or any of their duly authorized representatives, access to and the right to examine relevant books, accounts, records, audit reports, reports, files, documents, written or photographic material, videotape and other papers, things, or personal and real property belonging to or in use by Company pertaining to the Economic Development Program Grant (the "Records") upon receipt of ten (10) business days written notice from the City. The City's access to Company's books and records will be limited to information needed to verify that Company is and has been complying with the terms of this Agreement. Any information that is not required by law to be made public shall be kept confidential by City. In no event shall City's access to Company's Records include any access to any personal and/or medical data of any employees of Company except to confirm payroll information compliance for Job Equivalents. Company shall not be required to disclose to the City any information that by law Company is required to keep confidential. Should any good faith dispute or question arise as to the validity of the data provided, the City reserves the right to require Company to obtain an independent firm to verify the information. This certified statement by an independent firm shall be provided at the sole cost of Company. The rights to access the Records shall terminate five (5) years after the termination or expiration of this Agreement. Failure to provide reasonable access to the Records to authorized City representatives shall give the City the right to suspend or terminate this Agreement as provided for in Section 5 above, or any portion thereof, for reason of default. All Records shall be retained by Company for a period of five (5) years after all performance requirements are achieved for audit purposes until such audits or other administrative, civil or criminal matters including, but not limited to, investigations, lawsuits, administrative inquires and open record requests are completed. Company agrees to maintain the Records in an accessible location.

6.03 Company represents and agrees that throughout the term of this Agreement, the Company's obligations set forth in 6.02 shall also apply to Investor's Business Daily and that Company is authorized to make this representation on behalf of Investor's Business Daily.

Article VII Assignment

7.01 **Assignment.** This Agreement may not be assigned without the express written consent of the non-assigning party, except that the Company may assign this Agreement without obtaining the City's consent (a) to one of its wholly owned affiliates, or (b) to any person or entity that directly or indirectly acquires, through merger, sale of stock, purchase or otherwise, all or more than ninety (90) percent of the assets of the Company as long as the Company gives sixty (60) days prior written notice to the City and the assignee executes an agreement with the City to be bound to all the terms and conditions of this Agreement and be responsible for any default(s) that occurred prior to or after the assignment.

For any assignment not covered by (a) or (b) above, the Company must obtain the prior approval of the City through its City Manager and the assignee must agree to be bound to all the

terms and conditions of this Agreement and to accept all liability for any default that occurred prior to and/or after the assignment.

Any assignment agreement must be furnished in a form acceptable to the City and be provided at least thirty days prior to the effective assignment date. City agrees to notify the potential assignee of any known default, but such notification shall not excuse defaults that are not yet known to the City.

Article VIII Miscellaneous

8.01 **No Joint Venture.** It is acknowledged and agreed by the parties that the terms of this Agreement are not intended to and shall not be deemed to create a partnership or joint venture among the parties. Neither party shall have any authority act on behalf of the other party under any circumstances by virtue of this Agreement.

8.01.1 **Notice of Bankruptcy.** In the event Company files for bankruptcy, whether involuntarily or voluntary, Company shall provide written notice to the City within three (3) business days of such event.

8.02 **Authorization.** Each party represents that it has full capacity and authority to grant all rights and assume all obligations that are granted and assumed under this Agreement.

8.03 **Notice.** Any notice required or permitted to be delivered hereunder shall be deemed received three (3) days thereafter sent by United States Mail, postage prepaid, certified mail, return receipt requested, addressed to the party at the address set forth below (or such other address as such party may subsequently designate in writing) or on the day actually received if sent by courier or otherwise hand delivered.

If intended for the City:
City of Plano, Texas
Attention:
City Manager
1520 Avenue K
P.O. Box 860358
Plano, TX 75086-0358

With a copy to:
City of Plano, Texas
Attention:
City Attorney
1520 Avenue K
P. O. Box 860358
Plano, TX 75086-0358

If intended for the Company:
O'Neil Digital Solutions, LLC
Attention: Jim Lucanish
3100 East Plano Parkway
Plano, Texas

8.04 **Entire Agreement.** This Agreement is the entire Agreement between the parties with respect to the subject matter covered in this Agreement. There is no other collateral oral or written Agreement between the parties that in any manner relates to the subject matter of this Agreement.

8.05 **Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Texas, without giving effect to any conflicts of law rule or principle that might result in the application of the laws of another jurisdiction. Venue for any action concerning this Agreement, the transactions contemplated hereby or the liabilities or obligations imposed hereunder shall be in the State District Court of Collin County, Texas.

8.06 **Amendment.** This Agreement may only be amended by the mutual written agreement of the parties.

8.07 **Severability.** In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect other provisions, and it is the intention of the parties to this Agreement that in lieu of each provision that is found to be illegal, invalid, or unenforceable, a provision shall be added to this Agreement which is legal, valid and enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.

