



Item: Resolution 9959 Approving Tax Compliance Procedures Relating to Tax Exempt Bonds

From: Lois Thomas, Staff Accountant

Initiated By: Bond Counsel

Presented By: Melissa Kinzler, Fiscal Service Director

Action Requested: Adopt Resolution 9959

Suggested Motion:

1. Commissioner moves:

“I move that the City Commission (adopt/deny) Resolution 9959.”

2. Mayor calls for a second, discussion, inquiries from the public, and calls the vote.

Staff Recommendation: Staff recommends adoption of Resolution 9959.

Background: As part of the issuance of tax-exempt bonds, notes, lease obligations or other obligations, the City is required to track the interest and expenses on the issuances under Section 103 of the Internal Revenue Code. The City has had tax compliance procedures relating to tax-exempt bonds but now is formalizing the policies and procedures in writing on recommendation of the City’s bond counsel, Dorsey & Whitney, LLP.

The formalization of the procedure is to assist the City in preserving the tax-exempt status of bonds previously issued and to be issued by the City, and to maintain eligibility to issue additional tax-exempt bond in the future. The adoption of the policy also clarifies the need for a review of the policy on a yearly basis.

Concurrences: Representatives from Fiscal Services have been working with bond counsel throughout the entire process.

Fiscal Impact: Not having formalized written tax compliance procedures could limit the City’s ability to issue future bonds.

Alternatives: The City Commission could choose to not approve Resolution 9959.

Attachments/Exhibits: Resolution 9959 with Annex A

RESOLUTION NO. 9959

RESOLUTION APPROVING TAX COMPLIANCE PROCEDURES
RELATING TO TAX-EXEMPT BONDS

BE IT RESOLVED by the City Commission of the City of Great Falls, Montana (the "City"), as follows:

Section 1. Recitals.

1.01. Pursuant to the laws of the State of Montana and Section 103 of the Internal Revenue Code of 1986, as amended, the City has issued, and will issue in the future, tax exempt municipal bonds to finance and refinance various projects and functions of the City.

1.02. Dorsey & Whitney, LLP, as bond counsel to the City, has prepared a Tax Compliance Procedures For Tax-Exempt Bonds (the "Tax Compliance Procedures") for adoption by the City Commission in order to assist the City in preserving the tax-exempt status of bonds previously issued and to be issued by the City and to maintain eligibility to issue additional tax-exempt bonds in the future.

Section 2. Approval. The Tax Compliance Procedures are hereby approved in substantially the form attached hereto as Annex A, and the City hereby resolves to abide by the Tax Compliance Procedures and to update periodically the Tax Compliance Procedures in accordance with the Internal Revenue Code and supporting Internal Revenue Service rulings and regulations. The City Fiscal Services Director is hereby authorized and directed to review and revise the Tax Compliance Procedures, with advice from bond counsel, in order to ensure compliance with State and Federal laws and regulations.

Passed and approved February 21, 2012.

Michael J. Winters, Mayor

Attest:

Lisa Kunz, City Clerk

(SEAL)

APPROVED FOR LEGAL CONTENT:

James W. Santoro, City Attorney

ANNEX A

The City of Great Falls, Montana Tax Compliance Procedures For Tax-Exempt Bonds

Dated: February 21, 2012

I. Purpose

These procedures are adopted by the City of Great Falls, Montana (the “Issuer”) to ensure that interest on tax-exempt bonds, notes, lease obligations or other obligations (“Bonds”) of the Issuer remains excludable from gross income under Section 103 of the Internal Revenue Code of 1986, as amended (the “Code”).

These written procedures are intended to formally memorialize certain practices and procedures of the Issuer previously followed in connection with its issuance of Bonds. The Issuer reserves the right to use its discretion as necessary and appropriate to make exceptions to these procedures as facts and circumstances warrant.

