



State of West Virginia  
 Department of Administration  
 Purchasing Division  
 2019 Washington Street East  
 Post Office Box 50130  
 Charleston, WV 25305-0130

# Request for Quotation

RFQ NUMBER
FAR900000

PAGE
1

ADDRESS CORRESPONDENCE TO ATTENTION OF
KRISTA FERRELL 304-558-2596

RFQ COPY  
 TYPE NAME/ADDRESS HERE

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DEPARTMENT OF ADMINISTRATION  
 FINANCE DIVISION - ACCOUNTING  
 BUILDING 15, SECOND FLOOR  
 2019 WASHINGTON STREET, EAST  
 CHARLESTON, WV  
 25305 304-558-3459

DATE PRINTED	TERMS OF SALE	SHIP VIA	F.O.B.	FREIGHT TERMS
07/21/2008				

BID OPENING DATE: 07/31/2008 BID OPENING TIME 01:30PM

LINE	QUANTITY	UOP	CAT NO.	ITEM NUMBER	UNIT PRICE	AMOUNT
				ADDENDUM NO. 1		
				THIS ADDENDUM IS ISSUED TO PROVIDE ANSWERS TO ALL TECHNICAL QUESTIONS RECEIVED PRIOR TO THE 07/10/2008 DEADLINE ALSO, TO EXTEND THE BID OPENING DATE.		
				BID OPENING DATE IS EXTENDED TO: 07/31/2008 BID OPENING TIME REMAINS: 1:30 PM		
				***** ADDENDUM NO. 1 *****		
0001	1	LS		946-54		
				MASTER LEASE PURCHASE AGREEMENT FOR VARIOUS AGENCIES		
				***** THIS IS THE END OF RFQ FAR900000 ***** TOTAL:		

SEE REVERSE SIDE FOR TERMS AND CONDITIONS

SIGNATURE	TELEPHONE	DATE
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TITLE	FEIN	ADDRESS CHANGES TO BE NOTED ABOVE
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WHEN RESPONDING TO RFQ, INSERT NAME AND ADDRESS IN SPACE ABOVE LABELED 'VENDOR'

RFQ#: FAR900000  
Addendum No. 1  
Answers to Technical Questions

1.) There are numerous references to the Master Lease Purchase Financing Agreement (MLPFA), but a copy is not provided for review. Will the State provide a copy of the proposed MLPFA? Will the State allow bidders an opportunity to raise questions regarding, and/or negotiate the terms of the MLPFA?

Answer: The vendor will be required to use similar language/content as contained in the attached Master Lease Purchase Financing Agreement (MLPFA). The vendor may suggest substitute language; however, the State will have the option to accept or reject the vendor's suggested language.

2.) The RFQ states the term is 1 year with the option to renew (with mutual consent of the State and the Lessor). The RFQ goes on to provide that after the first year, the term extends for a "reasonable time" until the State obtains a new contract. Will the State agree to eliminate the potential extension of the term of the MLPFA during the "reasonable time" described on page 2 of the RFQ?

Answer: The term of the agreement is to be for one year and may be renewed upon mutual written consent of the spending unit and the vendor for two (2) additional one (1) year period. The "reasonable time" clause is available after the expiration date of the agreement/contract and shall not exceed twelve (12) months and is mainly used as time necessary to obtain a new contract. The "reasonable time" clause essentially allows for an additional twelve (12) month extension, if necessary. Therefore, the State will not agree to eliminate the potential extension of the term of the MLPFA during the "reasonable time" described on page 2 of the RFQ.

3.) Prepayment- Would the State consider the ability to prepay subject to make whole provision (Mark to Market)?

Answer: No, the State will not consider the ability to prepay subject to a make whole provision (Mark to Market).

4.) Index: The RFP requests the rate to be indexed to the H.15 Treasury Index and is to remain fixed for the entire life of the program. Would the State consider an alternative index within the H.15 such as the SWAP index for the appropriate tenor?

Answer: No, the State will not consider an alternative index.

5.) Although the State asserts in Section 3 of the Specifications that the State is exempt from all taxes regarding the scope of work and the contract, it is not clear that a Lessor will be similarly exempt from taxes assessed on the equipment, on the individual leases, on the rent payments, or on the acquisition of equipment. Is the State willing to modify the RFQ or the MLPFA to provide that the State will reimburse the Lessor for any sales taxes, use taxes, property taxes, or other taxes (but expressly excluding any income taxes or franchise taxes assessed on the income of the Lessor) assessed by the State or by any local taxing authority on the equipment, on the individual leases, on the rent payments, or on the acquisition of the equipment?

