

Introduced \_\_\_\_\_  
Public Hearing \_\_\_\_\_  
Council Action \_\_\_\_\_  
Executive Action \_\_\_\_\_  
Effective Date \_\_\_\_\_

## County Council Of Howard County, Maryland

2009 Legislative Session

Legislative Day No. 3

**Bill No. 16 -2009**

Introduced by: The Chairperson at the request of the County Executive

AN ACT pursuant to Section 612 of the Howard County Charter, approving a multi-year agreement between Howard County, Maryland and Grant Capital Management, Inc., where Grant Capital Management will finance the acquisition of certain equipment required under an energy performance contract.

---

Introduced and read first time \_\_\_\_\_, 2009. Ordered posted and hearing scheduled.

By order \_\_\_\_\_  
Stephen M. LeGendre, Administrator

Having been posted and notice of time & place of hearing & title of Bill having been published according to Charter, the Bill was read for a second time at a public hearing on \_\_\_\_\_, 2009.

By order \_\_\_\_\_  
Stephen M. LeGendre, Administrator

This Bill was read the third time on \_\_\_\_\_, 2009 and Passed \_\_\_, Passed with amendments \_\_\_, Failed \_\_\_\_\_.

By order \_\_\_\_\_  
Stephen M. LeGendre, Administrator

Sealed with the County Seal and presented to the County Executive for approval this \_\_\_\_ day of \_\_\_\_\_, 2009 at \_\_\_\_ a.m./p.m.

By order \_\_\_\_\_  
Stephen M. LeGendre, Administrator

Approved/Vetoed by the County Executive \_\_\_\_\_, 2009

\_\_\_\_\_  
Ken Ulman, County Executive

NOTE: [[text in brackets]] indicates deletions from existing law; TEXT IN SMALL CAPITALS indicates additions to existing law; Strike-out indicates material deleted by amendment; Underlining indicates material added by amendment

1           **WHEREAS**, Howard County, Maryland (the “County”) has determined where energy  
2 cost savings may be realized in County facilities and the County desires to install, construct,  
3 maintain and manage certain energy conservation measures; and  
4

5           **WHEREAS**, the County wishes to enter into an agreement with Energy Systems Group,  
6 a limited liability company, (“ESG”) where ESG will perform the design, construction and  
7 installation of equipment that will result in energy cost savings; and  
8

9           **WHEREAS**, the County desires to finance the cost of the design, construction and  
10 installation of the equipment through the energy cost savings resulting therefrom; and  
11

12           **WHEREAS**, in order to finance the purchase of the equipment through the energy  
13 savings generated by the equipment installed under the County’s contract with ESG, the County  
14 must enter into a financing agreement to lease the equipment; and  
15

16           **WHEREAS**, Grant Capital Management, Inc, a Maryland Corporation (“Grant Capital”)  
17 is engaged in the business of leasing certain energy conservation systems or equipment; and  
18

19           **WHEREAS**, the State of Maryland issued an invitation for bids for 2007 Energy  
20 Performance Contract Master Lease-Purchasing Financing #EML-08132007 dated August 13,  
21 2007; and  
22

23           **WHEREAS**, Grant Management submitted a proposal and the State of Maryland selected  
24 Grant Capital to perform services under the State’s invitation for bids; and  
25

26           **WHEREAS**, the County wishes to “piggyback”, in accordance with Section 4.115(a) of  
27 the Howard County Code, on the State invitation for bids; and  
28

29           **WHEREAS**, the County wishes to enter into a Lease-Purchase Agreement with Grant

1 Capital (“the Agreement”), the form of which is attached as Exhibit A, where Grant Capital will  
2 finance the equipment designed and installed by ESG, that may be needed to generate future cost  
3 savings; and  
4

5 **WHEREAS**, the County and Grant Capital wish to enter into the Agreement for a term  
6 that will extend beyond the current fiscal year; and  
7

8 **WHEREAS**, the Agreement requires the payment by the County of funds from an  
9 appropriation in a later fiscal year and therefore requires County Council approval as a multi-year  
10 agreement pursuant to Section 612 of the Howard County Charter.  
11

12 **NOW, THEREFORE,**  
13

14 *Section 1. Be It Enacted by the County Council of Howard County, Maryland that in*  
15 *accordance with Section 612 of the Howard County Charter, it approves the terms of a Lease-*  
16 *Purchase Agreement between Howard County and Grant Capital Management, Inc., which shall*  
17 *be in substantially the same form as Exhibit A attached to this Act.*  
18

19 *Section 2. And Be It Further Enacted by the County Council of Howard County, Maryland that*  
20 *the County Executive is hereby authorized to execute and deliver the Agreement for such term in*  
21 *the name of and on behalf of the County.*  
22

23 *Section 3. And Be It Further Enacted by the County Council of Howard County, Maryland that*  
24 *this Act shall be effective immediately upon its enactment.*

**2009 ENERGY PERFORMANCE CONTRACT MASTER  
LEASE-PURCHASE AGREEMENT**

**THIS 2009 ENERGY PERFORMANCE CONTRACT MASTER LEASE-PURCHASE AGREEMENT** is dated as of \_\_\_\_\_, 2009 (the "EPC Lease"), by and between **GRANT CAPITAL MANAGEMENT, INC.**, a Maryland Corporation (the "Lessor") having a principal place of business at \_\_\_\_\_ [insert address] \_\_\_\_\_ and the **HOWARD COUNTY, MARYLAND**, a body corporate and politic and a political subdivision of the state of Maryland ("Lessee"), having a principal place of business at George Howard Building, 3430 Courthouse Drive, Ellicott City, Maryland 21043.

**WITNESSETH**

**WHEREAS**, Lessee has determined that a present need exists for the acquisition of certain Equipment (hereinafter defined), and that Lessee is authorized under the Constitution and laws of the State and the Howard County Charter and Code to enter into this EPC Lease for the purposes hereinafter set forth; and

**WHEREAS**, Lessor has agreed to finance the acquisition of the Equipment and to EPC Lease with an option to purchase such Equipment to Lessee upon the terms and conditions set forth herein.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Lessor and Lessee agree as follows:

- 1. Agreement to Lease.** Lessor agrees to lease with the option to purchase to Lessee, and Lessee agrees to lease with the option to purchase from Lessor for the respective EPC Lease Term (hereinafter defined), the one or more items of energy conservation systems or equipment (the "Equipment") described in one or more Equipment Schedules (each an "Equipment Schedule" or "Schedule") in form and substance satisfactory to Lessor, from time to time executed and delivered by Lessor and Lessee in connection herewith, in accordance with the terms and conditions contained in this EPC Lease Agreement and the Financing Proposal Letter dated January 15, 2009 from Grant Capital Management, Inc. and all attachments thereto.

This EPC Lease Agreement and Exhibits A through D constitute and describe the scope of energy performance contract master lease-purchase financing services to be provided.

## **2. EPC Lease Term.**

- (a) This EPC Lease Agreement will become effective upon the execution and delivery by Lessee and Lessor of this EPC Lease Agreement.
- (b) The Lessor's period of performance for providing lease-financing under this EPC Lease Agreement shall be from November 1, 2007 to September 30, 2010, or until \$4,300,000 or such lesser amounts of Equipment as may be authorized by the County Council of the Lessee has been lease-financed hereunder. The term of this EPC Lease (the "EPC Lease Term") with respect to each item of Equipment will commence on either: (1) the Acceptance Date for such Equipment (for financing after Acquisition), or (2) the Commencement Date (for financing including an Acquisition Period) as set forth in the related Equipment Schedule, and unless earlier terminated as expressly provided for in this EPC Lease Agreement, will continue for the period set forth in the applicable Equipment Schedule. The EPC Lease Term with respect to the Equipment leased under a separate Equipment Schedule will terminate: (a) upon the purchase of the Equipment by the Lessee; (b) upon payment by Lessee of the EPC Lease Payments (hereinafter defined) required to be paid by Lessee hereunder with respect to the Equipment; or (c) as otherwise provided in this EPC Lease Agreement. Upon termination of the EPC Lease Term as to the Equipment leased under a separate Equipment Schedule as a result of the occurrence of either of the events specified in (a) or (b), above, the EPC Lease will terminate with respect to the Equipment leased under such Equipment Schedule, the security interest or other interest of the Lessor in such Equipment shall terminate, Lessee will acquire full and unencumbered title to such Equipment free and clear of all liens and encumbrances created by or arising through or under Lessor, and Lessor agrees to execute and deliver to Lessee such documents, in form and substance satisfactory to Lessee, to evidence such transfer of title and the termination of Lessor's security interest or other interest in the Equipment related to such Equipment Schedule.