II. Expenditure/Use of Bond Proceeds

A. Expenditure of Bond proceeds will be regularly reviewed by the Fiscal Services Director for consistency with the Bond documents, including any Bond Resolution or Trust Indenture and any Tax Certificate (collectively, the “Bond Documents”).

B. The Issuer has separately established a form and procedures for preparation and review of requisitions of Bond proceeds as part of its accounting system.

C. Requisitions must identify the Bond-financed property in conformity with the Tax Certificate executed at closing of the Bonds, including the character of the Bond-financed property. Such information is contained as part of the Issuer’s accounting system.

D. None of the Bond proceeds will be used to reimburse the Issuer for costs paid prior to the date of issuance of the Bonds unless the Issuer shall have fully complied with Section 1.150-2 of the Treasury Regulations with respect to such reimbursed amounts, which section is summarized in Exhibit A hereto.

E. Staff costs may be financed with Bond proceeds only to the extent that they are properly capitalized as a cost of a capital project under generally accepted accounting principles and federal tax law.

F. Requisitions for expenditures will be summarized in a “final allocation” of Bond proceeds to uses not later than 18 months after the in-service date of the Bond-financed property (and in any event not later than 5 years and 60 days after the issuance of the Bonds and not later

than 60 days after earlier retirement of the Bond issue) in a manner consistent with the Code and Treasury Regulations and the applicable Tax Certificate.

G. Expenditure of Bond proceeds will be measured against the Issuer's expectation, as set forth in the applicable Tax Certificate, to spend or commit 5% of net sale proceeds within 6 months, to spend 85% of net sale proceeds within 3 years, and to proceed with due diligence to complete the capital project and fully spend the net sale and investment proceeds. In the event that exceptions under the Code are not met, calculations of rebate liability will be performed or caused to be performed by as provided herein.

H. If there are any Bond proceeds remaining other than in a reserve or debt service fund established pursuant to the Bond Resolution or Trust Indenture after completion of a project, such proceeds shall be applied in a manner consistent with the applicable Bond Resolution or Trust Indenture and Tax Certificate or pursuant to advice from Bond Counsel.

I. In the event that Bond proceeds are to be used to make a grant to an unrelated party, a grant agreement will be reviewed prior to execution for compliance with the Code. Such agreement will be approved by Fiscal Services Director. The repayment of any portion of a grant by the grantee shall be treated as unspent Bond proceeds.

J. In the event that Bond proceeds are to be loaned to a conduit borrower, such conduit borrower will be required to agree to all terms of the applicable Tax Certificate and provide evidence of post-issuance tax compliance procedures deemed adequate and consistent with those set forth herein; and all such obligations for post-issuance tax compliance shall be assumed by such conduit borrower. The Issuer's Fiscal Services Director shall be the primary for all conduit borrowers and related compliance matters.

III. Use of Bond-Financed Property

A. Use of Bond-financed property when completed and placed in service will be reviewed by Fiscal Services Director. Appropriate department/facility managers shall be trained regarding restrictions on the use of Bond proceeds and facilities financed thereby and instructed to consult with Fiscal Services Director regarding any third-party contract concerning use of the facilities, including without limitation leases, use, management or service contracts, and research contracts.

B. Upon issuance of Bonds, there shall be no expectation that the Bond-financed property will be sold or otherwise disposed of by the Issuer during the term of the Bonds, except for replacement due to normal wear and tear or obsolescence.

C. Agreements with third parties for lease, use, or management, or any other service agreement or research contract with respect to, or non-governmental use in respect of, Bond-financed property will be reviewed prior to execution for compliance with the Code. Such agreements will be approved by the Fiscal Services Director, who will be responsible for determining whether the proposed agreement (i) results in private business use of the facilities, and (ii) if applicable, meets the compensation, term and other requirements under Revenue Procedure 97-13 (attached hereto as Exhibit B) and Revenue Procedure 2007-47; all upon advice of Bond Counsel, as necessary.