Answer: No, the State is not willing to modify the RFQ or the MLPFA to provide that the State will reimburse the Lessor for any sales taxes, use taxes, property taxes, or other taxes (but expressly excluding any income taxes or franchise taxes assessed on the income of the Lessor) assessed by the State or by any local taxing authority on the equipment, on the individual leases, on the rent payments, or on the acquisition of the equipment. As stated in the RFQ, it is the responsibility of the lessee to reimburse for any ad valorem tax, not the Department of Administration or the Purchasing Division of the State of West Virginia.

6.) Will the State agree to allow further review and modification of the aircraft financing documents based on reasonable requirements of FFA counsel to the successful bidder?

Answer: The State will agree to allow further review and modification of the aircraft financing document as long as the modifications are in compliance with the requirements of the FFA.

7.) Will the State provide potential bidders a copy of a proposed escrow agreement or may a bidder supply its own form of escrow agreement? In either event, will the State allow bidders a further opportunity to raise questions regarding, and/or negotiate the terms of any such escrow agreement.

Answer: The State will allow the Successful bidder to supply its own form of escrow agreement. The state will also allow the successful bidder to negotiate the terms of the escrow agreement.

8.) Will the State agree in the proposed MLPFA that the maximum principal amount financed shall not exceed \$20,000,000.00 without prior written mutual agreement of the State and the Lessor?

Answer: The State will agree in the MLPFA that the maximum principal amount financed shall not exceed \$20,000,000.00 without prior written mutual agreement of the State and the Lessor.

9.) It appears that the MLPFA is with the State of West Virginia; however, the lessee for each transaction will be a State Agency. Will lease payments be made solely by appropriations to each State Agency. If the Agency fails to make payment, is the State responsible for payment (up to the appropriated amount)?

Answer: All lease payments will be the responsibility of the Lessee and if the lessee fails to make payment the Lessor would take action as defined in the "Remedies on Default".

10.) When will the Master Lease Program commence?

Answer: The master lease program will commence upon selection of the successful bidder and the execution of the necessary documents.

11.) Is the State of West Virginia willing to consider a response for financing of computer equipment only.

Answer: No.

12.) Is there a website where I can obtain a copy of the Property Tax Ruling 04-07, Legal Log 04-21?

Answer: See attached.

13.) Please advise where I can obtain a copy of the Master Lease Purchase Agreement which would have the terms and conditions of doing business.

Answer: See Attached



State of West Virginia  
 Department of Administration  
 Purchasing Division  
 2019 Washington Street East  
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Purchase Order

PURCHASE ORDER NO.

FAR46060

PAGE

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**05**<sup>D 15</sup><sub>R 733</sub>

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CORRECT PURCHASE ORDER NUMBER MUST APPEAR ON ALL PACKAGES, INVOICES, AND SHIPPING PAPERS. QUESTIONS CONCERNING THIS PURCHASE ORDER SHOULD BE DIRECTED TO THE BUYER AS NOTED BELOW.

CHANGE ORDER

SEE REVERSE SIDE FOR TERMS AND CONDITIONS

INVOICE TO

DEPARTMENT OF ADMINISTRATION  
 ACCOUNTING SECTION  
 2019 WASHINGTON STREET, EAST  
 POST OFFICE BOX 50121  
 CHARLESTON, WV

25305-0121

REVENUE

\*820113229 410-307-6647  
 SUNTRUST LEASING CORPORATION  
 29 WEST SUSQUEHANNA AVENUE  
 #400  
 TOWSON MD 21204

SHIP TO

Purchasing Division's File Copy

DEPARTMENT OF ADMINISTRATION  
 FINANCIAL ACCOUNTING AND  
 REPORTING SECTION  
 2101 WASHINGTON ST E  
 CHARLESTON, WV

25305-1510 304-558-4083

DATE PRINTED	TERMS OF SALE	FEIN/SSN	FUND
08/27/2004	NET 30	540904325	MUL
SHIP VIA	F.O.B.	FREIGHT TERMS	ACCOUNT NUMBER
BEST WAY	DESTINATION	PREPAID	MUL-MUL-MUL -MUL

