

# **City of Scottsbluff, Nebraska**

**Monday, November 5, 2018**

**Regular Meeting**

## **Item Reports2**

**Council to consider an Economic Development Agreement for  
Bytes Computer and Network Solutions, Inc.**

**Staff Contact: Starr Lehl, Economic Development Director**

## **ECONOMIC DEVELOPMENT ASSISTANCE AGREEMENT**

This Agreement is made on November \_\_\_, 2018, between the City of Scottsbluff, Nebraska (the “City”) and Bytes Computer and Network Solutions, Inc. (the “Applicant”).

### **Recitals:**

a. The City has adopted an Economic Development Plan pursuant to the Nebraska Local Option Municipal Economic Development Act (the “Plan”). Pursuant to the Plan, the City has implemented an Economic Development Program (the “Program”).

b. The Applicant has made application for assistance from the Program (the “Application”);

c. The Administrator of the Program (the “Administrator”) and the City Economic Development Application Review Committee (the “Committee”) have reviewed the Application and recommended to the City Council (the “Council”) that a loan (the “Loan”) be made to the Applicant from the City of Scottsbluff Economic Development Fund (the “Fund”) as provided for in this Agreement. The City Council has approved the Committee’s recommendation.

d. The parties now desire to enter into this Agreement for the purpose of setting out the terms and conditions of the Loan.

### **Agreement:**

#### **1. Purpose of Loan:**

The Applicant is engaged in providing managed network services for businesses (the “Business”). The Applicant is moving its business to 1620 Broadway, Suite D, Scottsbluff, Nebraska. The proceeds of the loan will be used primarily in connection with that move. It is incurring expenses for upgrading equipment, leasehold improvements, and to add employees to meet business demand.

#### **2. Amount of Loan:**

The Loan shall be in the amount of \$100,000 and shall be disbursed from the City’s Economic Development Fund (the “Fund”) to the Applicant as provided for below. The Loan shall be represented by a promissory note (the “Note”) to be signed at the Loan Closing in the form of the attached Note. The Note shall carry interest from January 1, 2019 (the “Note Interest Date”) at the Applicable Federal Long Term rate for the month of the Loan Closing. Repayment shall be as set out below.

### **3. Loan Disbursement and Loan Closing:**

As soon as the Applicant has satisfied the conditions to the Loan Closing, the amount of the Loan shall be scheduled as a claim at the next Council meeting for which the matter may be reasonably scheduled. Disbursement of the Loan proceeds shall be made within 10 business after the Council has approved a claim for the Loan. The disbursement of the Loan proceeds shall constitute the “Loan Closing”.

### **4. Job Credits:**

As long as the Applicant is not in default of the Note, this Agreement, or any other document entered into pursuant to this Agreement, the Applicant shall be eligible for credit against the balance due under the Note for Job Credits earned during a Year. A “Year” shall mean the 12-month period ending on each June 30, with the first Year beginning January 1, 2019. “Annual Job Credits” shall be calculated as follows:

a. The Applicant is eligible to receive a “Base Annual Job Credit” during a Year equal to the Eligible FTE’s for a Year multiplied by \$2000.

b. If at the end of a Year, (1) the Annual Report (as provided for below) indicates that the Applicant has any Eligible FTE’s that have average earnings for the Year of at least (i) \$14 per hour in the case of hourly employees, or (ii) \$29,120 in the case of salaried employees, and (2) such employees are eligible for the Applicant’s fringe benefit plan, then the Applicant may earn additional job credits (the “Additional Annual Credits”) as calculated on a per employee basis based on the following table:

| <u>Additional Credit</u> | <u>Hourly Rate<br/>(Based on 2080 hours)</u> | <u>Annual Salary</u> |
|--------------------------|--|----------------------|
| \$400                    | \$14.00 to \$17.99                           | \$29,120 to \$37,439 |
| \$800                    | \$18.00 to \$21.99                           | \$37,440 to \$45,759 |
| \$1,200                  | \$22.00 to \$25.99                           | \$45,760 to \$54,079 |
| \$1,600                  | \$26.00 to \$29.99                           | \$54,080 to \$62,399 |
| \$2,000                  | \$30.00 and above                            | \$62,400 and above   |