D. No item of Bond-financed property will be sold or transferred by the Issuer while the Bonds are outstanding without approval of Fiscal Services Director, who shall seek advice of Bond Counsel, to provide guidance as to “remedial action” that may be required under the applicable Treasury Regulations. Remedial action is summarized in Exhibit C hereto.

E. The Issuer acknowledges that any sale, transfer, change in use, or change in users of the Bond-financed property may require remedial action or resolution pursuant to the IRS Voluntary Closing Agreement Program (“VCAP”) to assist in resolving violations of federal tax laws applicable to the Bonds.

IV. Investments

A. Investment of Bond proceeds in compliance with the arbitrage and rebate requirements of the Code and applicable Treasury Regulations will be managed and supervised by the Fiscal Services Director.

B. Guaranteed investment contracts (“GICs”) and other open market securities will be purchased according to the fair market value provisions of applicable Treasury Regulations, including bid requirements and fee limitations.

C. Calculations of rebate liability will be performed by the Fiscal Services Director or by a qualified professional. Such calculations shall be made annually and within the period prescribed following full retirement of the Bonds.

D. Upon final expenditure of the gross proceeds of Bonds, and in any event promptly following the fifth anniversary of the date of issuance of Bonds or earlier retirement of Bonds, the Fiscal Services Director shall prepare a spending exception report or an arbitrage rebate computation (as applicable) for such issue of Bonds. The Fiscal Services Director may consult with a qualified professional to prepare such report or computation.

E. Rebate payments will be made with Form 8038-T no later than 60 days after (i) each fifth anniversary of the date of issuance of the Bonds and (ii) the final retirement of the Bond issue.

V. Record Management and Retention

A. Management and retention of records related to Bond issues will be supervised by the Fiscal Services Director.

B. Records for Bonds will be retained for the life of the Bonds, plus any refunding Bonds, plus three years (or such longer term as may be required under State law). Such records may be in the form of documents or electronic copies of documents, appropriately indexed to specific Bond issues and compliance functions.

C. Retainable records pertaining to Bond issuance shall include a transcript of documents executed in connection with the issuance of the Bonds and any amendments thereto, copies of rebate calculations, records of payments, including Forms 8038-T, escrow agreements,

verification reports, records of investment earnings on any relevant funds/accounts, IRS filings and audit reports/investigations.

D. Retainable records pertaining to expenditures of Bond proceeds include requisitions, trustee statements, if applicable, and final allocation of proceeds.

E. Retainable records pertaining to use of Bond-financed property include all third-party contracts concerning use of the facilities, including, without limitation, leases, use, management or service contracts, and research contracts.

F. Retainable records pertaining to investments include GIC documents under the Treasury Regulations, records of purchase and sale of other investments, and records of investment activity sufficient to permit calculation of arbitrage rebate or demonstration that no rebate is due.

VI. Overall Responsibility

A. Overall administration and coordination of the procedures set forth herein are the responsibility of the Fiscal Services Director.

B. Review of compliance with the procedures set forth herein shall be undertaken periodically, and in any event, not less than annually.

C. The Issuer understands that failure to comply with these policies and procedures could result in the retroactive loss of the exclusion of interest on Bonds from federal gross and, thus, it would be advisable to consult with Bond Counsel and other professionals in advance regarding deviations from the facts and expectations as set forth in any Bond Documents.

D. Any violations or potential violations of federal tax requirements shall promptly be reported to the Fiscal Services Director, and the Fiscal Services Director will engage qualified professionals and bond counsel to further investigate potential violations or recommend appropriate remedial actions, which actions shall be approved by the governing body of the Issuer.

EXHIBIT A

REIMBURSEMENT BOND SUMMARY

Following is a general summary of the requirements relating to bonds that are issued in whole or in part to reimburse expenditures that were paid prior to the date of issuance of bonds (“Reimbursement Bonds”).

Reimbursement Bond proceeds cannot be used to reimburse expenditures paid more than 60 days prior to the adoption of the declaration of official intent/reimbursement resolution, which must contain:

- a general functional description of the property to which the reimbursement relates or an identification of the fund or account from which the expenditure is to be paid and a general functional description of the purposes of such fund or account; and
- the maximum principal amount of debt proposed to be issued.

