

CERTIFICATE AS TO RESOLUTION AND ADOPTING VOTE

I, the undersigned, being the duly qualified and acting recording officer of the City of Billings, Montana (the "City"), hereby certify that the attached resolution is a true copy of a Resolution No. \_\_\_\_\_ entitled: "RESOLUTION AUTHORIZING CERTAIN ENERGY EFFICIENCY IMPROVEMENTS AND APPROVING THE ENERGY PERFORMANCE CONTRACT AND LEASE-PURCHASE AGREEMENT IN CONNECTION THEREWITH" (the "Resolution"), on file in the original records of the City in my legal custody; that the Resolution was duly adopted by the City Council of the City at a regular meeting on October 11, 2011, and that the meeting was duly held by the City Council and was attended throughout by a quorum, pursuant to call and notice of such meeting given as required by law; and that the Resolution has not as of the date hereof been amended or repealed.

I further certify that, upon vote being taken on the Resolution at said meeting, the following Council Members voted in favor thereof: \_\_\_\_\_; voted against the same: \_\_\_\_\_; abstained from voting thereon: \_\_\_\_\_; or were absent: \_\_\_\_\_.

WITNESS my hand and seal officially this 11th day of October, 2011.

(SEAL)

\_\_\_\_\_  
City Clerk

RESOLUTION NO. \_\_\_\_

RESOLUTION AUTHORIZING CERTAIN ENERGY  
EFFICIENCY IMPROVEMENTS AND APPROVING  
THE ENERGY PERFORMANCE CONTRACT AND  
LEASE-PURCHASE AGREEMENT IN CONNECTION  
THEREWITH

BE IT RESOLVED by the City Council (the “Council”) of the City of Billings, Montana (the “City”), as follows:

Section 1. Recitals and Authorization.

1.01. The City proposes to undertake energy efficiency improvements to various buildings and facilities at the City-owned Billings Logan International Airport (the “Airport Improvements”) and within certain City-owned parking garages (the “Parking Improvements”). The total cost of the Airport Improvements is estimated to be \$1,399,078, and the total cost of the Parking Improvements is estimated to be \$578,311. The City will enter into an energy performance contract with McKinstry Essention, Inc. (“McKinstry”) to complete the Airport Improvements and the Parking Improvements, substantially in the form attached hereto as Exhibit A (the “Energy Performance Contract”). The Energy Performance Contract will guarantee the City energy savings of at least \$307,188 over a 3-year period with respect to the Airport Improvements (an average of \$102,396 per year) and at least \$151,998 over a 3-year period with respect to the Parking Improvements (an average of \$50,666 per year).

1.02. In order to finance the Airport Improvements and the Parking Improvements, the City proposes to enter into a Master Tax-Exempt Installment Purchase Agreement with U.S. Bancorp Equipment Finance, Inc., as lessor (“U.S. Bancorp”), substantially in the form attached hereto as Exhibit B (the “Lease-Purchase Agreement”). The financing of the Airport Improvements will be further governed by the terms and conditions set forth in Property Schedule No. 1 to the Lease-Purchase Agreement (the “Airport Property Schedule”) and the financing of the Parking Improvements will be further governed by the terms and conditions set forth in Property Schedule No. 2 to the Lease-Purchase Agreement (the “Parking Property Schedule”).

1.03. The installment payments payable by the City pursuant to the Airport Property Schedule with respect to the Airport Improvements (the “Airport Installment Payments”) and the installment payments payable by the City pursuant to the Parking Property Schedule with respect to the Parking Improvements (the “Parking Installment Payments”) shall constitute current expenses of the City’s Airport Enterprise Fund and the City’s Parking Enterprise Fund, respectively, and shall not in any way be construed to be debts of the City in contravention of any applicable constitutional or statutory limitation or requirements concerning the creation of indebtedness by the City, nor shall anything contained therein constitute a pledge of the general tax revenues, funds or money of the City. The Airport Installment Payments and the Parking Installment

Payments shall be payable only from current funds which are budgeted and appropriated solely from the City's Airport Enterprise Fund and the City's Parking Enterprise Fund, respectively, for such purpose during the fiscal year of the City for which such funds were budgeted and appropriated. The City has not pledged the full faith and credit of the City, Yellowstone County or the State of Montana to the payment of amounts due under the Lease-Purchase Agreement.

Section 2. Public Hearing. At a public hearing duly called, noticed and held on October 11, 2011 as required by Section 147 of the Internal Revenue Code of 1986, as amended (the "Code"), all persons who appeared were afforded an opportunity to express their views with respect to the proposal to undertake and finance the Airport Improvements. The Council hereby authorizes and confirms the authority of the City Clerk to publish or cause to be published a notice of public hearing in the *Billings Times*, a newspaper of general circulation in the county on September 22, 2011 and September 29, 2011.

Section 3. Approval of Improvements and Agreements.

3.01. The City hereby approves the Airport Improvements and the Parking Improvements. All actions heretofore taken by officers of the City in connection with the Improvements, to the extent not inconsistent with the provisions of this Resolution, are hereby ratified, approved and confirmed.

3.02. The City hereby approves the form of the Energy Performance Contract. Each of the Mayor, the City Administrator and the City Finance Director is hereby authorized and directed to approve, execute and deliver the Energy Performance Contract, together with such modifications thereto as may be approved by the officer or officers executing the same, which approval shall be conclusively evidenced by the execution thereof. Each of the Mayor, the City Administrator and the City Finance Director is also authorized to enter into and deliver such other documents and certificates as may be necessary or desirable in connection therewith as may be reasonably required by McKinstry.

3.03. The City hereby approves the forms of the Lease-Purchase Agreement, the Airport Property Schedule and the Parking Property Schedule. Each of the Mayor, the City Administrator and the City Finance Director is hereby authorized and directed to approve, execute and deliver to U.S. Bancorp the Lease-Purchase Agreement, the Airport Property Schedule and the Parking Property Schedule, together with such modifications thereto as may be approved by the officer or officers executing the same, which approval shall be conclusively evidenced by the execution thereof. Each of the Mayor, the City Administrator and the City Finance Director is also authorized to enter into and deliver such other documents and certificates as may be necessary or desirable in connection therewith, in the opinion of Dorsey & Whitney LLP, as special counsel to the City, or as may be reasonably required by U.S. Bancorp.

Section 3. Tax Matters.

4.01. General Covenant. The City covenants and agrees that it will not take or permit to be taken by any of its officers, employees or agents any action which would cause the portion of the Airport Installment Payments and Parking Installment Payments designated as interest to become includable in gross income for federal income tax purposes under the Code and applicable Treasury Regulations (the “Regulations”), and covenants to take any and all actions within its powers to ensure that the portion of the Airport Installment Payments and the Parking Installment Payments designated as interest will not become includable in gross income for federal income tax purposes under the Code and the Regulations.

4.02. Airport Improvements. The City provides as follows:

(a) the Airport Property Schedule is being issued as a “exempt facility bond” pursuant to Section 142(a)(1) of the Code, 95% or more of the net proceeds of the Airport Property Schedule will be used to provide airport facilities and such airport facilities, including any leased facilities, are owned by the City within the meaning of Section 142(b) of the Code;

(b) the City was not required to obtain a volume allocation for the Airport Property Schedule pursuant to Section 146(g) of the Code;

(c) estimated economic life of the Airport Improvements is not less than 20 years;

(d) no portion of the proceeds of the Airport Property Schedule will be used to provide any of the facilities described in Section 147(e) of the Code;

(e) the public approval requirements of Section 147(f) of the Code have been satisfied with respect to the Airport Property Schedule; and

(f) as required by Section 147(g) of the Code, no more than 2% of the proceeds of the Airport Property Schedule be used to finance issuance costs of the Airport Improvements.

4.03. Parking Improvements. The Parking Improvements are and will be owned and operated by the City and used by the City to provide parking services to members of the general public. No user of the Parking Improvements is granted any concession, license or special arrangement with respect to the Parking Improvements. Except for the Lease-Purchase Agreement and the Parking Property Schedule, the City shall not enter into any lease, use or other agreement with any non-governmental person relating to the use of the Parking Improvements or security for the payment of amounts due under the Parking Property Schedule that might cause the Parking Property Schedule or any payments to be made in connection therewith to be considered an “arbitrage bond” or “private loan bond” within the meaning of Sections 148 and 141 of the Internal Revenue Code of 1986, as amended (the “Code”).

4.04. Arbitrage Certification. The Mayor, the City Finance Director and the City Clerk, being the officers of the City charged with the responsibility for executing the

Lease-Purchase Agreement, the Airport Property Schedule and the Parking Property Schedule, are authorized and directed to execute and deliver to U.S. Bancorp a certificate in accordance with the provisions of Section 148 of the Code, and Section 1.148-2(b) of the Regulations, stating that on the basis of facts, estimates and circumstances in existence on the date of execution and delivery of the Airport Property Schedule and the Parking Property Schedule, it is reasonably expected that the proceeds of the Airport Property Schedule and the Parking Property Schedule will be used in a manner that would not cause the Airport Property Schedule or the Parking Property Schedule, respectively, to be “arbitrage bonds” within the meaning of Section 148 of the Code and the Regulations.

4.05. Arbitrage Rebate. The City acknowledges that the Airport Property Schedule and the Parking Property Schedule are subject to the rebate requirements of Section 148(f) of the Code. The City covenants and agrees to retain such records, make such determinations, file such reports and documents and pay such amounts at such times as are required under said Section 148(f) and applicable Regulations to preserve the exclusion of interest on the Airport Property Schedule and the Parking Property Schedule from gross income for federal income tax purposes, unless the Airport Property Schedule and the Parking Property Schedule qualify for the exception from the rebate requirement under Section 148(f)(4)(B) of the Code and no “gross proceeds” of the Airport Property Schedule and the Parking Property Schedule arise during or after the expenditure of the original proceeds thereof. In furtherance of the foregoing, the Mayor, the City Finance Director and the City Clerk are hereby authorized and directed to execute a Rebate Certificate, substantially in the form to be prepared by bond counsel, and the City hereby covenants and agrees to observe and perform the covenants and agreements contained therein, unless amended or terminated in accordance with the provisions thereof.

4.06. Information Reporting. The City shall file with the Secretary of the Treasury, not later than February 15, 2012, a statement concerning the Airport Property Schedule and the Parking Property Schedule containing the information required by Section 149(e) of the Code.

4.07. Qualified Tax-Exempt Obligations. Pursuant to Section 265(b)(3)(B)(ii) of the Code, the City hereby designates the Parking Property Schedule as “qualified tax-exempt obligations” for purposes of Section 265(b)(3) of the Code. The City has not designated any other obligations in 2011 under Section 265(b)(3) other than the Special Improvement District No. 1360 Refunding Bonds, Series 2011, the Pooled Special Improvement District Bonds, Series 2011 (Special Improvement Districts Nos. 1369 and 1391), the Higher Education Revenue Note (Rocky Mountain College Energy Performance Project), Series 2011, and the Special Improvement District No. 1392 Bond Anticipation Note, Series 2011. The City hereby represents that it does not anticipate that obligations bearing interest not includable in gross income for purposes of federal income taxation under Section 103 of the Code (including refunding obligations as provided in Section 265(b)(3) of the Code and including “qualified 501(c)(3) bonds” but excluding other “private activity bonds,” as defined in Sections 141(a) and 145(a) of the Code) will be issued by or on behalf of the City and all “subordinate entities” of the City in 2011 in an amount greater than \$10,000,000.

Section 5. Transcript Certification. The officers of the City are directed to furnish to U.S. Bancorp certified copies of all proceedings and information in their official records relevant to the authorization of the Lease-Purchase Agreement, the Airport Property Schedule, the Parking Property Schedule and such certificates and affidavits as to other matters appearing in their official records or otherwise known to them as may be reasonably required to evidence the validity and enforceability of the Lease-Purchase Agreement, the Airport Property Schedule, the Parking Property Schedule and all such certified copies, certificates and affidavits, including any heretofore furnished, shall constitute representations and recitals of the City as to the correctness of all facts stated therein and the completion of all proceedings stated therein to have been taken.

Section 6. Effective Date. This Resolution shall become effective upon passage and all provisions of ordinances, resolutions and other actions and proceedings of the City which are in any way inconsistent with the terms and provisions of this Resolution are repealed, amended and rescinded to the full extent necessary to give full force and effect to the provisions of this Resolution.

Adopted this 11th day of October, 2011.

CITY OF BILLINGS, MONTANA

\_\_\_\_\_  
\_\_\_\_ Mayor

Attest: \_\_\_\_\_  
City Clerk

(SEAL)

**EXHIBIT A**

**ENERGY PERFORMANCE CONTRACT**

**CITY OF BILLINGS CONTRACT**

**FOR**

**ENERGY PERFORMANCE CONTRACTING**

**ENERGY PERFORMANCE CONTRACT**  
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THIS CONTRACT is entered into by and between the City of Billings, Billings, Montana, (hereinafter referred to as the "City of Billings"), and McKinstry Essention, Inc., (hereinafter referred to as the "Contractor"). This Contract is entered into in accordance with Title 18, Montana Code Annotated (MCA), and the Administrative Rules of Montana (ARM), Title 2, chapter 5, for the purpose of installing certain energy and water cost saving equipment, described in **Schedule H (Equipment to Be Installed by Contractor)**, and providing other services designed to save energy for the City of Billings and its property and buildings, (the "Project Site(s)").

## **ARTICLE 1. DEFINITIONS; ACCEPTANCE OF TECHNICAL ENERGY AUDIT REPORT; OTHER DOCUMENTS**

### **Section 1.1. Definitions**

**Certificate of Acceptance:** The certificate substantially in the form provided in **Exhibit III (i) and (ii)**.

**Commencement Date:** The date described in **Section 2.4. (Commencement Date)**.

**Contract:** This Energy Performance Contract and all attached Schedules and Exhibits.

**Contract Sum:** The sum of all materials, labor, auditing, design, engineering, project construction management fees, overhead, profit, contingency, subcontracted services related to the project.

**Energy Conservation Measures (ECM):** Individual energy improvement projects identified and recommended in the Investment Grade Audit Report and that will be implemented as part of the Energy Performance Contract.

**Energy and Cost Savings Guarantee:** The guarantee that is achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract, as specified in **Schedule F (Compensation to Contractor for Annual Services)** and in accordance with the Savings Calculation Formula, shown in **Schedule C (Savings Measurement and Verification Plan; Methodology to Adjust Baseline)**.

**Equipment:** The goods specified in **Schedule H (Equipment to be Installed by Contractor)**.

**Independent Auditor:** Independent auditor referenced in Section 3.2 shall be an Engineering Consulting firm or an ESCO with a registered Professional Engineer.

**Interim Period:** The period from contract execution until the Commencement Date.

**Investment Grade Audit Report (IGAR):** A study that includes detailed descriptions of the improvements recommended for the project, the estimated costs of the improvements and the utility and operations and maintenance cost savings projected to result from the recommended improvements.

**Project Site(s):** The City of Billings facilities in need of energy and water saving

equipment.

**Total Guaranteed Cost:** The maximum amount that the City of Billings will have to pay for the Work to implement the ECM's identified in the Investment Grade Audit Report and agreed to by the City of Billings.

**Work:** Collectively, the Equipment, professional services, and project construction related to the project.

### **Section 1.2. Investment Grade Audit Report**

Contractor has prepared the Investment Grade Audit Report of the Project Site(s) set forth in **Appendix A (Investment Grade Audit Report)** and dated May 24, 2011, which has been approved and accepted by the City of Billings, as set forth in **Exhibit III (i) (Certificate of Acceptance—Investment Grade Audit Report)**. The audit includes all Energy Conservation Measures (ECM) agreed upon by the parties.

### **Section 1.3. Other Documents**

Acceptance by the City of Billings of the Investment Grade Audit Report is reflected in **Exhibit III (i)**. This Contract and the attached Schedules govern in the event of any inconsistencies between the Investment Grade Audit Report and this Contract.

## **PAYMENTS AND SCHEDULES**

### **ARTICLE 2. PURCHASE AND SALE; CONSIDERATION/PAYMENT; SERVICES AND/OR SUPPLIES; COMMENCEMENT DATE AND TERMS**

#### **Section 2.1. Purchase and Sale**

The City of Billings agrees to purchase Equipment using proceeds from private financing proceeds, as provided for in attached document, **Schedule E (Financing Agreement and Payment Schedule)**. Contractor agrees to provide the Equipment, together with installation, maintenance and other services as provided in **Schedule H (Equipment to be Installed by Contractor)** based upon the terms in **Schedule E (Financing Agreement and Payment Schedule)**.

#### **Section 2.2. Consideration/Payment**

In Consideration for the services to be provided, the City of Billings shall pay the Contractor up to the guaranteed maximum cost, in conformance with **Schedule D (Final Project Cost & Project Cash Flow Analysis)**. Financing payment terms are described in **Schedule E (Financing Agreement and Payment Schedule)**.

#### **Section 2.3. Services and/or Supplies**

Contractor shall provide to the City of Billings the services identified in **Schedule H (Equipment to be Installed by Contractor)** and the services detailed in **Schedule M (Contractor's Maintenance Responsibilities)** and **Schedule F (Compensation to Contractor for Annual Services)**. Equipment to be installed and the quality of materials selected are subject to approval by the City of Billings in the design review

process. Contractor shall supervise and direct the Work and shall be responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Contract. Contractor shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

The Contractor shall furnish the City of Billings with design documents for each portion of the work, in a reasonable timeframe prior to construction, to allow the City of Billings sufficient time to acknowledge receipt of design documents and advise if there is reasonable objection to the scope of work. The Contractor shall not proceed with the designed scope of work if the City of Billings raises an objection within ten (10) business days after receipt of design documents. Design documents and anticipated design reviews for the various Energy Conservation Measures (ECM) categories are defined below:

- Lighting Fixture Upgrades: Equipment submittals and lighting audit spreadsheets.
- Comprehensive Digital Control Additions: Points Lists and Sequences of Operation, 50% DD review and 95% CD review meetings with the Owner and Contractor.
- Variable Speed Drives on HVAC Equipment: 50% DD review and 95% CD review meetings with the Owner and Contractor.
- Comprehensive Commissioning and Balancing of existing systems.

#### **Section 2.4. Commencement Date**

The Commencement Date shall be the first day of the month after the month in which all schedules are in final form and accepted by the City of Billings and the Contractor has delivered a Notice to the City of Billings that it has installed and commenced operating all of the Equipment specified in **Schedule H (Equipment to be Installed by Contractor)** in accordance with **Article 8 (Construction Schedule and Equipment Installation; Approval)**, **Schedule I (Construction and Equipment Installation Schedule)** and **Schedule J (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**, and the City of Billings has inspected and accepted the installation and operation as evidenced by the Certificate of Acceptance, **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**.

Notwithstanding anything to the contrary in this **Article 2 (Purchase and Sale; Commencement Date and Terms, Interim Period)**, the Commencement Date shall not occur and the City of Billings shall not be required to accept the work under this Contract unless and until all Equipment installation for the Project Site(s) is completed by Contractor in accordance with the terms of this Contract. The City of Billings shall have fifteen (15) business days after notification by Contractor to inspect and accept the Equipment. The City of Billings reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract. Contractor shall not be paid in full, including retainage, until after a final walk through and acceptance by the City of Billings is completed and Contractor has satisfied all claims for labor and materials and the Certificate of Acceptance has been signed.

Compensation payments due to Contractor for on-going services and maintenance under this Contract, as set forth in **Schedule F (Compensation to Contractor for Annual Services)**, shall begin no earlier than thirty (30) calendar days after the Commencement Date.

### **Section 2.5. Effective Date/Duration**

This Contract shall take effect immediately upon its execution by all parties and terminate three (3) years from the Commencement Date, unless terminated earlier in accordance with this Contract. Refer to Section 4 for an explanation of payments due to the Contractor if the City of Billings terminates the Contract prior to three (3) years after the Commencement Date. The length of contract shall include the full term of Measurement and Verification time period as set forth in Schedule A (Energy and Cost Savings Guarantee). The period from contract execution until the Commencement Date constitutes the "Interim Period." All energy savings achieved during the Interim Period are to be credited to The City of Billings.

## **ARTICLE 3. SAVINGS GUARANTEE; ANNUAL RECONCILIATION; PAYMENTS TO CONTRACTOR**

### **Section 3.1. Energy and Cost Savings Guarantee**

Contractor has formulated and, subject to the adjustments provided for in **Article 15 (Material Changes)**, guarantees the annual level of energy and water cost savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract, in accordance with the methods of savings measurement and verification set forth in **Schedule C (Savings Measurement and Verification Plan; Methodology to Adjust Baseline)**. The Energy and Cost Savings Guarantee is set forth in annual increments for the term of the Contract, as specified in **Schedule A (Energy and Cost Savings Guarantee)**, and has been structured by Contractor to be sufficient to cover all annual payments required to be made by the City of Billings, as set forth in **Schedule F (Compensation to Contractor for Annual Services)** and **Schedule E (Financing Agreement and Payment Schedule)**, less City of Billings contributed capital (if any) as set forth in **Schedule D (Final Project Cost & Cash Flow Analysis)**.

### **Section 3.2. Annual Review and Reimbursement/Reconciliation**

For each one-year period of the Contract after the Commencement Date, Contractor shall measure and/or calculate energy related cost savings, as specified in **Schedule C (Savings Measurement and Verification Plan; Methodology to Adjust Baseline)**, and provide an Annual Energy Reconciliation report of the cost savings to the City of Billings within sixty (60) calendar days after the end of each one-year period assuming the City of Billings meets the reporting requirements established in Section 20.1 herein.

If Energy and Cost Savings achieved during a guarantee year are less than the Guaranteed Energy and Cost Savings, as defined in **Schedule A (Energy and Cost Savings Guarantee)**, Contractor shall pay the City of Billings an amount equal to the deficiency. Contractor shall remit such payments to the City of Billings within thirty (30) calendar days after the Contractor has submitted the Annual Energy Reconciliation report to the City of Billings.

In the event of any disagreement in the amount payable by the Contractor, the City of Billings shall notify the Contractor in writing of the alleged discrepancy within thirty (30) calendar days. Any deficiency amounts not in dispute shall be paid in accordance with this section.

The Contractor and the City of Billings agree to work in good faith to resolve any disagreement over the calculation of the energy savings. Should the parties be unable to resolve their disagreement as to the energy savings achieved, then either party may provide written notice to the other party and both parties will then agree that an independent auditor will be engaged to provide a binding decision on whether the calculation of saving or deficiencies, as prepared by the Contractor, is fairly stated in accordance with this Contract. If the parties cannot agree upon an auditing firm, then each shall designate a firm, and the two designated firms shall identify a mutually agreeable third firm and such third firm alone shall perform the audit. The independent auditing firm shall include in its report any exceptions determined by its review. Each party agrees to reasonably cooperate with the auditing firm, including without limitation, delivering to such firm any records, documents or information reasonably requested in electronic format, if available, or otherwise. Any payments between the parties that are necessary to resolve any irregularities identified in the review will be made within sixty (60) calendar days after submission of the review to the parties. If the audit is called by the Contractor or the City of Billings, the following structure will be applied to pay for the cost of the audit:

If the independent auditor determines that Contractor's determination of the difference between the annual Energy Savings Guarantee and the amount of the actual energy savings achieved at the Project Site(s) was in error in the City of Billings favor (i.e. contractor showed greater savings than determined by independent audit) by more than 5%, the Contractor shall pay the entire cost of the audit; however, if the Contractor's determination of the Energy Savings Guarantee is not in error or is in error in the Contractor's favor, the City of Billings shall pay for the entire cost of the audit. In any case, the calculation of energy savings shall be changed to reflect the findings of the audit, and the calculations of savings related to the Energy Savings Guarantee will be modified to reflect such.

When the total energy savings in any one year during the guarantee period exceed the Energy and Cost Savings Guarantee set forth in **Schedule A (Energy and Cost Savings Guarantee)** and are in addition to those monies due Contractor for compensation for services, as set forth in **Schedule F (Compensation to Contractor for Annual Services)**, the excess savings shall first be applied to reimburse Contractor for any payment Contractor made to the City of Billings to meet Contractor's guarantee for previous years in which the energy savings fell short of Contractor's Energy and Cost Savings Guarantee under the terms of **Schedule A (Energy and Cost Savings Guarantee)**. In no event shall credit for excess savings be used to satisfy savings guarantees or deficiencies in future years of the Contract.

### **Section 3.3. Contractor Compensation and Fees**

Contractor has structured the Energy and Cost Savings Guarantee, referred to in **Section 3.1** above, to be sufficient to include all annual payments required to be made by the City of Billings in connection with financing/purchasing the Equipment to be

installed by Contractor under this Contract, as set forth in **Schedule E (Financing Agreement and Payment Schedule)**. Actual energy and operations' savings achieved by the City of Billings through the operation of Equipment and through the performance of services by Contractor, plus capital infusion by the City of Billings shall be sufficient to cover all annual fees to be paid by the City of Billings to Contractor for its services, as set forth in, and in accordance with, **Schedules F (Compensation to Contractor for Annual Services)** and **M (Contractor's Maintenance Responsibilities)** and **Schedule D (Final Project Cost & Cash Flow Analysis)**.

#### **Section 3.4. Billing Information Procedure for Annual Services**

Payments due to Contractor for Annual Services are established for each year in accordance with **Schedule F (Compensation to Contractor for Annual Services)**. Annual Services provided by Contractor shall be in accordance with **Schedule F (Compensation to Contractor for Annual Services)**.