## **3. Cost of Equipment; Delivery of Equipment; and Payment of Equipment Costs.**

- (a) The Lessee will enter into certain energy performance contracts ("EPCs") with one or more vendors (the "Vendors") of various items of energy conservation systems or equipment to be purchased from the respective Vendors and leased hereunder. Such EPCs shall provide for the delivery, installation, and purchase of the Equipment. Lessee does hereby assign to Lessor all of Lessee's rights, but none of its obligations, under the EPCs, including without limitation, the right to purchase the Equipment in accordance with the terms thereof, and will execute and deliver as part of each Equipment

Schedule an EPC Assignment. When used herein, the term "Equipment Costs" means the net purchase price payable to the respective Vendors under the respective EPCs, which shall not exceed the amount set forth in the respective Equipment Schedules, so long as such cumulative amounts do not exceed \$4,300,000.00 in the aggregate, plus accrued interest earned under any Escrow Agreement. Equipment Costs shall be payable either: (1) not earlier than the respective acquisition dates (the "Acquisition Dates") stated on the respective Equipment Schedules (for financings after Acquisition); or (2) in accordance with the respective Escrow Agreements (for financings including Acquisition Periods).

- (b) The EPCs shall provide that the Equipment is to be delivered to Lessee at the location (the "Equipment Location") specified in the applicable Equipment Schedule. Lessee will accept the Equipment as soon as it has been installed and is operational to the reasonable satisfaction of the Lessee, or in the event that the Vendor allows a pre-acceptance test period, as soon as the test period has expired (the "Acceptance Date"). Lessee will evidence its acceptance of the Equipment by executing and delivering to Lessor on the Acceptance Date an Acceptance Certificate (herein so called).
- (c) Lessor agrees to make moneys available from time to time to fund an Escrow Agreement or to pay to the Vendors specified on a Takedown Schedule or the accompanying Equipment Schedule such Equipment Cost when required and upon execution by the Lessor and Lessee of one or more Takedown Schedules (herein so called) and one or more Equipment Schedules with respect to each draw. Each Takedown Schedule shall reflect an aggregation of the EPC Lease Payments due under one or more Equipment Schedules providing for a similar number of EPC Lease Payments and applicable to a single acquisition date. In the event the Equipment Cost exceeds \$4,300,000.00 in the aggregate, Lessor shall not be required to provide additional moneys for this purpose.
- (d) In connection with any Takedown Schedule requiring installment payments, Lessor and Lessee shall enter into an Escrow Agreement to provide for such payments. Lessor shall select a bank, reasonably acceptable to the Lessee and offering competitive interest rates on escrowed funds, to act as escrow agent and to make payments to the Vendors, specified on the Takedown Schedule or the accompanying Equipment Schedules, in accordance with the payment instructions specified in the Escrow Agreement. Lessor agrees to make a good faith effort to select a qualified minority business enterprise bank to act as the escrow agent. The cost of the services of such escrow agent will be borne by Lessor.

#### **4. EPC Lease Payments.**

- (a) Subject to Section 5 hereof, Lessee agrees to pay to Lessor or its assignee pursuant to Section 18 hereof the EPC Lease Payments (herein so called), equal to the amounts specified in Exhibit B to the applicable Equipment Schedule. A

portion of each semi-annual EPC Lease Payment is paid as, and represents payment of interest, all as set forth in the applicable Equipment Schedule. The EPC Lease Payments will be payable without notice or demand, except for the invoices hereinafter provided, at the office of Lessor (or such other place as Lessor or its assignee may from time to time designate in writing), and will commence on the date that is the later of 30 days from the receipt of an approved invoice or the invoice due date for the first EPC Lease Payment (the "Due Date") as set forth in Exhibit B to the applicable Equipment Schedule. Lessor shall prepare and submit to Lessee in accordance with the instructions of the County Project Coordinator (defined herein) semi-annual invoices for the EPC Lease Payments reflected on Exhibit B to each Equipment Schedule. Each consolidated invoice submitted for payment shall include on its face the Lessor's or the Lessor's assignee's Federal Tax Identification Number. Consolidated payments will be made within thirty (30) days of receipt by the Office of approved invoices or the invoice due date, whichever is later. The County Project Coordinator may make a consolidated payment of any number or all EPC Lease Payments due to Lessor (or to the Assignee of Lessor to whom such EPC Lease Payments are due) on the same date. Any payments received after the Due Date may bear interest from the Due Date in accordance with applicable laws. Except as specifically provided in Section 5, Section 25, and Section 26 hereof, Lessee's obligation to pay the EPC Lease Payments will be absolute and unconditional in all events and, to the extent funds are appropriated therefor, will not be subject to any set-off, defense, abatement, reduction, counterclaim, or recoupment for any reason whatsoever.

- (b) Electronic funds transfer will be used by the Lessee to pay Lessor or its assignee the EPC Lease Payments and any other County payments due Lessor unless the County Project Coordinator, in her sole discretion, determines otherwise.
- (c) Lessor and Lessee understand and intend that the obligation of Lessee to pay the EPC Lease Payments required hereunder shall be subject to appropriated funds, and shall not in any way be construed to be a debt of Lessee in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by Lessee, nor shall anything contained herein constitute a pledge of the general tax revenues, funds, or moneys of Lessee beyond those appropriated for the purpose of acquiring the Equipment.
- (d) The County Executive, through its acknowledgment and acceptance of this EPC Lease, reasonably believes that legally available funds can be obtained sufficient to make all EPC Lease Payments during the EPC Lease Term, and hereby covenants that he will do all things lawfully within his power to obtain, maintain, and pursue funds from which the EPC Lease Payments may be made, including making provision for such payments to the extent necessary in each budget proposed for the purpose of obtaining funding, and that he will use his bona fide best efforts to obtain appropriation of the necessary funds to avoid termination pursuant to Section 5 hereof by taking all appropriate action to seek adequate budgeted funds to maintain this EPC Lease in force. It is the intent of the County Executive to make the EPC Lease Payments for the full EPC Lease Term if funds

are legally available therefor, and in that regard, Lessee represents that the use of the Equipment is essential to its proper, efficient, and economic operation.

## **5. Nonappropriation of Funds; Substitution.**

- (a) In the event sufficient funds are not appropriated in any fiscal period for EPC Lease Payments due hereunder, then Lessee will immediately notify the Lessor or its assignee of such occurrence and the EPC Lease Term for the Equipment under an Equipment Schedule for which funds were not appropriated shall terminate on the last day of the fiscal period for which appropriations were authorized, without penalty or expense to Lessee of any kind whatsoever. In the event of such termination, Lessee may exercise its option to purchase the Equipment to the extent that appropriations are available in the current fiscal year with 15 days notice to the Lessor of its intent to purchase the Equipment, or in the alternative, agrees to peaceably surrender possession of such Equipment to Lessor or its assignee on the date of such termination. Lessor will have all legal and equitable rights and remedies to take possession of the Equipment upon such termination.
- (b) In the event that funds are not appropriated with respect to Equipment under one or more Equipment Schedules or for any other reason whatsoever, Lessee shall have the right to substitute therefor other equipment of equivalent value with the consent of the Lessor or its assignee so as to prevent termination of the Equipment Schedule.

## **6. Limitation on Warranties.**

- (a) Lessee acknowledges and agrees and shall confirm its acknowledgement and agreement on each Equipment Schedule that the Equipment is of a size, design, and capacity selected by the Lessee; that Lessee is satisfied that the Equipment is suitable for its purpose; that Lessor is neither a manufacturer nor a vendor of the Equipment; and that **LESSOR HAS NOT MADE, AND DOES NOT HEREBY MAKE, ANY REPRESENTATION, WARRANTY, OR COVENANT, EXPRESS OR IMPLIED, WITH RESPECT TO THE MERCHANTABILITY, CONDITION, QUALITY, DURABILITY, DESIGN, OPERATION, FITNESS FOR USE, OR SUITABILITY OF THE EQUIPMENT IN ANY RESPECT WHATSOEVER OR IN CONNECTION WITH OR FOR THE PURPOSES AND USES OF LESSEE, OR ANY OTHER REPRESENTATION, WARRANTY, OR COVENANT OF ANY KIND OR CHARACTER, EXPRESS OR IMPLIED, WITH RESPECT THERETO, AND LESSOR SHALL NOT BE OBLIGATED OR LIABLE FOR ANY ACTUAL, INCIDENTAL, CONSEQUENTIAL, OR OTHER DAMAGES OF OR TO LESSEE OR ANY OTHER PERSON OR ENTITY ARISING OUT OF OR IN CONNECTION WITH THE USE OR PERFORMANCE OF THE EQUIPMENT AND THE MAINTENANCE THEREOF.**



- (b) Lessor hereby assigns to Lessee during the EPC Lease Term, so long as no Event of Default (as hereinafter defined) has occurred and is continuing, all manufacturers' warranties, if any, express or implied, with respect to the Equipment, and Lessor authorizes Lessee to obtain the customary services furnished in connection with such warranties at Lessee's expense, and shall cooperate fully with Lessee with respect to the resolution of any claims against such warranties.