Reimbursement Bonds must be issued not later than 18 months after the later of (i) the date on which the original expenditure is paid, or (ii) the date on which the property is placed in service, but in any case not more than three years after the date on which the original expenditure is paid. If possible, actual reimbursement should be made within 30 days of the date of issuance of the Reimbursement Bonds.

Note that there are exceptions for “de minimis” amounts (not in excess of the lesser of \$100,000 or 5% of proceeds of the issue) and for “preliminary expenditures” (such as architectural, engineering, surveying, soil testing and similar costs and costs of issuance), so long as such preliminary expenditures do not exceed 20% of the aggregate issue price.

EXHIBIT B

SUMMARY OF REVENUE PROCEDURE 97-13

Background

A management, service or incentive payment contract with a private service provider with respect to tax exempt bond-financed property may result in private business use of that property, based on all facts and circumstances. None of the compensation may be based on a share of net profits.

Revenue Procedure 97-13 establishes conditions under which a management contract generally does not result in private business use. Issuers and bond counsel typically attempt to satisfy, or substantially satisfy, one of these “safe harbors” because of uncertainty as to the treatment of nonconforming contracts. Below is a brief summary of the provisions of Rev. Proc. 93-17, as modified by Rev. Proc. 2001-39.

Rev. Proc. 93-17 establishes conditions based on (1) the compensation arrangements and the term of the agreement, and (2) whether the service provider has any role or relationship with the “qualified user”¹ that substantially limits the qualified user’s ability to exercise its rights under the contract.

General Rules

In all events, the contract must provide for reasonable compensation for services rendered, with no compensation based, in whole or in part, on a share of net profits from the operation of the facility. Reimbursement of the service provider for actual and direct expenses paid by the service provider to unrelated parties is not by itself treated as compensation.

The compensation, with the percentage determined by the term of the contract, subject to additional conditions, as described under “Compensation Safe Harbors” below, generally may be computed by:

(A) a periodic fixed fee, which is a stated dollar amount for a specified period of time²;

(B) a percentage fee, which is a percentage of gross revenues (or adjusted gross revenues) of the facility or a percentage of expenses of the facility, but not both;

(C) a capitation fee, which is a fixed periodic amount for each person for whom the service provider or the qualified user assumes the responsibility to provide all needed

¹ A “qualified user” of the financed property is a state or local governmental unit (or instrumentality thereof) or a 501(c)(3) organization if the financed property is not used in an unrelated trade or business under section 513(a) of the Internal Revenue Code.

² A periodic fixed fee may include an automatic increase based on a specific, objective, external standard that is not linked to the output or efficiency of the facility in question.

services for a specified period so long as the quantity and type of services actually provided to covered persons varies substantially³;

(D) a per-unit fee, which is a fee based on a unit of service specified in the contract or otherwise specifically determined by an independent third party or the qualified user⁴; or

(E) a productivity reward equal to a stated dollar amount based on increases or decreases in gross revenues (or adjusted gross revenues), or reductions in total expenses (but not both increases in gross revenues (or adjusted gross revenues) and reductions in total expenses) in any annual period during the term of the contract.

The service provider must not have any role or relationship with the qualified user that, in effect, substantially limits the qualified user's ability to exercise its rights, including cancellation rights, under the contract based on all facts and circumstances. The relationship does not limit the qualified user's ability to exercise its rights if the following conditions are satisfied: (1) not more than 20 percent of the voting power of the governing body of the qualified user in the aggregate is vested in the service provider and its directors, officers, shareholders, and employees, (2) overlapping board members do not include the chief executive officers of the service provider or its governing body or the qualified user or its governing body, and (3) the qualified user and the service provider are not related parties.

