

**SECONDARY GUARANTOR AGREEMENT TO PROVIDE PAYMENT FOR AIR  
SERVICE  
TO DALLAS/FORT WORTH**

**CITY OF BILLINGS AVIATION AND TRANSIT DEPARTMENT**

This Agreement made and entered into this \_\_\_\_\_ day of \_\_\_\_\_

2017 by and between the following:

CITY OF BILLINGS, a Montana municipal corporation,  
Billings, Montana, hereinafter referred to as "the City"

and

BILLINGS CHAMBER OF COMMERCE,  
hereinafter referred to as "the Secondary Guarantor"

**WITNESSETH THAT:**

**RECITALS**

WHEREAS, the City of Billings is the owner and operator of Billings Logan International Airport (BIL), located in Yellowstone County, Montana; and

WHEREAS, the Secondary Guarantor and the City have an interest in promoting air service to and from BIL to Dallas/Fort Worth International Airport (DFW); and

WHEREAS, the City applied for a Small Community Air Service Development Program (SCASDP) Grant from the U.S. Department of Transportation to use as incentive funding to secure direct air service from BIL to DFW on American Airlines, Inc. (American); and

WHEREAS, the City was successful in receiving the SCASDP Grant for \$750,000, but required a local commitment of \$700,000 for a combined Air Service Development Program amount of \$1,450,000; and

WHEREAS, \$200,000 of the \$1,450,000 program amount is to be used for Marketing and Advertising Support to promote any new Air Service between BIL and DFW; and

WHEREAS, the remaining \$1,250,000 would be available to cover Minimum Revenue Guarantees and other startup costs required by American to secure the new service; and

WHEREAS, American responded positively to the financial incentives and the City has reached a tentative Agreement with American to provide service between BIL and DFW beginning June 2, 2017; and

WHEREAS, the City's approval of the Agreement with American is anticipated at the May 22, 2017 City Council meeting; and

WHEREAS, the Agreement with American takes advantage of the financial incentives set forth herein above, requiring \$200,000 for Marketing and Advertising Support for the new service and up to a maximum total of \$1,250,000 to cover Minimum Revenue Guarantees for a one year period beginning June 2, 2017 and ending June 1, 2018 (the Guaranty Period); and

WHEREAS, Secondary Guarantor understands that neither the City or BIL can be liable for the payments to American for the costs related to the marketing of the new American Airlines service or the Minimum Revenue Guarantees for the new air service that may be required, other than the use of the available SCASDP Grant funds; and

WHEREAS, Secondary Guarantor understands that the City cannot enter into the Agreement with American without the explicit consent of Secondary Guarantor of the terms contained in this Secondary Guarantor Agreement; and

WHEREAS, Secondary Guarantor desires to assume responsibility for reimbursing the City for the matching funds to the SCASDP Grant required to cover the Minimum Revenue Guarantee and the Marketing and Advertising Support commitment that may be needed in order to facilitate new air service between BIL and DFW during the Guaranty Period as set forth herein.

## **AGREEMENT**

In consideration of the foregoing premises and the mutual promises herein contained, it

is agreed as follows:

1. **RECITALS INCORPORATED.** The foregoing Recitals are incorporated into this Agreement as if set forth in full.

2. **LIABILITY FOR GUARANTY PAYMENT.** During the Guaranty Period, City may be required to provide American with payments to meet required Minimum Revenue Requirements. Based on the invoicing from American for the Minimum Revenue Requirements, Secondary Guarantor hereby agrees to reimburse the City on a proportional basis of 48.28% up to the maximum amount of \$603,500 of the total Minimum Revenue Requirement Guarantee amount of \$1,250,000. The remaining 51.72% will be reimbursed from the SCASDP Grant. City will invoice the Secondary Guarantor for the proportional amount within five (5) days of receiving a payment request from American. Secondary Guarantor agrees to remit the invoice amount to the City within fifteen (15) days of the invoice date.