## **7. Representations and Warranties.**

- (a) Lessee represents and warrants as of the date hereof, as of the date of acceptance under each Equipment Schedule, and at all times during the respective EPC Lease Term that : (i) Lessee is a "state or political subdivision thereof" within the meaning of Section 103 of the Internal Revenue Code of 1986, as amended (the "Code"), and will do or cause to be done all things necessary to preserve and keep in full force and effect its existence as such; (ii) the execution, delivery, and performance by the Lessee of this EPC Lease, all Equipment Schedules, all Takedown Schedules, and all other documents executed in connection herewith by Lessee ( all such documents shall be collectively referred to herein as the "EPC Lease Documents"), have been duly authorized by all necessary action on the part of the Lessee; (iii) the EPC Lease Documents constitute a legal, valid, and binding obligation of the Lessee enforceable in accordance with their respective terms; (iv) the execution and performance of the EPC Lease Documents will not (1) materially violate any judgment, order, law, or regulation applicable to Lessee or (2) result in the creation of any lien, charge, security interest, or other encumbrance upon the Equipment (other than as contemplated by this EPC Lease), or any assets of the Lessee that would result in a material breach of, or constitute a material default under any indenture, mortgage, deed of trust, bank loan, credit agreement, or other instrument to which Lessee is a party or by which it or its assets may be bound; (v) there are no actions, suits, or proceedings pending or, to the knowledge of the Lessee, threatened against or affecting Lessee's in any court or before any governmental commission, board, or authority, which, if adversely determined, will have a material, adverse effect on the ability of Lessee to perform its obligations under the EPC Lease Documents; (vi) the County has duly authorized and approved, by all necessary official action of the County, the adoption or execution and delivery by the County of, and the performance by the County of the obligations on its part, in connection with the execution and delivery of the EPC Lease Documents; (vii) without the prior consent of the Lessor, no portion of the Equipment will be used directly or indirectly in any trade or business carried on by any person other than Lessee; and (viii) without the prior consent of the Lessor, no portion of the Equipment will be used by an organization described in Section 501(c)(3) of the Code.
- (b) In connection with each Equipment Schedule and Takedown and as a condition precedent to the funding thereof by Lessor, Lessee shall deliver to Lessor: (1) an

opinion of Lessee's counsel in form and substance reasonably acceptable to Lessor as to the validity of the statements made in subsections (i) through (vi), above; (2) a certificate of a duly authorized officer of Lessee respecting the validity of the statements made in subsections (vii) and (viii), above; (3) a certificate of Lessee in form and substance acceptable to Lessor describing the facts upon which it may be determined that this EPC Lease as supplemented at the time by an Equipment Schedule, does not constitute an "arbitrage bond" as that term defined in Section 148 of the Code; (4) an opinion of nationally recognized bond counsel in form and substance reasonably acceptable to Lessor as to the excludability from gross income of the interest component of the EPC Lease payments under the laws of the United States and the State and other related matters; (5) compliance with Paragraph 9 below; and (6) such other documents and certificates as shall be reasonably requested by the Lessor.

8. **Title.** Upon Lessee's acceptance of the Equipment under an Equipment Schedule, title to the Equipment will vest in Lessee; provided, however, that (i) in the event of termination pursuant to Section 5 hereof; or (ii) upon the occurrence of an Event of Default hereunder, as long as such Event of Default is continuing, title to the Equipment will vest in Lessor or its assignee unless Lessee exercises its option to purchase pursuant to Paragraph 17.
9. **Security Interest.** In order to secure all of its obligations under the EPC Lease documents, Lessee hereby (i) grants to Lessor a first priority security interest in any and all right, title, and interest of Lessee in: (a) Lessee's Energy Performance Contract with Vendor when the Acquisition Period is being lease-financed; (b) the funds deposited by Lessor in an Escrow Account when the during the Acquisition Period; and (c) the Equipment, and in all additions, attachments, and accessions thereto and substitutions thereof; and (d) any proceeds (including the proceeds of any insurance policy) of the foregoing; (ii) agrees that this EPC Lease, and as appropriate, the EPC Assignment and the Escrow Agreement may be filed, by Lessor at its expense as a financing statement evidencing such security interests; and, (iii) agrees to execute and deliver all financing statements, certificates of title, and other instruments necessary or appropriate to evidence such security interest.
10. **Use; Repairs.** Lessee will use the Equipment in a careful manner consistent with the use generally contemplated by the manufacturer of the Equipment and will comply with all laws, ordinances, insurance policies, and regulations relating to, and will pay all valid costs, claims, damages, fees, and charges arising out of, its possession, use, or maintenance. Lessee, at its expense, will keep the Equipment in good repair, ordinary wear and tear excepted, and will furnish all parts, mechanisms, and devices required therefor.
11. **Alterations.** Lessee will not make any alterations or additions to the Equipment that will result in a material reduction in its value without Lessor's prior written consent or unless such alteration or addition may be readily removed without damage to the Equipment.

**12. Location; Inspection.**

- (a) The Equipment will not be removed from, or if the Equipment consists of rolling stock, its permanent base will not be changed from, the Equipment Location, without Lessor's prior written consent, which consent will not be unreasonably withheld.
- (b) Upon not less than three (3) business days prior notice, Lessor will be entitled to enter upon the Equipment Location or elsewhere during normal business hours to inspect the Equipment or observe its use and operation. Any such inspection shall be in compliance with the Lessee's security procedures. Lessee shall not be responsible for any injury to any person or property during any such inspection unless directly caused by Lessee's gross negligence or willful conduct.

**13. Liens and Taxes.** Lessee shall keep the Equipment free and clear of all levies, liens, and encumbrances except those created under this EPC Lease. The parties contemplate that the Equipment will be used for a governmental purpose of Lessee and that the Equipment will be exempt from all taxes presently assessed and levied. In the event that the use, possession, or acquisition of the Equipment is found to be subject to taxation, Lessee shall pay when due during the EPC Lease Term, to the extent of available appropriated funds, all charges and taxes (local, State, and federal), that now or hereafter may be imposed upon the ownership, leasing, rental, sale, purchase, possession, or use of the Equipment, excluding, however, all federal and State taxes on or measured by Lessor's or its assignee's income and any federal, state or local income, succession, transfer, franchise, profit, excess profit, capital stock, gross receipts, corporate, or other similar tax payable by Lessor, its successors or assigns, unless such tax is made as substitute for any tax, assessment or charge which is the obligation of Lessee under this Section.. If Lessee fails to pay said charges and taxes when due, and after delivery of written notice to Lessee, Lessor shall have the right, but shall not be obligated, to pay said charges and taxes. If Lessor pays any charges or taxes for which Lessee is liable under this agreement, Lessee shall reimburse Lessor therefor, subject only to the availability of appropriated funds.

**14. Risk of Loss; Damage, Destruction, and Condemnation; Use of Net Proceeds.**

- (a) Lessee assumes all risk of loss of, or damage to, the Equipment from any cause whatsoever, and no such loss of, or damage to, the Equipment, defect therein, or unfitness or obsolescence thereof shall relieve Lessee of its obligation to make EPC Lease Payments or to perform any other obligation hereunder. Notwithstanding the foregoing, Lessor shall be responsible for any loss of, or damage to, the Equipment that is proximately caused by Lessor's actions during any inspection.
- (b) If, prior to the termination of the EPC Lease Term, (i) the Equipment or any portion thereof is destroyed (in whole or in part), or is damaged by fire or other casualty; or (ii) title to, or the temporary use of, the Equipment or any part thereof

or the estate of Lessee or Lessor in the Equipment or any part thereof shall be taken under the exercise of the power of eminent domain by any governmental body or by any person, firm, or corporation acting under governmental authority, Lessee shall, at its option and subject to appropriation, repair, restore, or replace the affected Equipment with equipment of equivalent value, or purchase the affected Equipment on the Due Date (as set forth in the applicable Equipment Schedule) next succeeding the date of such loss at the Concluding Payment amount (the "Concluding Payment") applicable to such Due Date, plus the EPC Lease Payment due on such date, plus any past due amounts then payable by Lessee hereunder with respect to such items of Equipment. Upon any such payment, the EPC Lease Term with respect to such items of Equipment shall terminate, and Lessee will acquire full and unencumbered title to such items of Equipment. Within sixty (60) days of the happening of any events described in clauses (i) and (ii) of the first sentence of this subsection (b), Lessee shall give notice to the Lessor and any assignee with respect to such Equipment of such event and how it proposes to comply with the provisions of the first sentence of this paragraph.