LINE	QUANTITY	UOP	VENDOR ITEM NO.	UNIT PRICE	AMOUNT
	DELIVERY DATE	CAT. NO.	ITEM NUMBER		
0001	04/30/2004	LS	946-54	.00000	DOA/FIN
	MASTER LEASE PURCHASE AGREEMENT				
			BLANKET PURCHASE ORDER	SEP 17 2004	
	TO PROVIDE FINANCING FOR EQUIPMENT AND OTHER CAPITAL W STATE PURCHASING DIVISION				ADMINISTRATION UNIT
	FINANCING NEEDS OF VARIOUS STATE AGENCIES IN THE FORM OF A MASTER LEASE PURCHASE AGREEMENT PER THE ATTACHED AGREEMENT.				CERTIFIED ENCUMBERED
	EXHIBIT 3				AUG 27 2004
	LIFE OF CONTRACT: THIS CONTRACT BECOMES EFFECTIVE ON AUGUST 16, 2004 AND EXTENDS FOR A PERIOD OF ONE (1) YEAR OR UNTIL SUCH "REASONABLE TIME" THEREAFTER AS IS NECESSARY TO OBTAIN A NEW CONTRACT OR RENEW THE ORIGINAL CONTRACT. THE "REASONABLE TIME" PERIOD SHALL NOT EXCEED TWELVE (12) MONTHS. DURING THIS "REASONABLE TIME" THE VENDOR MAY TERMINATE THIS CONTRACT FOR ANY REASON UPON GIVING THE DIRECTOR OF PURCHASING 30 DAYS				<i>Beverly Toler</i>

ENTERED

APPROVAL AS TO FORM IS REQUIRED BY ATTORNEY GENERAL, CHECK HERE *ms*

OPEN END

TOTAL

**APPROVED FOR ONE FISCAL YEAR**  
*Paune Wayfield*  
 APPROVED AS TO FORM BY ASSISTANT ATTORNEY GENERAL

EVAN WILLIAMS 304-558-2316  
*BY Evan Williams 8/27/04*  
 PURCHASING DIVISION AUTHORIZED SIGNATURE



State of West Virginia  
Department of Administration  
Purchasing Division  
2019 Washington Street East  
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# Purchase Order

**PURCHASE ORDER NO.**  
FAR46060

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**SEE REVERSE SIDE FOR TERMS AND CONDITIONS**

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DEPARTMENT OF ADMINISTRATION  
ACCOUNTING SECTION  
2019 WASHINGTON STREET, EAST  
POST OFFICE BOX 50121  
CHARLESTON, WV  
25305-0121

**VENDOR**  
\*820113229 410-307-6647  
SUNTRUST LEASING CORPORATION  
29 WEST SUSQUEHANNA AVENUE  
#400  
TOWSON MD 21204

**SHIP TO**

DEPARTMENT OF ADMINISTRATION  
FINANCIAL ACCOUNTING AND  
REPORTING SECTION  
2101 WASHINGTON ST E  
CHARLESTON, WV  
25305-1510 304-558-4083

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SHIP VIA	F.O.B.	FREIGHT TERMS	ACCOUNT NUMBER
BEST WAY	DESTINATION	PREPAID	MUL-MUL-MUL -MUL

LINE	QUANTITY	UOP	VENDOR ITEM NO.	UNIT PRICE	AMOUNT
	DELIVERY DATE	CAT. NO.	ITEM NUMBER		
	WRITTEN NOTICE.				
	UNLESS SPECIFIC PROVISIONS ARE STIPULATED ELSEWHERE IN THIS CONTRACT DOCUMENT, THE TERMS, CONDITIONS AND PRICING SET HEREIN ARE FIRM FOR THE LIFE OF THE CONTRACT.				
	RENEWAL: THIS CONTRACT MAY BE RENEWED UPON THE MUTUAL WRITTEN CONSENT OF THE SPENDING UNIT AND VENDOR, SUBMITTED TO THE DIRECTOR OF PURCHASING THIRTY (30) DAYS PRIOR TO THE EXPIRATION DATE. SUCH RENEWAL SHALL BE IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE ORIGINAL CONTRACT AND SHALL BE LIMITED TO FOUR (4) ONE (1) YEAR PERIODS.				
	CANCELLATION: THE DIRECTOR OF PURCHASING RESERVES THE RIGHT TO CANCEL THIS CONTRACT IMMEDIATELY UPON WRITTEN NOTICE TO THE VENDOR IF THE COMMODITIES AND/OR SERVICES SUPPLIED ARE OF AN INFERIOR QUALITY OR DO NOT CONFORM TO THE SPECIFICATIONS OF THE BID AND CONTRACT HEREIN.				
	OPEN MARKET CLAUSE: THE DIRECTOR OF PURCHASING MAY AUTHORIZE A SPENDING UNIT TO PURCHASE ON THE OPEN MARKET, WITHOUT THE FILING OF A REQUISITION OR COST ESTIMATE, ITEMS SPECIFIED ON THIS CONTRACT FOR IMMEDIATE DELIVERY IN EMERGENCIES DUE TO UNFORESEEN CAUSES (INCLUDING BUT NOT LIMITED TO DELAYS IN TRANSPORTATION OR AN UNANTICIPATED INCREASE IN THE VOLUME				

APPROVAL AS TO FORM IS REQUIRED BY ATTORNEY GENERAL, CHECK HERE

**TOTAL**

APPROVED AS TO FORM BY  
ASSISTANT ATTORNEY GENERAL

BY \_\_\_\_\_  
PURCHASING DIVISION AUTHORIZED SIGNATURE



State of West Virginia  
 Department of Administration  
 Purchasing Division  
 2019 Washington Street East  
 Post Office Box 50130  
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# Purchase Order

**PURCHASE ORDER NO.**  
 FAR46060

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CORRECT PURCHASE ORDER NUMBER  
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 QUESTIONS CONCERNING THIS PUR-  
 CHASE ORDER SHOULD BE DIRECTED  
 TO THE BUYER AS NOTED BELOW.