COMPENSATION SAFE HARBORS

A management contract generally will not result in private business use if the compensation arrangement meets the criteria in one of the following categories:

50% Periodic Fixed Fee Contracts

- At least 50 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee;
- the term of the contract, including all renewal options⁵ in favor of the service provider, does not exceed 5 years; and
- the contract is terminable by the qualified user of the facility on reasonable notice, without penalty or cause, at the end of the third year of the contract term.

80% Periodic Fixed Fee Contracts

³ A capitation fee may include an automatic increase based on a specified, objective, external standard that is not linked to the output or efficiency of the facility. A capitation fee may also include a variable component of up to 20 percent of the total capitation fee designed to protect the service provider against risks such as catastrophic loss.

⁴ A periodic fee may include an automatic increase based on a specified, objective, external standard that is not linked to the output or efficiency of the facility.

⁵ A provision under which a contract is automatically renewed absent cancellation by either party is not a renewal option (even if it is expected to be renewed).

- At least 80 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee; and
- the term of the contract, including all renewal options in favor of the service provider, does not exceed the lesser of 80 percent of the reasonably expected useful life of the financed property and 10 years.

For purposes of this safe harbor (but not the 50% periodic fixed fee safe harbor), a one-time incentive award during the term of the contract under which compensation automatically increases by a single, stated dollar amount when a gross revenue or expense target (but not both) is reached may be considered part of a fixed fee arrangement.

95% Periodic Fixed Fee Contracts

- At least 95 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee; and
- the term of the contract, including all renewal options in favor of the service provider, does not exceed the lesser of 80 percent of the reasonably expected useful life of the financed property and 15 years.

For purposes of this safe harbor (but not the 50% periodic fixed fee safe harbor), a one-time incentive award during the term of the contract under which compensation automatically increases by a single, stated dollar amount when a gross revenue or expense target (but not both) is reached may be considered part of a fixed fee arrangement.

Capitation Fee Contracts (with or without fixed fees)

- All of the compensation for services is based on a capitation fee or a combination of a capitation fee and a periodic fixed fee;
- the term of the contract, including all renewal options in favor of the service provider, does not exceed 5 years; and
- the contract is terminable by the qualified user of the facility on reasonable notice, without penalty or cause, at the end of the third year of the contract term.

Per-unit Fee Contracts (with or without fixed fees)

- All of the compensation for services is based on a per-unit fee or a combination of a per-unit fee and a periodic fixed fee;
- the term of the contract, including all renewal options in favor of the service provider, does not exceed 3 years; and
- the contract is terminable by the qualified user of the facility on reasonable notice, without penalty or cause, at the end of the second year of the contract term.

Percentage of Revenue or Expenses

- All the compensation for services is based on a percentage of fees charged or a combination of a per-unit fee and a percentage of revenue or expense fee;
- the term of the contract, including all renewal options in favor of the service provider, does not exceed 2 years; and
- the contract is terminable by the qualified user of the facility on reasonable notice, without penalty or cause, at the end of the first year of the contract term.

During the start-up period, however, compensation may be based on a percentage of either gross revenues, adjusted gross revenues, or expenses of a facility. The contract must be terminable by the qualified user on reasonable notice, without penalty or cause, at the end of the first year of the contract term. This safe harbor applies only to contracts under which the service provider primarily provides services to third parties and management contracts involving a facility during an initial start-up period for which there have been insufficient operations to establish a reasonable estimate of the amount of the annual gross revenues and expenses (for example, a contract for general management services for the first year of operations).

Revision of Compensation Arrangements

Please note that if the compensation arrangements of a management contract are materially revised, the compensation arrangements are “retested” as of the date of the material revision, and the management contract is treated as one that was newly entered into as of the date of the material revision.