- (c) If appropriated funds are not available to permit Lessee to repair, restore, replace, or purchase such Equipment in accordance with subsection (b) of this paragraph, Lessee shall, to the extent allowed by applicable law, cause the Net Proceeds, as defined in Section 15 hereof, of any insurance claim or condemnation award to be applied to the payment of Lessee's obligations under this EPC Lease. Any portion of the Net Proceeds in excess of the amount required to pay in full Lessee's obligations as set forth in this subsection shall be for the account of Lessee. Lessee agrees that if the Net Proceeds are insufficient to pay in full Lessee's obligations hereunder, Lessee shall, to the extent of appropriated funds, make such payments to the extent of any deficiency.

- 15. Insurance.** At its own expense, subject to appropriated funds, Lessee shall self-insure, or at its option, commercially insure, the Equipment against loss or damage due to fire and risks normally included in extended coverage, malicious mischief, and vandalism for not less than the Full Insurable Value of the Equipment. As used herein, "Full Insurable Value" means the full replacement value of the Equipment or the then applicable Concluding Payment amount designated in the Equipment Schedules, whichever is less. All insurance for loss or damage shall provide, to the extent allowed by applicable law, that losses, if any, shall be payable to Lessor and Lessee, as their interests may appear, and in the event that the Equipment suffering a loss or damage is not repaired, restored, replaced, or purchased pursuant to Section 14(c) hereof, Lessee shall use its best efforts to have all checks relating to any such loss delivered promptly to Lessor to the extent allowed by applicable law. The Net Proceeds of the insurance required hereby shall be applied as provided in Section 14 hereof. As used herein, "Net Proceeds" means the amount remaining from the gross proceeds of any insurance claim or condemnation award after deduction of expenses (including reasonable attorneys' fees) incurred in the collection of such claim or award. At the request of Lessor, but in no event more than once per calendar year, Lessee shall provide written evidence of insurance.

**16. Indemnification.** To the extent permitted by law and subject to the availability of appropriated funds, Lessee shall indemnify Lessor against, and hold Lessor harmless from, any and all claims, actions, proceedings, expenses, damages, or liabilities, including reasonable attorneys' fees and court costs, arising in connection with the Equipment, including, but not limited to, its selection, purchase, delivery, possession, use, operation, rejection, or return, and the recovery of claims under insurance policies thereon, unless any such action is based upon the negligence, illegal act, breach of duty, or intentional tort committed by the Lessor.

**17. Purchase Option.**

- (a) Except as provided in subsection (b) of this paragraph, upon not less than 15 (15) days' prior written notice from Lessee to Lessor, Lessee will have the right to purchase Equipment leased hereunder on any payment date during the EPC Lease Term by paying to Lessor on such date the EPC Lease Payments then due together with the Concluding Payment amount set forth in the respective Equipment Schedule opposite such date.
- (b) In the event that Lessee receives a Notice of Default (hereinafter defined), Lessee may at any time during the Cure Period (hereinafter defined) inform Lessor of its intention to purchase all Equipment financed pursuant to this Agreement on the next payment date during the EPC Lease Term, at which time Lessee shall pay to Lessor on such date the EPC Lease Payments then due together with the Concluding Payment amount set forth in the respective Equipment Schedule opposite such date.
- (c) Lessor covenants that the applicable Concluding Payment amounts do not include anticipatory profit of Lessor. Upon satisfaction by Lessee of such purchase conditions set forth in subparagraphs (a) or (b),, Lessor will immediately transfer any and all of its right, title, and interest in the purchased Equipment to Lessee as is, without warranty, express or implied, except that Lessor will warrant to Lessee that the Equipment is free and clear of any liens or encumbrances created by or arising through or under Lessor.

**18. Assignment.**

- (a) Without Lessor's prior written consent, Lessee will neither: (i) assign, transfer, pledge, hypothecate, grant any security interest in, or otherwise dispose of this EPC Lease, any Equipment, or any interest in this EPC Lease or the Equipment; nor (ii) sublet or lend the Equipment.
- (b) Lessor may assign, in whole, or in part, its rights, title, and interest in and to this EPC Lease, including all Equipment Schedules, the Equipment, and any other documents executed with respect to this EPC Lease, and/or grant or assign a security interest in this EPC Lease and the Equipment only after prior written

approval by the Lessee, such approval not to be unreasonably withheld or delayed. Any assignment in part may be only with respect to one or more Equipment Schedules and not to any portion of a single Equipment Schedule. Any such assignee shall have all of the rights, but none of the obligations of Lessor under this EPC Lease other than the obligation to provide funds to Lessee in the aggregate amount specified on the Equipment Schedule assigned to such Assignee as contemplated hereunder. Subject to the preceding sentence, the term Lessor as used herein shall include any such assignees. Subject to the foregoing, this EPC Lease and the Equipment Schedules shall inure to the benefit of, and be binding upon, the successors and assigns of the parties hereto. After assignment of any portion of Lessor's interest in this EPC Lease is approved by the Lessee as set forth herein, Lessor will cause written notice of such assignment to be sent to Lessee which will be sufficient if it discloses the name of the assignee and the address to which further payments hereunder should be made. No further action will be required by Lessor or by Lessee to evidence the assignment of rights hereunder, but Lessee will acknowledge any such permitted assignment in writing if so requested. Lessee shall retain notice of such assignment and maintain a record that identifies the owner of Lessor's interest in this EPC Lease. Upon Lessee's receipt of written notice of Lessor's assignment of any portion of its interest in this EPC Lease, Lessee agrees to recognize such assignee as the owner of such portion of Lessor's interest in this EPC Lease, and Lessee thereafter shall make such payments, including without limitation, such EPC Lease Payments as are indicated in the notice of assignment, directly to such assignee; provided, however, that any such permitted assignment of a right to receive payment hereunder shall be accomplished in accordance with Lessee's instructions, if any, regarding invoicing or other processing of EPC Lease Payments.

- (c) Lessor or its assignee may not sell or distribute, in fractionalized interests or participations, its interest in its rights to receive payment of the aggregate amount of all Equipment Schedules for any given draw hereunder without the prior written consent of the Lessee. If Lessee gives its consent to such sale or distribution of such fractionalized interests or participations, Lessor or its assignee (i) shall limit the number of holders of such interests or participations to thirty-five (35) or fewer "sophisticated investors"; (ii) shall issue any such interest or participation in the amount of \$100,000 or more; (iii) shall maintain, on behalf of the Lessee, registration books or a book entry system with respect to the ownership and transfer of such participations or interests that complies with the requirements of Section 149(a) of the Code; (iv) shall not establish any such participations or interests in a manner that would cause interest payments on this EPC Lease received by owners of such participations or interests to be includable in gross income for federal income tax purposes; and (v) shall provide the County Solicitor with a copy of all offering materials thirty (30) business days prior to the time any such interests or participations are offered for sale or distribution. Lessor (i) shall be solely responsible for the allocation of payments received from Lessee among any such participants as their interests may appear; and (ii) shall be solely responsible for the costs and other financial or other liabilities attendant to the

establishment, maintenance, and operation of the aforesaid registration books or book entry system. Lessee shall be given notice of the establishment of any such registration books or book entry system and a full written explanation of how such books or system works, including the right to inspect the same during normal business hours, or, if Lessor is not conveniently located for such inspection, Lessee shall be furnished, upon request, with photocopies of such books and records and/or book entry system. The foregoing to the contrary notwithstanding, Lessee may, at its option and expense, appoint another agent to establish, maintain, and operate the registration books or book entry system contemplated hereunder.

- (d) The Lessee has not prepared an Official Statement or other offering materials in connection with this EPC Lease and does not intend to prepare such materials. It is the Lessee's intent that the restrictions contained in this Section 18 preclude the use by the Lessor of Certificates of Participation.

**19. Events of Default.** With respect to each Equipment Schedule, an Event of Default (herein so called) shall occur upon the happening of an event hereinafter described, but in the case of events described in paragraphs (b) and (c) below, only if the Lessor shall have given the Lessee prior written notice of the default (the "Notice of Default") and thirty (30) days (the "Cure Period") to cure the default specified in such notice , or cause such default to be cured, unless the Lessor and Lessee shall agree to an extension of such time prior to its expiration:

- (a) Lessee fails to make any EPC Lease Payment as it becomes due in accordance with the terms of this EPC Lease and the respective Equipment Schedules (except as such failure results from nonappropriation by the Lessee of funds for such purposes);
- (b) Lessee fails to perform or observe any other material covenant, condition, or agreement to be performed or observed by it hereunder or under the respective Equipment Schedules; or,
- (c) The discovery by Lessor that any statement, representation, or warranty made by Lessee in this EPC Lease or in any writing delivered by Lessee pursuant hereto or in connection herewith is false, misleading, or erroneous in any material respect at the time such statement, representation, or warranty was made.