**CHANGE ORDER**

**SEE REVERSE SIDE FOR  
 TERMS AND CONDITIONS**

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 ACCOUNTING SECTION  
 2019 WASHINGTON STREET, EAST  
 POST OFFICE BOX 50121  
 CHARLESTON, WV  
 25305-0121

**VENDOR**  
 \*820113229 410-307-6647  
 SUNTRUST LEASING CORPORATION  
 29 WEST SUSQUEHANNA AVENUE  
 #400  
 TOWSON MD 21204

**SHIP TO**

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SHIP VIA	F.O.B.	FREIGHT TERMS	ACCOUNT NUMBER
BEST WAY	DESTINATION	PREPAID	MUL-MUL-MUL -MUL

LINE	QUANTITY	UOP	VENDOR ITEM NO.	UNIT PRICE	AMOUNT
	DELIVERY DATE	CAT. NO.	ITEM NUMBER		
	OF WORK.)				
	<p>QUANTITIES: QUANTITIES LISTED IN THE REQUISITION ARE APPROXIMATIONS ONLY, BASED ON ESTIMATES SUPPLIED BY THE STATE SPENDING UNIT. IT IS UNDERSTOOD AND AGREED THAT THE CONTRACT SHALL COVER THE QUANTITIES ACTUALLY ORDERED FOR DELIVERY DURING THE TERM OF THE CONTRACT, WHETHER MORE OR LESS THAN THE QUANTITIES SHOWN.</p> <p>ORDERING PROCEDURE: ALL PURCHASE ORDERS ISSUED AGAINST THIS CONTRACT MUST BE SIGNED BY THE PURCHASING DIVISION DIRECTOR OR DESIGNEE. SPENDING UNIT(S) SHALL ISSUE A WV-35 TO THE FINANCE DIVISION. THE FINANCE DIVISION WILL SUBMIT THE WV-35 TO THE PURCHASING DIVISION FOR PROCESSING AND APPROVAL.</p> <p>BANKRUPTCY: IN THE EVENT THE VENDOR/CONTRACTOR FILES FOR BANKRUPTCY PROTECTION, THIS CONTRACT IS AUTOMATICALLY NULL AND VOID, AND IS TERMINATED WITHOUT FURTHER ORDER.</p> <p>THE TERMS AND CONDITIONS CONTAINED IN THIS CONTRACT SHALL SUPERSEDE ANY AND ALL SUBSEQUENT TERMS AND CONDITIONS WHICH MAY APPEAR ON ANY ATTACHED PRINTED DOCUMENTS SUCH AS PRICE LISTS, ORDER FORMS, SALES AGREEMENTS OR MAINTENANCE AGREEMENTS, INCLUDING ANY ELECTRONIC MEDIUM SUCH AS CD-ROM</p>				

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 ASSISTANT ATTORNEY GENERAL

BY \_\_\_\_\_  
 PURCHASING DIVISION AUTHORIZED SIGNATURE



State of West Virginia  
 Department of Administration  
 Purchasing Division  
 2019 Washington Street East  
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# Purchase Order

**PURCHASE ORDER NO.**  
 FAR46060

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 CHARLESTON, WV 25305-0121

**VEEDOR**  
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 2101 WASHINGTON ST E  
 CHARLESTON, WV 25305-1510 304-558-4083

<b>DATE PRINTED</b> 08/27/2004	<b>TERMS OF SALE</b> NET 30	<b>FEIN/SSN</b> 540904325	<b>FUND</b> MUL
<b>SHIP VIA</b> BEST WAY	<b>F.O.B.</b> DESTINATION	<b>FREIGHT TERMS</b> PREPAID	<b>ACCOUNT NUMBER</b> MUL-MUL-MUL -MUL