EXHIBIT C

CERTAIN REMEDIAL PROVISIONS APPLICABLE TO BONDS

The Issuer acknowledges that any deliberate action by the Issuer after Bond issuance that results in a satisfaction of the private business tests or the private loan test will result in private activity bond status unless one or more qualifying remedial actions are taken by the Issuer. Specifically, Treasury Regulations provide that actions are not treated as deliberate actions if (A) five conditional requirements are met, and (B) one of three remedial actions is taken, with respect to the disposition proceeds and nonqualified bonds*:

CONDITIONAL REQUIREMENTS

1. Reasonable Expectations – The Issuer reasonably expected on the issue date that it would not meet the private business tests or the private loan test for the whole term of the bonds; and
2. Reasonable Bond Maturity – The term of the issue must not be unreasonably long; this requirement is met if the weighted average maturity of the bond issue is not greater than 120% of the expected economic life of the property financed; and
3. Fair Market Value Consideration – The terms of any agreement (relating to satisfaction of a private activity bond test) must be bona fide and at arm's-length, and the new user must pay a fair market value consideration for the use of the bond-financed property; and
4. Disposition Proceeds Are Gross Proceeds – The Issuer must treat any disposition proceeds as gross proceeds subject to arbitrage/rebate restrictions; and
5. Proceeds Spent for Authorized Purpose – Except as described with respect to redemption and defeasance options below, prior to deliberate actions, the affected proceeds must have been spent for the authorized purposes under the applicable bond documents.

REMEDIAL ACTIONS – Under Treasury Regulations, Sections 1.141-12(d), (e) and (f):

1. Redemption of Non-Qualified Bonds – Under the general rule, all nonqualified bonds of the issue must be redeemed. Tax-exempt bond proceeds (i.e., refunding bond proceeds) cannot be used unless the tax-exempt bonds are qualified bonds, taking into account the purchaser's use of the facility. The bonds must be redeemed within 90 days of the date of the deliberate action or a defeasance escrow for the bonds must be established within such 90-day period. Special rules apply to transfers exclusively for cash and to defeasance escrows.
2. Alternative Use of Disposition Proceeds – To meet this requirement, all disposition proceeds must be in cash, the Issuer must reasonably expect to expend the proceeds within 2

* The portion of the outstanding bonds in an amount that, if the remaining bonds were issued on the date on which the deliberate action occurs, the remaining bonds would not satisfy the private business use test or the private loan financing test, as applicable. The amount of private business use is the highest percentage of business use in any one-year period, commencing with the deliberate action

years, the new use must not meet the private business tests or the private loan test (and the Issuer cannot take any action subsequent to the date of the deliberate action to cause the tests to be met), and any unused proceeds must satisfy the redemption requirement in the preceding paragraph.

3. Alternative Use of Facility – This remedial action is satisfied if the bond-financed property itself (as distinguished from the proceeds of the issue) is used in an alternative manner (e.g., for a different purpose or by a different person); the nonqualified bonds are treated as reissued on the date of the deliberate action and independently meet all of the requirements for tax exemption under Sections 141 through 150 of the Code, except the arbitrage and rebate rules of Section 148, for the remaining term of the nonqualified bonds; the deliberate action does not involve a transfer of the property to a purchaser that finances the acquisition with the proceeds of another issue of tax-exempt bonds; and any disposition proceeds, other than those arising from an agreement to provide services, resulting from the deliberate action are used to pay debt service on the bonds on the next available payment date or escrowed within 90 days of receipt and yield restricted to pay debt service on the next available payment date.

The above is only a brief summary of remedial actions, and additional special rules may be applicable. As provided in the Issuer's Compliance Procedures for Tax-Exempt Bonds, the Fiscal Services Director shall seek advice of Bond Counsel as necessary to provide guidance as to "remedial action" that may be required under the applicable Treasury Regulations.

The Commissioner of the IRS may, by publication, provide for additional remedial actions. In addition, the IRS provides a program in which issuers/borrowers which cannot meet a listed remedial action can enter into a closing agreement with the IRS to avoid private activity bond status. The closing agreement program includes several conditions, including providing for the redemption of the bonds and paying the IRS an amount based on an assumption that the non-qualified bonds are taxable from the date of the subsequent act until they are redeemed.