#### **Section 3.5. Payment Procedure for Work Completed During the Interim Period**

The application for progress payment shall be made monthly in a form similar to that attached hereto as Exhibit VI (Progress Payment Application) and shall constitute a representation by the Contractor to the City of Billings that the design and construction have progressed to the point indicated, and the Contractor is entitled to payment in the amount requested. All payment terms will be computed from the date of delivery of supplies or services OR receipt of a properly executed invoice, whichever is later. Unless otherwise noted in the solicitation document, the City of Billings is allowed thirty (30) calendar days to pay such invoices.

Pursuant to 15-50-205 and 206, MCA, the Contractor shall withhold the 1% license fee required for public contracts from payments to any subcontractors and inform the Montana Department of Revenue on prescribed forms of the amount of the 1% license fee in the Contractor's account to be allocated and transferred to the subcontractor. The notification to transfer portions of the 1% license fee must be filed within thirty (30) calendar days after each payment is made to subcontractors.

Pursuant to 15-50-206 MCA, the City of Billings shall withhold, in addition to other amounts withheld as provided by law, 1% of all payments due the Contractor and shall transmit that money to the Montana Department of Revenue. Each subcontractor who performs work greater than \$5,000 shall have 1% of its gross receipts withheld by the contractor. The contractor shall notify the Department of Revenue on the department's prescribed forms. All gross receipts tax obligations withheld shall be handled, disbursed, and otherwise processed as dictated by the Department of Revenue.

Payments due to the Contractor under this Section 3 shall be calculated in accordance with the provisions shown in **Schedule D, Table 1: Budget Summary Report**. The Contractor shall provide the City of Billings with an itemized monthly invoice of amount due along with any other evidence reasonably required by the City of Billings to demonstrate amount of required payment. Contractor fixed fees shall be invoiced and substantiated on a percent complete basis. All invoices submitted by the Contractor, less a five percent (5%) retainage (0% if a retention bond is provided by the Contractor), shall be due and payable within thirty (30) calendar days of receipt of the invoice. Five percent (5%) retainage will not be withheld on any Audit Fee or Design Services fees.

Once payments made to the Contractor total ninety-five percent (95%) of the Total Guaranteed Cost, as increased or decreased by approved change orders requested by the City of Billings, the City of Billings shall not make further payments other than the five percent (5%) retainage in accordance with this Section 3, unless a retention bond is provided by the Contractor in which case there shall be 0% retainage. The City of Billings shall have ten (10) business days from the date of receipt of said invoices and all support documentation to notify the Contractor of any irregularity in the billing. The failure of the City of Billings to provide notice of disagreement within said ten (10) business day period shall be deemed agreement with the information or calculations set forth in that particular invoice, except in cases where the City of Billings does not have full information and later learns of additional information that would cause it to disagree with a particular invoice. The City of Billings shall extend every effort to remit payment within thirty (30) calendar days after the later of receipt of said invoice and all supporting documentation reasonably requested. Interest at a rate equal to the lesser of 12% per annum or the maximum rate permitted by law will accrue on all undisputed unpaid balances commencing ten (10) business days after invoice is due. For purposes of this section, business days shall be Monday through Friday excluding holidays as set by the City of Billings calendar. In lieu of a 5% retainage, the Contractor has the option to provide a retention bond at Contractor's expense.

### **Section 3.6. Effective Date of Payment Obligation For Annual Services**

Notwithstanding the above provisions in **Section 3**, the City of Billings is not required to begin any payments to the Contractor for Annual Services under this Contract until all equipment is installed by Contractor in accordance with **Article 8 (Construction Schedule and Equipment Installation; Approval)** and **Schedule J (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)** and accepted by the City of Billings, as evidenced by the signed Certificate of Acceptance, **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**, and until this equipment is fully and properly functioning.

### **Section 3.7. Open Book Pricing**

Open book pricing is required, such that the Contractor shall fully disclose all direct construction costs, including all Subcontract Costs and Equipment Costs. These costs, excluding Contractor fixed fees (fixed fees: Audit Fee, Project Development Cost, Design Services, Construction Administration/Management, Overhead, Fees, and Performance Bonds) will be reconciled to the City of Billings upon formal completion in the event of any construction cost savings. Contractor will maintain cost accounting records on work performed, reflecting the direct construction costs for all ECM projects as identified for construction or installation under this contract.

The contractor and all subcontractors at any level or tier of the work shall give preference to the employment of bona fide Montana residents employing at least 50% in the performance of the work (18-2-401 and 18-2-403, MCA) and shall pay the standard prevailing rate of wages, including fringe benefits of health and welfare and pension contributions and travel allowance provisions in effect and applicable to the county or locality in which the work is being performed (18-2-403, MCA). Contractor shall follow state law concerning selection of any subcontractors. Contractor shall afford the City of Billings access to these records and all related project records and preserve all project records for at least three (3) years after final payment under this Contract. The

Contractor guarantees that the aggregate cost of implementing all ECM's will not exceed the contract sum. However, any one of the individual construction costs identified in **Schedule D (Final Project Cost & Cash Flow Analysis)** may exceed the identified budget.

### **Section 3.8. Construction Savings and Owner Directed Change Orders**

Upon the execution of a Certificate of Acceptance – Installed Equipment (Exhibit III (ii)), if the Total Project Cost is less than the Total Guaranteed Cost, then the difference between the actual and estimated costs as reconciled in accordance with Section 3.7 herein, may at the City of Billings discretion, be used to implement more projects per the terms of this Contract, provided that the difference is sufficient to fund additional projects. The Contractor shall apply the fee structure to those additional projects per **Schedule D, Table 1: Budget Summary Report**. For purposes of those additional projects, a new **Certificate of Acceptance – Installed Equipment** shall be executed, which date shall be the Commencement Date, for purposes of this Contract, as to those projects only. Otherwise the difference between the actual and estimated costs will be identified as project savings that can be used to offset other ECM project costs such as change orders. If there is a net project savings from all ECM projects installed, the net savings belongs to the City of Billings to be applied according to the terms of the Financing requirements for the total project.

In the event the City of Billings issues change orders that increase costs, the amount of those cost increases shall be identified by the Contractor and accounted for in a separate budget beyond the original Total Guaranteed Cost. It will be the City of Billings responsibility to pay these costs as the Project is being constructed. The Contractor shall use the mark-up structure indicated in **Schedule D, Table 1: Budget Summary Report**, as the original basis for the pricing of change orders. However, if either party believes that the scale and /or scope of the change order is not properly reflected in the pricing in **Schedule D**, then the parties will negotiate a mutually agreed upon fee for the specific change order and record it in writing, which writing may be satisfied by authorized persons from both parties signing the change order.

## **ARTICLE 4. FISCAL FUNDING**

### **Section 4.1. Non-appropriation of Funds**

The City of Billings is dependent upon state and federal appropriations for its funding. If state or federal government funds are not appropriated or otherwise made available to support continued performance of this Contract in subsequent fiscal periods, the City of Billings may terminate this contract. The City of Billings shall provide Contractor the date the City of Billings termination shall take effect. The City of Billings shall not be liable to the Contractor for any Contract payment that would have been payable had the contract not been terminated under this provision. The City of Billings shall be liable to the Contractor only for the Contract payment, or prorated portion of that payment, owed to the Contractor up to the date the City of Billings termination takes effect. The City of Billings shall be responsible for any contract charges incurred and demobilization charges caused due to contract termination. This is the Contractor's sole remedy.

## **Section 4.2. Non-substitution**

In the event of a termination of this contract due to the non-appropriation of funds or in the event this Contract is terminated by Contractor due to a default by the City of Billings, the City of Billings agrees, to the extent permitted by state law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by Contractor from another Energy Service Company for a period of three-hundred sixty five (365) calendar days following such default by the City of Billings, or termination of this Contract due to non-appropriations.

## **AUDIT AND CONSTRUCTION PHASE**

### **ARTICLE 5. ENERGY USAGE RECORDS AND DATA**

The City of Billings has furnished, and shall continue to furnish (or authorize its energy suppliers to furnish) during the Term of this Contract, to Contractor or its designee, upon its request, all of its records and complete data concerning energy and water usage and related maintenance for the Project Site(s).

### **ARTICLE 6. LOCATION AND ACCESS**

Contractor acknowledges that there exists sufficient space on the Project Site(s) for the installation and operation of the Equipment. Contractor is responsible for all aspects of protecting the equipment during construction. The City of Billings shall take reasonable steps to protect the Equipment from harm, theft, and misuse after final acceptance has been obtained. The City of Billings shall provide access to the Project Site(s) for Contractor to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by Contractor and acceptable to the City of Billings. The City of Billings shall grant Contractor immediate access to make emergency repairs or corrections as Contractor may, in its discretion, determine are needed. Contractor shall immediately notify the City of Billings when emergency action is taken and follow up with written notice within three (3) business days, specifying the action taken, the reasons for the action, and the impact upon the Project Site(s), if any.

### **ARTICLE 7. PERMITS AND APPROVALS; COORDINATION**

#### **Section 7.1. Permits and Approvals**

The City of Billings shall use its best efforts to assist Contractor in obtaining all necessary permits and other approvals for installation of the Equipment. However, the City of Billings is not responsible for payment of any permit or other approval fees. The equipment, and the operation of the equipment by Contractor, shall conform to all federal, state, and local code requirements. Contractor shall furnish to the City of Billings copies of each permit and license required to perform the work before Contractor commences the portion of the work requiring the permit or license.

The Contractor has excluded all scope and cost associated with hazardous abatement. As such, any cost associated with permitting hazardous abatement work has also been

excluded.

## **Section 7.2. Coordination During Installation**

The Contractor shall coordinate the activities of its equipment installers with those of the City of Billings, its employees, and agents. Contractor shall not commit or permit any act that will interfere with the performance of business activities conducted by the City of Billings or its employees, without prior written approval of the City of Billings.

## **ARTICLE 8. CONSTRUCTION SCHEDULE AND EQUIPMENT INSTALLATION; AWARD OF SUBCONTRACTS; SYSTEMS STARTUP APPROVAL**

### **Section 8.1. Construction Schedule; Equipment Installation**

Construction and Equipment installation shall proceed in accordance with the construction schedule approved by the City of Billings and attached as **Schedule I (Construction and Equipment Installation Schedule)**.

### **Section 8.2. Award of Subcontracts**

The Contractor shall furnish the City of Billings with the names of subcontractors and suppliers proposed for each principle portion of the work at least ten (10) business days prior to subcontract award. The City of Billings will promptly acknowledge receipt of this subcontractor and supplier plan and advise if there is reasonable objection to any listed person or entity. The Contractor shall not enter into an agreement with any subcontractor or supplier to which the City of Billings raises a timely objection. Should the disqualification of a subcontractor by the City of Billings add to the Project Cost, the Contractor reserves the right to increase the Contract Sum proportionally.

The Contractor and all subcontractors must comply with all Montana Department of Labor and Industry requirements, regulations, rules and statutes.

### **Section 8.3. Systems Startup and Equipment Commissioning Approval**

Contractor shall conduct a thorough and systematic performance test of each element and the total system of the installed Equipment in accordance with **Schedule J (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)** and prior to acceptance of the project by the City of Billings, as specified in **Exhibit III (i) (Certificate of Acceptance-Technical Energy Audit Report)**. Testing must be designed to determine whether the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract and whether modified building systems, subsystems, and components are functioning properly. Contractor shall notify the City of Billings of the scheduled test(s) and the City of Billings and/or its designees have the right to be present at any tests conducted by Contractor and/or manufacturers of the Equipment. Contractor is responsible for correcting and/or adjusting any deficiencies in systems and Equipment operations observed during system commissioning procedures, as specified in **Schedule J (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**. Contractor also is responsible for correcting and/or adjusting any deficiencies in Equipment operation observed during system testing procedures. Prior to the City of Billings' acceptance of the Equipment, Contractor also shall provide the City of Billings with reasonable

documentation that the Equipment installed is the Equipment specified in **Schedule H (Equipment to be Installed by Contractor)**. This documentation may be in the form of standard equipment submittals or equipment O & M manuals.

#### **Section 8.4. Airport Security Regulations**

The Contractor and all Sub-Contractors that will be performing work at the Billings Logan International Airport, especially in the secured areas of the Airport, must comply with all Airport Security Regulations including, but not limited to:

Filling out proper Forms; providing a list of all employees who will be working on the Project; ensuring that employees submit to a Criminal History Records Background Check and Security Threat Assessment; obtaining and paying for Personnel Security identification badges.

Contractor should contact the Airport Police office at the Airport for additional information regarding the security requirements that will impact the Project. The Airport Police office is located in Room 210 of the Airport Terminal building or may be reached by phone at 406-657-8498.

#### **ARTICLE 9. EQUIPMENT WARRANTIES**

The Contractor warrants to the Owner that materials and equipment furnished under the Contract will be new and of good quality unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract.

The Contractor warrants and guarantees all work, workmanship, and materials for the full warranty period. The warranty period shall be defined as started upon documented approval of Substantial Completion for each Energy Conservation Measure (ECM) and continue for one (1) calendar year.

Substantial Completion means the stage in the progress of an ECM, or portion thereof, where the ECM is sufficiently complete in accordance with the Contract Documents so that the City of Billings can take beneficial use of the ECM for its intended purpose. Substantial Completion does not occur until the Equipment or system has been commissioned, accepted, and the "Substantial Completion" form has been fully executed.

After the warranty period, as said warranty pertains to each individual ECM, Contractor is not responsible for performing maintenance or repairs or making manufacturer warranty claims relating to the Equipment, except as provided in **Schedule M (Contractor's Maintenance Responsibilities)**.

Manufacturer and product warranties and guarantees, as provided by the manufacturer or as specified in the Contract Documents, are in addition to the Contractor's warranty.

Contractor shall assign to the City of Billings all available manufacturer's warranties relating to the Equipment and deliver the written warranties to the City of Billings for attachment to this Contract as **Exhibit IV (Equipment Warranties)**. Contractor shall

pursue rights and remedies against the manufacturers under the warranties in the event of Equipment malfunction, improper or defective function, or defects in parts, workmanship, or performance. Contractor shall, during the warranty period, notify the City of Billings whenever defects in Equipment parts or performance occurs that give rise to rights and remedies and when those rights and remedies are exercised by Contractor. During this period, Contractor shall be liable to the City of Billings for the cost of any risk of damage or damage to the Equipment and its performance, including damage to property and equipment of the City of Billings or the Project Site(s), due to Contractor's failure to exercise its warranty rights.

All warranties, to the extent transferable, shall be transferable and extend to the City of Billings at Substantial Completion. Warranties must specify that only new, not reconditioned parts will be installed when repair is necessitated by malfunction. All extended warranties must be addressed as the property of the City of Billings and appropriately documented and titled.

## **ARTICLE 10. STANDARDS OF COMFORT**

Contractor shall maintain and operate the Equipment in a manner that provides the standards of heating, cooling, ventilation, hot water supply, and lighting quality and levels described in **Schedule K (Standards of Comfort)**. During the term of this Contract, Contractor and the City of Billings shall maintain, according to **Schedule M (Contractor's Maintenance Responsibilities)** and **Schedule N (the City of Billings Maintenance Responsibilities)**, and operate the Equipment in a manner that provides the standards of comfort and levels of operation described in **Schedule K (Standards of Comfort)**.

## **ARTICLE 11. ENVIRONMENTAL REQUIREMENTS**

### **Section 11.1. Excluded Material and Activities**

In connection with the installation and/or service or maintenance of Equipment at the Project Site(s), Contractor is not responsible for any work relating to: (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment of asbestos; (ii) fungus, including any type or form of fungi, including mold or mildew, and myotoxins, spores, scents or by-products produced or released by fungi; (iii) pre-existing incomplete or damaged work or systems or code violations discovered during, or prior to, the work under this Contract; or (iv) pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section below (collectively "Hazardous Materials"), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment of such materials. The materials and activities listed in the foregoing sentence are referred to as "Excluded Materials and Activities." If performance of work involves any Excluded Materials and Activities, the City of Billings shall perform, or arrange for the performance of, such work and shall bear the sole risk and responsibility for such work. If Contractor discovers Hazardous or Excluded Materials, Contractor shall immediately cease work, remove all Contractor personnel and subcontractors from the site, and notify the City of Billings. The City of Billings is responsible for handling such materials at its expense. Contractor shall undertake no further work on the area of the Project site affected by such materials, except as authorized by the City of Billings in writing. Any such discovery or remediation by the City of Billings does not constitute a default by the City

of Billings. In the event of such stoppage of work by Contractor, the time for Completion of Work is automatically extended by the amount of time of the work stoppage, and any additional costs incurred by Contractor in performing the work under this Contract as a result will be negotiated with the City of Billings and added by Change Order.

Contractor is responsible for any hazardous or other materials, including, without limitation, those listed in this section that it brings to the Project Site(s).

### **Section 11.2. Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps**

Contractor shall enter into an agreement with an approved PCB ballast disposal company that will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services for PCB ballasts. All capacitors and asphalt potting compound materials removed from the Project Site(s) containing PCB's must be incinerated in a federally approved facility. After proper disposal, a Certificate of Destruction must be provided by the approved facility to the City of Billings. Contractor is responsible for proper and legal management of all the City of Billings PCB ballasts removed as a result of installation of the Equipment until PCB ballasts are loaded onto the approved PCB ballast disposal company's vehicle for transportation.

Contractor shall enter into an agreement with an approved mercury lamp disposal company that will provide approved containers, materials required for labeling, transportation, and recycling or incineration, in accordance with EPA requirements, and a copy of the manifest.

The City of Billings agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Project Site(s).

## **ARTICLE 12. TRAINING BY CONTRACTOR**

Contractor shall conduct the training program described in **Schedule L (Contractor's Training Responsibilities)**. The training specified in **Schedule L (Contractor's Training Responsibilities)** must be completed prior to acceptance of the Equipment installation by the City of Billings, unless noted differently in **Schedule L (Contractor's Training Responsibilities)**. Contractor shall provide ongoing training as set forth in **Schedule L**.

## **POST-CONSTRUCTION PHASE**

## **ARTICLE 13. EQUIPMENT SERVICE**

### **Section 13.1. Actions by Contractor**

Contractor shall provide all service, repairs, and adjustments to the Equipment installed under this Contract, pursuant to **Schedule M (Contractor's Maintenance Responsibilities)**. The City of Billings shall incur cost for Equipment service, repairs, and adjustments, as set forth in **Schedule N (City of Billings Maintenance Responsibilities)** and as set forth in **Schedule F (Compensation to Contractor for Annual Services)**. However, if the Contractor demonstrates that the need for maintenance or repairs principally arises due to the negligence or willful misconduct of

the City of Billings or any employee or other agent of the City of Billings, Contractor may charge the City of Billings for the cost of the maintenance or repair if the cost is not covered by any warranty or insurance.

### **Section 13.2. Malfunctions and Emergencies**

The City of Billings shall use its best efforts to notify Contractor or its designated subcontractors within 24 hours after the City of Billings' actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or in any preexisting energy related equipment that might materially impact guaranteed energy savings; (ii) any interruption or alteration to the energy supply to the Project Site(s); or (iii) any alteration or modification in any energy-related equipment or its operation.

When the City of Billings exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration, it is not liable to Contractor for additional costs for failing to correctly identify such conditions as having a material impact upon the guaranteed energy savings, however the Contractor shall account for these conditions in the Measurement and Verification analysis. The City of Billings shall notify Contractor within twenty-four (24) hours upon learning of any emergency condition affecting the Equipment. Contractor shall respond, or cause its designee(s) to respond, within 48 hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by the City of Billings must be followed within five (5) business days by written notice or email to Contractor from the City of Billings. If the City of Billings unreasonably delays in notifying Contractor of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, the City of Billings is liable to Contractor for its loss, due to the delay, associated with the guaranteed savings under this Contract for the particular time period, if Contractor demonstrates a direct causal connection between the delay and the loss.

Contractor shall provide a written record of all service work performed. This record must state the reason for the service, a description of the problem, and the corrective action performed.

### **Section 13.3. Actions by the City of Billings**

The City of Billings may not move, remove, modify, alter, or change the Equipment or any part of the Equipment without prior written approval of Contractor, except as stated in **Schedule N (The City of Billings Maintenance Responsibilities)**. The City of Billings may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify Contractor before taking action. If there is an emergency, the City of Billings shall take reasonable steps to protect the Equipment from damage or injury and shall follow any instructions for emergency action provided in advance by Contractor. The City of Billings shall maintain the Project Site(s) in good repair, and protect and preserve all portions that may affect operation or maintenance of the Equipment.

## **ARTICLE 14. MODIFICATION, UPGRADE OR ALTERATION OF THE EQUIPMENT**

### **Section 14.1. Modification of Equipment**

During the Term of this Contract, the City of Billings may not, without prior written

consent of Contractor, install any accessory Equipment or device on any of the Equipment if the addition will change or impair the originally intended functions, value, or use of the Equipment.

#### **Section 14.2. Upgrade or Alteration of Equipment**

Contractor may, subject to the City of Billings prior written approval, which approval may not unreasonably be withheld, change the Equipment, revise any procedures for operation of the Equipment, or implement other energy saving actions in the Project Site(s), if: (i) Contractor complies with the standards of comfort and services specified in **Schedule K (Standard of Comfort)**; (ii) modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable Contractor to achieve the guaranteed energy and cost savings at the Project Site(s) and; (iii) Contractor bears any cost incurred relative to such modifications, additions, or replacement of the Equipment, or operational changes or new procedures.

All modifications, additions, or replacements of the Equipment, or revisions to operating or other procedures, must be described by Contractor in a supplemental Schedule(s) provided to the City of Billings for approval, which may not be unreasonably withheld, and any replacement Equipment must, unless otherwise agreed, be new and have equal or better potential to reduce energy consumption at the Project Site(s) than the Equipment being replaced. Contractor may update any software to be used in connection with the Equipment, in accordance with **Section 17.1 (Ownership of Certain Proprietary Property Rights)** and **Schedule M (Contractor's Maintenance Responsibilities)**. All replacements of, and alterations or additions to, the Equipment become part of the Equipment described in **Schedule H (Equipment to be Installed by Contractor)** and are covered by the terms of **Article 8 (Construction Schedule and Equipment Installation; Systems Startup Approval)**.

### **ARTICLE 15. MATERIAL CHANGES**

#### **Section 15.1. Material Change Defined**

A Material Change includes any change in, or to, the Project Site(s), whether structural, operational, or otherwise in nature that reasonably could be expected, in the judgment of the City of Billings, to increase or decrease annual energy consumption, in accordance with **Schedule B (Baseline Energy Consumption)** and **Schedule C (Savings Measurement and Verification Plan; Methodology to Adjust Baseline)** by at least 3%, after adjustments for climatic variations. Actions by the City of Billings that may result in a Material Change include, but are not limited to, the following:

- (i) Manner of use of the Project Site(s) by the City of Billings;
- (ii) Hours of operation for the Project Site(s), or for any equipment or energy using systems operating at the Project Site(s);
- (iii) Permanent changes in the comfort and service parameters specified in **Schedule K (Standards of Comfort)**;
- (iv) Occupancy of the Project Site(s);
- (v) Structure of the Project Site(s);
- (vi) Types and quantities of equipment used at the Project Site(s);
- (vii) Modification, renovation or construction at the Project Site(s);
- (viii) The City of Billings' failure to maintain and repair the Equipment in accordance

with **Schedule N (The City of Billings Maintenance Responsibilities)**;

- (ix) Any other conditions other than climate affecting energy use at the Project Site(s), including, but not limited to, replacement, addition, or removal of energy and water consuming devices, whether plug in or fixed assets;
- (x) Casualty or condemnation of the Project Site(s) or Equipment;
- (xi) Changes in utility provider or utility rate classification;
- (xii) Any other conditions other than climate affecting energy or water use at the Project Site(s); or
- (xiii) Modifications, alterations, or overrides of the energy management system schedules or hours of operation, set back/start up, or holiday schedules.

### **Section 15.2. Reported Material Changes; Notice by the City of Billings**

The City of Billings shall use its best efforts to deliver to Contractor a written notice describing all actual or proposed Material Changes in the Project Site(s) or in the operations of the Project Site(s) at least thirty (30) calendar days before any actual or proposed Material Change is implemented, or as soon as practicable after an emergency or other unplanned event. Notice to Contractor of Material Changes that result because of an emergency or other situation that precludes advance notice is sufficient if given by the City of Billings within 48 hours after the City of Billings knew or discovered that the event constituting the Material Change occurred.

### **Section 15.3. Other Adjustments**

The City of Billings shall alert Contractor of known Materials Changes. Contractor shall work with the City of Billings to investigate, identify, and correct any changes that prevent the guaranteed savings from being realized. Based on the investigation, Contractor and the City of Billings shall determine what, if any, adjustments to the baseline are to be made in accordance with **Schedule C (Savings Measurement and Verification Plan; Methodology to Adjust Baseline)** and **Schedule B (Baseline Energy Consumption)**. Any disputes between the City of Billings and Contractor concerning any such adjustment shall be resolved in accordance with **Schedule Q (Alternative Dispute Resolution Procedures)**.

When the affect on energy savings cannot be accurately determined due to changes that may be Material Changes, Projected Energy Savings for that portion of the Projected Sites(s) undergoing change will be used to determine the actual savings until the effect of the change can be determined by the Contractor unless there is at least two (2) years of historical energy savings available to use as a basis for the Energy Savings prior to the Material Change. Then the historical information will be used instead of the Projected Energy Savings.