8.08 **Recitals.** The recitals to this Agreement are incorporated herein.

8.09. **Authorized to Bind.** The persons who execute their signatures to this Agreement represent and agree that they are authorized to sign and bind their respective parties to all of the terms and conditions contained herein.

8.10 **Counterparts.** This Agreement may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument.

EXECUTED on this _____ day of _____, 20__.

ATTEST:

CITY OF PLANO, TEXAS, a home rule
municipal corporation

Diane Zucco, CITY SECRETARY

By: _____
Bruce D. Glasscock
CITY MANANGER

APPROVED AS TO FORM:

Diane C. Wetherbee, CITY ATTORNEY

ATTEST:

O'Neil Digital Solutions, LLC, a Texas
company

Name: _____
Title: _____

By: _____
Name: _____
Title: _____

EXHIBIT "A"

INITIAL CERTIFICATE OF COMPLIANCE

I hereby certify that O'Neil Digital Solutions, LLC has occupied not less than 218,000 square feet of commercial space on the Property and has retained, transferred or added 96 Job Equivalent positions to the Property by December 31, 2013, and is in compliance with the Agreement and is entitled to receive payment in accordance with Section 4.02 (a)(i) of that Agreement.

ATTEST:

O'Neil Digital Solutions, LLC, a Texas company

By: _____

Name: _____

Chief Financial Officer

Date

This Certification is due by January 31, 2014.

This Certificate of Compliance should be mailed to:

City of Plano
Finance Department
P.O. Box 860358
Plano, Texas 75086-0358

EXHIBIT "A"

SECOND CERTIFICATE OF COMPLIANCE

I hereby certify that O'Neil Digital Solutions, LLC is in compliance with all terms and conditions of the Agreement and:

- a. I further certify that O'Neil Digital Solutions, LLC has added up to 70 new Job Equivalents to the Property by December 31, 2014, and is in compliance with all terms of the Agreement and is entitled to receive payment in accordance with Section 4.02 (a)(ii). The exact number of added Job Equivalents is _____; or,
- b. The number of actual Job Equivalents is below the number required to be maintained pursuant the Agreement, the actual number of Job Equivalents is _____ and I certify that the City of Plano has been refunded the appropriate amount as required by Section 4.03 of the Agreement.

ATTEST:

O'Neil Digital Solutions, LLC, a Texas company

By: _____
Name: _____
Chief Financial Officer

Date

This form is due by January 31, 2015.

This Certificate of Compliance should be mailed to:

City of Plano
Finance Department
P.O. Box 860358
Plano, Texas 75086-0358

EXHIBIT "A"

THIRD CERTIFICATE OF COMPLIANCE

I hereby certify that O'Neil Digital Solutions, LLC is in compliance with all terms and conditions of the Agreement and:

- a. I further certify that O'Neil Digital Solutions, LLC. has added up to 84 additional new Job Equivalents to the Property by December 31, 2015, and is in compliance with all terms of the Agreement and is entitled to receive payment in accordance with Section 4.02 (a)(iii). The total number of Job Equivalents is _____; or,
- b. The number of actual Job Equivalents is below the number required to be maintained pursuant the Agreement, the actual number of Job Equivalents is _____ and I certify that the City of Plano has been refunded the appropriate amount as required by Section 4.03 of the Agreement.

ATTEST:

O'Neil Digital Solutions, LLC, a Texas company

By: _____
Name: _____
Chief Financial Officer

Date

This form is due by January 31, 2016.

This Certificate of Compliance should be mailed to:

City of Plano
Finance Department
P.O. Box 860358
Plano, Texas 75086-0358

EXHIBIT "B"

**ANNUAL CERTIFICATE OF COMPLIANCE
(Following final grant payment)**

I hereby certify that O'Neil Digital Solutions, LLC is in compliance with each applicable term as set forth in the Agreement and the transferred or retained number of Job Equivalents has not fallen below the number for which it has received a grant payment in accordance with the terms and conditions set out in Article IV. I further certify that as of December 31 of the prior year, the number of Job Equivalents was _____. If the number of Job Equivalents is below the number required to be maintained pursuant the Agreement, I certify that the City of Plano has been refunded the appropriate amount as required by Article IV, Section 4.03 of the Agreement.

ATTEST:

O'Neil Digital Solutions, LLC, a Texas company

By: _____

Name: _____

Chief Financial Officer

Date

NOTE:

This form is due on January 31 of each year following the final grant payment and as long as this Agreement is in effect with the final annual certification due on January 31, 2022.

This Certificate of Compliance should be mailed to:

City of Plano
Finance Department
P.O. Box 860358
Plano, Texas 75086-0358