

STATE OF TEXAS §
 §
COUNTY OF LUBBOCK §

PERFORMANCE AGREEMENT

This Performance Agreement (the "Agreement") is made effective on December 13, 2010 by and between LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC., a Texas nonprofit corporation (hereinafter referred to as "LEDA") and XFAB TEXAS, INC., a Texas corporation, (hereinafter referred to as "Recipient"), by and through their duly authorized officers and affiliate organizations under the terms and conditions that follow.

1. **Applicable Law:** It is understood by and between the parties that the term "Act," as used herein, is intended to mean the Development Corporation Act of 1979, as amended. (Sec 501.001 et seq, Local Government Code, formerly Sec 5190.6, VACS.) The parties hereto covenant and agree to comply with the terms of the Act applicable to this Agreement.

2. **Parties:**

- A. LEDA, a Texas non-profit corporation as well as a tax exempt 501(c) 4 entity, was created by the City of Lubbock, Texas, as an Industrial Development Corporation under the Act for the purpose of creating and retaining positions and encouraging new businesses to be established in Lubbock, Texas, to stimulate business and commercial activities, as well as all other purposes allowed by the Act.

- B. Recipient is preparing a new "Project" which shall include the manufacturing of the Enerchip™ in Lubbock, Texas (NAICS 311-339) with projected employment of 77 new employees. Its business project is anticipated to result in 77 new Primary Jobs for the City of Lubbock, with a Target Annual Compensation of \$3,200,000.00 in the aggregate, or a total of \$16,000,000.00 over five years. Total capital investment costs estimate is 12,000,000.00.

- C. Recipient is a Texas corporation authorized to do business in Texas.

3. **Purpose:** The purpose for this Agreement is to formalize the agreements between LEDA and Recipient for the payment of certain costs associated with Recipient's Project and specifically state the covenants, representations of the parties, and the incentives associated with Recipient's commitment to abide by the provisions of the Act and to abide by the terms of this Agreement which has been approved by the Board of Directors of LEDA as complying with the specific requirements of the Act. It is expressly agreed that this Agreement constitutes a single transaction; although, incentive payments thereunder are divided into multiple installments as annually earned. A failure to perform any obligation by Recipient may constitute a breach of the entire Agreement and terminate any further commitments by LEDA.

4. **Definitions:**

- A. The "Act" shall refer to the Development Corporation Act of 1979, as amended, as Sec 501.001 et seq, Local Government Code, formerly Sec 5190.6, VACS.
- B. "LEDA" shall refer to Lubbock Economic Development Alliance, Inc., a Texas non-profit corporation, created by the City of Lubbock as an "Industrial Development Corporation," pursuant to the Act.
- C. "Recipient" shall refer to X-Fab Texas, Inc., a Texas corporation authorized to do business in Texas, and the recipient party to this Agreement.
- D. "Project" shall mean the project identified in Paragraph 2B, above.
- E. "Recipient Request" may include the identification of the cost of the project by Recipient to the facility or other purpose within Section 2(4) of the Act.
- F. "LEDA's Sliding Scale" shall mean the incentive allocation to be utilized in determining compliance with the future employment payments toward the cost of the project confirmed by the establishment of new Primary Jobs. The application of LEDA's incentive sliding scale as to each "full-time equivalent employee" is as follows:

<u>Actual Compensation As Defined Herein</u>	<u>Total Incentive</u>
\$75,000 and above	\$10,000.00
\$60,000 - \$74,999.99	\$7,500.00
\$50,000 - \$59,999.99	\$5,000.00
\$40,000 - \$49,999.99	\$4,000.00
\$30,000 - \$39,999.99	\$3,000.00
\$25,000 - \$29,999.99	\$2,500.00

- G. "Full-Time Equivalent Employee" shall include individuals employed in "Primary Jobs" as defined by the Act, as well as contract or leased employees performing "Primary Jobs" in the City of Lubbock on behalf of Recipient.
- H. "Annual Compensation" shall mean the higher of actual compensation or annualized base pay or actual annualized payment as determined within the sole discretion of LEDA's auditor/representative.
- I. "Term", as used herein, shall begin with the Start Date of March 1, 2011, and end on February 29, 2016, (the "Termination Date") unless earlier breached by Recipient's failure to perform.
- J. "Payback Provisions" shall mean forfeiture of all unpaid incentives.