LINE	QUANTITY	UOP	VENDOR ITEM NO.	UNIT PRICE	AMOUNT
	DELIVERY DATE	CAT. NO.	ITEM NUMBER		
	REV. 04/11/2001				

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 ASSISTANT ATTORNEY GENERAL

BY \_\_\_\_\_  
 PURCHASING DIVISION AUTHORIZED SIGNATURE





STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

(304) 558-2021  
FAX (304) 558-0140

August 27, 2004

SunTrust Leasing Corporation  
29 Susquehanna Avenue - Suite 400  
Towson, Maryland 21204

Re: WV Master Lease Purchase Financing Agreement

Dear Sir or Madam:

As counsel for the Purchasing Division of the Department of Administration of the State of West Virginia (the "State"), I have examined duly executed originals of the Master Lease Purchasing Financing Agreement (the "Agreement") dated August 16, 2004, between the State and SunTrust Leasing Corporation, Lessor. Based upon this examination and upon such other examination as I have deemed appropriate, I am of the opinion that:

1. The Agreement has been duly authorized, executed and delivered by the State and is a legal, valid and binding obligation, enforceable in accordance with its terms.
2. To the best of my knowledge, no litigation is pending or threatened in any court or other tribunal, state or federal, in any way affecting the validity of the Agreement.
3. The signatures of the officials of the State, as they appear on the Agreement are true and genuine. I know said officials and know them to hold the positions set forth below their names.
4. West Virginia is a political subdivision within the meaning of Section 103 of the Internal Revenue Code of 1986, as amended, and the related regulations and rulings.

Very truly yours

  
DAWN E. WARFIELD  
DEPUTY ATTORNEY GENERAL

DEW/tl

STATE OF WEST VIRGINIA

MASTER LEASE PURCHASE FINANCING AGREEMENT

**THIS MASTER LEASE PURCHASE AGREEMENT**, Made this 16th day of August, 2004, by and between SUNTRUST LEASING CORPORATION (“Lessor”), and the PURCHASING DIVISION of the Department of Administration of the State of West Virginia, on behalf of the Lessees specified in the attached appendices (“Purchasing”).

The parties hereto do mutually covenant and agree as follows:

1. Agreement

Pursuant to the provisions of Chapter 5A of the West Virginia Code, the Purchasing Division of the Department of Administration of the State of West Virginia, on behalf of the Lessees specified in the attached appendices, as body politics duly organized and existing under the laws of the State of West Virginia, agrees to lease from Lessor the various items of equipment specified in each appendix (“Equipment”), and Lessor, as specified above, agrees to lease to Lessees the Equipment in accordance with the terms and conditions of this Master Lease Purchase Financing Agreement (“Agreement”). Upon execution, this Agreement is binding on and enforceable against Lessor and Lessees in accordance with its terms.

2. Covenants of Lessor

Lessor, and any assignee of Lessor, shall allow Lessees to quietly have, hold and enjoy the Equipment, without suit, trouble or hindrance from Lessor during the term of this Agreement, except as expressly set forth in this Agreement.

3. Covenants of Lessees

Lessees are not prohibited by the Constitution or laws of the State of West Virginia from entering into this Agreement. No approval, consent or withholding of an objection is required from any governmental authority not a signatory to this Agreement with respect to the performance or obligations of Lessees under this Agreement. This Agreement will not violate any judgement, law or regulation applicable to Lessees or result in any breach of, or constitute a default under, or result in the creation of any lien or encumbrance upon the assets of the Lessees or on the Equipment pursuant to, any other instrument to which Lessees are a party.

#### 4. Equipment Delivery and Acceptance

Lessees shall accept the Equipment when and if delivered and placed in good working order in accordance with the Purchase Order for such items of Equipment and hereby authorize the Lessor to add to the appropriate Appendix the serial number of each item of Equipment so delivered. Lessees shall have thirty (30) days from the date of delivery to accept the Equipment and deliver an Equipment Acceptance Certificate or to have the Equipment returned. Notice of any Equipment defects shall be given to Lessor within thirty (30) days of delivery, unless not discovered at that time by reasonable efforts.

Lessor agrees to pay the invoices for the accepted Equipment within seven (7) days of receipt of the Equipment Acceptance Certificate and Request for Payment and all other closing documents required by this Agreement, but shall not be liable for the specific performance of the Agreement or for damages, if for any reason, the supplier delays or fails to fill the order. Any delay in such delivery shall not affect the validity of this Agreement.

In the event any portion of the Equipment is not accepted or the cost of the Equipment is less than the funded amount under an appendix, then the amount of the funding remaining shall be applied as a partial prepayment on that appendix.

#### 5. Term of Master Lease Purchase Agreement

The Agreement will control each financing completed, and an appendix evidencing each financing will be issued through a separate purchase order for each user agency referencing the Agreement.