In calculating the hourly rate or salary rate for purposes of the above table, the Applicant is entitled to add the hourly equivalent or annual cost of the following fringe benefits provided to the applicable employee by the Applicant: 401k Plan, profit sharing, pension or equivalent retirement benefits, health insurance, and life and disability insurance.

c. For purposes of this Agreement, Annual Job Credit shall mean the total of the Base Annual Job Credits and the Additional Annual Credit.

d. The amount of the Annual Job Credit may not exceed \$20,000 per Year (the "Maximum Annual Credit"). If the Applicant earns credits in excess of the Maximum Annual Credit in any one Year, the excess credits may be carried back to one or more prior Years where the Maximum Annual Credit was not earned, as long as the Maximum Annual Credit is not exceeded for any one Year. Excess credits may not be carried forward.

## **5. Note Repayment:**

The Note shall be repayable as follows:

a. Upon receipt of an Annual Report, the City will make a preliminary review based on the Annual Job Credits claimed. The amount of the Annual Job Credits, adjusted for any adjustments from the preliminary review, shall then be applied against the principal of the Note.

b. The difference in the amount applied to the principal plus the interest due on the Note shall be paid to the City on or before April 1.

## **6. Employee Definitions:**

a. "Full Time Employee" shall mean a bona fide employee of the Applicant who (1) is classified by the Applicant as full time; and (2) subject to normal and reasonable waiting periods, is eligible for the employer's normal fringe benefit package. The normal fringe benefit package must, at the least, include a health insurance plan which provides for employee coverage with a significant contribution made by the Applicant.

b. "Eligible Full Time Employee" shall mean a Full Time Employee who: (1) primarily works within the City, and (2) resides within 60 miles of the corporate limits of the City; provided, however any Full Time Employee who does not reside within 60 miles of the corporate limits of the City at the time that the Full Time Employee is hired, shall nevertheless be considered an Eligible Full Time Employee if the Full Time Employee moves to a residence within the required geographic area within 6 months of the hiring of the Eligible Full Time Employee.

c. "Full Time Equivalent" Employees (the "FTE's") shall be the number arrived at by dividing the total hours paid by the Applicant to their Eligible Full Time Employees during a Year divided by 2080 hours, and then rounded down to the nearest tenth; provided, however, the maximum hours paid that can be counted for any one Eligible Full Time Employee shall not exceed 40 hours per week. Salaried employees shall be presumed to have been paid on the basis of 40 hours per week.

d. "Eligible FTE's" shall mean the FTE's calculated for a year less 11; provided, however, in determining which Eligible Full Time Employees are eligible for the Additional

Annual Credits, the amounts paid for those positions described in the Application shall be used (COO, Service Engineer II, Service Engineer I and Senior Systems Engineer). If the Applicant has more than 15 Eligible Full Time Employees, then the most recently hired Eligible Full Time Employee(s) over 15 shall be used.

**7. Representations and Warranties of the Applicant:**

The Applicant represents and warrants the following, all of which shall survive the Closing:

a. The Applicant is a corporation organized, existing, and in good standing under the laws of Nebraska. The Applicant has full power and authority to enter into this Agreement and carry out the transactions contemplated by this Agreement. The Applicant's execution, delivery and performance of this Agreement have been authorized by all necessary action on the part of the Applicant. This Agreement, and each agreement and instrument delivered by the Applicant pursuant to it, is the legal and binding obligation of the Applicant, enforceable against the Applicant in accordance with its terms.

b. No representation or warranty made by the Applicant in this Agreement contains or will contain any untrue statement of any material fact, or omits or will fail to state any material fact known to the Applicant that are required to make the statements not misleading.

c. The execution and performance of this Agreement will not violate any provision of law, or conflict with or result in any breach of any of the terms or conditions of, or constitute a default under any indenture, mortgage, agreement or other instrument to which the Applicant is a party or by which they are bound.

All representations and warranties made by the Applicant shall survive the Loan Closing.