- K. Baseline Employment Level" is defined to mean the employee census on the day preceding the Term of the contract.
- L. "Baseline Measurement Date" shall mean the day preceding the Start Date of the contract.
- M. "Operations Arm" shall mean the Recipient or its affiliate in charge of day to-day operations and hiring decisions (if different than Recipient).
- N. "Census" is defined as a compilation listing of the employee name, address, date of hire, date of termination, position, base pay, and indication of full-time or part-time status. (Such information is preferred to be presented in Excel format) which shall be made available to the Auditor in performing the audit.
- O. "Measurement Date" shall mean the date upon which the determination is made as to whether Recipient is in compliance with creating and/or maintaining the Primary Job positions represented by Recipient. Measurement Dates shall be:
 - (1) Year One: March 1, 2011 to February 29, 2012
 - (2) Year Two: March 1, 2012 to February 28, 2013
 - (3) Year Three: March 1, 2013 to February 28, 2014
 - (4) Year Four: March 1, 2014 to February 28, 2015
 - (5) Year Five: March 1, 2015 to February 29, 2016

5. Representations of Recipient:

- A. Recipient represents that it will utilize the incentive provided towards costs involved and associated with the Project.
- B. Recipient represents that it is authorized to do business in Texas and has authorization to enter into this Agreement on its behalf.
- C. Recipient represents that it has sought from LEDA economic assistance pursuing Recipient's Project.
- D. Recipient represents that it has conferred with attorneys of its own choosing and is fully knowledgeable of the terms of the Act and understands the reporting requirements of the Act, as well as all conditions precedent and subsequent as required to be eligible for the incentives offered by LEDA, including the Payback Provisions.
- E. Recipient represents that it acknowledges that its failure to perform any reporting requirements within a reasonable period of time after the request is made and/or its failure to maintain the Baseline Employment Level could result in payment adjustments.
- F. Recipient understands and agrees that any variations as to any term of this Agreement or any terms or conditions of the incentives as stated must be mutually agreed to in written

supplements or addenda since no oral agreements, amendments, or representations will be binding on either party.

6. Representations by LEDA:

- A. LEDA represents that it is established as an Industrial Development Corporation under the Act and further represents that the costs applied toward Recipient's Project as stated in this Agreement have been found by the Board of Directors of LEDA sitting as fact finders have determined the Project to be in compliance with the requirements and purposes of the Act, the provisions of LEDA's charter, as well as for the benefit of the City of Lubbock, Lubbock County, Texas, and trade area.
- B. LEDA represents that it has authority to enter into this Agreement. LEDA understands and agrees that any variation in terms of this Agreement or the incentives offered to Recipient or commitment by Recipient will only be binding if mutually agreed to in writing.

7. (There is no Paragraph 7 since a real property conveyance incentive is not involved.)

8. Capital Incentive to be Awarded and Terms of Award

Initial Capital Investment (exclusive of Real Property, if any):

LEDA hereby grants to Recipient a potential capital incentive of \$162,500.00, with payments to be expressly made under the following terms and conditions:

- A. LEDA agrees to pay Recipient the sum of \$162,500.00 payable in three (3) annual installments, with the first installment of \$54,166.66 becoming due upon Recipient's confirmation and written notice that business operations under the new Project have begun at the Lubbock location. Subsequent payments of \$54,166.67 will be paid every twelve (12) months after the initial payment, until the \$162,500.00 is paid in full.

In addition to the foregoing, LEDA hereby grants to Recipient a potential incentive of \$337,500.00 with payments to be expressly made under the following terms and conditions:

- A. LEDA agrees to pay up to \$337,500.00 of Project costs, payable over five (5) years, conditioned upon the creation of Primary Jobs pursuant to and in compliance with LEDA's Sliding Scale after Recipient's written substantiation of such employment and under the following terms and conditions:

Recipient agrees to establish a Baseline Employment Level and Census (as defined herein) and shall timely provide such information to LEDA or its designated audit representative when requested. Recipient agrees to maintain the Baseline Employment Level through the term of this Agreement and create and maintain the

additional full-time job positions intended to qualify for the additional Project cost incentive, as offered by LEDA. Recipient shall earn one-fifth (1/5) of the additional Project cost incentive at each Measurement Date. Such earned portion shall be paid within a reasonable time following the completion of a yearly audit by LEDA or its designated representative which payment shall be made within fifteen (15) days after LEDA's board review and approval of the audit. LEDA and its representative agree to maintain confidentiality of all of Recipient's records and to return all such records unless other mutually agreeable arrangements are made regarding record retention by Recipient or inspection access to LEDA.