3. **LIABILITY FOR MARKETING AND ADVERTISING SUPPORT.** During the Guaranty Period, Secondary Guarantor agrees to assist the City with providing \$200,000 of Marketing and Advertising Support required for the new American service between BIL and DFW. Secondary Guarantor, with the assistance of various community organizations coordinated by Secondary Guarantor, shall provide a proportional amount (48.28%) of at least \$96,550 of the Marketing and Advertising Support. The remaining \$103,440 of Marketing and Advertising Support can be reimbursed through the SCASDP Grant, meeting the required \$200,000 of Marketing and Advertising Support for the new American service. The City shall assist Secondary Guarantor with identifying and providing the necessary documentation required to ensure that the Marketing and Advertising Support funds provided by the SCASDP Grant are made available to Secondary Guarantor. Secondary Guarantor shall develop and implement a marketing and advertising plan, the scope and details of which shall be determined in the reasonable discretion of Secondary Guarantor.

4. **SECURITY AND GUARANTEE OF PAYMENT.** To secure the Secondary

Guarantor's performance under this Agreement, Secondary Guarantor shall, on or before September 1, 2017, provide to the City an irrevocable letter of credit, or other form of security acceptable to the City, obtained from a bank or other financial institution that is reasonably acceptable to the City, in the amount of \$603,500. The sole purpose of the letter of credit or other security provided by Secondary Guarantor shall be to secure Secondary Guarantor's performance of guaranteeing Secondary Guarantor's proportional share of the Minimum Revenue Requirement during the Guarantee Period as set forth herein above.

The City shall only be entitled to draw upon the letter of credit or other security should the Secondary Guarantor fail to provide or remit the proportional share of the Minimum Revenue Guarantee as required in Paragraph 2 above.

The letter of credit or other security will be released by the City back to Secondary Guarantor after the final proportional share of American's final billing for the Minimum Revenue Guarantee has been received by the City from Secondary Guarantor.

**5. LIABILITY FOR BREACH.** Secondary Guarantor agrees that if it materially fails to meet its obligations under this Agreement for any reason, Secondary Guarantor shall be liable to indemnify the City for any and all claims asserted by American, and for all damages arising from such claims, due to Secondary Guarantor's breach of obligations under this Agreement. Under no circumstances shall Secondary Guarantor be liable to American or any other party or entity as a result of the City's breach of the Agreement with American for the new air service between BIL and DFW or for a breach of any other agreements between the City and American for services or facilities provided by the City for or in conjunction with American.

**6. CONTINGENCIES.** This Agreement, and all of the promises, rights, and obligations contained herein, is contingent upon the City executing and entering into the Agreement with American to provide services to DFW.

**7. MISCELLANEOUS PROVISIONS.**

**A. VOLUNTARY AND KNOWING EXECUTION OF THIS AGREEMENT.** The

parties represent and agree that they are fully aware of their right to discuss any and all aspects of this matter with an attorney and that they have done so or have had opportunity to do so, that they have carefully read and fully understand all the provisions of this Agreement, and that they are voluntarily entering into this Agreement and have not been influenced by any person or any attorney acting on behalf of any other party.

**B. REPRESENTATIONS, EXPENSES OF THIS AGREEMENT.** Each party shall bear their own costs and attorney fees in connection with the negotiation and execution of this Agreement.

**C. NO INDUCEMENT.** Each party declares and represents that no promise, inducement, or other agreement not expressly contained herein has been made and that this Agreement contains the entire agreement of the parties. The terms of this Agreement are contractual and not recitals only.

**D. BINDING EFFECT.** This Agreement shall bind and shall inure to the benefit of each party hereto, and their respective successors in interest.

**E. NO MODIFICATIONS.** This Agreement shall not be altered, amended, or modified in any respect except by a writing duly executed by all the parties hereto.