**8. Representations and Warranties of the City:**

The City represents and warrants the following, all of which shall survive the Loan Closing:

a. The City is a municipal corporation organized and existing under the laws of Nebraska, and has full power and authority to enter into this Agreement and carry out the transactions contemplated by this Agreement. The City's execution, delivery and performance of this Agreement has been authorized by all necessary action on the part of the City. This Agreement, and each agreement and instrument delivered by the City pursuant to it, is the legal and binding obligation of the City, enforceable against the City in accordance with its terms.

b. No representation or warranty made by the City in this Agreement contains or will contain any untrue statement of any material fact, or omits or will fail to state any material fact known to the City that is required to make the statements not misleading.

**9. Conditions to Loan Closing:**

The City's obligation to proceed with the Loan Closing is subject to the Applicant's fulfillment of each of the following conditions at or prior to the Loan Closing:

- a. All representations and warranties of the Applicant shall be true as of the Loan Closing.
- b. The Applicant shall have delivered to the City:
  - (1) Evidence of Good Standing of the Applicant from the Nebraska Secretary of State.
  - (2) A copy of the current and correct Articles of Incorporation and Bylaws of the Applicant certified by the Secretary of the Applicant to be correct;
  - (3) Certified resolutions of the Applicants Board of Directors authorizing this Agreement and providing for signature authority.
- c. The Applicant shall have received a loan as provided for in the Application.
- d. In order to secure the Loan and the Repayment, the Applicant shall have delivered to the City the following:
  - (1) a guaranty (the "Guaranty") of Todd Lewis. The form of the Guaranty is attached.
  - (2) a security agreement (the "Security Agreement") covering the Applicant's equipment which shall be second in priority to the Applicant's primary lender. The form of the Security Agreement is attached.
- e. The Applicant shall in all material respects have performed its obligations, agreements, and covenants contained in this Agreement to be performed by them, on, or before the Loan Closing.
- f. There shall have been no material adverse change in the operation or financial status of the Applicant and the Loan Closing shall constitute the Applicant's representations that there has been no such material adverse change.
- g. In requesting the disbursement of the Loan, the Applicant is considered to have represented that the above conditions have been satisfied and are continuing to be satisfied.

**10. Annual Reports:**

If the Applicant desires to claim Job Credits, the Applicant shall annually, within 60 days of the end of each Year, provide to the Administrator a report in form and substance acceptable to the Administrator which calculates the Annual Job Credit for the Year (the "Annual Report"). The Administrator shall have the right at any time to (i) require that the Annual Reports be reviewed at the Applicant's expense by a Certified Public Accountant reasonably acceptable to the Administrator, or (ii) hire, at the Administrator's own expense, an independent Certified Public Accountant or other Business or financial expert, to review the books and records of the Applicant pertaining to the Annual Report and any other terms and conditions as provided for in this Agreement. If after a review or audit of the Applicant's records it is discovered that the Annual Job Credit claimed on the Annual Job Credit Report exceeds 10% of the Annual Job Credit as determined by the Administrator, then the Administrator may require the Applicant to reimburse the Fund for the actual cost of the audit.

**11. Default:**

The Applicant shall be in default in this Agreement and the Note if any of the following happen:

- a. Failure to comply with any of the terms of this Agreement, the Note, the Security Agreement or the Guaranty to include an assignment not permitted under this Agreement.
- b. Any warranty, representation or statement made or given to the City by the Applicant proves to have been false in any material respect when made or given.
- c. Dissolution or liquidation of any of the Applicant, the termination of existence, insolvency, business failure, appointment of a receiver, assignment for the benefit of creditors, or bankruptcy of the Applicant.
- d. The Applicant ceases to conduct its Business or moves its Business outside of the City.

**12. Assignability:**

The Administrator may assign his interest in this Agreement to any successor administrator designated by the City Council. The Applicant may not assign or transfer its interest in this Agreement without the consent of the Administrator. Assignment shall include a transfer of ownership of the Applicant which results in the Partners owning less than 51% of the ownership interests of the Applicant.