If the City of Billings elects not to use the Projected Energy Savings or historical energy savings that applies to the portion of the Project Site(s) adversely affected by the Material Change, the Contractor has the right to charge for work required to assess the effect on energy savings for any Material Changes, including but not limited to the conditions identified in Section 15.1, that requires more than eight (8) total hours per year to be spent in calculating their effect on the energy savings. Such hours will be billed at the Contractors then current engineering rates. Before initiating such work, the Contractor will notify the City of Billings in writing of the intent and relevant scope of the

work.

The City of Billings, within forty-five (45) calendar days thereafter, shall notify the Contractor in writing with permission to proceed at current rates or, alternatively and at no charge, stipulating that the Projected Energy Savings or the historical energy savings for the portion of the Project Site(s) in question shall be used as the actual achieved savings for the purpose of meeting the Energy Savings Guarantee. If the Contractor does not receive written notice within the required forty-five (45) calendar days, the Projected Energy Savings or historical energy savings for the portion of the Project Sites(s) in question from the date the Material Change begins will be used in the calculation of energy savings until such time that the City of Billings approves the work, as long as the scope of work has not changed. Such work is in addition to the work performed under the Total Guaranteed Cost.

If required notice of Material Changes is not given, or if the City of Billings fails to supply the Contractor with copies of its applicable monthly utility bills and/or data within the timeframe established, energy savings calculated for the period will be equal to the Projected Energy Savings or historical energy savings for the period at the portion of the Project Site(s) affected by such oversight. If information or utility bills for the period in question are supplied at a later date other than is permitted, the energy savings calculated for the period will be modified only if such calculated energy savings for the period exceeds the Projected Energy Savings or historical energy savings for that period of time.

## **ARTICLE 16. PERFORMANCE BY CONTRACTOR**

### **Section 16.1. Corrective Action; Accuracy of the Services**

Contractor shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and in conformance with the standards in **Schedule K (Standards of Comfort)** and the construction schedule specified in **Schedule I (Construction and Equipment Installation Schedule)**. Contractor shall repair and restore to its original condition any area of damage caused by Contractor's performance under this Contract. The City of Billings may review the work performed by Contractor and direct Contractor to take corrective action reasonably necessary to remedy damage caused by Contractor if the structural integrity of the Project Site(s) or its operating system is or will be harmed. Contractor shall bear all costs associated with such corrective action.

Contractor is responsible for the professional and technical accuracy of all services performed, whether by Contractor or its subcontractors or others on its behalf, throughout the term of this Contract.

### **Section 16.2. Annual Reporting Requirements; Annual ENERGY STAR Rating**

Within ninety (90) days after the end of each year during the guarantee period, as specified in **Schedule A (Energy and Water Cost Savings Guarantee)**, Contractor shall complete and submit to the City of Billings the data required in **Schedule P (Annual Reporting Requirements)**. Contractor shall provide an ENERGY STAR rating for each eligible facility for each year of the guarantee period, if applicable.

## **ADMINISTRATION**

### **ARTICLE 17. OWNERSHIP OF CERTAIN PROPRIETARY PROPERTY RIGHTS; EXISTING EQUIPMENT**

#### **Section 17.1. Ownership of Certain Proprietary Property Rights**

The City of Billings does not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property used in connection with the Equipment. Contractor grants to the City of Billings a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the City of Billings to continue to operate, maintain, and repair the Equipment in a manner that will yield guaranteed utility consumption reductions for the specified contract term. Contractor shall provide new versions of software or other enhancements if new versions or enhancements are necessary to achieve the guaranteed utility consumption reductions.

#### **Section 17.2. Ownership of Existing Equipment**

Equipment and materials existing at the Project Site(s) at the time of execution of this Contract remain the property of the City of Billings, even if replaced or operation is made unnecessary by work performed by Contractor pursuant to this Contract. At least fourteen (14) calendar days prior to replacement, Contractor shall provide the City of Billings with written advance notice of all equipment and materials to be replaced at the Project Site(s). Within ten (10) calendar days after receipt of the notice, the City of Billings shall identify in writing to Contractor the equipment and materials that are not to be disposed of off-site by Contractor, and Contractor may not dispose of any such equipment or materials off site. The City of Billings shall designate the location and manner of storage for any equipment and materials that are to be stored on-site. Contractor is only responsible for disposal, in accordance with all applicable laws and regulations, of all equipment and materials designated by the City of Billings as disposable off-site.

### **ARTICLE 18. INSURANCE AND CLAIMS**

Contractor shall maintain through the term of this Contract and for two (2) years after termination or expiration of this Contract the insurance coverage, outlined below, and all such other insurance as required by applicable law. Within ten (10) calendar days of execution of this Contract, Contractor shall provide evidence of coverage to the City of Billings and shall update such evidence on an annual basis via a Certificate of Insurance or endorsement, as required by the City of Billings.

Workers' Compensation/Employers Liability: Workers' Compensation/Employers Liability for states in which Contractor is not a qualified self-insured. Limits as follows:

Workers' Compensation - Statutory

Employers Liability:

- Bodily Injury by Accident \$1,000,000 Each Accident

- Bodily Injury by Disease \$1,000,000 Each Employee
- Bodily Injury by disease \$1,000,000 policy limit

Commercial General Liability: Commercial General Liability insurance with limits of:

- \$2,000,000 Per Occurrence for Bodily Injury and Property Damage
- \$4,000,000 General Aggregate - Other Than Products/Completed Operations
- \$4,000,000 Products/Completed Operations Aggregate
- \$300,000 Damage to Rented Premises (Each Occurrence)
- \$ 10,000 Medical Expenses (Any One Person)
- \$2,000,000 Personal and ADV Injury

Coverage is to be written on an Occurrence form. Coverage is to be issued as on ISO form CG 2010 (10/01), without endorsements that limit the policy terms with respect to: (i) the definition of an Insured Contract, (ii) provisions for severability of interest, (iii) explosion, collapse, underground hazard.

Auto Liability: Auto Liability insurance for owned, hired, and non-owned vehicles with limits of \$1,000,000 per accident Coverage is to be written on an Occurrence form.

Professional Liability: Professional Liability insurance with limits of:

- \$2,000,000 Per Occurrence
- \$2,000,000 Aggregate

Coverage is to be written on a Claims-made form.

Excess Liability: Excess Liability insurance. Limits as follows:

- \$5,000,000 Each Occurrence
- \$5,000,000 Aggregate

Coverage is to be written on an Occurrence form. Coverage terms and limits to apply in excess of the per occurrence and/or aggregate limits provided for Commercial General Liability, Auto Liability and Professional Liability. Coverage terms and limits to also apply in excess of those required for Employers Liability.

Endorsements: Policy Endorsements.

All insurance specified herein, shall contain waivers of subrogation rights against the City of Billings and its agents, officers, directors and employees for recovery of damages to the extent such damages are covered by the required policies.

The insurance provided for above shall:

- For Commercial General Liability, Professional Liability, Excess Liability and Auto Liability, include the City of Billings as a primary additional insured with respect to work performed and services provided under this Contract,
- Provide that the insurance is primary coverage with respect to all insured and shall not be considered contributory insurance with any insurance policies of the City of Billings, and
- Require thirty (30) calendar days written notice to the City of Billings, by first class mail, prior to any cancellation of, or refusal to renew the policy. Contractor shall provide thirty (30) calendar days written notice to the City of Billings of a material change to the policy.

Good Standing: Any insurance, or additional insurance required under this Article, shall be covered by an insurance policy with an insurer licensed and in good standing to do business in the state of Montana.

Waiver: Contractor waives all rights against the City of Billings and its agents, agencies, officers, directors and employees for recovery of damages to the extent these damages are covered by the required policies. Policies may contain deductibles but such deductibles shall not be reduced from any damages due to City of Billings.

No Representation: By requiring insurance herein, the City of Billings does not represent that coverage and limits will necessarily be adequate to protect the Contractor and such coverage and limits shall not be deemed a limitation on Contractor's indemnity liabilities under the Contract.

Contractor Responsibility: To the extent where such damage or injury occurs as a result of Contractor's negligent acts or omissions under this Contract, Contractor shall be responsible for (i) any damage to the Equipment and (ii) any bodily injury, personal injury and property damage, but only if such damage is not covered by insurance required to be maintained by Contractor.

Hold Harmless: Contractor agrees to defend, indemnify, and hold the City of Billings and its officers, agents, and employees ("Indemnities") harmless from any and all claims, demands, losses, liabilities, damages, and court awards (including costs, expenses, and attorney fees) to or by third parties arising from, resulting from, or connected with the services and work performed and equipment installed under this Contract by Contractor, its agents, employees, invitees, guests and subcontractors and sub-consultants of any tier, subject to the limitations provided below.

Contractor's duty to indemnify Indemnities shall not apply to liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the City of Billings, its agents or employees or invitees, or guests, or subcontractors or sub-consultants of any tier.

Contractor specifically and expressly waives any immunity that may be granted it under any worker's compensation act. Further, this indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable to or for any third party under worker's compensation acts, disability benefits acts, or other employee benefits acts; PROVIDED Contractor's waiver of immunity by the provisions of this paragraph extends only to claims against Contractor by Indemnities, it does not include, or extend to, any claims by Contractor's employees directly against Contractor. This Section shall survive termination of this Contract.

## **Section 18.1. Claims, Disputes and Controversies**

**18.1.1.** Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extensions of time or other relief with respect to the terms of the Contract. The term "Claim" includes all disputes, controversies, and matters in question between the City of Billings and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice to the other party. The responsibility to substantiate Claims shall rest solely with the party making the Claim.

**18.1.1.1.** All Claims must contain sufficient justification and substantiation or they may be rejected without consideration by the other party with no additional impact or consequence to the Contract.

**18.1.1.2.** If additional compensation is claimed, the exact amount claimed and a breakdown of that amount into the following categories shall be provided with each and every claim:

**18.1.1.2.1.** Direct costs;

**18.1.1.2.2.** Indirect costs.

**18.1.1.3.** If additional time is claimed the following shall be provided with each and every claim:

**18.1.1.3.1.** The specific number of days and specific dates for which the additional time is sought;

**18.1.1.3.2.** The specific reasons, causes, and/or effects whereby the Contractor believes that additional time should be granted; and,

**18.1.1.3.3.** The Contractor shall provide analyses, documentation, and justification of its claim for additional time.

### **18.1.2. Continuing Contract Performance**

Pending final resolution of a Claim except as otherwise agreed in writing or as provided in this Contract, the Contractor shall proceed diligently with performance of the Contract and the City of Billings shall continue to make payments in accordance with the Contract on portions of the Work not involved in a Claim.

## **Section 18.2. Resolution of Claims, Disputes and Controversies**

**18.2.1.** Upon receipt of a Claim against the Contractor or at any time thereafter, the City of Billings may, but is not obligated to, notify the surety of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the City of Billings may, but is not obligated to, notify

the surety and request the surety's assistance in resolving the controversy.

- 18.2.2.** A Claim subject to or related to liens or bonds shall be governed by applicable law regarding notices, filing deadlines, and resolution of such Claim prior to any resolution of such Claim by the City of Billings, by mediation, or by arbitration, except for claims made by the City of Billings against the Contractor's bonds.

**Section 18.3. Mediation**

- 18.3.1.** Any Claim arising out of or related to the Contract, except Claims waived elsewhere in the Contract, shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

- 18.3.2.** The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise in writing, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect and/or those rules specified in the contract documents or separately agreed upon between the parties. Construction Industry Mediation Rule M-2 (filing with AAA) does not apply, unless the parties mutually agree in writing to use AAA, and no filing of a request for mediation shall be made to AAA by either party until such mutual agreement has been made. Unless the parties agree to use AAA, the parties shall mutually agree upon a mediator who shall then take the place of AAA in the Construction Industry Mediation Rules. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association, if the parties have agreed to use AAA. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of sixty (60) calendar days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

- 18.3.3.** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon in writing. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

**Section 18.4. Arbitration**

- 18.4.1.** Any controversy or Claim arising out of or related to this Contract or the breach thereof, that is not first resolved by mediation, shall be settled by arbitration in accordance with the Montana Uniform Arbitration Act (MUAA). To the extent it does not conflict with the MUAA, the Construction Industry Arbitration Rules of the American Arbitration Association shall apply except as modified herein, or unless the parties mutually agree otherwise in writing. The parties to the arbitration shall

bear their own costs and expenses for participating in the arbitration. Costs of the Arbitration panel shall be borne equally between the parties except those costs awarded by the Arbitration panel (including costs for the arbitration itself).

- 18.4.2.** Prior to the arbitration hearing, all parties to the arbitration may conduct discovery in conformance with the provisions of the Montana Rules of Civil Procedure. In addition to any other remedies available, the arbitration panel may award actual damages incurred if a party fails to provide full disclosure under any discovery request. If a party claims a right of information privilege protected by law, the party must submit that claim to the arbitration panel for a ruling, before failing to provide information requested under discovery or the arbitration panel may award actual damages.
- 18.4.3.** The venue for all arbitration proceedings required by this Contract shall be the seat of the county in which the work occurs or the District Court of the Montana Thirteenth Judicial District, Billings, Yellowstone County, Montana, as determined solely by the City of Billings. Arbitration shall be conducted by a panel comprised of three members with one selected by the Contractor, one selected by the City of Billings, and one selected by mutual agreement of the City of Billings and the Contractor.
- 18.4.4.** Any Claim arising out of or related to the Contract, except Claims waived elsewhere in the Contract, shall be subject to arbitration if a demand for arbitration is properly made after the mediation process has been completed without resolving the claim.
- 18.4.5.** Construction Industry Arbitration Rule R-3 (filing with AAA) does not apply, unless the parties mutually agree in writing to use AAA, and no filing of a request for arbitration shall be made to AAA by either party until such mutual agreement has been made. Unless the parties agree to use AAA, the parties shall mutually agree upon an arbitrator or arbitrators who shall then take the place of AAA in the Construction Industry Arbitration Rules. The demand for arbitration shall be filed in writing with the other party to the Contract and a copy shall be filed with the City of Billings.
- 18.4.6.** In no event shall a demand for arbitration be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations.
- 18.4.7.** Pending final resolution of a Claim for which a request for arbitration has been made, unless otherwise mutually agreed in writing, the Contractor shall proceed diligently with performance of the Contract and the City of Billings shall continue to make payments in accordance with the Contract on Work or amounts not in dispute.
- 18.4.8.** **Limitation on Consolidation or Joinder.** No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the City of Billings and Contractor, a separate contractor of the City of Billings, and other persons substantially involved in a common question of fact or

law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the City of Billings, Contractor or a separate contractor of the City of Billings, whose interest or responsibility is insubstantial, shall be included as an original third party or additional third party to an arbitration. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

**18.4.9. Claims and Timely Assertion of Claims.** The party filing a demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

**18.4.10. Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. The parties agree that the costs of the arbitrator(s)' compensation and expenses shall be borne equally. The parties further agree that the arbitrator(s) shall have authority to award to either party some or all of the costs and expenses involved, including attorney's fees. The parties agree that the costs of the arbitrator(s)' compensation and expenses shall be borne equally by the parties, except that the arbitrator(s) shall have authority to award to either party some or all of that parties' costs and expenses involved, including arbitrator costs and attorney's fees.

## **ARTICLE 19. CONDITIONS BEYOND CONTROL OF THE PARTIES**

### **Section 19.1. Force Majeure**

In no event shall the City of Billings be liable to the Contractor, any subcontractor, any supplier, Contractor's surety, or any other person or organization, for damages or costs arising out of or resulting from: (1) delays caused by or within the control of the Contractor which include but are not limited to labor issues or labor strikes on the Project, federal, state, or local jurisdiction enforcement actions related directly to the Contractor's Work (e.g. safety or code violations, etc.); or, (2) delays beyond the control of both parties including but not limited to fires, floods, earthquakes, abnormal weather conditions, acts of God, nationwide material shortages, actions or inaction by utility owners, emergency declarations by federal, state, or local officials enacted in the immediate vicinity of the project, or (3) delays caused by other contractors performing work for the City of Billings unless said delays are the direct result of negligent acts on the part of the City of Billings or its contractor.

### **Section 19.2 Conditions Beyond Control of the Parties**

If Contractor reasonably is unable to perform any of its obligations under this Contract due to unforeseeable events beyond Contractor's control, at the City of Billings' option, the Contract shall: (i) remain in effect but the Contractor's obligations are suspended until such events have ended; or, (ii) the City of Billings may terminate the Contract upon ten (10) business days written notice to the performing party, in which event neither party has any further liability to the other under this Contract.

Additionally, if the City of Billings reasonably is unable to perform any of its obligations under this Contract due to unforeseeable events beyond the City of Billings' control, at the Contractor's option, the Contract shall: (i) remain in effect but the City of Billings' obligations are suspended until such events have ended; or, (ii) the Contractor may terminate the Contract upon ten (10) business days written notice to the City of Billings, in which event neither party has any further liability to the other under this Contract.

## **ARTICLE 20. ADDITIONAL DUTIES AND REPRESENTATIONS OF THE PARTIES**

**Section 20.1.** For the term of this contract, as set forth in Section 2.5 (Effective Date/Duration) or as subsequently amended, the City of Billings timely shall provide the Contractor with accurate and complete copies of all records relating to the Contract, including, but not limited to, records relating to energy usage and energy-related maintenance of Project Site(s) requested by Contractor that have not already been provided. Said information shall be provided to Contractor within thirty (30) calendar days after the end of each calendar quarter for as long as Contractor will be providing the annual services and Measurement and Verification reporting as specified in Article 3 (Savings Guarantee; Annual Reconciliation; Payments to Contractor) and Schedule A (Energy and Cost Savings Guarantee), herein.

**Section 20.2.** The City of Billings represents that it has not entered into any lease or other contract regarding energy efficiency equipment, provision of energy management services for the Project Site(s), or servicing of any energy related equipment located in the Project Site(s). If the City of Billings enters into any such lease or other contract, within ten (10) calendar days after execution, it shall provide Contractor with a copy of the lease or other contract.

**Section 20.3.** Contractor represents that it is financially solvent, able to pay its debts as they mature, and has sufficient working capital to perform its duties under this Contract.

**Section 20.4.** Within thirty (30) calendar days after executing this Contract, and before commencing performance of this Contract, Contractor shall provide the City of Billings with written documentation that it is licensed to perform its duties under this Contract within the State of Montana and that all insurance and bonding requirements applicable to Contractor under this Contract have been met. Contractor must also have a valid City of Billings Business License.

**Section 20.5.** Upon request, Contractor shall make available to the City of Billings all documents relating to its performance under this Contract, including all contracts and subcontracts.

**Section 20.6.** All subcontractors used by Contractor in performing its duties under this Contract must be qualified, licensed, and bonded in the State of Montana to perform the subcontracted work. Subcontractor must also have a valid City of Billings Business License.

**Section 20.7.** All Equipment installed by Contractor under this Contract must meet, or exceed, the requirements specified in **Section 8.2 (Systems Start Up and Equipment Commissioning)** and in **Schedule J (Systems Start-Up and Commissioning);**

**Operating Parameters of Installed Equipment).**

**Section 20.8.** All Equipment installed by Contractor under this Contract must be compatible with all other Project Site(s) mechanical and electrical systems, subsystems, and components with which the Equipment interacts.

**ARTICLE 21. MISCELLANEOUS DOCUMENTATION PROVISIONS**

**Section 21.1. Construction Performance and Payment Bonds, Labor and Material Payment Bonds**

Contractor shall obtain and maintain the bonds shown in **Exhibit I (Performance Bond)** and **Exhibit II (Labor and Material Payment Bond)** for the term of this Contract.

**Section 21.2. Further Documents**

The parties to this Contract shall timely execute and deliver to each other all documents and shall perform all further acts reasonably necessary to effectuate the provisions of this Contract.

**Section 21.3. The City of Billings Responsibilities**

(a) Methods of Operation by the City of Billings

The parties agree that the guaranteed Energy and Cost Savings may not be obtained unless certain procedures and methods of operation designed for energy and water conservation are implemented and followed by the City of Billings on a regular and continuous basis.

(b) The City of Billings Maintenance Responsibilities

The City of Billings shall implement and follow the conservation procedures and methods of operation specified in **Schedule N (City of Billings Maintenance Responsibilities)**.

(c) Inspection of Project Site(s)

Once per month, with prior notice to the City of Billings, Contractor may inspect the Project Site(s) to determine whether the City of Billings is complying with **Section 21.3(b)**. Compliance is to be determined by Contractor using the checklist shown in **Schedule O (Facility Maintenance Checklist)**, as completed by Contractor during its monthly inspections. The City of Billings shall make the Project Site(s) available to Contractor during each monthly inspection and may witness each inspection and Contractor's notations on the checklist. The City of Billings may complete its own checklist at the same time. Contractor may not interfere with the City of Billings operations during any monthly inspection.

**Section 21.4. Waiver Of Liens**

Contractor shall obtain, and furnish to the City of Billings a Waiver of Liens from each

vendor, material manufacturer, and laborer related to the supply, installation, and servicing of each piece of Equipment.

## **ARTICLE 22. CONFLICTS OF INTEREST**

**Section 22.1.** Conflicts of interest relating to this Contract are strictly prohibited. Neither party to this Contract, nor any director, employee, or agent of either party may give to, or receive from, any director, employee, or agent of the other party any gift, entertainment, or other favor of significant value, or any commission, fee, or rebate in connection with this Contract.

**Section 22.2.** Neither party to this Contract, nor any director, employee, or agent of either party may, without prior notice to the other party, enter into any business relationship with any director, employee, or agent of the other party or of any affiliate of the other party.

**Section 22.3.** The parties to this Contract promptly shall notify the other party of any violation of this article, and any consideration received as a result of such violation shall be paid or credited to the other party.

**Section 22.4.** Any representative of a party to this Contract, authorized by that party, may, upon reasonable notice to the other party and during regular business hours, audit the records of the other party related to this Contract, including the expense records of the parties' employees involved in this Contract, for the purpose of determining whether there has been compliance with this section.

## **ARTICLE 23. SCOPE, AMENDMENT AND INTERPRETATION**

Contract. This Contract consists of thirty-six (36) numbered pages, Attachments, and Exhibits. In the case of dispute or ambiguity about the minimum levels of performance required of Contractor, the order of precedence of document interpretation is in the same order.

Entire Contract. These documents contain the entire Contract of the parties. Any enlargement, alteration, or modification requires a written amendment signed by both parties.

## **ARTICLE 24. CHOICE OF LAW AND VENUE**

This Contract is governed by the laws of Montana. The parties agree that any litigation concerning this Contract must be brought in the District Court of the Montana Thirteenth Judicial District, Billings, Yellowstone County, State of Montana, and each party shall pay its own costs and attorney fees. (MCA § 18-1-401)

## **ARTICLE 25. DISPUTE RESOLUTION**

Questions of fact that arise in relation to interpretation of this Contract are subject to the Alternative Dispute Resolution procedures described in **Schedule Q (Alternative Dispute Resolution Procedures)**. Unless the Parties agree otherwise, or the Work cannot be continued without a resolution of the question of fact, Alternative Dispute

Resolution procedures are not cause for delay of the Work under this Contract. Continuation of the Work does not constitute a waiver of any rights accruing to Contractor or the City of Billings.

## **ARTICLE 26. LIAISON AND SERVICE OF NOTICES**

All project management and coordination on behalf of the City of Billings shall be through a single point of contact at each designated City of Billings' project location. Contractor shall designate a liaison who will provide the single point of contact for management and coordination of Contractor's work. All work performed pursuant to this Contract shall be coordinated between the City of Billings liaisons and Contractor's liaison. All written notice required by this Contract shall be sent by mail through the United States Postal Service or electronically by e-mail.

Mark Evangeline will be the liaison for the City of Billings Airport Project.

1901 Terminal Circle, Room 216  
Billings, MT 59105  
Telephone: 406-657-8499  
Cell Phone: 406-698-7350  
Fax: 406-657-8438  
E-mail: [evangelinem@ci.billings.mt.us](mailto:evangelinem@ci.billings.mt.us)

Chris Mallow will be the liaison for the City of Billings Parking Garage Project.

210 North 27th Street  
Billings, MT 59101  
Telephone: 406-237-6188  
Cell Phone:  
Fax:  
E-mail: [mallow@ci.billings.mt.us](mailto:mallow@ci.billings.mt.us)

Jeff Davis, PE, will be the liaison for Contractor.

McKinstry Essention, Inc.  
1982 Stadium Drive, Suite #1  
Bozeman, MT 59715  
Telephone: 406-582-7573  
Cell Phone: 406-579-9058  
Fax: 406-586-0486  
E-mail: [jeffd@mckinstry.com](mailto:jeffd@mckinstry.com)

Notices will also be sent to:

Paul Zasada  
McKinstry Essention, Inc.  
9 S. Washington St. #605  
Spokane, WA 99201  
Telephone: 509-625-7246  
Cell Phone: 208-640-9294  
Fax: 206-658-1743  
E-mail: [PaulZ@mckinstry.com](mailto:PaulZ@mckinstry.com)

The City of Billings liaison and Contractor's liaison may be changed by written notice to the other party. Written notices, requests, or complaints must first be directed to the liaison.

## **ARTICLE 27. GENERAL TERMS AND CONDITIONS**

### **DESIGN/ENGINEERING**

All analysis, design, equipment selections, specifications, and all aspects connected with design, installation, and construction of energy-savings measures, completed by the Contractor shall be performed by an engineer licensed in the State of Montana in accordance with 18-2-121 and 12-2-122, MCA.