**F. ENTIRE AGREEMENT.** This Agreement sets forth the entire agreement between the parties hereto and fully supersedes and terminates any and all prior agreements, understandings, and contracts, implied and express, written and oral, between the parties concerning the subject matter of this Agreement

**G. GOVERNING LAW.** This Agreement and all disputes arising hereunder shall be construed and enforced by the laws of the State of Montana. Venue in any proceedings held hereunder shall be in the State of Montana Thirteenth Judicial District Court, Yellowstone County, Montana.

**H. COSTS AND ATTORNEY FEES.** Should either party employ an attorney or attorneys or utilize the services of in-house attorneys to enforce any of the provisions

hereof or to protect its interest in any manner arising under this Agreement, the non-prevailing party in any action pursued in a court of competent jurisdiction agrees to pay to the prevailing party all reasonable costs, damages, expenses, and attorney's fees, including fees for in-house attorneys, expended or incurred in connection therewith.

**I. FEDERALLY REQUIRED CLAUSES.** For clarification purposes, Contract and Agreement, and Contractor and Guarantor throughout these clauses shall mean the same thing.

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

1) **Compliance with Regulations:** The contractor (hereinafter includes consultants) will comply with the Acts and the Regulations relative to Non-discrimination in Federally assisted programs of the U.S. Department of Transportation (DOT), as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.

2) **Non-discrimination:** The contractor, with regard to the work performed by it during the contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.

3) **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding, or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential

subcontractor or supplier will be notified by the contractor of the contractor's obligations under this contract and the Acts and the Regulations relative to Non-discrimination on the grounds of race, color, or national origin.

4) **Information and Reports:** The contractor will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Recipient or DOT to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the contractor will so certify to the Recipient or DOT, as appropriate, and will set forth what efforts it has made to obtain the information.

5) **Sanctions for Noncompliance:** In the event of a contractor's noncompliance with the Non-discrimination provisions of this contract, the Recipient will impose such contract sanctions as it or DOT may determine to be appropriate, including, but not limited to:

- a. Withholding payments to the contractor under the contract until the contractor complies; and/or
- b. Cancelling, terminating, or suspending a contract, in whole or in part.

6) **Incorporation of Provisions:** The contractor will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations, and directives issued pursuant thereto. The contractor will take action with respect to any subcontract or procurement as the Recipient or DOT may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the contractor becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the contractor may request the Recipient to enter into any litigation to protect the interests of the Recipient. In addition, the contractor may request the United States to enter into the litigation to protect the interests of the United States.

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "contractor") agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

**Pertinent Non-discrimination Authorities:**

1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252) (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21 (entitled *Non-discrimination in Federally Assisted Programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act of 1964*);

2) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. § 4601) (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal aid programs and projects);

3) Federal Aid Highway Act of 1973 (23 U.S.C. § 324 *et seq.*) (prohibits discrimination on the basis of sex);

4) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;

5) The Age Discrimination Act of 1975, as amended (42 U.S.C. § 6101 *et seq.*) (prohibits discrimination on the basis of age);

6) Airport and Airway Improvement Act of 1982 (49 U.S.C. § 471, § 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);

7) The Civil Rights Restoration Act of 1987 (PL 100-209) (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, and § 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);

8) Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 – 12189) as implemented by DOT regulations at 49 CFR Parts 37 and 38;

9) The Federal Aviation Administration's Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);

10) Executive Order 12898 (as amended by Executive Order 12948), Federal Actions to Address Environmental Justice in Minority Populations and

Low Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low income populations;

11) Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency (LEP), and resulting agency guidance, national origin discrimination includes discrimination because of LEP. To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Federal Regulations at 74087 to 74100);

12) Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 *et seq.*);

13) 28 CFR § 50.3 (U.S. Department of Justice Guidelines for Enforcement of Title VI of the Civil Rights Act of 1964).

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date written above.

ATTEST:

CITY OF BILLINGS

BY \_\_\_\_\_  
CITY CLERK

BY \_\_\_\_\_  
MAYOR

APPROVED AS TO FORM

GUARANTOR

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

BY \_\_\_\_\_