**13. Confidentiality:**

It is agreed that this Agreement and its terms are public record and are not confidential. However, the City agrees to take reasonable steps to insure that any financial and proprietary information provided in connection with this Agreement by the Applicant shall remain

confidential and shall not be revealed or disclosed to outside sources unless the information is public knowledge, is independently developed, or is required to be disclosed by law or legal process.

**14. Notices:**

Any notices or other communications between the parties shall be personally delivered, sent by certified or registered mail, return receipt requested, by Federal Express or similar service that records delivery, to the addresses set out below, or to such other address as a party may designate, from time to time, by written notice to the other. A notice shall be deemed effective upon receipt.

a. If to the City:

City of Scottsbluff  
2525 Circle Drive  
Scottsbluff, NE 69361  
Attention: City Manager

b. If to the Applicant:

Bytes Computer and Network Solutions, Inc.  
1620 Broadway, Suite D  
Scottsbluff, NE 69361  
Attention: Todd Lewis

**15. Miscellaneous:**

a. This Agreement constitutes the entire agreement of the parties with respect to its subject matter, and may only be modified by a writing signed by both of the parties.

b. The City's waiver of any one default shall not be a waiver of the same or any other default in the future. In addition, the City's failure to exercise any right given to it by this Agreement shall not be a waiver of any later exercise of that right.

c. The provisions of this Agreement are severable and if any provision is held to be invalid, the remainder of the Agreement shall remain in effect.

d. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but which together shall constitute a single instrument.

e. This Agreement shall be governed by the laws of Nebraska.

f. This Agreement shall be binding on the successors and assigns of the parties.

*[Signature page to follow]*



**Signature Page to Economic Development Assistance Agreement between  
the City of Scottsbluff, Nebraska and Bytes Computer and Network Solutions, Inc.**

City of Scottsbluff, Nebraska

Bytes Computer and Network Solutions, Inc.

By: \_\_\_\_\_  
Economic Development  
Program Administrator

By: \_\_\_\_\_  
Todd Lewis, President

**City of Scottsbluff**  
**Economic Development Application Review Committee**  
**October 4, 2018**

A meeting of the Economic Development Application Review Committee was held on October 4, 2018, at 8:00 a.m. at City Hall, 2525 Circle Drive, Scottsbluff, NE.

Present were Committee Members, Jim Trumbull, Dennis Hadden, Marla Marx, and Hod Kosman. Also attending was alternate Jeanne McKerrigan. Since there were four Committee Members present, alternate McKerrigan was designated to participate in all matters. In attendance on behalf of the City were City Manager, Nathan Johnson, City Economic Development Director, Starr Lehl, City Finance Director, Liz Hilyard, and Deputy City Attorneys, Rick Ediger and Libby Stobel.

Chairman Trumbull called the meeting to order and stated that a copy of the Nebraska Open Meetings Act is located on the South wall of the Council Chamber. There were no changes in the Agenda, nor were there any citizens with business not scheduled on the Agenda.

It was moved by Marx and seconded by Hadden that the minutes of September 21, 2018 Committee Meeting be approved. Voting yes: Trumbull, Hadden, Marx, Kosman, and McKerrigan. Voting no: None.

A revised request was received from Bsquared Farming and Trucking, LLC. Present on behalf of Bsquared were Valerie Baker, Clifford Brabson, and Scott Blanton. Margaret Akin of the Nebraska Business Development Center also appeared on behalf of the Applicant. The primary change from the original Application is that SC Blanton Enterprises, Inc. is now included as a joint Applicant. While SC Blanton will continue to own most of the trucks and Bsquared will lease the trucks from SC Blanton, the SC Blanton trucks will be available as collateral. A list of the trucks owned by each entity is now included with the Application with an indication of which items and equipment are free and clear. The Applicants indicated that the business is now expanding beyond where they thought they would be at this time. Economic Development Director Lehl indicated that there has been an increased need for trucking in the area.