**20. Remedies.** Upon the occurrence of an Event of Default and as long as such Event of Default is continuing, Lessor, at its option, may declare this EPC Lease to be in default by written notice to such effect to the Lessee, and thereafter Lessor may exercise any one or more of the following remedies:

- (a) By written notice to Lessee, declare an amount equal to all amounts then due or to become due during the then current fiscal year of Lessee under this EPC Lease and the Equipment Schedules to which the Event of Default applies to be

immediately due and payable, whereupon the same shall become immediately due and payable;

- (b) By written notice to Lessee, request Lessee to (and Lessee agrees that it will), promptly return the Equipment described on the Equipment Schedule to which the Event of Default applies to Lessor, and Lessor may enter upon the premises where the Equipment is located and take immediate possession of and remove all or any portion of the same;
- (c) sell or lease the Equipment or sublease it for the account of Lessee holding Lessee liable, only for the fiscal year for which appropriated funds are available and only to the extent of those appropriated funds, for all EPC Lease Payments and other payments due on or before the effective date of such selling, leasing, or subleasing, and for the difference between the purchase price, rental, and other amounts paid by the purchaser, lessee, or sublessee pursuant to such sale, lease, or sublease and the amount payable by Lessee hereunder; and,
- (d) Exercise any other right, remedy, or privilege that may be available to it under applicable laws of the State of Maryland or any other applicable law, or proceed by appropriate legal action to enforce the terms of this EPC Lease or to recover damages for the breach of this EPC Lease, or to rescind this EPC Lease as to the Equipment.

Any assignee of Lessor shall only have the right to declare the Lease in default and exercise the remedies described in paragraphs (a) through (d) above to the extent of the Equipment Schedules which Lessor has assigned to such assignee and the EPC Lease Payments and Equipment described thereon.

In addition, Lessee will remain liable, to the extent permitted by law and to the extent of then currently available appropriated funds, for all covenants and indemnities under this EPC Lease and for all reasonable legal fees and other costs and expenses, including court costs, incurred by Lessor with respect to the enforcement of any of the remedies listed above or any other remedy available to Lessor. No remedy herein conferred upon or reserved to Lessor is intended to be exclusive, and every such remedy shall be cumulative and shall be in addition to every other remedy given under this EPC Lease or now or hereafter existing at law or in equity. Lessor's remedies hereunder may be exercised separately with respect to items of Equipment. No delay or omission to exercise any right or power accruing upon the occurrence of any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right or power may be exercised from time to time and as often as may be deemed expedient.

- 21. Lessor's Right To Perform for Lessee.** Except as provided in Sections 5, 25 and 26, if Lessee fails to perform or comply with any of its material covenants contained herein, Lessor shall have the right, but shall not be obligated, to effect such performance or compliance of its material covenants, and the amount of any reasonable out-of-pocket expenses or other reasonable expenses of Lessor incurred in connection with the



performance of, or compliance with, such material covenant, together with interest thereon at the lesser of: (i) the highest lawful rate permitted by applicable State law on the date of payment by Lessor; or (ii) the same rate as the underlying EPC Lease Payments shall be payable by Lessee to the extent of then currently available appropriated funds, upon demand. Lessee shall execute, endorse, and deliver to Lessor any conveyance, assignment, or other instrument in writing as may be reasonably required to vest in Lessor any right, title, or power that by the terms hereof is intended to be conveyed or conferred upon Lessor, including without limitation: (a) Uniform Commercial Code Financing Statements (including continuation statements); (b) to the extent allowed by applicable law, documents and checks or drafts relating to or received in payment for any loss or damage on the insurance required hereunder, but only to the extent that same relates to the Equipment; and, (c) at such time of default or nonappropriation, upon any bill of sale, document, instrument, invoice, freight bill, bill of lading, or similar document relating to the Equipment in order to vest title in Lessor and to transfer possession to Lessor within ten (10) days upon receipt of same.

22. **Quiet Enjoyment of Equipment.** Lessor hereby covenants to provide to Lessee during the term of this EPC Lease quiet use and enjoyment of the Equipment, and Lessee shall during the term of this EPC Lease peaceably and quietly have and hold and enjoy the Equipment without suit, trouble, or hindrance from Lessor except upon the occurrence of an Event of Default.
23. **Delivery of Related Documents.** Lessee will execute or provide, as requested by Lessor, such other documents and information as are reasonably necessary with respect to the transactions contemplated by this EPC Lease. At the written request of the Lessor, Lessee will furnish current financial statements of Lessee within sixty (60) days after the date such statements become available to the public. During the EPC Lease Term and upon annual request of the Lessor, Lessee will provide to Lessor the applicable budget, or relevant portions thereof at Lessee's election, with proof of appropriation for the ensuing fiscal year, and such other financial information relating to the ability of Lessee to continue this EPC Lease as reasonably may be requested by Lessor.
24. **Lessee's Covenants.** Lessee specifically covenants that it shall comply with the provisions of the Code, including, without limitation, compliance with any provisions of such law regarding the timing of the expenditure of the proceeds of this EPC Lease, the use of such proceeds, the restriction of investment yields, the filing of information with the Internal Revenue Service, and the rebate of certain earnings resulting from the investment of the proceeds of this EPC Lease. Lessee further covenants that it shall make such use of the proceeds of this EPC Lease, regulate the investment of the proceeds thereof, and take such other and further actions as may be required to maintain exclusion from gross income for federal tax purposes of the interest portion of the EPC Lease Payments. Both Lessor and Lessee shall provide such certification of facts and estimates regarding the amount and use of the proceeds of this EPC Lease as may be necessary or appropriate from time to time to comply with, or to evidence Lessee's compliance with, the covenants set forth in this Section, and Lessor agrees that it will comply with all

reasonable requests from Bond Counsel that may be necessary to ensure Lessee's compliance with the covenants set forth in this Section.

25. **Termination for Cause.** If Lessor: (a) fails to fulfill its obligation under this EPC Lease to provide funds sufficient to pay the Equipment Cost as described in Section 3 hereof properly and on time, Lessee may terminate this Agreement with respect to any Equipment Schedule for which Lessor has failed to fulfill such payment obligation and any future Equipment Schedules by written notice to Lessor or (b) otherwise violates any provision of the Lease, Lessee may terminate this EPC Lease with respect to any or all pending or future Equipment Schedules by written notice to Lessor; provided, however, that clauses (a) and (b) shall not be deemed to permit termination of this Agreement by Lessee with respect to existing previously financed Equipment Schedules. The notice shall specify the acts or omissions relied upon as cause for termination. In addition to all other remedies at law or in equity in the event of Lessor's default, and in the event Lessor has provided a performance security, such security shall be forfeited in its entirety to Lessee and for full liquidated damages. In the event a performance security has been waived by the Lessee, then Lessor shall pay Lessee the actual amount of damages caused by Lessor's breach. Lessor will remain liable after termination of this Agreement and Lessee can affirmatively collect damages.
26. **Termination for Convenience.** The performance of this EPC Lease may be terminated by Lessee in accordance with this clause, in whole or in part, whenever the Lessee shall determine that such termination is in the best interest of Lessee; provided, however, that this clause shall not be deemed to permit termination by Lessee with respect to existing Equipment Schedules.
27. **Contingent Fee Prohibition.** Lessor warrants that it has not employed or retained any person, partnership, corporation, or other entity, other than a bona fide employee or agent working for Lessor, to solicit or secure this EPC Lease, and that it has not paid or agreed to pay any person, partnership, corporation, or other entity, other than a bona fide employee or agent, any fee or other consideration contingent on the making of this EPC Lease.
28. Lessor certifies that the officer of the corporation executing this Agreement has read and understands Exhibit \_\_ entitled Howard County Charter and Code References to Ethics, which contains the provisions of Section 901(a) of the Howard County Charter dealing with conflicts of interest and Section 22.204 of the Howard County Code dealing with conflicts of interest. The Lessor further certifies that he/she has (1) not been a party to an agreement to bid a fixed or uniform price; (2) not offered nor will offer any gratuity to any County official or employee; and (3) not violated any of the fair employment provisions of Code Sec. 4.119 Ethics and Fair Employment Practices detailed in Exhibit \_\_\_\_.
29. **Political Contribution Disclosure.** Lessor shall comply with Election Law Article, §§14-101—14-108, Annotated Code of Maryland, which requires that every person that enters into contracts, leases, or other agreements with the State, a county, or an

incorporated municipality, or their agencies, during a calendar year in which the person receives in the aggregate \$100,000 or more, shall file with the State Board of Elections a statement disclosing contributions in excess of \$500 made during the reporting period to a candidate for elective office in any primary or general election. The statement shall be filed with the State Board of Elections: (1) before a purchase or execution of a lease or contract by the State, a county, an incorporated municipality, or their agencies, and shall cover the preceding two calendar years; and (2) if the contribution is made after the execution of a lease or contract, then twice a year, throughout the contract term, on: (a) February 5, to cover the 6-month period ending January 31; and (b) August 5, to cover the 6-month period ending July 31.