Each appendix will include the following:

- (a) State Agency;
- (b) Source of Funding;
- (c) Use of the Equipment;
- (d) Beginning Date;
- (e) Term;
- (f) List of Equipment;
- (g) Essential Use Certificate; and
- (h) Payment Schedule (including the amount finance, the rate, the term payment due dates, the principal balance, payment amount and interest for each payment). RFP 3.2.1.

Several items for an Agency may be combined into one (1) appendix Therefore, funds for certain appendices may need to be escrowed, while in other cases no escrow will be needed. Lessor must be able provide escrowed funds or offer an alternative acceptable to Lessee. RFP 3.2.2.

This Agreement will be effective upon award and shall extend for the period of one (1) year, subject to renewal in accordance with Section 23 of this Agreement. The term of each appendix, evidencing each financing, shall commence on the date specified in each appendix and shall terminate upon the first to occur:

- (a) the payment of the purchase option price;
- (b) the payment of all lease payments;
- (c) an event of non-appropriation; or

- (d) an event of default.

The terms and conditions contained in this Agreement shall be the terms and conditions of each appendix, and shall be the same as the terms and conditions during any renewal of the financing available under this Agreement. RFP 3.3.10.

6. Event of Non-Appropriation

If the Agency is not allotted funds in any succeeding fiscal year for the continued use of the service covered by this Agreement by the West Virginia Legislature, the Agency may terminate the Agreement at the end of the affected current fiscal period without further charge or penalty. The Agency shall give the vendor written notice of such non-allocation of funds as soon as possible after the Agency receives notice. No penalty shall accrue to the Agency in the event this provision is exercised. RFP 3.3.11. An event of non-appropriation shall be deemed to have occurred if:

- (a) sufficient funds are not appropriated for lease payments under an appendix in any fiscal year; and
- (b) Lessee shall have at such time no funds duly authorized or otherwise available for the lease payments.

Upon the occurrence of an event of non-appropriation, that appendix shall terminate without penalty at the end of the then current fiscal year and the Agreement and other payments shall be canceled. Lessee agrees to return the Equipment to Lessor to a site within a fifty (50) mile radius of the city of Baltimore, Maryland, together with a release of all that Lessee's title and interest therein. It is the intention of the parties that any transfer of title to Lessor pursuant to this Section shall occur automatically without the necessity of any bill of sale, certificate of title or other instrument of conveyance. Lessee agrees, nevertheless, to execute and deliver any such instruments as Lessor may reasonably request to evidence such transfer. An event of non-appropriation under one appendix shall not be deemed an event of non-appropriation under any other appendix. Furthermore, an event of non-appropriation shall not be deemed an event of default.

7. Agreement Termination

The Lessee may terminate this Agreement immediately at any time the Lessor fails to carry out its responsibilities or to make substantial process under the terms of this Agreement. Lessee shall provide Lessor with advance notice of performance conditions which are endangering the Agreement's continuation. If after such notice Lessor fails to remedy the conditions contained in the notice, within the time period contained in the notice, Lessee shall issue Lessor an order to cease and desist all work immediately. Lessee shall be obligated only for services rendered and accepted prior to the date of the notice of termination.

The Agreement may also be terminated upon mutual agreement of the parties with thirty (30) days prior notice. RFP 3.3.12.

8. Warranties/Guarantees

Each Lessee acknowledges that it has selected the Equipment financed under this Agreement and that Lessor is not the manufacturer or dealer in the Equipment herein leased. As Lessor is not the manufacturer or dealer in the Equipment, Lessor makes, and has made, no representations or warranties whatsoever as to the existence or availability of warranties by the vendor of any item(s) of Equipment. Lessor hereby assigns to each Lessee for and during the lease term all manufacturers' warranties or guarantees, expressed or implied, issued on or applicable to the Equipment acquired by that Lessee, if any.

LESSOR MAKES NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, AS TO THE VALUE, DESIGN, CONDITION, MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE OR FITNESS FOR USE OF THE EQUIPMENT, OR WARRANTY WITH RESPECT THERETO. IN NO EVENT SHALL LESSOR BE LIABLE FOR ANY INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGE IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT OR THE EXISTENCE, FURNISHING, FUNCTIONING OR LESSEE'S USE OF ANY ITEM(S) OF EQUIPMENT PROVIDED IN THIS AGREEMENT. HOWEVER, LESSOR AGREES TO BE LIABLE FOR ANY LOSS TO TANGIBLE PERSONAL PROPERTY OR INJURY TO PERSONS CAUSED BY THE NEGLIGENCE OF LESSOR.