An Application for Assistance from Bytes Computer and Network Solutions, Inc. was presented by Todd Lewis, President of the Applicant. Ediger indicated that his firm had a conflict of interest. Kosman indicated that he would not be voting on this matter as he also had a conflict. Mr. Lewis indicated that his firm's current and future business model is based on providing managed services for its customers. Bytes is also getting into hosted services where businesses don't have to have their own servers, along with providing enterprise level products for the benefit of small businesses, in particular. Bytes also has data storage capabilities for customers. The business is moving to a new location which allows for more space to provide services to customers. The business is asking for help with moving costs and upgrade expenditures. Improvements include a server room, which is required to have redundant air conditioning, fire suppression and 1½ hour UPS along with generator capabilities. Bytes will be adding two new hosts and additional storage, along with new switching and network cards and different racks for their equipment. Currently, they have 15 total employees, two of which were

hired in April and two more hired recently. Bytes is requesting that credit be given for the new employees.

Herb Gibson of Prime Metal Products, Inc. appeared once more in support of the Application of Prime Metal Products. Ediger indicated that, once again, their firm had a conflict of interest. Kosman also indicated a conflict. The Committee has had an opportunity to review financial information concerning the business. Gibson indicated that one concern was that it was not yet known what portion, if any, of the State's CDBG commitment will be forgivable. The Applicant is waiting for DED to make a decision and there is a concern that the State will not provide as favorable terms for Prime Metal Products as it has for other businesses. In addition, it has been 2011 since anyone in the Scottsbluff/Gering area received CDBG assistance. Prime Metal Products intends to start with 15 employees for the first year and add approximately 15 employees each year until it gets to 70 employees. In order to meet the potential CDBG requirements, it has to have 33 employees after 2 years. In addition, 51% of the jobs must be made available to those who meet low and moderate income standards. That is one of the reasons why an Application has also been made with DED for job training funds.

After further discussion by the Committee, it was moved by Hadden and seconded by Marx that the Committee recommend a forgivable low-interest loan in the amount of \$1,750,000. The loan would be designed to allow for job credits to be earned over a 10 year period. Interest would accrue at the long term Applicable Federal Rate in effect at the time the loan was closed. At the end of each year, the Applicant can submit a Job Credit Report and a credit against the loan will be earned as per the 2014 High Paying Job Credit Schedule. However, the maximum amount that can be earned each year during the first 5 years is 20% of the loan amount. The City's assistance is contingent upon (1) a satisfactory CDBG Grant from DED, and (2) the amount previously earmarked by the City Council for the Gering Industrial site being directed to this project. Security will be a lien against the equipment of the business and its building, which will likely be third position behind the Applicant's bank and the State's CDBG grant/loan. Guarantees of Herb Gibson and Smith & Willis Heating and Air Conditioning, LLC will be required. Voting yes: Trumbull, Hadden, Marx, and McKerrigan. Voting no: None. Abstain: Kosman.

The Committee then had further discussion concerning the Application of Bsquared. Concern was raised concerning the difference between projections and actual results to date. Also, the Committee wanted more information on how the value for the potential collateral items was determined and the amount of the existing loans against the equipment. Finally, the Committee would look more favorably on assistance if there was equity in real estate that could be used as collateral or the values of the trucks be legitimately be verified by an outside party . The Economic Development Director was directed to contact the Applicant and attempt to answer these questions.

The Committee then discussed the Bytes Application. Following discussion it was moved by Marx and seconded by McKerrigan that the Committee recommend approval of a \$100,000 forgivable low-interest loan. The loan shall be amortized over 5 equal annual payments with interest at the Applicable Midterm Federal Rate in effect at the time the loan is closed. Annual Job Credits may be earned as per the 2014 High Paying Job Credit Schedule. Security shall be

the personal Guaranty of Todd Lewis and a second lien on equipment. Voting yes: Trumbull, Hadden, Marx, and McKerrigan. Voting no: None. Abstain: Kosman.

Before adjourning, Chairman Trumbull indicated that after the November election, he intended to step down as Chair of the Committee, but would stay on the Committee if the City wanted him to stay in that position.

The meeting was then adjourned at 9:35 a.m.

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Starr Lehl, Economic Development Director