- 30. Retention of Records.** If requested by Lessee, Lessor shall deliver to the Lessee background material prepared or obtained by Lessor incident to the performance of this EPC Lease. "Background Material" shall include, but not be limited to, work papers, notes, completed questionnaires, other printed materials, pamphlets, maps, drawings, and books acquired by Lessor during the term of this EPC Lease and directly related to the services provided under this EPC Lease. Any proprietary computer programs of Lessor are expressly excluded from the definition of "Background Material" as used in this Section. Lessor shall maintain records and documents relating to the performance of this EPC Lease for three years following final payment hereunder or any applicable statute of limitations, whichever is longer, and shall make such records available for inspection and audit by the authorized representatives of Lessee.
- 31. Nondiscrimination in Employment.** Lessor agrees: (a) not to discriminate in any manner against an employee or applicant for employment because of race, color, religion, creed, age, sex, marital status, national origin, ancestry, or physical or mental handicap unrelated in nature and extent so as reasonably to preclude the performance of such employment; (b) to include a provision similar to that contained in subsection (a), above, in any underlying subcontract; and, (c) to post and to cause subcontractors to post in conspicuous places available to employees and applicants for employment, notices setting forth the substance of this clause.
- 32. Compliance with Laws.** Lessor hereby represents and warrants that:
- (a) it is qualified to do business in the State of Maryland and that it will take such action as, from time to time, may be necessary to remain so qualified;
  - (b) it is not in arrears with respect to the payment of any moneys due and owing the State of Maryland, Howard County, or any department or unit thereof, including, but not limited to, the payment of taxes and employee benefits, and that it shall not become so in arrears during the term of this EPC Lease;
  - (c) it shall comply with all federal, State, and local laws applicable to its activities and obligations under this EPC Lease; and

- (d) it shall obtain, at its expense, all licenses, permits, insurance, and governmental approvals, if any, necessary to the performance of its obligations under this EPC Lease.
33. **Administration.** This EPC Lease shall be performed under the direction of Sharon Greisz, Director of Finance, or her designee (the "County Project Coordinator"). All matters relating to administration and performance of this EPC Lease shall be referred to the County Project Coordinator for determination.
34. **Governing Law.** This EPC Lease shall be construed, interpreted, and enforced in accordance with the laws of the State of Maryland.
35. **Notices.** All notices (excluding invoices and communications in the ordinary course of business) to be given under this EPC Lease shall be in writing and mailed by certified mail, return receipt requested, to the other party at its address set forth in the introduction to this EPC Lease, or at such address as the party may provide in writing from time to time.
36. **Section Headings.** All section headings contained herein are for convenience of reference only and are not intended to define or limit the scope of any provision of this EPC lease.
37. **Entire Agreement; Modification; Severability.** This EPC Lease, together with Exhibits A through D all other EPC Lease Documents, constitutes the entire agreement between the parties with respect to the lease of the Equipment, and the EPC Lease Documents shall not be modified, amended, altered, or changed except with the written consent of Lessee and Lessor. If any terms contained in any earlier writing, agreement, or proposal conflict with the terms and conditions of this EPC Lease, the terms and conditions of this EPC Lease shall control. Any provision of this EPC Lease found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remainder of this EPC Lease.
38. **Representations.** Each party to this EPC Lease represents and warrants to the other that it has full right, power, and authority to execute this EPC Lease.
39. **Non-Hiring of Employees.** No employee of the Lessee or any unit thereof, whose duties as such employee include matters relating to or affecting the subject matter of this EPC Lease, shall, while so employed, become or be an employee of the party or parties hereby contracting with Lessee.

**IN WITNESS WHEREOF,** the parties hereto have caused this EPC Lease to be executed as of the day and year above first written.

**ATTEST: LESSOR:**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**WITNESS: LESSEE:**

[COUNTY

SIGNATURE

PAGE

FOLLOWS]

## APPENDIX E

### DRAFT

Date

Name and Address of Lessor

Name and address of Assignees

Ladies & Gentlemen:

I have examined an original of a Howard County 2009 Energy Performance Contract Master Lease-Purchase Agreement dated as of (the "Lease"), Equipment Schedule No. \_\_\_\_ and Takedown Schedule No. \_\_, thereto, dated as of \_\_\_\_\_, between the Howard County (the "Lessee"), and Grant Capital Management, Inc. (the "Lessor"), and certain other documents executed by Lessee in connection with the Lease (the Lease, the Equipment Schedule, the Takedown Schedule, and such other documents are collectively referred to herein as the "Lease Documents").

Based upon such examination and upon such other examination of law and fact as I have deemed necessary or appropriate for purposes of the opinions set forth below, and assuming due execution, as appropriate, of the Lease Documents by Lessor, I am of the opinion, that:

1. Lessee is a "State or political subdivision thereof" within the meaning of Section 103 of the Internal Revenue Code of 1986, as amended;
2. The Lessee has full legal right, power and authority to authorize, enter into, execute and deliver the Lease Documents and to perform its duties, covenants, obligations and agreements thereunder;
3. Execution and delivery of the Lease Documents by the County Executive and Lessee's performance of the Lease Documents in accordance with their terms have been duly authorized by all necessary action on the part of the Lessee;
4. The Lease Documents are legal, valid, and binding obligations of Lessee enforceable against Lessee in accordance with their terms except as such enforceability may be limited by nonappropriation of funds or by applicable bankruptcy, insolvency, moratorium, reorganization, or similar laws from time to time in effect and equitable principles. In the event Lessor obtains a judgment against Lessee for money damages as a result of an event of default under the Lease, Lessee would be obligated to pay such judgment subject to any budget and appropriation the Howard County Charter and the Howard County Code;
5. The execution and performance of the Lease Documents does not, to the best of my knowledge, materially violate any judgment, order, law, or regulation applicable to the Lessee or result in any material breach of, or constitute a material default under, or result in the creation of any lien, charge, security interest, or other encumbrance upon, the Equipment (other than as contemplated by the Lease), or any assets of the Lessee pursuant to any indenture, mortgage,

deed of trust, bank loan, credit agreement, or other instrument to which Lessee is a party or by which it or its assets may be bound;

6. To the best of my knowledge, there are no actions or proceedings pending or threatened against or affecting the Lessee in any court or before any governmental commission, board, or authority, which, if adversely determined, would have a material, adverse effect upon the ability of Lessee to perform its obligations under the Lease Documents;

7. To The County has duly authorized and approved, by all necessary official action of the County, the adoption or execution and delivery by the County of, and the performance by the County of the obligations on its part in connection with the execution and delivery of the Lease Documents.

8. To the best of my knowledge, the Lessee has complied with all requirements applicable to any of the Lease Documents under the Howard County Charter, and Title 4, Subtitle 1 of the Howard County Code.

In accordance with the foregoing, this opinion is rendered solely for your benefit and by \_\_\_\_\_, special tax counsel retained by the County to render an opinion with respect to the federal income tax consequences of this transaction and may not be relied upon by any other person or for any other purpose without our prior written consent.. Except as expressly provided herein, however, I express no opinion as to any Federal or State tax or securities law matters.

Sincerely,

## APPENDIX F

### 2009 ENERGY PERFORMANCE CONTRACT MASTER LEASE-PURCHASE AGREEMENT

#### CERTIFICATE OF HOWARD COUNTY

**I HEREBY CERTIFY** as of the \_\_ day of \_\_\_\_, 200\_\_, that I am the Director of Finance for Howard County, Maryland, acting on behalf of the various departments or agencies (the “Agencies”) using the Equipment (the “Equipment”); that I hold the office set forth below, and that I hereby execute and deliver this Certificate for the benefit of all persons interested in the execution and delivery of that certain 2009 Energy Performance Contract Master Lease-Purchase Agreement (the “Master Lease”) dated as of \_\_\_\_, Equipment Schedule No. \_\_\_\_ (the “Equipment Schedule”), and Takedown Schedule No. \_\_ thereto, each dated as of \_\_\_\_, by and between \_\_\_\_ and Howard County, Maryland (the “County”). Terms defined in the Master Lease and the Equipment Schedule are used in this Certificate with the same meanings as used therein. I do further certify as follows:

1. I am Director of Finance for Howard County, and in such capacity, I am familiar with the matters hereinafter stated

2. The signature appearing opposite my name is my true and genuine signature:

OFFICE	NAME	SIGNATURE
[title]_____	[name]_____	[signature]_____

3. The Master Lease, the Equipment Schedule thereto, and all certificates and other documents (collectively, the “Financing Documents”), to which the County is a party, as executed and delivered or as approved, as appropriate, are in compliance with the County’s approved Annual Budget Ordinance as proposed for the fiscal year FY 2009, which was previously validly adopted and is in full force and effect as of \_\_\_\_, subject to such changes and revisions therein as may be approved by the representatives of the County executing the same. In making this certification, I have relied upon the representations of the appropriate official or officials of the Department of Finance (the “Department”) and I am personally aware of no fact or other matter that would make my reliance upon the representations of the Department unreasonable.