9. Lease Payments

Lessees agree to pay to Lessor lease payments, comprised of the principal and accrued interest, in the amounts set forth in each payment schedule. The term of each appendix shall not exceed the useful life of the Equipment financed under that appendix. The Index is defined as the annualized interest on three-, five- or seven-year Treasury Notes, shown below for the applicable term, as reported by the Federal Reserve weekly in Publication H.15 (519), on a weekly average basis for the week preceding the date of execution of an appendix, fixing as of such date, and as published weekly by the Federal Reserve, adjusted by adding or subtracting the indicated index amounts, as follows:

- (a) 3-Year Financing Term= - 0.19 of the 3-Yr H.15
- (b) 4-Year Financing Term= + 0.10 of the 3-Yr H.15
- (c) 5-Year Financing Term= - 0.53 of the 5-Yr H.15
- (d) 7-Year Financing Term= - 0.64 of the 7-Yr H.15

The above Index amounts will remain fixed during the term of the Agreement and any renewal or extension thereof. RFP 3.2.3.

All payments shall be made in arrears for the preceding period, and shall be absolute and unconditional in all events, without abatement, diminution, deduction, set-off or defense, for any reason, including without limitation any failure of the Equipment to be delivered or installed, any defects, malfunctions, breakdowns or infirmities in the Equipment or any accident, condemnation or unforeseen circumstances, except as expressly provided in Section 6 of this Agreement, provided with respect to any item of Equipment Lessor has provided the funds to finance such item of Equipment and no payment with respect to such item of Equipment has been withheld from a vendor. Lessor shall provide invoices to Lessees in a timely manner. Interest for late payments shall be in accordance with West Virginia law.

The obligation of each Lessee to pay lease payments hereunder is a current expense of that Lessee and not a debt in contravention of any applicable constitutional or statutory limitation or requirement, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or monies.

Lessees reasonably believe that sufficient funds can be obtained to make all lease payments during the term of this Agreement and hereby covenant that they will use their best efforts to obtain, maintain and properly request funds from which the lease payments may be made, including making provisions for such payments to the extent necessary in each budget submitted for the purpose of obtaining funding, using their best efforts to have such portion of the budget approved. Lessees intend to make lease payments for the full term of this Agreement and represent that the Equipment will be used for one or more authorized governmental or proprietary functions essential to their proper, efficient and economic operation.

10. Use and Maintenance

Lessees agree to comply with all federal, state and local laws, ordinances, and regulations applicable to the possession, use or maintenance of the Equipment.

Lessees will not use, operate or maintain the Equipment improperly, carelessly, or in violation of any applicable law. Lessees will, at their expense, maintain, preserve and keep the Equipment in good repair, working order and condition.

Material alterations, modifications, additions or attachments to the Equipment must have the written approval of the Lessor, which consent shall not be unreasonably withheld, and such action shall be performed at the sole expense of each Lessee. All alterations, modifications, additions or attachments shall not reduce the value or usefulness of the Equipment.

During the term of this Agreement, Lessor and its officers, employees or agents shall have the right at all reasonable times during business hours of each Lessee to enter into and upon the property of such Lessee for the purpose of inspecting the Equipment.

11. Insurance and Loss of Equipment

Lessees are self-insured through the West Virginia Board of Risk and Insurance Management and will protect the interests of the Lessor and Lessee against Equipment losses or damage. Lessees are also self-insured against liability related to the Equipment. In the event of any loss, damage, injury or accident involving the Equipment, the appropriate Lessee shall promptly provide the Lessor with written notice thereof and make available to Lessor all information and documentation thereof.

If any Equipment or any portion thereof is destroyed, in whole or in part, or is damaged by fire or other casualty, or if title to, or the temporary use of, the Equipment or any part thereof is taken under the exercise of the power of eminent domain, Lessee and Lessor will cause the net proceeds of any insurance claim or condemnation award to be applied either to the prompt repair, restoration, modification or replacement of the Equipment or, at Lessee's option, to the payment of the appropriate portion of the purchase option price.

Any balance of the net proceeds remaining after such work or purchase has been completed shall be paid to the appropriate Lessee. Net proceeds shall mean the amount remaining from the gross proceeds of any insurance claim or condemnation award after deducting all expenses incurred in the collection of such claims or awards. If the net proceeds are insufficient to pay in full, the cost of any repair, restoration, modification or replacement, Lessee shall either (a) complete the work and pay any cost in excess of the amount of net proceeds, or (b) Lessee shall pay to Lessor the purchase option price. The amount of the net proceeds in excess of the then applicable purchase option price, if any, may be retained by Lessee.

In the event the purchase option payment for any item(s) of Equipment is paid in accordance with this section, Lessor agrees to release any security interest on that item(s) of Equipment.