### **ACCESS AND RETENTION OF RECORDS**

Access to Records: The Contractor agrees to provide the City of Billings or its authorized agents, access to any records necessary to determine contract compliance. (MCA § 18-1-118).

Retention Period: The Contractor agrees to create and retain records supporting the services rendered or supplies delivered for a period of three years after either the completion date of this Contract or the conclusion of any claim, litigation, or exception relating to this Contract taken by the City of Billings or third party.

### **ASSIGNMENT, TRANSFER, AND SUBCONTRACTING**

The Contractor may not assign, transfer, or subcontract any portion of this Contract without the express written consent of the City of Billings. (MCA § 18-4-141) The City of Billings will not unreasonably withhold consent. The Contractor shall be responsible to the City of Billings for the acts and omissions of all subcontractors or agents and of persons directly or indirectly employed by such subcontractors, and for the acts and omissions of persons employed directly by the Contractor. No contractual relationships exist between subcontractor(s) and the City of Billings.

### **COMPLIANCE WITH LAWS**

The Contractor and any subcontractor must, in performance of work under this Contract, fully comply with all applicable federal, state, or local laws, rules, and regulations, including the Montana Human Rights Act, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Any subletting or subcontracting by the Contractor subjects subcontractors to the same provision. In accordance with Section 49-3-207, MCA, the Contractor agrees that the hiring of persons to perform the Contract will be made on the basis of merit and qualifications and there will be no discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the Contract.

### **CONFORMANCE WITH CONTRACT**

No alteration of the terms, conditions, delivery, price, quality, quantities, or specifications of the contract shall be granted without prior written consent of the City of Billings.

Supplies delivered which do not conform to the Contract terms, conditions, and specifications may be rejected and returned at the Contractor's expense.

**DISABILITY ACCOMMODATIONS**

The City of Billings does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services, or activities. Individuals who need aids, alternative document formats, or services for effective communications or other disability related accommodations in the programs and services offered are invited to make their needs and preferences known to the City of Billings. Interested parties should provide as much advance notice as possible.

**HOLD HARMLESS/INDEMNIFICATION**

The Contractor agrees to protect, defend, and save the City of Billings, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, causes of action of any kind or character, including the cost of defense thereof, arising in favor of the Contractor's employees or third parties on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omissions of the Contractor and/or its agents, employees, representatives, assigns, or subcontractors, except the sole negligence of the City of Billings, under this Contract.

**REFERENCE TO CONTRACT**

The Contract number MUST appear on all invoices, packing lists, packages, and correspondence pertaining to the Contract.

**REGISTRATION WITH THE SECRETARY OF STATE**

Any business intending to transact business in Montana must register with the Secretary of State. Businesses that are incorporated in another state or country, but which are conducting activity in Montana, must determine whether they are transacting business in Montana in accordance with Sections 35-1-1026 and 35-8-1001, MCA. Such businesses may want to obtain the guidance of their attorney or accountant to determine whether their activity is considered transacting business.

If businesses determine that they are transacting business in Montana, they must register with the Secretary of State and obtain a certificate of authority to demonstrate that they are in good standing in Montana. To obtain registration materials, call the Office of the Secretary of State at (406) 444-3665, or visit their Website at <http://sos.mt.gov>.

**SEPARABILITY CLAUSE**

A declaration by any court, or any other binding legal source, that any provision of the Contract is illegal and void shall not affect the legality and enforceability of any other provision of the Contract, unless the provisions are mutually dependent.

**SHIPPING**

Supplies shall be shipped prepaid, F.O.B. Destination, unless the Contract specifies otherwise.

**TAX EXEMPTION**

The City of Billings is exempt from Federal Excise Taxes (#81-6001237).

**VENUE**

This Contract is governed by the laws of Montana. The parties agree that any litigation concerning this Contract must be brought in the District Court of the Montana Thirteenth Judicial District, Billings, Yellowstone County, State of Montana, and each party shall pay its own costs and attorney fees. (Section 18-1-401, MCA.)

The parties through their authorized agents have executed this contract on the dates set out below.

CITY OF BILLINGS  
CITY HALL  
210 NORTH 27TH STREET  
BILLINGS, MT 59101

MCKINSTRY ESSENTION, INC.  
5005 3RD AVENUE SOUTH  
SEATTLE, WA 98134  
FEDERAL ID # 91-2055773

BY: THOMAS W. HANEL  
MAYOR, CITY OF BILLINGS

BY: JOSEPH HAGAR  
DIRECTOR OF FINANCE

\_\_\_\_\_  
(SIGNATURE)

\_\_\_\_\_  
(SIGNATURE)

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

APPROVED AS TO FORM AND  
LEGAL CONTENT:

APPROVED AS TO FORM AND  
LEGAL CONTENT:

\_\_\_\_\_  
CITY ATTORNEY

\_\_\_\_\_  
MCKINSTRY ESSENTION, INC.

## **EXHIBIT B**

### **LEASE-PURCHASE AGREEMENT**

#### **MASTER TAX-EXEMPT INSTALLMENT PURCHASE AGREEMENT**

Between: U.S. Bancorp Equipment Finance, Inc. (the "Seller")  
13010 SW 68th Parkway, Suite 100  
Portland, Oregon 97223

And: City of Billings, Montana (the "Purchaser")  
P.O. Box 1178  
Billings, Montana 59103  
Attention: Finance Director  
Telephone: (406) 657-8209

Dated: October 28, 2011

#### **ARTICLE I DEFINITIONS**

The following terms will have the meanings indicated below unless the context clearly requires otherwise:

**"Agreement"** means this Master Tax-Exempt Installment Purchase Agreement, including all exhibits and schedules attached hereto.

**"Code"** is defined in Section 3.01(f).

**"Commencement Date"** is the date when the term of a Property Schedule and Purchaser's obligation to pay Installment Payments thereunder commences, which date shall be set forth in such Property Schedule.

**"Event of Default"** is defined in Section 13.01.

**"Installment Payments"** means the installment payments payable by Purchaser under Article VI of this Agreement and each Property Schedule, as set forth in each Property Schedule.

**"Installment Payment Dates"** means the Installment Payment dates for the Installment Payments as set forth in each Property Schedule.

**"Net Proceeds"** is defined in Section 9.01.

**"Nonappropriation Event"** is defined in Section 6.06.

“**Property**” means, collectively, the property purchased pursuant to this Agreement, and with respect to each Property Schedule, the property described in such Property Schedule, and all replacements, repairs, restorations, modifications and improvements thereof or thereto made pursuant to Section 8.01 or Article IX.

“**Property Schedule**” means a Property Schedule in the form attached hereto for Property Schedule 1. Subsequent Property Schedules pursuant to this Agreement shall be numbered consecutively, beginning with Property Schedule 2.

“**Purchaser**” means the entity identified as such in the first paragraph hereof, and its permitted successors and assigns.

“**Seller**” means the entity identified as such in the first paragraph hereof, and its successors and assigns.

“**State**” means the state where Purchaser is located.

“**Term**” means, with respect to a Property Schedule, the Term set forth in such Property Schedule.

“**Vendor**” means the manufacturer or contractor of the Property as well as the agents or dealers of the manufacturer or contractor from whom Seller or Purchaser arranged for the purchase of all or any portion of the Property.

## **ARTICLE II**

**2.01 Property Schedules Separate Financings.** Each Property Schedule executed and delivered under this Agreement shall be a separate financing, distinct from other Property Schedules. Without limiting the foregoing, upon the occurrence of an Event of Default with respect to a Property Schedule, Seller shall have the rights and remedies specified herein with respect to the Property financed and the Installment Payments payable under such Property Schedule, and except as expressly provided in Section 12.02 below, Seller shall have no rights or remedies with respect to Property financed or Installment Payments payable under any other Property Schedules unless an Event of Default has also occurred under such other Property Schedules.

## **ARTICLE III**

**3.01 Covenants of Purchaser.** As of the Commencement Date for each Property Schedule executed and delivered hereunder, Purchaser shall be deemed to represent, covenant and warrant for the benefit of Seller as follows:

- (a) Purchaser is a public body corporate and politic duly organized and existing under the constitution and laws of the State and its home rule charter with full power and authority to enter into this Agreement and the

Property Schedule and the transactions contemplated thereby and to perform all of its obligations thereunder.

- (b) Purchaser will do or cause to be done all things necessary to preserve and keep in full force and effect its existence as a body corporate and politic. To the extent Purchaser should merge with another entity under the laws of the State, Purchaser agrees that as a condition to such merger it will require that the remaining or resulting entity shall be assigned Purchaser's rights and shall assume Purchaser's obligations hereunder.
- (c) Purchaser has been duly authorized to execute and deliver this Agreement and the Property Schedule by proper action by its governing body, or by other appropriate official approval, and all requirements have been met and procedures have occurred in order to ensure the validity and enforceability of this Agreement and the Property Schedule, and Purchaser has complied with such public bidding requirements as may be applicable to this Agreement and the Property Schedule and the acquisition by Purchaser of the Property thereunder. On or before the Commencement Date for the Property Schedule, Purchaser shall cause to be delivered an opinion of counsel in substantially the form of Exhibit 2 to the Property Schedule.
- (d) During the Term for the Property Schedule, the Property thereunder will perform and will be used by Purchaser only for the purpose of performing essential governmental uses and public functions within the permissible scope of Purchaser's authority.
- (e) Purchaser will provide Seller with current financial statements, budgets and proof of appropriation for the ensuing fiscal year and other financial information relating to the ability of Purchaser to continue this Agreement and the Property Schedule in such form and containing such information as may be requested by Seller.
- (f) Purchaser will comply with all applicable provisions of the Internal Revenue Code of 1986, as amended (the "Code"), including Sections 103 and 148 thereof, and the regulations of the Treasury Department thereunder, from time to time proposed or in effect, in order to maintain the excludability from gross income for federal income tax purposes of the interest component of Installment Payments under the Property Schedule and will not use or permit the use of the Property in such a manner as to cause a Property Schedule to be a "private activity bond" under Section 141(a) of the Code. Purchaser covenants and agrees that it will use the proceeds of the Property Schedule as soon as practicable and with all reasonable dispatch for the purpose for which the Property Schedule has been entered into, and that no part of the proceeds of the Property Schedule shall be invested in any securities, obligations or other

investments except for the temporary period pending such use nor used, at any time, directly or indirectly, in a manner which, if such use had been reasonably anticipated on the date of issuance of the Agreement, would have caused any portion of the Property Schedule to be or become “arbitrage bonds” within the meaning of Section 103(b)(2) or Section 148 of the Code and the regulations of the Treasury Department thereunder proposed or in effect at the time of such use and applicable to obligations issued on the date of issuance of the Property Schedule.

- (g) The execution, delivery and performance of this Agreement and the Property Schedule and compliance with the provisions hereof and thereof by Purchaser does not conflict with or result in a violation or breach or constitute a default under, any resolution, bond, agreement, indenture, mortgage, note, lease or other instrument to which Purchaser is a party or by which it is bound by any law or any rule, regulation, order or decree of any court, governmental agency or body having jurisdiction over Purchaser or any of its activities or properties resulting in the creation or imposition of any lien, charge or other security interest or encumbrance of any nature whatsoever upon any property or assets of Purchaser or to which it is subject.
- (h) Purchaser’s exact legal name is as set forth on the first page of this Agreement. Purchaser will not change its legal name in any respect without giving thirty (30) days prior notice to Seller.

#### **ARTICLE IV**

**4.01 Sale of Property.** On the Commencement Date of each Property Schedule executed hereunder, Seller will be deemed to sell, transfer and convey to Purchaser, and Purchaser will be deemed to purchase and accept from Seller, the Property described in such Property Schedule, in accordance with this Agreement and such Property Schedule, for the Term set forth in such Property Schedule.

**4.02 Term.** The term of each Property Schedule shall commence on the Commencement Date set forth therein and shall terminate upon payment of the final Installment Payment set forth in such Property Schedule, unless terminated sooner pursuant to this Agreement or the Property Schedule.

**4.03 Delivery, Installation and Acceptance of Property.** Purchaser shall order the Property, shall cause the Property to be delivered and installed at the locations specified in the applicable Property Schedule and shall pay all taxes, delivery costs and installation costs, if any, in connection therewith. To the extent funds are deposited under an escrow agreement or trust agreement for the acquisition of the Property, such funds shall be disbursed as provided therein. When the Property described in such Property Schedule is delivered, installed and accepted as to Purchaser’s specifications, Purchaser shall immediately accept the Property and evidence said acceptance by

executing and delivering to Seller the Acceptance Certificate substantially in the form attached to the Property Schedule.

## **ARTICLE V**

**5.01 Location; Inspection.** The Property will be initially located or based at the location specified in the applicable Property Schedule. Seller shall have the right at all reasonable times during business hours to enter into and upon the property of Purchaser for the purpose of inspecting the Property.

## **ARTICLE VI**

**6.01 Payment of Installment Payments.** Purchaser shall pay Installment Payments under a Property Schedule, exclusively from the funds or accounts described in such Property Schedule, in lawful money of the United States of America, to Seller in such amounts and on such dates as described in such Property Schedule, at Seller's address set forth on the first page of this Agreement, unless Seller instructs Purchaser otherwise. Purchaser shall pay a late charge of five cents per dollar or the highest amount permitted by applicable law, whichever is lower, on all delinquent Installment Payments and interest on said delinquent amounts from the date such amounts were due until paid at the rate of 12% per annum or the maximum amount permitted by applicable law, whichever is less, subject to appropriation by Purchaser.

**6.02 Installment Payments to Constitute Binding Contractual Obligation.** The Seller and the Purchaser understand and intend that the obligation of the Purchaser to pay Installment Payments shall constitute a current expense of the funds or accounts described in the applicable Property Schedule and shall not in any way be construed to be a debt of the Purchaser in contravention of any applicable constitutional or statutory limitation or requirements concerning the creation of indebtedness by the Purchaser, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or money of the Purchaser. Installment Payments due shall be payable only from current funds which are budgeted or appropriated from the funds or accounts described in the applicable Property Schedule for such purpose during the fiscal year of the Purchaser for which such funds were budgeted and appropriated. The Purchaser has not pledged the full faith and credit of the Purchaser, the State or any agency or department of the Purchaser to the payment of the Installment Payments or any other payment due under this Agreement.

The person or entity in charge of preparing the Purchaser's budget will include in the budget request for each fiscal year the Installment Payments to become due in such fiscal year, and will use all reasonable and lawful means available to secure the appropriation of money for such fiscal year sufficient to pay all such Installment Payments coming due therein, and the Purchaser reasonably believes that moneys in an amount sufficient to make all such Installment Payments can and will lawfully be appropriated and made available for this purpose.

**6.03 Interest Component.** A portion of each Installment Payment due under each Property Schedule is paid as, and represents payment of, interest, and each Property Schedule hereunder shall set forth the interest component (or method of computation thereof) of each Installment Payment thereunder during the Term.

**6.04 Installment Payments to be Unconditional.** EXCEPT AS PROVIDED IN SECTION 6.06, THE OBLIGATIONS OF PURCHASER TO PAY THE INSTALLMENT PAYMENTS DUE UNDER THE PROPERTY SCHEDULES AND TO PERFORM AND OBSERVE THE OTHER COVENANTS AND AGREEMENTS CONTAINED HEREIN SHALL BE ABSOLUTE AND UNCONDITIONAL IN ALL EVENTS WITHOUT ABATEMENT, DIMINUTION, DEDUCTION, SET-OFF OR DEFENSE, FOR ANY REASON, INCLUDING WITHOUT LIMITATION, ANY DEFECTS, MALFUNCTIONS, BREAKDOWNS OR INFIRMITIES IN THE PROPERTY OR ANY ACCIDENT, CONDEMNATION OR UNFORESEEN CIRCUMSTANCES. THIS PROVISION SHALL NOT LIMIT PURCHASER'S RIGHTS OR ACTIONS AGAINST ANY VENDOR AS PROVIDED IN SECTION 10.02.

**6.05 Defeasance of Installment Payments.** Purchaser may at any time irrevocably deposit in escrow with a defeasance escrow agent for the purpose of paying all of the principal component and interest component accruing under a Property Schedule, a sum of cash and non-callable securities consisting of direct obligations of, or obligations the principal of an interest on which are unconditionally guaranteed by, the United States of America or any agency or instrumentality thereof, in such aggregate amount, bearing interest at such rates and maturing on such dates as shall be required to provide funds sufficient for this purpose. Upon such defeasance, all right, title and interest of Seller in the Property under said Property Schedule shall terminate. Purchaser shall cause such investment to comply with the requirements of federal tax law so that the exclusion from gross income of the interest component of Installment Payments on said Property Schedule is not adversely affected.

**6.06 Nonappropriation.** If during the Term, sufficient funds are not appropriated to make Installment Payments required under a Property Schedule for the following fiscal year, Purchaser shall be deemed to not have renewed such Property Schedule for the following fiscal year and the Property Schedule shall terminate at the end of the fiscal year for which funds have been appropriated and Purchaser shall not be obligated to make Installment Payments under said Property Schedule beyond the fiscal year for which funds have been appropriated. Upon the occurrence of such nonappropriation (a "Nonappropriation Event") Purchaser shall, no later than the end of the fiscal year for which funds have been appropriated, deliver possession of the Property under said Property Schedule to Seller. If Purchaser fails to deliver possession of the Property to Seller upon termination of said Property Schedule by reason of a Nonappropriation Event, the termination shall nevertheless be effective but Purchaser shall be responsible for the payment of damages in an amount equal to the portion of Installment Payments thereafter coming due that is attributable to the number of days after the termination during which the Purchaser fails to deliver possession and for any

other loss suffered by Seller as a result of Purchaser's failure to deliver possession as required. In addition, Seller may, by written instructions to any escrow agent who is holding proceeds of the Property Schedule, instruct such escrow agent to release all such proceeds and any earnings thereon to Seller, such sums to be credited to Purchaser's obligations under the Property Schedule and this Agreement. Purchaser shall notify Seller in writing within seven (7) days after the failure of the Purchaser to appropriate funds sufficient for the payment of the Lease Payments, but failure to provide such notice shall not operate to extend the Lease Term or result in any liability to Purchaser.

## **ARTICLE VII**

**7.01 Title to the Property.** Upon acceptance of the Property by Purchaser and unless otherwise required by the laws of the State, title to the Property shall vest in Purchaser, subject to Seller's interests under the applicable Property Schedule and this Agreement.

**7.02 Personal Property.** The Property is and will remain personal property and will not be deemed to be affixed to or a part of the real estate on which it may be situated, notwithstanding that the Property or any part thereof may be or hereafter become in any manner physically affixed or attached to real estate or any building thereon. If requested by Seller, Purchaser will, at Purchaser's expense, furnish a waiver of any interest in the Property from any party having an interest in any such real estate or building.

**7.03 Security Interest.** To secure the performance of all of Purchaser's obligations under this Agreement with respect to a Property Schedule, including without limitation all Property Schedules now existing and hereafter executed, Purchaser grants to Seller, for the benefit of Seller and its successors and assigns, a security interest constituting a first lien on Purchaser's interest in all of the Property under the Property Schedule, whether now owned or hereafter acquired, all additions, attachments, alterations and accessions to the Property, all substitutions and replacements for the Property, and on any proceeds of any of the foregoing, including insurance proceeds. Purchaser shall execute any additional documents, including financing statements, affidavits, notices and similar instruments, in form and substance satisfactory to Seller, which Seller deems necessary or appropriate to establish, maintain and perfect a security interest in the Property in favor of Seller and its successors and assigns. Purchaser hereby authorizes Seller to file all financing statements which Seller deems necessary or appropriate to establish, maintain and perfect such security interest.

## **ARTICLE VIII**

**8.01 Maintenance of Property by Purchaser.** Purchaser shall keep and maintain the Property in good condition and working order and in compliance with the manufacturer's specifications, shall use, operate and maintain the Property in conformity with all laws and regulations concerning the Property's ownership, possession, use and maintenance, and shall keep the Property free and clear of all liens and claims, other than those created by this Agreement. Purchaser shall have sole responsibility to maintain and

repair the Property. Should Purchaser fail to maintain, preserve and keep the Property in good repair and working order and in accordance with manufacturer's specifications, and if requested by Seller, Purchaser will enter into maintenance contracts for the Property in form approved by Seller and with approved providers.

**8.02 Liens, Taxes, Other Governmental Charges and Utility Charges.**

Purchaser shall keep the Property free of all levies, liens and encumbrances, except for the interest of Seller under this Agreement. The parties to this Agreement contemplate that the Property will be used for a governmental or proprietary purpose of Purchaser and, therefore, that the Property will be exempt from all property taxes. The Installment Payments payable by Purchaser under this Agreement and the Property Schedules hereunder have been established to reflect the savings resulting from this exemption from taxation. Purchaser will take such actions necessary under applicable law to obtain said exemption. Nevertheless, if the use, possession or acquisition of the Property is determined to be subject to taxation or later becomes subject to such taxes, Purchaser shall pay when due all taxes and governmental charges lawfully assessed or levied against or with respect to the Property. Purchaser shall pay all gas, water, steam, electricity, heat, power, telephone, utility and other charges incurred in the operation, maintenance, use, occupancy and upkeep of the Property. Purchaser shall pay such taxes or charges as the same may become due; provided that, with respect to any such taxes or charges that may lawfully be paid in installments over a period of years, Purchaser shall be obligated to pay only such installments as accrue during the then-current fiscal year of the Term for such Property.

**8.03 Insurance.** At its own expense, Purchaser shall maintain (a) casualty insurance insuring the Property against loss or damage by fire and all other risks covered by the standard extended coverage endorsement then in use in the State and any other risks reasonably required by Seller in an amount equal to at least the outstanding principal component of Installment Payments, and (b) liability insurance that protects Seller from liability in all events in an amount reasonably acceptable to Seller, and (c) worker's compensation insurance covering all employees working on, in, near or about the Property; provided that Purchaser may self-insure against all such risks (other than rental interruption). All insurance proceeds from casualty losses shall be payable as hereinafter provided in this Agreement. All such insurance shall be with insurers that are authorized to issue such insurance in the State. All such liability insurance shall name Seller as an additional insured. All such casualty insurance shall contain a provision making any losses payable to Seller and Purchaser as their respective interests may appear. All such insurance shall contain a provision to the effect that such insurance shall not be canceled or modified without first giving written notice thereof to Seller and Purchaser at least thirty (30) days in advance of such cancellation or modification. Such changes shall not become effective without Seller's prior written consent. Purchaser shall furnish to Seller, on or before the Commencement Date for each Property Schedule, and thereafter at Seller's request, certificates evidencing such coverage, or, if Purchaser self-insures, a written description of its self-insurance program together with a certification from Purchaser's risk manager or insurance agent or consultant to the effect that Purchaser's self-insurance program provides adequate coverage against the risks listed above.

**8.04 Advances.** In the event Purchaser shall fail to either maintain the insurance required by this Agreement or keep the Property in good repair and working order, Seller may, but shall be under no obligation to, purchase the required insurance and pay the cost of the premiums thereof or maintain and repair the Property and pay the cost thereof. All amounts so advanced by Seller shall constitute additional rent for the Term for the applicable Property Schedule and shall be due and payable on the next Installment Payment Date and Purchaser covenants and agrees to pay such amounts so advanced by Seller with interest thereon from the date such amounts are advanced until paid at the rate of 12% per annum or the maximum amount permitted by applicable law, whichever is less, subject to appropriation by Purchaser.

## **ARTICLE IX**

**9.01 Damage or Destruction.** If (a) the Property under a Property Schedule or any portion thereof is destroyed, in whole or in part, or is damaged by fire or other casualty, or (b) title to, or the temporary use of, the Property under a Property Schedule or any part thereof shall be taken under the exercise or threat of the power of eminent domain by any governmental body or by any person, firm or corporation acting pursuant to governmental authority, Seller and Purchaser will cause the Net Proceeds (as hereinafter defined) of any insurance claim, condemnation award or sale under threat of condemnation to be applied to the prompt replacement, repair, restoration, modification or improvement of the Property, unless Purchaser shall have exercised its right to defease the Property Schedule as provided herein, or unless Purchaser shall have exercised its option to prepay the Installment Payments if the Property Schedule so provides. Any balance of the Net Proceeds remaining after such work has been completed shall be paid to Purchaser. For purposes of Section 8.03 and this Article IX, the term "Net Proceeds" shall mean the amount remaining from the gross proceeds of any insurance claim, condemnation award or sale under threat of condemnation after deducting all expenses, including attorneys' fees, incurred in the collection thereof.

**9.02 Insufficiency of Net Proceeds.** If the Net Proceeds are insufficient to pay in full the cost of any repair, restoration, modification or improvement referred to in Section 9.01, Purchaser shall (a) complete such replacement, repair, restoration, modification or improvement and pay any costs thereof in excess of the amount of the Net Proceeds and, if Purchaser shall make any payments pursuant to this Section, Purchaser shall not be entitled to any reimbursement therefor from Seller nor shall Purchaser be entitled to any diminution of the amounts payable under Section 6.01, or (b) defease the Property Schedule pursuant to Section 6.05, or (c) exercise its option to prepay the Installment Payments pursuant to the optional prepayment provisions if the Property Schedule so provides. The amount of the Net Proceeds, if any, remaining after completing such repair, restoration, modification or improvement or after such defeasance or purchase may be retained by Purchaser.