4. To the best of my knowledge, (i) the representations and warranties of the County in the Financing Documents are true and correct on and as of the date hereof as though made on and as of the date hereof, and (ii) the County has complied with all terms on its part to be performed or satisfied by it under the Lease at or prior to the date hereof.

5.



The County Executive, and , the Agencies under his supervision will take all actions necessary to appropriate or otherwise provide for all amounts required to be paid under the Lease during the County's fiscal period ending \_\_\_\_\_, and to the best knowledge and belief of the Department, the County Executive, and the Agencies, there is no reason to believe that the County will not make such appropriation or have sufficient unexhausted funds to make such payments as the same become due.

6. The Equipment will be used by the County only for the purpose of performing one or more of its governmental or proprietary functions consistent with the permissible scope of its authority. No portion of the Equipment will be leased to or operated by any person in connection with a nongovernmental trade or business, or used by a Section 501( c)(3)organization.

7. The Equipment is essential to the proper, efficient, and economic functioning of the County and to the services that the County provides. The County has an immediate need for and expects to make immediate use of substantially all the Equipment, which use is not temporary or expected to diminish in the foreseeable future.

8. The County will prepare or cause to be prepared and will file or cause to be filed a Form 8038-G in the manner and within the time provided by Section 149(e) of the Internal Revenue Code of 1986, as amended.

9. The Federal Taxpayer Identification Number of the County is 52-6000965.

**IN WITNESS WHEREOF**, I have executed this Certificate as of the day and year first above written.

**WITNESS:**

\_\_\_\_\_

\_\_\_\_\_  
Sharon Greisz  
Director of Finance

**TAKEDOWN SCHEDULE NO. \_\_\_\_**  
**TO**  
**2009 ENERGY PERFORMANCE CONTRACT**  
**MASTER LEASE-PURCHASE AGREEMENT**

THIS TAKEDOWN SCHEDULE NO. \_\_, dated as of \_\_\_\_\_ (the "Takedown Schedule") is executed by and between \_\_\_\_\_ ("Lessor"), and the Howard County, Maryland ("Lessee"), its Director of Finance ("Director")

**WITNESSETH:**

**WHEREAS**, Lessor and Lessee have previously entered into that certain 2009 Energy Performance Contract Master Lease-Purchase Agreement dated as of \_\_\_\_\_ (the "Lease") (unless otherwise defined herein all terms having a defined meaning in the Lease shall have the same meaning when used herein), which Lease provides for the execution and delivery of one or more Equipment Schedules for the purpose of identifying the Equipment to be leased and purchased pursuant to the Lease and specifying certain terms and conditions applicable to the lease and purchase of such Equipment.

**NOW, THEREFORE**, in consideration of the premises, Lessor and Lessee hereby agree as follows:

1. **Funding.** On \_\_\_\_\_, Lessor shall provide funds in the aggregate amount of \$ \_\_\_\_\_ (the "Takedown Amount") to permit Lessee's acquisition of Equipment described summarily on Attachment 1A hereto in accordance with the Lease and Equipment Schedule No. \_\_\_\_ to the Lease.
2. **Restrictions on Resale.** Lessee agrees that the restrictions on resale by Lessor of its interest in its right to receive payment pursuant to the Lease in fractionalized interest or participations as set forth in Section 18(c) of the Lease shall be deemed to apply to the Takedown Amount set forth in Section 1 of this Takedown Schedule.

**IN WITNESS WHEREOF**, Lessee and Lessor have executed this Takedown Schedule as of the date and year first above written.

**HOWARD COUNTY MARLAND acting by (Lessor) ACKNOWLEDGED AND ACCEPTED:**  
**and through the "Director of Finance"**

By: By: \_\_\_\_\_ By: \_\_\_\_\_  
Bernadette Benik Name David A. Treasure

**EQUIPMENT SCHEDULE NO. \_\_\_\_\_**  
**TO**  
**2009 ENERGY PERFORMANCE CONTRACT**  
**MASTER LEASE-PURCHASE AGREEMENT**

*(Agency Name)*

**THIS EQUIPMENT SCHEDULE NO. \_\_\_\_\_**, dated as of \_\_\_\_\_ (the "Equipment Schedule"), is executed by and between \_\_\_\_\_ ("Lessor"), and the **HOWARD COUNTY, MARYLAND** ("Lessee"),

**WITNESSETH:**

**WHEREAS**, Lessor and Lessee have previously entered into that certain 2009 Energy Performance Contract Master Lease-Purchase Agreement dated as of \_\_\_\_\_ (the "Lease") (unless otherwise defined herein all terms having a defined meaning in the Lease shall have the same meaning when used herein), which Lease provides for the execution and delivery of one or more Equipment Schedules for the purpose of identifying the Equipment to be leased and purchased pursuant to the Lease and specifying certain terms and conditions applicable to the lease and purchase of such Equipment; and,

**WHEREAS**, Lessor desires to lease with an option to purchase to Lessee, and Lessee desires to lease with an option to purchase from Lessor, the items of Equipment herein described on the terms and conditions of the Lease and as herein provided.

**NOW, THEREFORE**, in consideration of the premises, Lessor and Lessee hereby agree as follows:

**1. EQUIPMENT.** The items of Equipment described in Exhibit A shall be subject to the terms and conditions of the Lease and this Equipment Schedule.

**2. LOCATION OF EQUIPMENT.** The Equipment shall be kept at the Equipment Location (herein so called) set forth on Exhibit A.

**3. LEASE TERM.** The Lease Term (herein so called) with respect to the Equipment described herein shall commence on the date of hereof and shall continue for a term ending on \_\_\_\_\_.

**4. LEASE PAYMENTS.** (a) Lessee hereby agrees to make the Lease Payments (herein so called) to Lessor in such amounts and at such times as set forth on Exhibit B.

(b) Upon the exercise by Lessee of any option granted under the Lease to terminate the Lease or this Equipment Schedule prior to the expiration of the term thereof and hereof, Lessee agrees to pay to Lessor the applicable principal balances as shown on Exhibit B for the lease and purchase of the Equipment.

(c) Should Lessee elect its option to prepay this Equipment Schedule prior to the expiration of the term hereof on any lease payment date, it shall provide Lessor at least fifteen (15) days' prior written notice of such election. Lessee's exercise of this purchase option shall be at the following percentage of the principal balance then outstanding after deduction of the Lease Payment made on the date of prepayment (the principal balance plus prepayment amount derived from the applicable percentage that follows is reflected in Exhibit B as the "Concluding Payment"):

Remaining Lease Term	Prepayment Price (% of Concluding Payment Balance Then Outstanding)
61 to 180 months	102.0%
37 to 60 months	101.0%
0 to 36 months	100.0%

(d) In the event of a termination or nonrenewal of the Lease Term pursuant to Section 5, Section 19, Section 25, or Section 26 of the Lease, moneys shall be applied first to the payment of all obligations of Lessee then due and owing hereunder, and then to the payment of the principal balance or Concluding Payment amount as set forth in Exhibit B applicable at the time of such termination or nonrenewal.

(e) The principal components of the Lease Payments bear interest at the total interest cost of \_\_\_\_\_% per annum but in no event shall such interest exceed 6.25%.

**5. REPRESENTATIONS AND WARRANTIES.** By execution and delivery of this Equipment Schedule, Lessee confirms that all representations and warranties contained in Section 7 of the Lease are true and correct as of the date hereof. Further, Lessee represents and warrants as of the date hereof that: (i) Lessee reasonably has sufficient appropriations or other funds legally available to pay all Lease Payments and other amounts due hereunder for the fiscal period ending on \_\_\_\_\_; and, (ii) the use of the Equipment by Lessee is essential to the Lessee's proper, efficient, and economic operation and will be used for the purposes set forth on Exhibit C.