- B. Recipient understands and agrees that in the event, other than as a result of a force majeure (as defined in Section 15.F below), there is a failure to meet its Target Annual Compensation in the aggregate or attain its Target Job Positions, then LEDA shall have the right to make all necessary adjustments according to LEDA's Sliding Scale, not to exceed the sums as approved by LEDA's Board of Directors.
- C. In evaluating Recipient's Request and pursuant to Section 40(b) of the Act, it is the intention of the parties that, assuming Recipient is successful in total completion of Recipient's Project, its total Target Job Positions of 77 in number would ultimately result in a Target Annual Compensation of \$3,200,000.00 in the aggregate, or a total of \$16,000,000.00 over five years. Total capital investment costs estimate is 12,000,000.00.

Each annual incentive installment shall be considered as earned in one-fifth (1/5) increments as of each Measurement Date during the Agreement when, by audit, it is confirmed that Recipient attained the Target Job Positions and the Target Annual Compensation.

9. Conditions for Payment of Incentives:

It is specifically agreed and understood by and between the parties that LEDA has agreed to make the project payments strictly upon the following terms and conditions:

- A. Any use of LEDA's name for publicity in connection with Recipient's business or activities must be approved in advance by LEDA. It is understood that LEDA may make known its contributions to Recipient in whatever public manner LEDA deems appropriate.
- B. Recipient shall have delivered to LEDA a certified copy of the authorization by the President, authorizing the execution and performance of this Agreement, as well as timely delivery of all other information expressly called for in this Agreement.
- C. Recipient must maintain a business location in the City of Lubbock or Lubbock County and its legal status under federal and state law duly and remain qualified to do business in the State of Texas.

- D. The operations or activities of Recipient and its employees shall be performed and conducted in a professional and businesslike manner and shall be in keeping with federal and state laws and regulations, and any ordinances of the City of Lubbock and/or governmental entities which may have jurisdiction over operations and activities.
- E. Recipient agrees to, in good faith, engage in a confidential review of all material record examination by LEDA's auditors as mutually agreed as necessary to insure compliance with the conditions of the incentive payments (including a base salary, overtime, and fringe benefits).
- F. Recipient certifies that the Recipient does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Recipient is convicted of a violation under 8 U.S.C. § 1324a(f), Recipient shall repay the amount of the public subsidy provided under this Agreement, with interest at the legal pre-judgment interest rate, with attorney's fees, not later than the 120th day after the date LEDA notifies Recipient of the violation.
- G. Any information obtained by LEDA or its agents or assigns during negotiations leading up to the execution of the Agreement or otherwise about the business, have or will be returned upon the execution of this Agreement, subject to a right to a continuing examination by LEDA in order to comply with LEDA's reporting obligations, if any. Such information shall be considered confidential and beyond the scope of any Open Records request as proprietary information.

10. Payback Provisions and Events of Default: Recipient acknowledges that LEDA and Recipient are required to remain in conformance with the statutory provisions of the Act. The parties hereto agree that in the event Recipient fails to comply with the provisions of this Agreement, including but not limited to Paragraphs 5E, 8C, 9C, 9D, 9E or 11, and after written notice and failure to cure the violation, then LEDA, in its sole discretion, may terminate this Agreement and permanently suspend all future payments to Recipient.

11. Assignment, Merger, and Termination Due to Merger, Etc.: This Agreement shall not be assignable, either in whole or in part. Termination as the result of assignment or merger or change in business form shall not disqualify the remaining or new entity from applying to LEDA for new incentive consideration.