## **ARTICLE X**

**10.01 Disclaimer of Warranties.** SELLER MAKES NO (AND SHALL NOT BE DEEMED TO HAVE MADE ANY) WARRANTIES, EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, THE DESIGN, OPERATION OR CONDITION OF, OR THE QUALITY OF THE MATERIAL, EQUIPMENT OR WORKMANSHIP IN, THE PROPERTY, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE, THE STATE OF TITLE THERETO OR ANY COMPONENT THEREOF, THE ABSENCE OF LATENT OR OTHER DEFECTS (WHETHER OR NOT DISCOVERABLE), AND SELLER HEREBY DISCLAIMS THE SAME; IT BEING UNDERSTOOD THAT THE PROPERTY IS SOLD TO PURCHASER "AS IS" ON THE DATE OF THIS AGREEMENT OR THE DATE OF DELIVERY, WHICHEVER IS LATER, AND ALL SUCH RISKS, IF ANY, ARE TO BE BORNE BY PURCHASER. Purchaser acknowledges that it has made (or will make) the selection of the Property from the Vendor based on its own judgment and expressly disclaims any reliance upon any statements or representations made by Seller. Purchaser understands and agrees that (a) neither the Vendor nor any sales representative or other agent of Vendor, is (i) an agent of Seller, or (ii) authorized to make or alter any term or condition of this Agreement, and (b) no such waiver or alteration shall vary the terms of this Agreement unless expressly set forth herein. In no event shall Seller be liable for any incidental, indirect, special or consequential damage in connection with or arising out of this Agreement, the Property Schedules, or the existence, furnishing, functioning or use of any item, product or service provided for in this Agreement or the Property Schedules.

**10.02 Vendor's Warranties.** Seller hereby irrevocably assigns to Purchaser all rights that Seller may have to assert from time to time whatever claims and rights (including without limitation warranties) related to the Property against the Vendor. Purchaser's sole remedy for the breach of such warranty, indemnification or representation shall be against the Vendor, and not against Seller, nor shall such matter have any effect whatsoever on the rights and obligations of Seller with respect to this Agreement, including the right to receive full and timely payments hereunder. Purchaser expressly acknowledges that Seller makes, and has made, no representations or warranties whatsoever as to the existence or the availability of such warranties of the Vendor.

**10.03 Use of the Property.** Purchaser will not install, use, operate or maintain the Property improperly, carelessly, in violation of any applicable law or in a manner contrary to that contemplated by this Agreement and the applicable Property Schedule. Purchaser shall provide all permits and licenses, if any, necessary for the installation and operation of the Property. In addition, Purchaser agrees to comply in all respects with all laws of the jurisdiction in which its operations involving any item of Property may extend and any legislative, executive, administrative or judicial body exercising any power or jurisdiction over the items of the Property; provided that Purchaser may contest in good faith the validity or application of any such law or rule in any reasonable manner that does not, in the opinion of Seller, adversely affect the interest of Seller in and to the Property or its interest or rights under this Agreement. Purchaser shall promptly notify

Seller in writing of any pending or threatened investigation, inquiry, claim or action by any governmental authority which could adversely affect this Agreement, any Property Schedule or the Property thereunder.

**10.04 Modifications.** Subject to the provisions of this Section, Purchaser shall have the right, at its own expense, to make alterations, additions, modifications or improvements to the Property. All such alterations, additions, modifications and improvements shall thereafter comprise part of the Property and shall be subject to the provisions of this Agreement. Such alterations, additions, modifications and improvements shall not in any way damage the Property, substantially alter its nature or cause it to be used for purposes other than those authorized under the provisions of state and federal law; and the Property, on completion of any alterations, additions, modifications or improvements made pursuant to this Section, shall be of a value which is equal to or greater than the value of the Property immediately prior to the making of such alterations, additions, modifications and improvements. Purchaser shall, at its own expense, make such alterations, additions, modifications and improvements to the Property as may be required from time to time by applicable law or by any governmental authority.

## **ARTICLE XI**

**11.01 Option to Prepay.** Purchaser shall have the option to prepay in whole the Installment Payments due under a Property Schedule, but only if the Property Schedule so provides, and on the terms set forth in the Property Schedule.

## **ARTICLE XII**

**12.01 Assignment by Seller.** Seller's right, title and interest in, to and under each Property Schedule and the Property under such Property Schedule may be assigned and reassigned in whole or in part to one or more assignees or subassignees by Seller without the necessity of obtaining the consent of Purchaser; provided that any assignment shall not be effective until Purchaser has received written notice, signed by the assignor, of the name, address and tax identification number of the assignee. Purchaser shall retain all such notices as a register of all assignees and shall make all payments to the assignee or assignees designated in such register. Purchaser agrees to execute all documents, including notices of assignment and chattel mortgages or financing statements that may be reasonably requested by Seller or any assignee to protect its interests in this Agreement and the Property Schedules.

**12.02 Property Schedules Separate Financings.** Assignees of the Seller's rights in one Property Schedule shall have no rights in any other Property Schedule unless such rights have been separately assigned.

**12.03 Release and Indemnification Covenants.** To the extent permitted by applicable law, Purchaser shall indemnify, protect, hold harmless, save and keep harmless Seller from and against any and all liability, obligation, loss, claim and damage whatsoever, regardless of cause thereof, and all expenses in connection therewith,

including, without limitation, counsel fees and expenses, penalties and interest (collectively, “Losses”) arising out of or resulting from the entering into this Agreement, any Property Schedules hereunder, the ownership of any item of the Property, the loss of federal tax exemption of the interest on any of the Property Schedules, the ordering, acquisition, use, operation, condition, purchase, delivery, rejection, storage or return of any item of the Property or any accident in connection with the operation, use, condition, possession, storage or return of any item of the Property resulting in damage to property or injury to or death to any person; provided, however, that Purchaser shall not be required to indemnify Seller for Losses arising out of or resulting from Seller’s own willful or negligent conduct, or for Losses arising out of or resulting from Seller’s preparation of disclosure material relating to certificates of participation in this Agreement and any Property Schedule (other than disclosure material provided to Seller by Purchaser). The indemnification arising under this Section shall continue in full force and effect notwithstanding the full payment of all obligations under this Agreement, or the applicable Property Schedule, or the termination of the Term for such Property Schedule for any reason.

### **ARTICLE XIII**

**13.01 Events of Default Defined.** Any of the following shall constitute an “Event of Default” under a Property Schedule:

- (a) Failure by Purchaser to pay any Installment Payment under the Property Schedule or other payment required to be paid with respect thereto at the time specified therein;
- (b) Failure by Purchaser to observe and perform any covenant, condition or agreement on its part to be observed or performed with respect to the Property Schedule, other than as referred to in subparagraph (a) above, for a period of thirty (30) days after written notice specifying such failure and requesting that it be remedied is given to Purchaser by Seller, unless Seller shall agree in writing to an extension of such time prior to its expiration; provided that, if the failure stated in the notice cannot be corrected within the applicable period, Seller will not unreasonably withhold its consent to an extension of such time if corrective action is instituted by Purchaser within the applicable period and diligently pursued until the default is corrected;
- (c) Any statement, representation or warranty made by Purchaser in or pursuant to the Property Schedule or its execution, delivery or performance shall prove to have been false, incorrect, misleading or breached in any material respect on the date when made;
- (d) Purchaser shall (i) apply for or consent to the appointment of a receiver, trustee, custodian or liquidator of Purchaser, or of all or a substantial part of the assets of Purchaser, (ii) be unable, fail or admit in writing its inability generally to pay its debts as they become due, (iii) make a general

assignment for the benefit of creditors, (iv) have an order for relief entered against it under applicable federal bankruptcy law, or (v) file a voluntary petition in bankruptcy or a petition or an answer seeking reorganization or an arrangement with creditors or taking advantage of any insolvency law or any answer admitting the material allegations of a petition filed against Purchaser in any bankruptcy, reorganization or insolvency proceeding; or

- (e) An order, judgment or decree shall be entered by any court of competent jurisdiction, approving a petition or appointing a receiver, trustee, custodian or liquidator of Purchaser or of all or a substantial part of the assets of Purchaser, in each case without its application, approval or consent, and such order, judgment or decree shall continue unstayed and in effect for any period of 60 consecutive days.

The foregoing provisions of Section 13.01 are subject to the following limitation: if by reason of force majeure Purchaser is unable in whole or in part to perform its agreements under this Agreement and the Property Schedule (other than the obligations on the part of Purchaser contained in Article VI hereof) Purchaser shall not be in default during the continuance of such inability. The term “force majeure” as used herein shall mean the following: acts of God; strikes, lockouts or other industrial disturbances; acts of public enemies; orders or restraints of any kind of the government of the United States or of the State or any of their departments, agencies or officials, or any civil or military authority; insurrections, riots, landslides, earthquakes, fires, storms, droughts, floods, explosions, breakage or accident to machinery, transmission pipes or canals; or any other cause or event not reasonably within the control of Purchaser. Notwithstanding anything in this Agreement to the contrary, an event of Nonappropriation shall not constitute an Event of Default.

**13.02 Remedies on Default.** Whenever any Event of Default exists with respect to a Property Schedule, Seller shall have the right, at its sole option without any further demand or notice, to take one or any combination of the following remedial steps:

- (a) Without terminating the Property Schedule, and by written notice to Purchaser, Seller may declare all Installment Payments and other amounts payable by Purchaser thereunder to the end of the then-current fiscal year of Purchaser to be due, including without limitation delinquent Installment Payments under the Property Schedule from prior fiscal years, and such amounts shall thereafter bear interest at the rate of 12% per annum or the maximum rate permitted by applicable law, whichever is less, subject to appropriation by Purchaser;
- (b) Seller may terminate the Property Schedule, and by written notice to Purchaser, Seller may accelerate the principal component of all outstanding Installment Payments due or to become due during the then-current fiscal year, in which case Purchaser shall pay to Seller such principal component, together with interest thereon from the date of acceleration until so paid at the rate of 12% per annum or the maximum

rate permitted by applicable law, whichever is less, subject to appropriation by Purchaser;

- (c) Seller may terminate the Property Schedule, may enter the premises where the Property subject to the Property Schedule is located and retake possession of the Property, or require Purchaser, at Purchaser's expense, to promptly return any or all of the Property to the possession of Seller at such place within the United States as Seller shall specify, and Seller may thereafter dispose of the Property in accordance with Article 9 of the Uniform Commercial Code in effect in the State, continuing to hold Purchaser liable for any outstanding Installment Payments due or to become due during the then-current fiscal year and all costs and expenses incurred by Seller in exercising its remedies hereunder, including, without limitation, all costs and expenses of taking possession, removing, storing and reconditioning the Property, and including, without limitation, all brokerage and attorneys fees;
- (d) By written notice to any escrow agent who is holding proceeds of the Property Schedule, Seller may instruct such escrow agent to release all such proceeds and any earnings thereon to Seller, such sums to be credited to payment of Purchaser's obligations under the Property Schedule;
- (e) Seller may take any action, at law or in equity, that is permitted by applicable law and that may appear necessary or desirable to enforce or to protect any of its rights under the Property Schedule and this Agreement.

**13.04 No Remedy Exclusive.** No remedy herein conferred upon or reserved to Seller is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right or power may be exercised from time to time and as often as may be deemed expedient. In order to entitle Seller to exercise any remedy reserved to it in this Article it shall not be necessary to give any notice, other than such notice as may be required in this Article.

**13.05 Costs and Attorney Fees.** Upon the occurrence of an Event of Default by Purchaser in the performance of any term of this Agreement, Purchaser agrees to pay to Seller or reimburse Seller for, in addition to all other amounts due hereunder, all of Seller's costs of collection, including reasonable attorney fees, whether or not suit or action is filed thereon. Any such costs shall be immediately due and payable upon written notice and demand given to Purchaser, shall be secured by this Agreement until paid and shall bear interest at the rate of 12% per annum or the maximum amount permitted by applicable law, whichever is less, subject to appropriation by Purchaser. In the event suit or action is instituted to enforce any of the terms of this Agreement, the prevailing party shall be entitled to recover from the other party such sum as the court

may adjudge reasonable as attorneys' fees at trial or on appeal of such suit or action or in any bankruptcy proceeding, in addition to all other sums provided by law.

#### **ARTICLE XIV**

**14.01 Notices.** All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed given when delivered or mailed by certified mail, postage prepaid, to the parties hereto at the addresses immediately after the signatures to this Agreement (or at such other address as either party hereto shall designate in writing to the other for notices to such party), to any assignee at its address as it appears on the registration books maintained by Purchaser.

**14.02 Further Assurances.** Purchaser agrees to execute such other and further documents, including, without limitation, confirmatory financing statements, continuation statements, certificates of title and the like, and to take all such action as may be necessary or appropriate, from time to time, in the reasonable opinion of Seller, to perfect, confirm, establish, reestablish, continue, or complete the interests of Seller in this Agreement and the Property Schedules, to consummate the transactions contemplated hereby and thereby, and to carry out the purposes and intentions of this Agreement and the Property Schedules.

**14.03 Binding Effect.** This Agreement shall inure to the benefit of and shall be binding upon Seller and Purchaser and their respective successors and assigns.

**14.04 Severability.** In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

**14.05 Waiver of Jury Trials.** Purchaser and Seller hereby irrevocably waive all right to trial by jury in any action, proceeding or counterclaim (whether based on contract, tort or otherwise) arising out of or relating to this Agreement or the actions of Seller or Purchaser in the negotiation, administration, performance or enforcement hereof.

**14.06 Amendments, Changes and Modifications.** This Agreement may be amended in writing by Seller and Purchaser to the extent the amendment or modification does not apply to outstanding Property Schedules at the time of such amendment or modification. The consent of all assignees shall be required to any amendment or modification before such amendment or modification shall be applicable to any outstanding Property Schedule.

**14.07 Execution in Counterparts.** This Agreement and the Property Schedules hereunder may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

**14.08 Applicable Law.** This Agreement shall be governed by and construed in accordance with the laws of the State.

**14.09 Captions.** The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections of this Agreement.

IN WITNESS WHEREOF, Seller and Purchaser have caused this Agreement to be executed in their names by their duly authorized representatives as of the date first above written.

**SELLER:**  
**U.S. BANCORP EQUIPMENT**  
**FINANCE, INC.**

**PURCHASER:**  
**CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name: Thomas Hanel  
Title: Mayor

Attest:

By: \_\_\_\_\_  
Name: Cari Martin  
Title: City Clerk

**PROPERTY SCHEDULE NO. 1**  
**MASTER TAX-EXEMPT INSTALLMENT PURCHASE AGREEMENT**

This Property Schedule No. 1 is entered into as of the Commencement Date set forth below, pursuant to that certain Master Tax-Exempt Installment Purchase Agreement (the "Master Agreement"), dated as of October 28, 2011, between U.S. Bancorp Equipment Finance, Inc. (the "Seller") and the City of Billings, Montana (the "Purchaser").

1. Interpretation. The terms and conditions of the Master Agreement are incorporated herein by reference as if fully set forth herein. Reference is made to the Master Agreement for all representations, covenants and warranties made by Purchaser in the execution of this Property Schedule, unless specifically set forth herein. In the event of a conflict between the provisions of the Master Agreement and the provisions of this Property Schedule, the provisions of this Property Schedule shall control. All capitalized terms used herein but not otherwise defined shall have the meanings provided in the Master Agreement.
2. Commencement Date. The Commencement Date for this Property Schedule is October 28, 2011.
3. Property Description and Payment Schedule. The Property subject to this Property Schedule is described in Exhibit 1 hereto. It includes all replacements, parts, repairs, additions, accessions and accessories incorporated therein or affixed or attached thereto and any and all proceeds of the foregoing, including, without limitation, insurance recoveries. Purchaser shall not remove such property from the locations set forth therein without giving prior written notice, including the new location of such property, to Seller. The Installment Payment Schedule for this Property Schedule is set forth in Exhibit 1 hereto.
4. Opinion. The Opinion of Purchaser's Counsel is attached as Exhibit 2 hereto.
5. Purchaser's Certificate. The Purchaser's Certificate is attached as Exhibit 3 hereto.
6. Proceeds. Seller shall disburse the proceeds of this Property Schedule in accordance with the instructions attached as Exhibit 4 hereto.
7. Acceptance Certificate. The form of Acceptance Certificate is attached as Exhibit 5 hereto.
8. Additional Purchase Option Provisions. Installment Payments payable under this Property Schedule shall be subject to prepayment in whole at any time at the option of the Purchaser by payment of the applicable Prepayment Balance set forth in Exhibit 1 hereto and payment of all accrued and unpaid interest through the date of prepayment.

9. Tax Certificate. Attached as Exhibit 6 hereto.
10. Expiration. Seller, at its sole determination, may choose not to accept this Property Schedule if the fully executed, original Master Agreement (including this Property Schedule and all ancillary documents) is not received by Seller at its place of business by November 11, 2011.

IN WITNESS WHEREOF, Seller and Purchaser have caused this Property Schedule to be executed in their names by their duly authorized representatives as of the Commencement Date above.

**SELLER:**  
**U.S. BANCORP EQUIPMENT**  
**FINANCE, INC.**

**PURCHASER:**  
**CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name: Thomas Hanel  
Title: Mayor

Attest:

By: \_\_\_\_\_  
Name: Cari Martin  
Title: City Clerk

**EXHIBIT 1**  
**Property Description and Payment Schedule**

Re: **Property Schedule No. 1** to Master Tax-Exempt Installment Purchase Agreement U.S. Bancorp Equipment Finance, Inc. and the City of Billings, Montana.

The Property is as follows: The Property as more fully described in Exhibit A incorporated herein by reference and attached hereto.

PROPERTY LOCATION: Airport Highway 3 Office Building – 291 South View Drive, Billings, Montana – Lighting Upgrades; Airport Operations Center – 2281 Overlook Drive, Billings, Montana – Lighting Upgrades and Comprehensive Systems Commissioning and Balancing; Airport Terminal Building – 1901 Terminal Circle, Billing, Montana – Lighting Upgrades, Centralized Comprehensive Digital Control System, Variable Frequency Drive Install and Comprehensive Systems Commissioning and Balancing.

USE: Energy Efficiency Improvements. This use is essential to the proper, efficient and economic functioning of Purchaser or to the services that Purchaser provides; and Purchaser has immediate need for and expects to make immediate use of substantially all of the Property, which need is not temporary or expected to diminish in the foreseeable future.

ACCOUNT: Installment Payments payable by the Purchaser pursuant to this Property Schedule shall constitute current expenses of the Purchaser’s Airport Enterprise Fund and shall not in any way be construed to be debts of the Purchaser in contravention of any applicable constitutional or statutory limitation or requirements concerning the creation of indebtedness by the Purchaser, nor shall anything contained therein constitute a pledge of the general tax revenues, funds or money of the Purchaser. Installment Payments payable by the Purchaser pursuant to this Property Schedule shall be payable only from current funds which are budgeted and appropriated solely from the Purchaser’s Airport Enterprise Fund for such purpose during the fiscal year of the Purchaser for which such funds were budgeted and appropriated. The Purchaser has not pledged the full faith and credit of the Purchaser, Yellowstone County or the State of Montana to the payment of amounts due under the Master Agreement.

Installment Payment Schedule

Total Principal Amount: \$1,353,078.00.

<u>Pay #</u>	<u>Date</u>	<u>Payment</u>	<u>Principal</u>	<u>Interest (4.86%)</u>	<u>Prepayment Balance</u>
1	28-Apr-2012	64,475.00	30,918.04	33,556.96	1,361,824.76
2	28-Oct-2012	64,475.00	31,684.83	32,790.17	1,329,189.39
3	28-Apr-2013	64,475.00	32,470.62	32,004.38	1,295,744.64
4	28-Oct-2013	64,475.00	33,275.91	31,199.09	1,261,470.46
5	28-Apr-2014	64,475.00	34,101.17	30,373.83	1,226,346.25

6	28-Oct-2014	64,475.00	34,946.89	29,528.11	1,190,350.95
7	28-Apr-2015	64,475.00	35,813.59	28,661.41	1,153,462.96
8	28-Oct-2015	64,475.00	36,701.78	27,773.22	1,115,660.12
9	28-Apr-2016	64,475.00	37,612.01	26,862.99	1,076,919.75
10	28-Oct-2016	64,475.00	38,544.80	25,930.20	1,037,218.61
11	28-Apr-2017	64,475.00	39,500.73	24,974.27	996,532.85
12	28-Oct-2017	64,475.00	40,480.37	23,994.63	954,838.08
13	28-Apr-2018	64,475.00	41,484.30	22,990.70	912,109.25
14	28-Oct-2018	64,475.00	42,513.13	21,961.87	868,320.73
15	28-Apr-2019	64,475.00	43,567.47	20,907.53	823,446.23
16	28-Oct-2019	64,475.00	44,647.97	19,827.03	777,458.83
17	28-Apr-2020	64,475.00	45,755.26	18,719.74	730,330.92
18	28-Oct-2020	64,475.00	46,890.01	17,584.99	682,034.21
19	28-Apr-2021	64,475.00	48,052.90	16,422.10	632,539.72
20	28-Oct-2021	64,475.00	49,244.64	15,230.36	581,817.75
21	28-Apr-2022	64,475.00	50,465.92	14,009.08	529,837.84
22	28-Oct-2022	64,475.00	51,717.50	12,757.50	476,568.82
23	28-Apr-2023	64,475.00	53,000.12	11,474.88	421,978.69
24	28-Oct-2023	64,475.00	54,314.55	10,160.45	366,034.71
25	28-Apr-2024	64,475.00	55,661.57	8,813.43	308,703.29
26	28-Oct-2024	64,475.00	57,042.01	7,432.99	249,950.02
27	28-Apr-2025	64,475.00	58,456.67	6,018.33	189,739.64
28	28-Oct-2025	64,475.00	59,906.43	4,568.57	128,036.03
29	28-Apr-2026	64,475.00	61,392.13	3,082.87	64,802.13
30	28-Oct-2026	64,475.00	62,914.69	1,560.31	0.00
Total		1,934,250.00	1,353,078.00	581,172.00	0.00

**PURCHASER:  
CITY OF BILLINGS, MONTANA**

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

Name: Thomas Hanel

Title: Mayor

Attest:

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

Name: Cari Martin

Title: City Clerk

EXHIBIT A  
Description of Property

<u>PROJECT</u>	<u>LOCATION</u>	<u>BUDGET</u>
Lighting Upgrade	Airport Hwy 3 Office	\$ 14,834
Lighting Upgrade	Airport Operations Center	92,420
Comprehensive Systems Commissioning & Balancing	Airport Operations Center	20,299
Centralized Comprehensive Digital Control System	Airport Terminal Building	568,429
Variable Frequency Drive Install	Airport Terminal Building	85,464
Lighting Upgrade	Airport Terminal Building	594,274
Comprehensive Systems Commissioning & Balancing	Airport Terminal Building	<u>23,358</u>
Total Project Budget		\$1,399,078
Less Utility Upgrade Incentives		<u>(\$ 46,000)</u>
<b>TOTAL PROPERTY SCHEDULE PURCHASE AMOUNT</b>		<b>\$1,353,078</b>

**EXHIBIT 2**  
**Opinion of Dorsey & Whitney LLP**

October 28, 2011

City of Billings  
Billings, Montana

U.S. Bancorp Equipment Finance, Inc.  
Denver, Colorado

Re: Master Tax-Exempt Installment Purchase Agreement  
City of Billings, Montana

Ladies and Gentlemen:

We have acted as special counsel to the City of Billings, Montana (the “City”), in connection with the authorization, execution and delivery by the City of the Master Tax-Exempt Installment Purchase Agreement, dated as of October 28, 2011 (the “Lease-Purchase Agreement”), between the City and U.S. Bancorp Equipment Finance, Inc. (“U.S. Bancorp”) and Property Schedule No. 1 thereto, dated as of October 28, 2011 (the “Airport Property Schedule”). In that capacity, we have examined executed counterparts, or copies otherwise identified to our satisfaction, of the Lease-Purchase Agreement, the Airport Property Schedule and the Escrow Agreement dated as of October 28, 2011 (the “Escrow Agreement”), between the City, U.S. Bancorp and U.S. Bank National Association, as Escrow Agent, together with certified copies of certain proceedings taken and certain certificates and affidavits furnished by the City in the authorization, execution and delivery of the Lease-Purchase Agreement and the Airport Property Schedule, including a certified copy of Resolution No. [\_\_] adopted by the City Council of the City on October 11, 2011. As to questions of fact material to our opinion, we have assumed the authenticity of and relied upon the proceedings, affidavits and certificates furnished to us without undertaking to verify the same by independent investigation.