**6. LIMITATIONS ON WARRANTIES.** Lessee represents, warrants, acknowledges, and agrees that the Equipment is of a size, design, and capability selected by Lessee; that Lessee is satisfied that the Equipment is suitable for its purpose; that Lessor is neither a manufacturer nor a vendor of the Equipment; and that **LESSOR HAS NOT MADE, AND DOES NOT HEREBY MAKE, ANY REPRESENTATION, WARRANTY, OR COVENANT, EXPRESS OR IMPLIED, WITH RESPECT TO THE MERCHANTABILITY, CONDITION, QUALITY, DURABILITY, DESIGN, OPERATION, FITNESS FOR USE,**

**OR SUITABILITY OF THE EQUIPMENT IN ANY RESPECT WHATSOEVER OR IN CONNECTION WITH OR FOR THE PURPOSES AND USES OF LESSEE, OR ANY OTHER REPRESENTATION, WARRANTY, OR COVENANT OF ANY KIND OR**

**CHARACTER, EXPRESS OR IMPLIED, WITH RESPECT THERETO, AND LESSOR SHALL NOT BE OBLIGATED OR LIABLE FOR ACTUAL, INCIDENTAL, CONSEQUENTIAL, OR OTHER DAMAGES OF OR TO LESSEE OR ANY OTHER PERSON OR ENTITY ARISING OUT OF OR IN CONNECTION WITH THE USE OR PERFORMANCE OF THE EQUIPMENT AND THE MAINTENANCE THEREOF.**

**7. EQUIPMENT COST.** The cost of the improvements and Equipment described on Exhibit A shall not exceed \$\_\_\_\_\_ of which the Equipment Cost (herein so called) of \$\_\_\_\_\_ is financed hereunder, and shall be disbursed in such amounts and no earlier than such dates (the "Acquisition Dates") as are reflected on Exhibit A.

**8. COVENANTS, DELIVERY, AND ACCEPTANCE.** (a) Lessee agrees to use its best efforts to, and as of the date hereof, reasonably expects to acquire the Equipment on or before \_\_\_\_\_.

(b) Lessee will cause the Equipment to be delivered at the Equipment Location. Lessee will pay all transportation and other costs, if any, incurred in connection with the delivery of the Equipment. Lessee will accept the Equipment as soon as it has been delivered and is operational, or in the event that the manufacturer or vendor allows a pre-acceptance test period, as soon as the test period has expired.

**9. REQUEST FOR PAYMENT.** Immediately following acceptance, Lessee will request that payment be made to the Vendor by executing, if required, and delivering to Lessor the following:

- (a) a request that payment be made to the Vendor;
- (b) a true copy of the applicable purchase order and, where applicable, a duplicate original of any change order approved by Lessee increasing the Equipment Cost in an amount in excess of the original purchase order price;
- (c) bills of sale for any component of the Equipment for which a bill of sale may be delivered;
- (d) a true copy of the Vendor's statement or invoice;
- (e) a duly executed Uniform Commercial Code Financing Statement with respect to the Equipment; and
- (f) an Acceptance Certificate and an Equipment Use Certificate as set forth in Exhibits C and D, respectively.

**10. PAYMENT.** Upon receipt of the items required by Section 9 hereof in a form acceptable to Lessor, Lessor shall make payment to the Vendor and shall certify the fact of such payment to Lessee.

**IN WITNESS WHEREOF**, Lessee and Lessor have executed this Equipment Schedule as of the date and year first above written.

**WITNESS:**

**HOWARD  
COUNTY, MARYLAND**

\_\_\_\_\_  
Lonnie R. Robbins

\_\_\_\_\_  
Ken Ulman

Ken Ulman  
[INSERT COUNTY SIGNATURE  
PAGE]

**EXHIBIT C  
TO**

**EQUIPMENT SCHEDULE NO. \_\_\_\_\_**

**TO 2009 ENERGY PERFORMANCE CONTRACT MASTER LEASE-PURCHASE  
AGREEMENT**

**ACCEPTANCE CERTIFICATE**

In accordance with the terms of the Equipment Schedule, Lessee hereby certifies and represents to, and agrees with, Lessor as follows:

A. An obligation has been incurred in connection with the Equipment described on Exhibit A, which is a proper charge against the Equipment Acquisition Fund for costs relating to the Equipment, and has not been paid. A duplicate original invoice for such obligation is attached hereto.

B. Lessee has conducted such inspection and/or testing of the Equipment as it deems necessary and appropriate and hereby acknowledges that it accepts the work reflected on the attached invoice effective the date hereof.

C. The Equipment described in Exhibit A is essential to the proper, efficient, and economic operations of the Lessee. The Equipment will be used by Lessee for the purpose of performing one or more of Lessee's governmental functions consistent with the permissible scope of Lessee's authority.

**HOWARD COUNTY, MARYLAND**

By: \_\_\_\_\_  
(Name)  
(Title)  
(Phone)  
Date:

**EXHIBIT D**  
**TO**  
**EQUIPMENT SCHEDULE NO. \_\_\_\_\_**

**2009 ENERGY PERFORMANCE CONTRACT MASTER LEASE-PURCHASE  
AGREEMENT**

**[PLACE YOUR AGENCY NAME HERE]**

**EQUIPMENT USE CERTIFICATE**

1. Will all proceeds of this financing of your Agency's Equipment be used to make payment to the vendor(s) of that Equipment?

Yes \_\_\_\_\_ No \_\_\_\_\_

If your answer to Question 1 is "no", please complete parts (a) and (b); if your answer to Question 1 is "yes", please go to Question 2.

1.(a) What is the amount of proceeds of this financing that will not be used to make payment to the Equipment vendor(s)?

1.(b) What is the intended use of financing proceeds that will not be paid to the Equipment vendor(s)? \_\_\_\_\_

\_\_\_\_\_  
(Total amount must equal amount identified in response to Question 1.(a)).

2. Will any item(s) of Equipment to be financed be used by any person or organization other than the County or the Agency? (For purposes of this question, property should be considered "used by any person or organization" if such person or organization owns, leases, occupies, manages, or in any other way uses or receives benefits from the Equipment).

Yes \_\_\_\_\_ No \_\_\_\_\_

If your answer to Question 2 is "yes", please complete parts (a) through (f); if your answer to Question 2 is "no", please go to Question 3.

2.(a) Please indicate the items(s) of Equipment and cost thereof that will be used by any person or organization other than the County or the Agency: \_\_\_\_\_

2.(b) Please describe the use: \_\_\_\_\_



2.(c) Will the person or organization use the item(s) of Equipment on an equal basis with the general public? (For purposes of this question, “general public” would include an Agency’s clients, students, and other similar user classes that are granted use of the Equipment on a nondiscriminatory basis such as first-come-first-served, lottery, etc.)

Yes \_\_\_\_\_ No \_\_\_\_\_

2.(d) If “yes” to Question 2.(c), please describe:

(i) The user class: \_\_\_\_\_

(ii) The basis for user selection: \_\_\_\_\_

\_\_\_\_\_

2.(e) Will there be any direct or indirect payments by any person or organization (other than the County or the Agency) back to the County, any of its agencies, or any other governmental unit with respect to the use of any item(s) of Equipment to be financed? (Direct or indirect payments may take the form of loan repayments, rental payments for the use of the Equipment, commissions, profit sharing, etc.).

Yes \_\_\_\_\_ No \_\_\_\_\_

2.(f) If yes to Question 2.(e), please describe the payments: \_\_\_\_\_

\_\_\_\_\_.

3. Will any proceeds of this financing be used to provide temporary financing in anticipation of the receipt of other moneys (for example, a federal grant) that are expected to be received for the lease or purchase of item(s) of Equipment to be financed by this financing?

Yes \_\_\_\_\_ No \_\_\_\_\_

3.(a) If yes to Question 3., please describe the other funds that are anticipated, including the expected amount and date of their receipt: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_.

4. Will any of the proceeds of this Equipment financing be used to pay the principal of, or interest on, any prior issue of governmental obligations such as bonds, equipment leases, installment sales agreements, or the like?

Yes\_\_\_\_\_ No\_\_\_\_\_

4. (a) If yes to Question 4, please describe the prior issue(s) governmental obligations:\_\_\_\_\_

5. Will any of the proceeds of this Equipment financing be used to replace any proceeds of an earlier issue of governmental obligations, including an earlier equipment lease, that (i) was issued to finance the same item(s) of Equipment, and (ii) the proceeds of which were not expended on the item(s) of Equipment?

Yes\_\_\_\_\_ No\_\_\_\_\_

5.(a) If yes to Question 5, please describe the prior proceeds to be replaced, the item(s) of Equipment affected, and the cost thereof:\_\_\_\_\_

**I HEREBY CERTIFY** that I am responsible for approving or authorizing payments for the items to be financed by this Equipment Schedule.

**[PLACE YOUR AGENCY NAME HERE]**

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

(Name)

(Title)

(Phone)

Date\_\_\_\_\_, 2009