12. Insurance/Hold Harmless: Where real property has been conveyed as part of the incentive, Recipient covenants and agrees to provide, assign, and include LEDA as an additional named insured to all policies of liability insurance coverage and insurance policies regarding Recipient's ownership and operations whereby LEDA is provided insurance coverage against all liability for injury or damages caused by Recipient's employees, customers, clients, patrons, visitors, or guests. Additionally, Recipient agrees to indemnify and hold LEDA harmless from all loss, cost, or expenses (including attorneys fees) arising out of the existence of this Performance Agreement or any interpretation, application, or performance thereunder.

13. No Privity of Endeavor Nor Joint Venture: It is specifically agreed that there shall be no privity of endeavor nor joint venture whatsoever between LEDA and Recipient and the sole connection between the parties is the contribution of the economic assistance by LEDA under the restricted conditions as set forth herein and that such contributions as stated herein are for the sole purposes as set forth herein and it shall in no way be construed as a continuing basis of financial support by LEDA to Recipient. The parties hereto have entered into this Agreement in an arms-length transaction. No agency relationship or fiduciary relationship is intended to be created by this Agreement and no such relationship shall be determined to exist.

14. Good Faith -Normal Business Operations: The parties agree that this Agreement has been entered into in good faith and that each party shall act in good faith in complying with its provisions. The parties further agree to transact all their business under and that which relates to this Agreement in accordance with their normal business operations.

15. Miscellaneous Provisions:

A. Notices:

For the purposes of any notices to be given, pursuant to the terms of this Agreement, the parties shall use the following addresses or any other address as may be changed by the parties, upon written notice to the other party, as follows:

(1) John Osborne
CEO and President
LUBBOCK ECONOMIC DEVELOPMENT ALLIANCE, INC .
1500 Broadway, 6th Floor
Lubbock, TX 79401

(2) With a copy to:

William F. "Pete" Baker
MCCLESKEY, HARRIGER, BRAZILL & GRAF, L.L.P.
5010 University Avenue, 5th Floor
P.O. Box 6170
Lubbock, TX 79493


Don Meinkoth
Director, President
X-Fab Texas, Inc.
5807 116th Street
Lubbock, Texas 79424

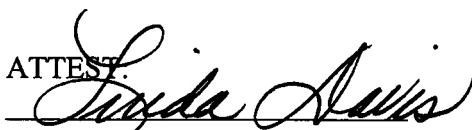
Notices shall be deemed to be given upon the placing in the United States Mail, Certified Mail, Return Receipt Requested, to the above-described addresses or as may be changed, pursuant to the terms and conditions hereof.

- B. Entire Agreement: This instrument constitutes the entire agreement between the parties hereto and neither this Agreement nor any of the Exhibits attached hereto, if any, can be altered, changed, or amended in any respect except by an instrument in writing duly executed by both parties.
- C. Governing Law and Performance: This Agreement shall be governed by the laws of the State of Texas and shall be deemed to be executed in and performance called for in Lubbock, Lubbock County, Texas.
- D. Partial Invalidity: In the event that any portion of this Agreement should be found or declared to be invalid for any reason, the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the parties. The parties agree that it is their intent for this Agreement to be determined as being an indivisible obligation of the parties.
- E. Binding Effect: This Agreement shall be binding upon the undersigned, their successors and assigns, subject to the express terms of this Agreement concerning assignment.
- F. Force Majeure: If any default or performance of any other covenant or term of this Agreement is delayed by reason of strike, riots, shortages of labor, materials, supplies, or transportation, war, civil commotion, act of God, governmental restrictions, regulations, or interference, fire, or other casualty, or any other circumstances beyond a signatory party's control, then the duty to do or perform the term or covenant, regardless of whether the circumstance is similar to any of those enumerated above or not, is excused during the delay period.
- G. Time is of the Essence: The parties agree that time is of the essence in the execution of this Agreement.

EXECUTED in multiple counterparts, each of which is an original, on this 25th day of August, 2011.

LUBBOCK ECONOMIC DEVELOPMENT
ALLIANCE, INC.


John Osborne, CEO and President

ATTEST: 

RECIPIENT:

X-FAB TEXAS, INC.

By: 

Its: Lloyd L. Whetzel, CEO and
President

ATTEST: 