The installment payments payable by the City under the Airport Property Schedule (the “Installment Payments”) are payable solely from the current revenues of the City which are budgeted and appropriated solely from the City’s Airport Enterprise Fund and are subject to annual appropriation in accordance with the provisions of the Lease-Purchase Agreement and the Airport Property Schedule. The Lease-Purchase Agreement and the Airport Property Schedule are not general obligations of the City and the general credit and taxing powers of the City are not pledged to the payment of the Installment Payments. U.S. Bancorp is selling to the City energy efficiency improvements described in the Airport Property Schedule (the “Airport Improvements”) to be constructed and installed in various buildings and facilities at the City’s Airport. The Airport Property Schedule will be in effect for a term commencing as provided therein and ending on October 28, 2026, unless earlier terminated in accordance with its terms. The Installment Payments will be payable at such times and in such amounts and

will comprise principal payments and interest payments as set forth in the Airport Property Schedule. In the sole event that moneys are not appropriated and provided from the City's Airport Enterprise Fund with respect to the Installment Payments, the City may, by written notice to U.S. Bancorp, discontinue the Airport Property Schedule at the end of any fiscal year of the City then in effect. If the City should discontinue the Airport Property Schedule at the end of any such fiscal year in the manner provided therein, the Airport Property Schedule is terminated without penalty or liability on the part of the City to pay any Installment Payments coming due after the fiscal year then in effect, but in such event the City has the obligation to deliver possession of the Airport Improvements to U.S. Bancorp at the time and in the manner provided in the Lease-Purchase Agreement. In the event the City should not discontinue the Airport Property Schedule and does pay all Installment Payments, the rights of U.S. Bancorp in the Airport Improvements will be terminated and U.S. Bancorp must transfer legal title to the Airport Improvements to the City. The City will have an option to purchase U.S. Bancorp's interest in the Airport Improvements on each Installment Payment date in the amount set forth in the Airport Property Schedule.

From our examination of such proceedings, certificates and affidavits, and on the basis of existing law, it is our opinion that:

1. The Lease-Purchase Agreement, the Airport Property Schedule and the Escrow Agreement are each valid and binding instruments of the City, enforceable in accordance with their respective terms.
2. The portion of the Installment Payments designated as interest: (a) is not includable in gross income for federal income tax purposes; (b) is an item of tax preference includable in alternative minimum taxable income for purposes of the federal alternative minimum tax applicable to all taxpayers; and (c) is includable in adjusted current earnings of corporations in determining alternative minimum taxable income for purposes of the federal alternative minimum tax imposed on corporations; provided, however, that we express no opinion as to the portion of the Installment Payments designated specifically as interest for any period during which an interest in the Airport Property Schedule is owned by a person who is a "substantial user" of the City-owned Billings Logan International Airport facilities financed with proceeds of the Airport Property Schedule or by a "related person" of such substantial user, as defined in Section 147(a) of the Internal Revenue Code of 1986, as amended (the "Code").
3. The portion of the Installment Payments designated as interest is not includable in gross income for State of Montana individual income tax purposes, but is includable in the computation of income for purposes of the Montana corporate income tax and the Montana corporate license tax.

The opinions expressed in paragraph 1 above are subject, as to enforceability, to the effect of any state or federal laws relating to bankruptcy, insolvency, reorganization, moratorium or creditors' rights and the exercise of judicial discretion.

The opinions expressed in paragraphs 2 and 3 above are subject to the condition that the City comply with all requirements of the Code that must be satisfied subsequent to the execution and delivery of the Airport Property Schedule in order that the portion of the Installment Payments that are specifically designated as interest may be, and continue to be, excluded from gross income for federal income tax purposes. The City has covenanted to comply with these continuing requirements. Its failure to do so could result in the inclusion of such interest in gross income for federal income tax purposes, retroactive to the date of execution and delivery of the Airport Property Schedule. Except as stated in this opinion, we express no opinion regarding federal, state or other tax consequences with respect to the Lease-Purchase Agreement or the Airport Property Schedule.

Very truly yours,

**EXHIBIT 3**  
**Purchaser's Certificate**

Re: **Property Schedule No. 1** to Master Tax-Exempt Installment Purchase Agreement  
U.S. Bancorp Equipment Finance, Inc. and the City of Billings, Montana.

The undersigned, being the duly elected, qualified and acting City Clerk of the City of Billings, Montana (the "Purchaser") do hereby certify, as of October 28, 2011 as follows:

1. Purchaser did, at a meeting of the governing body of the Purchaser held October 11, 2011 by resolution or ordinance duly enacted, in accordance with all requirements of law, approve and authorize the execution and delivery of the above-referenced Property Schedule (the "Property Schedule") and the Master Tax-Exempt Installment Purchase Agreement (the "Master Agreement") by the following named representative of Purchaser, to wit:

NAME OF EXECUTING OFFICIAL	TITLE OF EXECUTING OFFICIAL	SIGNATURE OF EXECUTING OFFICIAL
Thomas Hanel	Mayor	_____
Cari Martin	City Clerk	_____

2. The above-named representative of the Purchaser held at the time of such authorization and holds at the present time the office set forth above.

3. The meeting(s) of the governing body of the Purchaser at which the Master Agreement and the Property Schedule were approved and authorized to be executed was duly called, regularly convened and attended throughout by the requisite quorum of the members thereof, and the enactment approving the Master Agreement and the Property Schedule and authorizing the execution thereof has not been altered or rescinded. All meetings of the governing body of Purchaser relating to the authorization and delivery of Master Agreement and the Property Schedule have been: (a) held within the geographic boundaries of the Purchaser; (b) open to the public, allowing all people to attend; (c) conducted in accordance with internal procedures of the governing body; and (d) conducted in accordance with the charter of the Purchaser, if any, and the laws of the State.

4. No event or condition that constitutes, or with the giving of notice or the lapse of time or both would constitute, an Event of Default or a Nonappropriation Event (as such terms are defined in the Master Agreement) exists at the date hereof with respect to this Property Schedule or any other Property Schedules under the Master Agreement.

5. The acquisition of all of the Property under the Property Schedule has been duly authorized by the governing body of Purchaser.

6. Purchaser will, in accordance with the requirements of law, fully budget and appropriate sufficient funds for the current fiscal year to make the Installment Payments scheduled to come due during the current fiscal year under the Property Schedule and to meet its other obligations for the current fiscal year.

7. As of the date hereof, no litigation is pending, (or, to my knowledge, threatened) against Purchaser in any court (a) seeking to restrain or enjoy in the delivery of the Master Agreement or the Property Schedule or of other agreements similar to the Master Agreement; (b) questioning the authority of Purchaser to execute the Master Agreement or the Property Schedule, or the validity of the Master Agreement or the Property Schedule, or the payment of principal of or interest on, the Property Schedule; (c) questioning the constitutionality of any statute, or the validity of any proceedings, authorizing the execution of the Master Agreement and the Property Schedule; or (d) affecting the provisions made for the payment of or security for the Master Agreement and the Property Schedule.

**PURCHASER:**  
**CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name: Cari Martin  
Title: City Clerk

**EXHIBIT 4**  
**Payment of Proceeds Instructions**

U.S. Bancorp Equipment Finance, Inc.  
13010 SW 68th Parkway, Suite 100  
Portland, Oregon 97223

Re: **Property Schedule No. 1** (the "Property Schedule") to Master Tax-Exempt Installment Purchase Agreement between U.S. Bancorp Equipment Finance, Inc. ("Seller") and the City of Billings, Montana ("Purchaser").

Ladies and Gentlemen:

The undersigned, an Authorized Representative of the Purchaser hereby requests and authorizes Seller to disburse the net proceeds of the Property Schedule as follows:

Name of Payee: \_\_\_\_\_

By check \_\_\_\_\_ By wire transfer \_\_\_\_\_

If by check, Payee's address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If by wire transfer, instructions as follows:

Pay to Bank Name: U.S. Bank, National Association

Bank Address: 303 North Broadway  
PO Box 30678  
Billings, MT 59101

Bank Phone #: (406) 447-5251

For Account of: City of Billings General Depository

Account No.: 1-500-9559-2021

ABA No.: 092900383

**PURCHASER:**  
**CITY OF BILLINGS, MONTANA**

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

Name:

Title:

**EXHIBIT 5**  
**Acceptance Certificate**

U.S. Bancorp Equipment Finance, Inc.  
13010 SW 68th Parkway, Suite 100  
Portland, Oregon 97223

Re: **Property Schedule No. 1** to Master Tax-Exempt Installment Purchase Agreement  
between U.S. Bancorp Equipment Finance, Inc. and the City of Billings, Montana

Ladies and Gentlemen:

In accordance with the above-referenced Master Tax-Exempt Installment Purchase Agreement (the "Master Agreement"), the undersigned ("Purchaser") hereby certifies and represents to, and agrees with, U.S. Bancorp Equipment Finance, Inc. ("Seller"), as follows:

- (1) The Property, as such terms are defined in the above-referenced Property Schedule, has been acquired, made, delivered, installed and accepted on the date indicated below.
- (2) Purchaser has conducted such inspection and/or testing of the Property as it deems necessary and appropriate and hereby acknowledges that it accepts the Property for all purposes.
- (3) No event or condition that constitutes, or with notice or lapse of time, or both, would constitute, an Event of Default (as such term is defined in the Master Agreement) exists at the date hereof.

Date: \_\_\_\_\_

**PURCHASER:**  
**CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name:  
Title:

**EXHIBIT 6  
Tax Certificate**

**Master Tax-Exempt Installment Purchase Agreement  
Property Schedule No. 1**

**City of Billings, Montana**

**ARBITRAGE AND REBATE CERTIFICATE AND  
AGREEMENT**

This Arbitrage and Rebate Certificate and Agreement (this “Certificate”) is given for the purpose of establishing and maintaining the tax-exempt status of interest payments required to be made by the City of Billings, Montana (the “City”), under the Master Tax-Exempt Installment Purchase Agreement dated as of October 28, 2011 (the “Lease-Purchase Agreement”) between the City and U.S. Bancorp Equipment Finance, Inc., as lessor (the “Lessor”), and Property Schedule No. 1 thereto (the “Airport Property Schedule”). The representations and covenants of the City herein are for the benefit of the owner or owners from time to time of the interest of the Lessor under the Airport Property Schedule.

I. General Provisions and Definitions.

*1.1. The Airport Property Schedule will be entered into by the City pursuant to Resolution No. [\_\_\_], adopted by the City Council of the City on October 11, 2011 ( the “Resolution”). Terms used with initial capital letters but undefined herein shall have the meanings given them in the Lease Purchase Agreement, the Internal Revenue Code of 1986, as amended (the “Code”), or in the Regulations (as hereinafter defined), unless the context hereof clearly requires otherwise.*

*This Certificate is intended to be, and may be relied upon as, among other things, a certification described in the Regulations, Section 1.148-2(b) and Section 148 of the Code, and is delivered as a part of the transcript of proceedings relating to the Airport Property Schedule. We are among the officers of the City responsible for the issuance of the Airport Property Schedule.*

*1.2. We have investigated the facts, estimates and circumstances surrounding the execution and delivery of the Airport Property Schedule, which are described summarily in this Certificate. To the best of our knowledge and belief, such facts, estimates and circumstances are correct and complete and the City’s expectations as to future events, which are based thereon, are in all respects reasonable and made in good faith. To the extent that the expectations of the City are based upon estimates and representations made by others, including the Lessor, we have examined such estimates and representations and consider them to be reasonable and correct. Any statements in this Certificate involving future events, whether or not expressly so stated, are intended*

*as expectations of the City and not as representations of fact. On the basis of such facts, estimates and circumstances, it is expected that the proceeds of the Airport Property Schedule will be used in a manner that would not cause the Airport Property Schedule to be considered an “arbitrage bond” within the meaning of Section 148 of the Code.*

1.3. *The following terms have the following meanings when used in this Certificate:*

Bond Counsel shall mean nationally recognized municipal bond counsel selected by the City.

Bond Year shall mean each one-year period (or shorter period from the Closing Date) that ends at the close of business on each September 15 or, if the last Installment Payment owing under the Airport Property Schedule is not paid on a September 15, such shorter period from the last preceding September 15 to the date on which such last Installment Payment is made.

Closing Date shall mean October 28, 2011, the date of execution and delivery of the Airport Property Schedule.

Computation Date shall mean an installment computation date (the last day of the fifth and each succeeding fifth Bond Year) and the final computation date (the date the last Bond is discharged). If the Installment Payments owing under the Airport Property Schedule are paid when due, the installment computation dates for the Airport Property Schedule shall be September 15, 2016 and September 15, 2021, September 15, 2026 and the final computation date shall be October 28, 2026.

Construction Account shall mean the Construction Account created in the Escrow Fund established under the Escrow Agreement.

Escrow Agreement shall mean the Escrow Agreement referred to in the Airport Property Schedule, dated as of October 28, 2011, by and between the City and the Lessor, as amended or supplemented from time to time.

Escrow Fund shall mean the Escrow Fund established under the Escrow Agreement.

Gross Proceeds shall mean, with respect to the Airport Property Schedule, all proceeds of the Airport Property Schedule (including sale proceeds and transferred proceeds) and any funds (other than proceeds) that are part of any reserve or replacement fund for the Airport Property Schedule.

Investment Property shall mean any security, obligation (other than a Non-AMT Obligation), annuity contract or investment-type property.

Non-AMT Obligation means any obligation the interest on which is not includible in gross income under Section 103 of the Code and which is not a “specified private activity bond” (within the meaning of Section 57(a)(5)(C) of the Code).

Nonpurpose Investment shall mean any Investment Property that is not a purpose investment in which Gross Proceeds of the Airport Property Schedule are invested.

Project shall mean the construction and installation of energy efficiency improvements to various buildings and facilities at the City-owned Billings Logan International Airport (the “Airport”) and related fees and expenses.

Rebatable Arbitrage shall mean, as of any Computation Date, the excess of the future value of all nonpurpose receipts with respect to the Airport Property Schedule, over the future value of all nonpurpose payments with respect to the Airport Property Schedule, or with respect to a Voluntary Computation Date, the amount of the payment that would be payable to the United States under Section 148(f) of the Code if such date were a “Computation Date.”

Regulations shall mean the Treasury Regulations applicable to the Lease Purchase Agreement and the Airport Property Schedule and promulgated under the Code, including, without limitation, Treasury Regulations, Sections 1.148-0 through 1.148-11, and Sections 1.149(b)-1, 1.149(d)-1, 1.149(g)-1, 1.150-1 and 1.150-2.

Voluntary Computation Date means September 15, 2012, and each September 15 thereafter, excluding Computation Dates.

Yield, with reference to any obligation, means that discount rate which, when computing the present value of all unconditionally payable payments of principal and interest paid and to be paid on such obligation and taking into account payments made for qualified guarantees, produces an amount equal to the present value of the issue price of the obligation.

Yield of the Airport Property Schedule shall mean 4.96000%.

II. The Purpose of the Airport Property Schedule.

2.1. *The Airport Property Schedule is entered into pursuant to the Resolution for the purposes of providing funds to be used to finance costs of the Project. The City expects to expend the following sums from the proceeds of the Airport Property Schedule for the Project:*

Lighting Upgrade — Airport Hwy 3 Office	\$ 14,834
Lighting Upgrade — Airport Operations Center	92,420
Comprehensive Systems Commissioning & Balancing — Airport Operations Center	20,299
Centralized Comprehensive Digital Control System — Airport Terminal Building	568,429

Variable Frequency Drive Install — Airport Terminal Building	85,464
Lighting Upgrade — Airport Terminal Building	594,274
Comprehensive Systems Commissioning & Balancing — Airport Terminal Building	23,358
Less Utility Upgrade Incentives	<u>(46,000)</u>
Total:	\$1,353,078.00

2.2. *Any costs in excess of the proceeds of the Airport Property Schedule will be paid from other funds of the City available therefor.*

III. Sources and Disbursements of Funds.

3.1. *The aggregate amount of the principal components payable by the City pursuant to the Airport Property Schedule equals \$1,353,078.00. The City is executing and delivering the Airport Property Schedule to the Lessor in exchange for proceeds in the amount of \$1,353,078.00. The issue price of the Airport Property Schedule, as defined in Section 1.148-1(b) of the Regulations and Sections 1273(b)(1) and (2) of the Code, is \$1,353,078.00, equal to the principal amount thereof.*

3.2. *\$1,353,078.00 of the proceeds of the Airport Property Schedule are expected to be deposited in the Construction Account to pay the costs of the Project. Costs of entering into the Airport Property Schedule will be paid from other available funds of the City.*

3.3. *The Airport Property Schedule is not a hedge bond (as defined in Section 149(g) of the Code) since at least 85% of the spendable proceeds of the Airport Property Schedule are to be used to pay costs of the Project within three years after the date hereof and less than 50% of the proceeds of the Airport Property Schedule are to be invested in nonpurpose investments having a substantially guaranteed yield for four years or more.*

IV. Yield of the Airport Property Schedule.

4.1. *No other obligations of the City are being (a) issued at substantially the same time as the Airport Property Schedule, (b) sold pursuant to the same plan of financing as the Airport Property Schedule, and (c) paid out of substantially the same source of funds (or which will have substantially the same claim to be paid out of substantially the same source of funds) as will be used to pay the Airport Property Schedule, within the meaning of Section 1.150-1(c) of the Regulations. Contemporaneous with the execution and delivery of the Airport Property Schedule, the City is entering into Property Schedule No. 2 to the Lease-Purchase Agreement (the "Parking Property Schedule"). The installment payments payable by the City pursuant*

*to the Airport Property Schedule and the Parking Property Schedule shall be payable, as specified in the Resolution, only from current funds which are budgeted and appropriated solely from the City's Airport Enterprise Fund and the City's Parking Enterprise Fund, respectively, for such purpose during the fiscal year of the City for which such funds were budgeted and appropriated.*

*4.2. The Yield of the Airport Property Schedule computed in accordance with Section 148 of the Code and applicable Regulations, is 4.96000% per annum.*

V. Temporary Investments.

*5.1. Except as described in Section 5.2 hereof, none of the proceeds of the Airport Property Schedule will be invested at a materially higher yield.*

*5.2. Proceeds of the Airport Property Schedule deposited in the Construction Account are to be used to finance the costs of the Project. The estimated total cost of the Project, including implementation, administration, construction management and contingencies, excluding costs of entering into the Airport Property Schedule, is not less than \$1,353,078.00.*

(a) The City has incurred or will incur within six months after the date hereof substantial binding obligations to undertake the Project (in the form of binding contracts or commitments) in an aggregate amount not less than five percent of the net sale proceeds of the Airport Property Schedule (i.e., \$67,654).

(b) Work on the Project and allocation of the net sale proceeds and investment proceeds of the Airport Property Schedule to expenditures will proceed with due diligence to completion and it is reasonably expected the Project will be completed and all net sale proceeds of the Airport Property Schedule will be so allocated by March 28, 2013.

(c) The net sale proceeds of the Airport Property Schedule, plus investment earnings thereon, do not exceed the amount to be spent by the City to acquire and construct the Project.

(d) The City expects to spend on the Project, within not more than three years from the date hereof, all of the net sale and investment proceeds to be derived by the City from the issuance of the Airport Property Schedule.

Therefore, the City may invest said amounts deposited in the Construction Account without yield restriction for a temporary period ending three years from the Closing Date pursuant to Section 1.148-2(e)(2) of the Regulations. Should any of the proceeds of the Airport Property Schedule not be so expended by the end of such period, the City may either (i) invest such amounts at a yield which does not exceed the Yield of the Airport Property Schedule, or (ii) comply with the provisions of Section 1.148-5(c) of the Regulations and make such payments at such times as are required pursuant to Section 1.148-5(c) to reduce the Yield on any investments made subsequent to expiration of the

temporary period to a Yield not materially higher than the Yield of the Airport Property Schedule.

VI. No Sinking Fund.

6.1. *The City has not created or established, and does not expect to create or establish, any sinking or similar fund which is reasonably expected to be used to pay debt service on the Airport Property Schedule or which is pledged as collateral to secure the Airport Property Schedule. No amounts in any other funds or accounts of the City are reserved for or pledged to the payment of debt service on the Airport Property Schedule or will be used to replace funds that will be used to pay debt service on the Airport Property Schedule.*

VII. Sale Proceeds.

7.1. *The sale proceeds of the Airport Property Schedule do not exceed the amount necessary to achieve the purposes described in Section II hereof. No portion of the Airport Property Schedule is issued solely for the purpose of investing the proceeds at a materially higher yield than the Yield of the Airport Property Schedule. None of the proceeds of the Airport Property Schedule will be used directly or indirectly to replace funds which were used directly or indirectly to acquire obligations with a yield that is materially higher than the Yield of the Airport Property Schedule.*

7.2. *In connection with the execution and delivery of the Airport Property Schedule, except as specifically provided in Sections 148(c) and (d) of the Code, the City has not engaged and will not engage in any transaction or series of transactions (i) enabling the City to exploit the difference between tax-exempt and taxable interest rates to gain a material financial advantage, and (ii) increasing the burdens on the market for tax-exempt obligations in any manner including, without limitation, by selling any obligation that would not otherwise be sold, or by selling more obligations, or issuing them sooner, or allowing them to remain outstanding longer, than would otherwise be necessary.*

XIII. Miscellaneous.

8.1. *The City will fulfill all conditions specified in Sections 141(e) and 142 of the Code to qualify the Airport Property Schedule as “qualified exempt facility bonds” thereunder.*

8.2. *The facilities financed with proceeds of the Airport Property Schedule (the “Financed Facilities”) will in their entirety qualify as “airport facilities” within the meaning of Section 142(a)(1). The portion of the Financed Facilities that constitutes an office is not more than a de minimis amount of the functions to be performed at such office is not directly related to the day-to-day operations of Financed Facilities within the meaning of Section 142(b)(2) of the Code.*

8.3. *The Project is treated as serving a general public use within the meaning of Sections 1.103-8(a)(2) and 1.103-8(e) of the Regulations. The Financed Facilities*

*consist entirely of airport facilities and property functionally related and subordinate thereto within the meaning of Section 1.103-8(a)(3) of the Regulations. The Airport Property Schedule is not a deep discount obligation within the meaning of Section 1.103-8(a)(6) and (7) of the Regulations.*

*8.4. The Financed Facilities are owned by the City. The City has no present intention to sell or otherwise dispose of the Financed Facilities before the termination of the Airport Property Schedule. The City expects that such property will continue to be owned and operated by the City substantially in the manner in which similar property is now owned and operated for an indefinite period concluding not earlier than the final stated termination date of the Airport Property Schedule.*

*8.5. The City has not and will not enter into a lease or use agreement relating to Airport facilities constituting or comprising the Financed Facilities for a period in excess of five years unless the lease contains a provision to the effect that (1) the lessee has made an irrevocable election not to claim depreciation or an investment credit under the Code with respect to the leased premises and (2) the term of the lease is not more than eighty percent of the reasonably expected economic life of such Airport facilities.*

*8.6. The City covenants that none of the proceeds of the Airport Property Schedule shall be used to provide any airplane, skybox or other private luxury box, health club facility, facility primarily used for gambling, or store the principal business of which is the sale of alcoholic beverages for consumption off premises.*

*8.7. Not less than 95% of the proceeds of the Airport Property Schedule have been or will be applied to capital costs of "airport" facilities, within the meaning of Section 142(a) of the Code and Section 1.103-8(e) of the Regulations.*

*8.8. In order to comply with Section 147(g) of the Code, the City covenants and agrees that not more than \$27,062 of proceeds of the Airport Property Schedule will be used to pay issuance costs of entering into the Airport Property Schedule.*

*8.9. The weighted average maturity of the Airport Property Schedule (8.660 years) does not exceed 120 percent of the average reasonably expected economic life of the Project. Such average reasonably expected economic life is not less than 15 years. It is not expected that any replacement proceeds of the Airport Property Schedule will arise subsequent to the execution and delivery of the Airport Property Schedule.*

*8.10. A public hearing was held on October 11, 2011 for which at least 14 days published notice was given in the official newspaper of the City, satisfying the requirements of Section 147(f) of the Code.*

**IX. Minor Portion.**

**9.1.** An aggregate amount not to exceed the "minor portion" amount for the Airport Property Schedule (\$67,654) may be invested pursuant to Section 148(e) of the Code and Section 1.148-2(g) of the Regulations without restriction as to Yield. To the extent the amount on hand in the Construction Account has been credited thereto longer

than the period described in Section 5.2 hereof, such amount may be invested up to the minor portion amount at a yield greater than the Yield of the Airport Property Schedule. Such amounts are Gross Proceeds of the Airport Property Schedule, however, and subject to the rebate requirements set forth in Sections X and XI hereof.

X. Rebate.

*10.1. The City, in the Resolution, has covenanted to comply with the requirements of Section 148(f) of the Code with respect to the Airport Property Schedule. The City covenants that it will consult with Bond Counsel and undertake to determine what is required with respect to the rebate provisions contained in Section 148(f) of the Code from time to time and will comply with any requirements that may be applicable to the Airport Property Schedule. The methodology described in this Certificate will be followed, except to the extent inconsistent with any requirements of future regulations or written advice received from Bond Counsel.*

*10.2. Subject to any applicable exceptions or exemptions available under the Code or regulations, detailed records with respect to each and every Nonpurpose Investment attributable to Gross Proceeds of the Airport Property Schedule will be maintained by the City including: (i) purchase date, (ii) purchase price, (iii) brokerage or other transaction costs of purchase, (iv) information establishing fair market value on the date such investment became a Nonpurpose Investment, (v) any accrued interest paid, (vi) face amount, (vii) coupon or Stated interest rate, (viii) periodicity of interest payments, (ix) disposition price, (x) any accrued interest received, (xi) disposition date, and (xii) brokerage or other transaction costs of disposition. Such detailed recordkeeping is required for the calculation of the Rebatable Arbitrage.*

XI. Rebatable Arbitrage Calculation and Payment.

*11.1. The City, in the Resolution, has covenanted to comply with the requirements of Section 148(f) of the Code with respect to the Airport Property Schedule. The City covenants that it will consult with Bond Counsel and undertake to determine what is required with respect to the rebate provisions contained in Section 148(f) of the Code from time to time and will comply with any requirements that may be applicable to the Airport Property Schedule. The methodology described in this Certificate will be followed, except to the extent inconsistent with any requirements of future regulations or written advice received from Bond Counsel.*

*11.2. Subject to any applicable exceptions or exemptions available under the Code or regulations, the City shall pay to the United States Department of the Treasury from funds legally available therefor: (A) not later than 60 days after each Computation Date, an amount which, when added to the future value as of the Computation Date of all previous rebate payments, equals at least 90% of the Rebatable Arbitrage calculated as of such Computation Date; and (B) not later than 60 days after the final Computation Date, an amount which, when added to the future value as of the Computation Date of all previous rebate payments, equals 100% of the Rebatable Arbitrage.*

11.3. Any payment required to be made pursuant hereto shall be filed with the Internal Revenue Service Center, Ogden, Utah 84201 (or at such other address as the Internal Revenue Service may from time to time designate), on or before the date such payment is due, and shall be accompanied by a completed and executed Internal Revenue Service Form 8038-T. The City shall retain records of the calculations required by this Section XI until six years after the final Computation Date for the Airport Property Schedule.

