

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. 11-19121 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notice of such meeting given as required by law; and that the Resolution has not as of the date hereof been amended or repealed.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: Ronquillo, Gaghen, Pitman, Cimmino, McFadden, Ruegamer, McCall, Ulledalen, Astle and Clark ; voted against the same: none ; abstained from voting thereon: none ; or were absent: none .

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

(SEAL)



Cari Martin
City Clerk

RESOLUTION NO. 11-19121

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

BY: Thomas W. Hanel
Thomas W. Hanel, Mayor

ATTEST:

BY: Cari Martin
Cari Martin, 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