11.4. The City shall file or cause to be filed such reports or other documents with the Internal Revenue Service as required by Section 148(f) of the Code.

11.5. Notwithstanding anything in this Certificate or any other provisions of the Resolution to the contrary, the obligation to remit the Rebatable Arbitrage with respect to the Airport Property Schedule to the United States Department of the Treasury and to comply with all other requirements contained in this Certificate shall survive the defeasance of the Airport Property Schedule.

11.6. The Project will be owned and operated by the City and used for governmental purposes. All of the Gross Proceeds qualify for the temporary period under Section 1.148-2(e)(2) of the Regulations. Apart from the sale proceeds of the Airport Property Schedule and investment proceeds derived therefrom, the City does not expect that any other Gross Proceeds will arise. Thus, if the expenditure tests set forth in Section 1.148-7(d)(1)(i) of the Regulations are met (i.e., the following percentages of Gross Proceeds are spent within the following periods beginning on the date of issuance: at least 15% within six months (April 28, 2012); 60% within one year (October 28, 2012), and 100% within eighteen months (April 28, 2013) (subject to a reasonable contractual retainage amount not exceeding five percent of the net sale proceeds of the Airport Property Schedule as of October 28, 2011 to be spent within 30 months after the date hereof, as defined in Section 1.148-7(h) of the Regulations)), then the City may elect to treat the Gross Proceeds as exempt from the rebate requirements of Section 148(f) of the Code pursuant to the "18 month" spending exception provided under Section 1.148-7(d) of the Regulations.

11.7. If Gross Proceeds subject to arbitrage rebate arise, either as a result of the failure to expend all Gross Proceeds as provided in Section 11.6 hereof, or from another cause, for purposes of complying with Section 148(f), the City will prepare or have prepared a calculation of the Rebatable Arbitrage for the Airport Property Schedule consistent with the rules described in this Section XI.

11.8. The City will prepare the calculation of the Rebatable Arbitrage within 30 days after each Computation Date and will, within 30 days after each Voluntary Computation Date, calculate the Rebatable Arbitrage on the assumption such Voluntary Computation Date is a Computation Date and file a copy of such calculations in the office of the City Clerk.

11.9. The City agrees to retain detailed records and documents relating to the expenditure of Gross Proceeds, the use of the facilities financed thereby and the

*investment of Gross Proceeds until three years following the retirement of the Airport Property Schedule to the extent required by applicable IRS rules and the Regulations and shall consult with counsel regarding such retention as appropriate.*

XII. Amendments.

12.1. The City may amend or supplement the provisions of Sections X or XI hereof by filing an executed copy of such amendment or supplement with the City Finance Director accompanied by an opinion of Bond Counsel to the effect that such amendment or supplement is required by, or better complies with, the provisions of Section 148 and applicable Regulations.

WITNESS our hands, on behalf of the City, officially as Mayor, City Finance Director and City Clerk of the City of Billings, Montana as of this 28th day of October, 2011.

CITY OF BILLINGS, MONTANA

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Finance Director

\_\_\_\_\_  
City Clerk

**Language for UCC Financing Statements**

**Schedule 1**

SECURED PARTY: U.S. Bancorp Equipment Finance, Inc.

DEBTOR: City of Billings, Montana

This financing statement covers all of Debtor's right, title and interest, whether now owned or hereafter acquired, in and to the equipment sold to Debtor under Property Schedule No. 1 dated October 28, 2011 to that certain Master Tax-Exempt Installment Purchase Agreement dated as of October 28, 2011, in each case between Debtor, as Purchaser, and Secured Party, as Seller, together with all accessions, substitutions and replacements thereto and therefor, and proceeds (cash and non-cash), including, without limitation, insurance proceeds, thereof, including without limiting, all equipment described on Exhibit A attached hereto and made a part hereof.

EXHIBIT A  
Description of Property

PROJECT

LOCATION

Lighting Upgrade

Airport Hwy 3 Office

Lighting Upgrade

Airport Operations Center

Comprehensive Systems  
Commissioning & Balancing

Airport Operations Center

Centralized Comprehensive  
Digital Control System

Airport Terminal Building

Variable Frequency Drive Install

Airport Terminal Building

Lighting Upgrade

Airport Terminal Building

Comprehensive Systems  
Commissioning & Balancing

Airport Terminal Building

**INSURANCE AUTHORIZATION AND VERIFICATION**

Date: October 28, 2011

Property Schedule No. 1

To: City of Billings, Montana ("Purchaser") P.O. Box 1178 Billings, Montana 59103 Attention: City Finance Director	From: U.S. Bancorp Equipment Finance, Inc. (the "Seller") 13010 SW 68th Parkway, Suite 100 Portland, Oregon 97223 Attn: Chris Jones
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**TO THE PURCHASER:** In connection with the above-referenced Property Schedule, Seller requires proof in the form of this document, executed by both Purchaser\* and Purchaser's agent, that Purchaser's insurable interest in the financed property (the "Property") meets Seller's requirements as follows, with coverage including, but not limited to, fire, extended coverage, vandalism, and theft:

Seller, AND ITS SUCCESSORS AND ASSIGNS, shall be covered as both ADDITIONAL INSURED and LENDER'S LOSS PAYEE with regard to all equipment financed or leased by policy holder through or from Seller. All such insurance shall contain a provision to the effect that such insurance shall not be canceled or modified without first giving written notice thereof to Seller and Purchaser at least thirty (30) days in advance of such cancellation or modification.

Purchaser must carry GENERAL LIABILITY (and/or, for vehicles, Automobile Liability) in the amount of no less than \$1,000,000.00 (one million dollars).

Purchaser must carry PROPERTY Insurance (or, for vehicles, Physical Damage Insurance) in an amount no less than the 'Insurable Value' \$1,353,078.00, with deductibles no more than \$25,000.00.

*\*Purchaser: Please execute this form and return with your document package. Seller will fax this form to your insurance agency for endorsement. In lieu of agent endorsement, Purchaser's agent may submit insurance certificates demonstrating compliance with all requirements. If fully executed form (or Purchaser-executed form plus certificates) is not provided within 15 days, we have the right to purchase such insurance at your expense. Should you have any questions, please contact Chris Jones at (303) 862-1201.*

**By signing, Purchaser authorizes the Agent named below: (1) to complete and return this form as indicated; and (2) to endorse the policy and subsequent renewals to reflect the required coverage as outlined above.**

Agency/Agent: Hoiness LaBar Insurance  
A Member of Payne Financial Group  
Address: P.O. Box 30638

Phone: Billings, Montana 59107-0638  
(406) 238-1900

**PURCHASER:  
CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name:  
Title:

**TO THE AGENT:** *In lieu of providing a certificate, please execute this form in the space below and promptly fax it to Seller at (406) 657-8363. This fully endorsed form shall serve as proof that Purchaser's insurance meets the above requirements.*

**Agent hereby verifies that the above requirements have been met in regard to the Property listed below.**

Print Name Of Agency: **X** \_\_\_\_\_

By: **X** \_\_\_\_\_  
(Agent's Signature)

Print Name: **X** \_\_\_\_\_

Date: **X** \_\_\_\_\_

**Insurable Value:** \$1,353,078.00.

**ATTACHED: PROPERTY DESCRIPTION FOR PROPERTY SCHEDULE NO. 1.**

EXHIBIT A  
Description of Property

<u>PROJECT</u>	<u>LOCATION</u>	<u>BUDGET</u>
Lighting Upgrade	Airport Hwy 3 Office	\$ 14,834
Lighting Upgrade	Airport Operations Center	92,420
Comprehensive Systems Commissioning & Balancing	Airport Operations Center	20,299
Centralized Comprehensive Digital Control System	Airport Terminal Building	568,429
Variable Frequency Drive Install	Airport Terminal Building	85,464
Lighting Upgrade	Airport Terminal Building	594,274
Comprehensive Systems Commissioning & Balancing	Airport Terminal Building	<u>23,358</u>
Total Project Budget		\$1,399,078
Less Utility Upgrade Incentives		<u>(\$ 46,000)</u>
TOTAL PROPERTY SCHEDULE PURCHASE AMOUNT		\$1,353,078

**PROPERTY SCHEDULE NO. 2**  
**MASTER TAX-EXEMPT INSTALLMENT PURCHASE AGREEMENT**

This Property Schedule No. 2 is entered into as of the Commencement Date set forth below, pursuant to that certain Master Tax-Exempt Installment Purchase Agreement (the "Master Agreement"), dated as of October 28, 2011, between U.S. Bancorp Equipment Finance, Inc. (the "Seller") and the City of Billings, Montana (the "Purchaser").

1. Interpretation. The terms and conditions of the Master Agreement are incorporated herein by reference as if fully set forth herein. Reference is made to the Master Agreement for all representations, covenants and warranties made by Purchaser in the execution of this Property Schedule, unless specifically set forth herein. In the event of a conflict between the provisions of the Master Agreement and the provisions of this Property Schedule, the provisions of this Property Schedule shall control. All capitalized terms used herein but not otherwise defined shall have the meanings provided in the Master Agreement.
2. Commencement Date. The Commencement Date for this Property Schedule is October 28, 2011.
3. Property Description and Payment Schedule. The Property subject to this Property Schedule is described in Exhibit 1 hereto. It includes all replacements, parts, repairs, additions, accessions and accessories incorporated therein or affixed or attached thereto and any and all proceeds of the foregoing, including, without limitation, insurance recoveries. Purchaser shall not remove such property from the locations set forth therein without giving prior written notice, including the new location of such property, to Seller. The Installment Payment Schedule for this Property Schedule is set forth in Exhibit 1 hereto.
4. Opinion. The Opinion of Purchaser's Counsel is attached as Exhibit 2 hereto.
5. Purchaser's Certificate. The Purchaser's Certificate is attached as Exhibit 3 hereto.
6. Proceeds. Seller shall disburse the proceeds of this Property Schedule in accordance with the instructions attached as Exhibit 4 hereto.
7. Acceptance Certificate. The form of Acceptance Certificate is attached as Exhibit 5 hereto.
8. Additional Purchase Option Provisions. Installment Payments payable under this Property Schedule shall be subject to prepayment in whole at any time at the option of the Purchaser by payment of the applicable Prepayment Balance set forth in Exhibit 1 hereto and payment of all accrued and unpaid interest through the date of prepayment.

9. Tax Certificate. Attached as Exhibit 6 hereto.
10. Expiration. Seller, at its sole determination, may choose not to accept this Property Schedule if the fully executed, original Master Agreement (including this Property Schedule and all ancillary documents) is not received by Seller at its place of business by November 11, 2011.

IN WITNESS WHEREOF, Seller and Purchaser have caused this Property Schedule to be executed in their names by their duly authorized representatives as of the Commencement Date above.

**SELLER:**  
**U.S. BANCORP EQUIPMENT**  
**FINANCE, INC.**

**PURCHASER:**  
**CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name: Thomas Hanel  
Title: Mayor

Attest:

By: \_\_\_\_\_  
Name: Cari Martin  
Title: City Clerk

**EXHIBIT 1**  
**Property Description and Payment Schedule**

Re: **Property Schedule No. 2** to Master Tax-Exempt Installment Purchase Agreement  
U.S. Bancorp Equipment Finance, Inc. and the City of Billings, Montana.

The Property is as follows: The Property as more fully described in Exhibit A  
incorporated herein by reference and attached hereto.

PROPERTY LOCATION: Park One Garage – 2912 3rd Avenue North, Billings,  
Montana – Lighting Upgrades; Park Two Garage and Park Two Addition – 2651 1st  
Avenue North, Billings, Montana – Lighting Upgrades; Park Three Garage – 210 N.  
27th, Billings, Montana – Lighting Upgrades.

USE: Energy Efficiency Improvements. This use is essential to the proper, efficient and  
economic functioning of Purchaser or to the services that Purchaser provides; and  
Purchaser has immediate need for and expects to make immediate use of substantially all  
of the Property, which need is not temporary or expected to diminish in the foreseeable  
future.

ACCOUNT: Installment Payments payable by the Purchaser pursuant to this Property  
Schedule shall constitute current expenses of the Purchaser’s Parking Enterprise Fund  
and shall not in any way be construed to be debts of the Purchaser in contravention of any  
applicable constitutional or statutory limitation or requirements concerning the creation  
of indebtedness by the Purchaser, nor shall anything contained therein constitute a pledge  
of the general tax revenues, funds or money of the Purchaser. Installment Payments  
payable by the Purchaser pursuant to this Property Schedule shall be payable only from  
current funds which are budgeted and appropriated solely from the Purchaser’s Parking  
Enterprise Fund for such purpose during the fiscal year of the Purchaser for which such  
funds were budgeted and appropriated. The Purchaser has not pledged the full faith and  
credit of the Purchaser, Yellowstone County or the State of Montana to the payment of  
amounts due under the Lease-Purchase Agreement.

Installment Payment Schedule

Total Principal Amount: \$578,311.00

<u>Pay #</u>	<u>Date</u>	<u>Payment</u>	<u>Principal</u>	<u>Interest (4.96%)</u>	<u>Prepayment Balance</u>
1	28-Apr-2012	26,909.64	13,591.24	13,318.40	581,661.35
2	28-Oct-2012	26,909.64	13,904.24	13,005.39	567,339.98
3	28-Apr-2013	26,909.64	14,224.46	12,685.18	552,688.79
4	28-Oct-2013	26,909.64	14,552.04	12,357.59	537,700.19
5	28-Apr-2014	26,909.64	14,887.17	12,022.46	522,366.40
6	28-Oct-2014	26,909.64	15,230.02	11,679.62	506,679.48
7	28-Apr-2015	26,909.64	15,580.77	11,328.87	490,631.29
8	28-Oct-2015	26,909.64	15,939.59	10,970.05	474,213.51

9	28-Apr-2016	26,909.64	16,306.67	10,602.96	457,417.64
10	28-Oct-2016	26,909.64	16,682.21	10,227.42	440,234.96
11	28-Apr-2017	26,909.64	17,066.40	9,843.23	422,656.56
12	28-Oct-2017	26,909.64	17,459.44	9,450.20	404,673.34
13	28-Apr-2018	26,909.64	17,861.53	9,048.11	386,275.97
14	28-Oct-2018	26,909.64	18,272.87	8,636.76	367,454.91
15	28-Apr-2019	26,909.64	18,693.70	8,215.94	348,200.40
16	28-Oct-2019	26,909.64	19,124.21	7,785.43	328,502.47
17	28-Apr-2020	26,909.64	19,564.63	7,345.00	308,350.89
18	28-Oct-2020	26,909.64	20,015.20	6,894.43	287,735.23
19	28-Apr-2021	26,909.64	20,476.15	6,433.49	266,644.80
20	28-Oct-2021	26,909.64	20,947.71	5,961.92	245,068.65
21	28-Apr-2022	26,909.64	21,430.14	5,479.50	222,995.61
22	28-Oct-2022	26,909.64	21,923.67	4,985.97	200,414.24
23	28-Apr-2023	26,909.64	22,428.57	4,481.07	177,312.81
24	28-Oct-2023	26,909.64	22,945.09	3,964.55	153,679.37
25	28-Apr-2024	26,909.64	23,473.51	3,436.12	129,501.65
26	28-Oct-2024	26,909.64	24,014.10	2,895.53	104,767.13
27	28-Apr-2025	26,909.64	24,567.14	2,342.49	79,462.97
28	28-Oct-2025	26,909.64	25,132.92	1,776.72	53,576.06
29	28-Apr-2026	26,909.64	25,711.73	1,197.91	27,092.98
30	28-Oct-2026	26,909.64	26,303.86	605.77	0.00
Total		807,289.11	578,311.00	228,978.11	0.00

**PURCHASER:  
CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name: Thomas Hanel  
Title: Mayor

Attest:

By: \_\_\_\_\_  
Name: Cari Martin  
Title: City Clerk

EXHIBIT A  
Description of Property

<u>PROJECT</u>	<u>LOCATION</u>	<u>BUDGET</u>
Lighting Upgrade	Park One Parking Garage	\$209,433
Lighting Upgrade	Park Two Parking Garage	163,827
Lighting Upgrade	Park Two Garage Addition	84,784
Lighting Upgrade	Park Three Parking Garage	<u>120,267</u>
TOTAL PROPERTY SCHEDULE PURCHASE AMOUNT		\$578,311

**EXHIBIT 2**  
**Opinion of Dorsey & Whitney LLP**

October 28, 2011

City of Billings  
Billings, Montana

U.S. Bancorp Equipment Finance, Inc.  
Denver, Colorado

Re: Master Tax-Exempt Installment Purchase Agreement  
City of Billings, Montana

Ladies and Gentlemen:

We have acted as special counsel to the City of Billings, Montana (the “City”), in connection with the authorization, execution and delivery by the City of the Master Tax-Exempt Installment Purchase Agreement, dated as of October 28, 2011 (the “Lease-Purchase Agreement”), between the City and U.S. Bancorp Equipment Finance, Inc. (“U.S. Bancorp”) and Property Schedule No. 2 thereto, dated as of October 28, 2011 (the “Parking Property Schedule”). In that capacity, we have examined executed counterparts, or copies otherwise identified to our satisfaction, of the Lease-Purchase Agreement, the Parking Property Schedule and the Escrow Agreement dated as of October 28, 2011 (the “Escrow Agreement”), between the City, U.S. Bancorp and U.S. Bank National Association, as Escrow Agent, together with certified copies of certain proceedings taken and certain certificates and affidavits furnished by the City in the authorization, execution and delivery of the Lease-Purchase Agreement and the Parking Property Schedule, including a certified copy of Resolution No. [ ] adopted by the City Council of the City on October 11, 2011. As to questions of fact material to our opinion, we have assumed the authenticity of and relied upon the proceedings, affidavits and certificates furnished to us without undertaking to verify the same by independent investigation.

The installment payments payable by the City under the Parking Property Schedule (the “Installment Payments”) are payable solely from the current revenues of the City which are budgeted and appropriated solely from the City’s Parking Enterprise Fund and are subject to annual appropriation in accordance with the provisions of the Lease-Purchase Agreement and the Parking Property Schedule. The Lease-Purchase Agreement and the Parking Property Schedule are not general obligations of the City and the general credit and taxing powers of the City are not pledged to the payment of the Installment Payments. U.S. Bancorp is selling to the City energy efficiency improvements described in the Parking Property Schedule (the “Parking Improvements”) to be constructed and installed within certain City parking garages. The Parking Property Schedule will be in effect for a term commencing as provided therein and ending on October 28, 2026, unless earlier terminated in accordance with its terms. The Installment

Payments will be payable at such times and in such amounts and will comprise principal payments and interest payments as set forth in the Parking Property Schedule. In the sole event that moneys are not appropriated and provided from the City's Parking Enterprise Fund with respect to the Installment Payments, the City may, by written notice to U.S. Bancorp, discontinue the Parking Property Schedule at the end of any fiscal year of the City then in effect. If the City should discontinue the Parking Property Schedule at the end of any such fiscal year in the manner provided therein, the Parking Property Schedule is terminated without penalty or liability on the part of the City to pay any Installment Payments coming due after the fiscal year then in effect, but in such event the City has the obligation to deliver possession of the Parking Improvements to U.S. Bancorp at the time and in the manner provided in the Lease-Purchase Agreement. In the event the City should not discontinue the Parking Property Schedule and does pay all Installment Payments, the rights of U.S. Bancorp in the Parking Improvements will be terminated and U.S. Bancorp must transfer legal title to the Parking Improvements to the City. The City will have an option to purchase U.S. Bancorp's interest in the Parking Improvements on each Installment Payment date in the amount set forth in the Parking Property Schedule.

From our examination of such proceedings, certificates and affidavits, and on the basis of existing law, it is our opinion that:

1. The Lease-Purchase Agreement, the Parking Property Schedule and the Escrow Agreement are each valid and binding instruments of the City, enforceable in accordance with their respective terms.
2. The portion of the Installment Payments designated as interest: (a) is not includable in gross income for federal income tax purposes; (b) is not an item of tax preference includable in alternative minimum taxable income for purposes of the federal alternative minimum tax applicable to all taxpayers; and (c) is includable in adjusted current earnings of corporations in determining alternative minimum taxable income for purposes of the federal alternative minimum tax imposed on corporations.
3. The portion of the Installment Payments designated as interest is not includable in gross income for State of Montana individual income tax purposes, but is includable in the computation of income for purposes of the Montana corporate income tax and the Montana corporate license tax.
4. The City has designated the Parking Property Schedule as a "qualified tax-exempt obligation," within the meaning of Section 265(b)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), and financial institutions described in Section 265(b)(5) of the Code may treat the Parking Property Schedule for purposes of Sections 265(b)(2) and 291(e)(1)(B) of the Code as if it was acquired on August 7, 1986.

The opinions expressed in paragraph 1 above are subject, as to enforceability, to the effect of any state or federal laws relating to bankruptcy, insolvency, reorganization, moratorium or creditors' rights and the exercise of judicial discretion.

The opinions expressed in paragraphs 2 and 3 above are subject to the condition that the City comply with all requirements of the Code that must be satisfied subsequent to the execution and delivery of the Parking Property Schedule in order that the portion of the Installment Payments that are specifically designated as interest may be, and continue to be, excluded from gross income for federal income tax purposes, and that the Parking Property Schedule be and continue to be a qualified tax-exempt obligation, within the meaning of Section 265(b)(3) of the Code. The City has covenanted to comply with these continuing requirements. Its failure to do so could result in the inclusion of such interest in gross income for federal income tax purposes, retroactive to the date of execution and delivery of the Parking Property Schedule. Except as stated in this opinion, we express no opinion regarding federal, state or other tax consequences with respect to the Lease-Purchase Agreement or the Parking Property Schedule.

Very truly yours,

**EXHIBIT 3**  
**Purchaser's Certificate**

Re: **Property Schedule No. 2** to Master Tax-Exempt Installment Purchase Agreement  
U.S. Bancorp Equipment Finance, Inc. and the City of Billings, Montana.

The undersigned, being the duly elected, qualified and acting City Clerk of the City of Billings, Montana (the "Purchaser") do hereby certify, as of October 28, 2011 as follows:

1. Purchaser did, at a meeting of the governing body of the Purchaser held October 11, 2011 by resolution or ordinance duly enacted, in accordance with all requirements of law, approve and authorize the execution and delivery of the above-referenced Property Schedule (the "Property Schedule") and the Master Tax-Exempt Installment Purchase Agreement (the "Master Agreement") by the following named representative of Purchaser, to wit:

NAME OF EXECUTING OFFICIAL	TITLE OF EXECUTING OFFICIAL	SIGNATURE OF EXECUTING OFFICIAL
Thomas Hanel	Mayor	_____
Cari Martin	City Clerk	_____

2. The above-named representative of the Purchaser held at the time of such authorization and holds at the present time the office set forth above.

3. The meeting(s) of the governing body of the Purchaser at which the Master Agreement and the Property Schedule were approved and authorized to be executed was duly called, regularly convened and attended throughout by the requisite quorum of the members thereof, and the enactment approving the Master Agreement and the Property Schedule and authorizing the execution thereof has not been altered or rescinded. All meetings of the governing body of Purchaser relating to the authorization and delivery of Master Agreement and the Property Schedule have been: (a) held within the geographic boundaries of the Purchaser; (b) open to the public, allowing all people to attend; (c) conducted in accordance with internal procedures of the governing body; and (d) conducted in accordance with the charter of the Purchaser, if any, and the laws of the State.

4. No event or condition that constitutes, or with the giving of notice or the lapse of time or both would constitute, an Event of Default or a Nonappropriation Event (as such terms are defined in the Master Agreement) exists at the date hereof with respect to this Property Schedule or any other Property Schedules under the Master Agreement.

5. The acquisition of all of the Property under the Property Schedule has been duly authorized by the governing body of Purchaser.

6. Purchaser will, in accordance with the requirements of law, fully budget and appropriate sufficient funds for the current fiscal year to make the Installment Payments scheduled to come due during the current fiscal year under the Property Schedule and to meet its other obligations for the current fiscal year.

7. As of the date hereof, no litigation is pending, (or, to my knowledge, threatened) against Purchaser in any court (a) seeking to restrain or enjoy in the delivery of the Master Agreement or the Property Schedule or of other agreements similar to the Master Agreement; (b) questioning the authority of Purchaser to execute the Master Agreement or the Property Schedule, or the validity of the Master Agreement or the Property Schedule, or the payment of principal of or interest on, the Property Schedule; (c) questioning the constitutionality of any statute, or the validity of any proceedings, authorizing the execution of the Master Agreement and the Property Schedule; or (d) affecting the provisions made for the payment of or security for the Master Agreement and the Property Schedule.

**PURCHASER:  
CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name: Cari Martin  
Title: City Clerk

**EXHIBIT 4**  
**Payment of Proceeds Instructions**

U.S. Bancorp Equipment Finance, Inc.  
13010 SW 68th Parkway, Suite 100  
Portland, Oregon 97223

Re: **Property Schedule No. 2** (the "Property Schedule") to Master Tax-Exempt Installment Purchase Agreement between U.S. Bancorp Equipment Finance, Inc. ("Seller") and the City of Billings, Montana ("Purchaser").

Ladies and Gentlemen:

The undersigned, an Authorized Representative of the Purchaser hereby requests and authorizes Seller to disburse the net proceeds of the Property Schedule as follows:

Name of Payee: \_\_\_\_\_

By check \_\_\_\_\_ By wire transfer \_\_\_\_\_

If by check, Payee's address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If by wire transfer, instructions as follows:

Pay to Bank Name: U.S. Bank, National Association

Bank Address: 303 North Broadway  
PO Box 30678  
Billings, MT 59101  
Bank Phone #: (406) 447-5251

For Account of: City of Billings General Depository

Account No.: 1-500-9559-2021

ABA No.: 092900383

**PURCHASER:**  
**CITY OF BILLINGS, MONTANA**

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

Name:

Title:

**EXHIBIT 5**  
**Acceptance Certificate**

U.S. Bancorp Equipment Finance, Inc.  
13010 SW 68th Parkway, Suite 100  
Portland, Oregon 97223

Re: **Property Schedule No. 2** to Master Tax-Exempt Installment Purchase Agreement  
between U.S. Bancorp Equipment Finance, Inc. and the City of Billings, Montana

Ladies and Gentlemen:

In accordance with the above-referenced Master Tax-Exempt Installment Purchase Agreement (the "Master Agreement"), the undersigned ("Purchaser") hereby certifies and represents to, and agrees with, U.S. Bancorp Equipment Finance, Inc. ("Seller"), as follows:

- (1) The Property, as such terms are defined in the above-referenced Property Schedule, has been acquired, made, delivered, installed and accepted on the date indicated below.
- (2) Purchaser has conducted such inspection and/or testing of the Property as it deems necessary and appropriate and hereby acknowledges that it accepts the Property for all purposes.
- (3) No event or condition that constitutes, or with notice or lapse of time, or both, would constitute, an Event of Default (as such term is defined in the Master Agreement) exists at the date hereof.

Date: \_\_\_\_\_

**PURCHASER:**  
**CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name:  
Title:

**EXHIBIT 6**  
**Tax Certificate**

**Master Tax-Exempt Installment Purchase Agreement**  
**Property Schedule No. 2**

**City of Billings, Montana**

**ARBITRAGE AND REBATE CERTIFICATE AND**  
**AGREEMENT**

This Arbitrage and Rebate Certificate and Agreement (this “Certificate”) is given for the purpose of establishing and maintaining the tax-exempt status of interest payments required to be made by the City of Billings, Montana (the “City”), under the Master Tax-Exempt Installment Purchase Agreement dated as of October 28, 2011 (the “Lease-Purchase Agreement”) between the City and U.S. Bancorp Equipment Finance, Inc., as lessor (the “Lessor”), and Property Schedule No. 2 thereto (the “Parking Property Schedule”). The representations and covenants of the City herein are for the benefit of the owner or owners from time to time of the interest of the Lessor under the Parking Property Schedule.

I. General Provisions and Definitions.

1.1. The Parking Property Schedule will be entered into by the City pursuant to Resolution No. [\_\_\_], adopted by the City Council of the City on October 11, 2011 ( the “Resolution”). Terms used with initial capital letters but undefined herein shall have the meanings given them in the Lease Purchase Agreement, the Internal Revenue Code of 1986, as amended (the “Code”), or in the Regulations (as hereinafter defined), unless the context hereof clearly requires otherwise.

This Certificate is intended to be, and may be relied upon as, among other things, a certification described in the Regulations, Section 1.148-2(b) and Section 148 of the Code, and is delivered as a part of the transcript of proceedings relating to the Parking Property Schedule. We are among the officers of the City responsible for the issuance of the Parking Property Schedule.

1.2. We have investigated the facts, estimates and circumstances surrounding the execution and delivery of the Parking Property Schedule, which are described summarily in this Certificate. To the best of our knowledge and belief, such facts, estimates and circumstances are correct and complete and the City’s expectations as to future events, which are based thereon, are in all respects reasonable and made in good faith. To the extent that the expectations of the City are based upon estimates and representations made by others, including the Lessor, we have examined such estimates and representations and consider them to be reasonable and correct. Any statements in this Certificate involving future events, whether or not expressly so stated, are intended

as expectations of the City and not as representations of fact. On the basis of such facts, estimates and circumstances, it is expected that the proceeds of the Parking Property Schedule will be used in a manner that would not cause the Parking Property Schedule to be considered an “arbitrage bond” within the meaning of Section 148 of the Code.

1.3. The following terms have the following meanings when used in this Certificate:

Bond Counsel shall mean nationally recognized municipal bond counsel selected by the City.

Bond Year shall mean each one-year period (or shorter period from the Closing Date) that ends at the close of business on each September 15 or, if the last Installment Payment owing under the Parking Property Schedule is not paid on a September 15, such shorter period from the last preceding September 15 to the date on which such last Installment Payment is made.

Closing Date shall mean October 28, 2011, the date of execution and delivery of the Parking Property Schedule.

Computation Date shall mean an installment computation date (the last day of the fifth and each succeeding fifth Bond Year) and the final computation date (the date the last Bond is discharged). If the Installment Payments owing under the Parking Property Schedule are paid when due, the installment computation dates for the Parking Property Schedule shall be September 15, 2016 and September 15, 2021, September 15, 2026 and the final computation date shall be October 28, 2026.

Construction Account shall mean the Construction Account created in the Escrow Fund established under the Escrow Agreement.

Escrow Agreement shall mean the Escrow Agreement referred to in the Parking Property Schedule, dated as of October 28, 2011, by and between the City and the Lessor, as amended or supplemented from time to time.

Escrow Fund shall mean the Escrow Fund established under the Escrow Agreement.

Gross Proceeds shall mean, with respect to the Parking Property Schedule, all proceeds of the Parking Property Schedule (including sale proceeds and transferred proceeds) and any funds (other than proceeds) that are part of any reserve or replacement fund for the Parking Property Schedule.

Investment Property shall mean any security, obligation (other than a Non-AMT Obligation), annuity contract or investment-type property.

Non-AMT Obligation means any obligation the interest on which is not includible in gross income under Section 103 of the Code and which is not a “specified private activity bond” (within the meaning of Section 57(a)(5)(C) of the Code).

Nonpurpose Investment shall mean any Investment Property that is not a purpose investment in which Gross Proceeds of the Parking Property Schedule are invested.

Project shall mean the construction and installation of energy efficiency improvements certain City-owned parking garages and related fees and expenses.

Rebatable Arbitrage shall mean, as of any Computation Date, the excess of the future value of all nonpurpose receipts with respect to the Parking Property Schedule, over the future value of all nonpurpose payments with respect to the Parking Property Schedule, or with respect to a Voluntary Computation Date, the amount of the payment that would be payable to the United States under Section 148(f) of the Code if such date were a “Computation Date.”

Regulations shall mean the Treasury Regulations applicable to the Lease Purchase Agreement and the Parking Property Schedule and promulgated under the Code, including, without limitation, Treasury Regulations, Sections 1.148-0 through 1.148-11, and Sections 1.149(b)-1, 1.149(d)-1, 1.149(g)-1, 1.150-1 and 1.150-2.

Voluntary Computation Date means September 15, 2012, and each September 15 thereafter, excluding Computation Dates.

Yield, with reference to any obligation, means that discount rate which, when computing the present value of all unconditionally payable payments of principal and interest paid and to be paid on such obligation and taking into account payments made for qualified guarantees, produces an amount equal to the present value of the issue price of the obligation.

Yield of the Parking Property Schedule shall mean 4.86000%.

## II. The Purpose of the Parking Property Schedule.

1.1. The Parking Property Schedule is entered into pursuant to the Resolution for the purposes of providing funds to be used to finance costs of the Project. The City expects to expend the following sums from the proceeds of the Parking Property Schedule for the Project:

Lighting Upgrade — Park One Parking Garage	\$209,433
Lighting Upgrade — Park Two Parking Garage	\$163,827
Lighting Upgrade — Park Three Parking Garage	\$ 84,784
Lighting Upgrade — Park Four Parking Garage	<u>\$120,267</u>
Total:	\$578,311

2.2 Any costs in excess of the proceeds of the Parking Property Schedule will be paid from other funds of the City available therefor.

### III. Sources and Disbursements of Funds.

3.1. The aggregate amount of the principal components payable by the City pursuant to the Parking Property Schedule equals \$578,311.00. The City is executing and delivering the Parking Property Schedule to the Lessor in exchange for proceeds in the amount of \$578,311.00. The issue price of the Parking Property Schedule, as defined in Section 1.148-1(b) of the Regulations and Sections 1273(b)(1) and (2) of the Code, is \$578,311.00, equal to the principal amount thereof.

3.2. \$578,311.00 of the proceeds of the Parking Property Schedule are expected to be deposited in the Construction Account to pay the costs of the Project. Costs of entering into the Parking Property Schedule will be paid from other available funds of the City.

3.3. The Parking Property Schedule is not a hedge bond (as defined in Section 149(g) of the Code) since at least 85% of the spendable proceeds of the Parking Property Schedule are to be used to pay costs of the Project within three years after the date hereof and less than 50% of the proceeds of the Parking Property Schedule are to be invested in nonpurpose investments having a substantially guaranteed yield for four years or more.

### IV. Yield of the Parking Property Schedule.

4.1. No other obligations of the City are being (a) issued at substantially the same time as the Parking Property Schedule, (b) sold pursuant to the same plan of financing as the Parking Property Schedule, and (c) paid out of substantially the same source of funds (or which will have substantially the same claim to be paid out of substantially the same source of funds) as will be used to pay the Parking Property Schedule, within the meaning of Section 1.150-1(c) of the Regulations. Contemporaneous with the execution and delivery of the Parking Property Schedule, the City is entering into Property Schedule No. 1 to the Lease-Purchase Agreement (the "Airport Property Schedule"). The installment payments payable by the City pursuant to the Parking Property Schedule and the Airport Property Schedule shall be payable, as specified in the Resolution, only from current funds which are budgeted and appropriated solely from the City's Parking Enterprise Fund and the City's Airport Enterprise Fund, respectively, for such purpose during the fiscal year of the City for which such funds were budgeted and appropriated.

4.2. The Yield of the Parking Property Schedule computed in accordance with Section 148 of the Code and applicable Regulations, is 4.86000% per annum.

### V. Temporary Investments.

5.1 Except as described in Section 5.2 hereof, none of the proceeds of the Parking Property Schedule will be invested at a materially higher yield.

5.2. Proceeds of the Parking Property Schedule deposited in the Construction Account are to be used to finance the costs of the Project. The estimated total cost of the Project, including implementation, administration, construction management and

contingencies, excluding costs of entering into the Parking Property Schedule, is not less than \$578,311.00.

(a) The City has incurred or will incur within six months after the date hereof substantial binding obligations to undertake the Project (in the form of binding contracts or commitments) in an aggregate amount not less than five percent of the net sale proceeds of the Parking Property Schedule (i.e., \$28,916).

(b) Work on the Project and allocation of the net sale proceeds and investment proceeds of the Parking Property Schedule to expenditures will proceed with due diligence to completion and it is reasonably expected the Project will be completed and all net sale proceeds of the Parking Property Schedule will be so allocated by March 28, 2013.

(c) The net sale proceeds of the Parking Property Schedule, plus investment earnings thereon, do not exceed the amount to be spent by the City to acquire and construct the Project.

(d) The City expects to spend on the Project, within not more than three years from the date hereof, all of the net sale and investment proceeds to be derived by the City from the issuance of the Parking Property Schedule.

Therefore, the City may invest said amounts deposited in the Construction Account without yield restriction for a temporary period ending three years from the Closing Date pursuant to Section 1.148-2(e)(2) of the Regulations. Should any of the proceeds of the Parking Property Schedule not be so expended by the end of such period, the City may either (i) invest such amounts at a yield which does not exceed the Yield of the Parking Property Schedule, or (ii) comply with the provisions of Section 1.148-5(c) of the Regulations and make such payments at such times as are required pursuant to Section 1.148-5(c) to reduce the Yield on any investments made subsequent to expiration of the temporary period to a Yield not materially higher than the Yield of the Parking Property Schedule.

#### VI. No Sinking Fund.

6.1. The City has not created or established, and does not expect to create or establish, any sinking or similar fund which is reasonably expected to be used to pay debt service on the Parking Property Schedule or which is pledged as collateral to secure the Parking Property Schedule. No amounts in any other funds or accounts of the City are reserved for or pledged to the payment of debt service on the Parking Property Schedule or will be used to replace funds that will be used to pay debt service on the Parking Property Schedule.

#### VII. Sale Proceeds.

7.1. The sale proceeds of the Parking Property Schedule do not exceed the amount necessary to achieve the purposes described in Section II hereof. No portion of the Parking Property Schedule is issued solely for the purpose of investing the proceeds

at a materially higher yield than the Yield of the Parking Property Schedule. None of the proceeds of the Parking Property Schedule will be used directly or indirectly to replace funds which were used directly or indirectly to acquire obligations with a yield that is materially higher than the Yield of the Parking Property Schedule.

7.2. In connection with the execution and delivery of the Parking Property Schedule, except as specifically provided in Sections 148(c) and (d) of the Code, the City has not engaged and will not engage in any transaction or series of transactions (i) enabling the City to exploit the difference between tax-exempt and taxable interest rates to gain a material financial advantage, and (ii) increasing the burdens on the market for tax-exempt obligations in any manner including, without limitation, by selling any obligation that would not otherwise be sold, or by selling more obligations, or issuing them sooner, or allowing them to remain outstanding longer, than would otherwise be necessary.

#### VIII. Miscellaneous.

8.1. The City has no present intention to sell or otherwise dispose of the facilities financed with proceeds of the Parking Property Schedule before the termination of the Parking Property Schedule. The City expects that such property will continue to be owned and operated by the City substantially in the manner in which similar property is now owned and operated for an indefinite period concluding not earlier than the final stated termination date of the Parking Property Schedule.

8.2. The City reasonably expects that during the term of the Parking Property Schedule no private business use will be made of the facilities financed with proceeds thereof and that no private payments or security will be made or furnished that would cause the Parking Property Schedule to consist of “private activity bonds”, within the meaning of Section 141 of the Code and applicable Regulations. No proceeds of the Parking Property Schedule are being or will be loaned to any nongovernmental person. The City reasonably expects that the Parking Property Schedule will not consist of private activity bonds within the meaning of Section 141 of the Code.

8.3. The weighted average maturity of the Parking Property Schedule (8.642 years) does not exceed 120 percent of the average reasonably expected economic life of the Project. Such average reasonably expected economic life is not less than 15 years. It is not expected that any replacement proceeds of the Parking Property Schedule will arise subsequent to the execution and delivery of the Parking Property Schedule.

#### IX. Minor Portion.

9.1. An aggregate amount not to exceed the “minor portion” amount for the Parking Property Schedule (\$28,916) may be invested pursuant to Section 148(e) of the Code and Section 1.148-2(g) of the Regulations without restriction as to Yield. To the extent the amount on hand in the Construction Account has been credited thereto longer than the period described in Section 5.2 hereof, such amount may be invested up to the minor portion amount at a yield greater than the Yield of the Parking Property Schedule.

Such amounts are Gross Proceeds of the Parking Property Schedule, however, and subject to the rebate requirements set forth in Sections X and XI hereof.

X. Rebate.

10.1 The City, in the Resolution, has covenanted to comply with the requirements of Section 148(f) of the Code with respect to the Parking Property Schedule. The City covenants that it will consult with Bond Counsel and undertake to determine what is required with respect to the rebate provisions contained in Section 148(f) of the Code from time to time and will comply with any requirements that may be applicable to the Parking Property Schedule. The methodology described in this Certificate will be followed, except to the extent inconsistent with any requirements of future regulations or written advice received from Bond Counsel.

10.2. Subject to any applicable exceptions or exemptions available under the Code or regulations, detailed records with respect to each and every Nonpurpose Investment attributable to Gross Proceeds of the Parking Property Schedule will be maintained by the City including: (i) purchase date, (ii) purchase price, (iii) brokerage or other transaction costs of purchase, (iv) information establishing fair market value on the date such investment became a Nonpurpose Investment, (v) any accrued interest paid, (vi) face amount, (vii) coupon or Stated interest rate, (viii) periodicity of interest payments, (ix) disposition price, (x) any accrued interest received, (xi) disposition date, and (xii) brokerage or other transaction costs of disposition. Such detailed recordkeeping is required for the calculation of the Rebatable Arbitrage.

XI. Retabable Arbitrage Calculation and Payment.

11.1. Subject to any applicable exceptions or exemptions available under the Code or regulations, the City shall pay to the United States Department of the Treasury from funds legally available therefor: (A) not later than 60 days after each Computation Date, an amount which, when added to the future value as of the Computation Date of all previous rebate payments, equals at least 90% of the Rebatable Arbitrage calculated as of such Computation Date; and (B) not later than 60 days after the final Computation Date, an amount which, when added to the future value as of the Computation Date of all previous rebate payments, equals 100% of the Rebatable Arbitrage.

11.2. Any payment required to be made pursuant hereto shall be filed with the Internal Revenue Service Center, Ogden, Utah 84201 (or at such other address as the Internal Revenue Service may from time to time designate), on or before the date such payment is due, and shall be accompanied by a completed and executed Internal Revenue Service Form 8038-T. The City shall retain records of the calculations required by this Section XI until six years after the final Computation Date for the Parking Property Schedule.

11.3. The City shall file or cause to be filed such reports or other documents with the Internal Revenue Service as required by Section 148(f) of the Code.

11.4. Notwithstanding anything in this Certificate or any other provisions of the Resolution to the contrary, the obligation to remit the Rebatale Arbitrage with respect to the Parking Property Schedule to the United States Department of the Treasury and to comply with all other requirements contained in this Certificate shall survive the defeasance of the Parking Property Schedule.

11.5. The Project will be owned and operated by the City and used for governmental purposes. All of the Gross Proceeds qualify for the temporary period under Section 1.148-2(e)(2) of the Regulations. Apart from the sale proceeds of the Parking Property Schedule and investment proceeds derived therefrom, the City does not expect that any other Gross Proceeds will arise. Thus, if the expenditure tests set forth in Section 1.148-7(d)(1)(i) of the Regulations are met (i.e., the following percentages of Gross Proceeds are spent within the following periods beginning on the date of issuance: at least 15% within six months (March 28, 2012); 60% within one year (October 28, 2012), and 100% within eighteen months (March 28, 2013) (subject to a reasonable contractual retainage amount not exceeding five percent of the net sale proceeds of the Parking Property Schedule as of October 28, 2011 to be spent within 30 months after the date hereof, as defined in Section 1.148-7(h) of the Regulations)), then the City may elect to treat the Gross Proceeds as exempt from the rebate requirements of Section 148(f) of the Code pursuant to the "18 month" spending exception provided under Section 1.148-7(d) of the Regulations.

11.6. If Gross Proceeds subject to arbitrage rebate arise, either as a result of the failure to expend all Gross Proceeds as provided in Section 11.6 hereof, or from another cause, for purposes of complying with Section 148(f), the City will prepare or have prepared a calculation of the Rebatale Arbitrage for the Parking Property Schedule consistent with the rules described in this Section XI.

11.7. The City will prepare the calculation of the Rebatale Arbitrage within 30 days after each Computation Date and will, within 30 days after each Voluntary Computation Date, calculate the Rebatale Arbitrage on the assumption such Voluntary Computation Date is a Computation Date and file a copy of such calculations in the office of the City Clerk.

11.8. The City agrees to retain detailed records and documents relating to the expenditure of Gross Proceeds, the use of the facilities financed thereby and the investment of Gross Proceeds until three years following the retirement of the Parking Property Schedule to the extent required by applicable IRS rules and the Regulations and shall consult with counsel regarding such retention as appropriate.

## XII. Amendments.

12.1 The City may amend or supplement the provisions of Sections X or XI hereof by filing an executed copy of such amendment or supplement with the City Finance Director accompanied by an opinion of Bond Counsel to the effect that such amendment or supplement is required by, or better complies with, the provisions of Section 148 and applicable Regulations.

WITNESS our hands, on behalf of the City, officially as Mayor, City Finance Director and City Clerk of the City of Billings, Montana as of this 28th day of October, 2011.

CITY OF BILLINGS, MONTANA

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Finance Director

\_\_\_\_\_  
City Clerk

Language for UCC Financing Statements

Schedule 1

SECURED PARTY: U.S. Bancorp Equipment Finance, Inc.

DEBTOR: City of Billings, Montana

This financing statement covers all of Debtor's right, title and interest, whether now owned or hereafter acquired, in and to the equipment sold to Debtor under Property Schedule No. 2 dated October 28, 2011 to that certain Master Tax-Exempt Installment Purchase Agreement dated as of October 28, 2011, in each case between Debtor, as Purchaser, and Secured Party, as Seller, together with all accessions, substitutions and replacements thereto and therefor, and proceeds (cash and non-cash), including, without limitation, insurance proceeds, thereof, including without limiting, all equipment described on Exhibit A attached hereto and made a part hereof.

EXHIBIT A  
Description of Property

PROJECT

LOCATION

Lighting Upgrade

Park One Parking Garage

Lighting Upgrade

Park Two Parking Garage

Lighting Upgrade

Park Two Garage Addition

Lighting Upgrade

Park Three Parking Garage

## INSURANCE AUTHORIZATION AND VERIFICATION

Date: October 28, 2011  
No. 2

Property Schedule

To: City of Billings, Montana ("Purchaser") P.O. Box 1178 Billings, Montana 59103 Attention: City Finance Director	From: U.S. Bancorp Equipment Finance, Inc. (the "Seller") 13010 SW 68th Parkway, Suite 100 Portland, Oregon 97223 Attn: Chris Jones
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**TO THE PURCHASER:** In connection with the above-referenced Property Schedule, Seller requires proof in the form of this document, executed by both Purchaser\* and Purchaser's agent, that Purchaser's insurable interest in the financed property (the "Property") meets Seller's requirements as follows, with coverage including, but not limited to, fire, extended coverage, vandalism, and theft:

Seller, AND ITS SUCCESSORS AND ASSIGNS, shall be covered as both ADDITIONAL INSURED and LENDER'S LOSS PAYEE with regard to all equipment financed or leased by policy holder through or from Seller. All such insurance shall contain a provision to the effect that such insurance shall not be canceled or modified without first giving written notice thereof to Seller and Purchaser at least thirty (30) days in advance of such cancellation or modification.

Purchaser must carry GENERAL LIABILITY (and/or, for vehicles, Automobile Liability) in the amount of no less than \$1,000,000.00 (one million dollars).

Purchaser must carry PROPERTY Insurance (or, for vehicles, Physical Damage Insurance) in an amount no less than the 'Insurable Value' \$578,311.00 with deductibles no more than \$25,000.00.

\*Purchaser: Please execute this form and return with your document package. Seller will fax this form to your insurance agency for endorsement. In lieu of agent endorsement, Purchaser's agent may submit insurance certificates demonstrating compliance with all requirements. If fully executed form (or Purchaser-executed form plus certificates) is not provided within 15 days, we have the right to purchase such insurance at your expense. Should you have any questions, please contact Chris Jones at (303) 862-1201.

**By signing, Purchaser authorizes the Agent named below: (1) to complete and return this form as indicated; and (2) to endorse the policy and subsequent renewals to reflect the required coverage as outlined above.**

Agency/Agent: Hoiness LaBar Insurance

Address: A Member of Payne Financial Group  
P.O. Box 30638  
Billings, Montana 59107-0638  
Phone: (406) 238-1900

**PURCHASER:  
CITY OF BILLINGS, MONTANA**

By: \_\_\_\_\_  
Name:  
Title:

**TO THE AGENT:** *In lieu of providing a certificate, please execute this form in the space below and promptly fax it to Seller at (406) 657-8363. This fully endorsed form shall serve as proof that Purchaser's insurance meets the above requirements.*

**Agent hereby verifies that the above requirements have been met in regard to the Property listed below.**

Print Name Of Agency: X \_\_\_\_\_

By: X \_\_\_\_\_  
(Agent's Signature)

Print Name: X \_\_\_\_\_

Date: X \_\_\_\_\_

**Insurable Value: \$578,311.00**

**ATTACHED: PROPERTY DESCRIPTION FOR PROPERTY SCHEDULE NO. 2**

EXHIBIT A  
Description of Property

<u>PROJECT</u>	<u>LOCATION</u>	<u>BUDGET</u>
Lighting Upgrade	Park One Parking Garage	\$209,433
Lighting Upgrade	Park Two Parking Garage	163,827
Lighting Upgrade	Park Two Garage Addition	84,784
Lighting Upgrade	Park Three Parking Garage	<u>120,267</u>
TOTAL PROPERTY SCHEDULE PURCHASE AMOUNT		\$578,311