12. Title to Leased Equipment

During the term of this Agreement, title to the Equipment listed in an appendix shall vest in the related Lessee so long as such Lessee shall not be in default or this Agreement shall not have been terminated as to such Equipment. To secure all obligations hereunder, the related Lessee hereby grants to Lessor a security interest in any and all right, title and interest of Lessee in the Equipment. Lessee shall promptly discharge any mechanics', materialmen's or other liens placed on the Equipment.

Lessor shall convey all the Lessor's right and interest in and to the Equipment listed in an appendix to Lessee upon payment of all the lease payments required in accordance with the related appendix or the purchase option price set forth in the applicable payment schedule, if the Lessee is not on such date in default as to any terms of this Agreement.

13. Taxes and Other Charges

Lessees represent that they are exempt from federal, state and local taxation, and as such, shall not be liable or responsible from the payment or reimbursement of any tax of any type incurred in connection with this Agreement, nor will they file any tax returns or reports on behalf of Lessor or its assignees.

As title to the Equipment shall vest in the appropriate Lessees during the term of this Agreement, such Lessee represents that, to the best of its knowledge, no personal property taxes nor licensing or titling fees based upon the use, possession or acquisition of the Equipment are due under the current laws of West Virginia. In the event the use, possession or acquisition of the Equipment should become subject to taxation, each Lessee agrees to provide reasonable assistance to Lessor in its endeavors to have such taxes waived or decreased. Should such efforts be unsuccessful, Lessee agrees to reimburse Lessor for *ad valorem* personal property taxes assessed upon and paid by Lessor due to Lessor's interest in the Equipment, if such assessment is ultimately upheld on appeal.

It is the intention of the Lessor and Lessees that the interest portion of the lease payments made under this Agreement be and remain exempt from federal income taxation. Lessee covenants that they will take any and all action reasonably necessary to maintain the exemption from federal income taxation of the interest portion of the lease payment, and that they will not perform any act or enter into any agreement or use or permit the use of the Equipment or any portion thereof in a manner that shall have the effect of terminating or denying the exemption from federal income taxation of the interest portion of the lease payments, including, without limitation, leasing all or any portion of the Equipment or contracting with a

third party for the use or operation of all or any portion of the Equipment if entering into such Agreement or contract would have such effect.

#### 14. Assignment

This Agreement, the Appendices, and the obligations of Lessees to make payments hereunder, may not be sold, assigned or otherwise disposed of in whole or in part to one or more successors, grantors, holders, assignees or subassignees by Lessor, except upon the written consent of the Department of Administration and the appropriate Lessee, which consent will not be unreasonably withheld or delayed. Further, Lessor hereby covenants not to sell or offer to sell this Agreement through, (1) a certificate of participation program, whereby two or more interests are created in the Agreement, the Equipment or the lease payments; or (2) other similar instruments, agreements and obligations through a pool, trust, limited partnership, or other entity. However, each Lessee shall have the right to assign or lease the Equipment, in whole or in part, to other agencies or the State of West Virginia for governmental use only.

During the term of this Agreement, the Department of Administration and the Escrow Agent, if any, shall each keep a complete and accurate register of all such assignments in a form necessary to comply with the Internal Revenue Code of 1986, as amended. The Department of Administration or the registrar named by the State may require the person requesting any transfer to reimburse it for any tax or other governmental charge payable in connection therewith.

Lessees agree to make all payments to the assignee designated in the assignment, notwithstanding any claim, defense, set-off or counterclaim whatsoever, whether arising from a breach of the purchase order for the Equipment or otherwise, that such Lessee may from time to time have against any provider of the Equipment. Lessees agree to execute all documents, including notices of assignment, chattel mortgages or financing statements, which may be reasonably requested by Lessor or assignee to protect its interests in the Equipment and in this Agreement.

To request consent to assign Lessor's interest herein, in whole or in part, Lessor will cause a written request to assign to be sent to the Department of Administration and the appropriate Lessee, requesting approval. Upon submission of the request, Lessor shall provide the Department of Administration and the Lessee with a duplicate original counterpart of the documents effectuating the assignment, or a written notice signed by both Lessor and the assignee confirming the assignment of Lessor's interest in one or more appendices, the name and address of the assignee, and stating that assignee accepts the assignment under the terms and conditions of this Agreement.

Upon receipt of a request to assign, the Department of Administration will notify Lessor in writing of its decision. In the event the Department of Administration approves the request to assign, the Department of Administration shall (i) acknowledge its approval in writing to Lessor, and (ii) record the assignment in its book entry system as that term is defined in the Internal Revenue Code of 1986, as amended. Upon assignment of a Lessee's interest herein, such Lessee will cause written notice of such assignment to be sent to Lessor disclosing the name and address of an assignee. Upon assignment by Lessor, Lessor will provide an executed copy of the documents effectuating the assignment. No further action will be required by Lessor or by Lessee to evidence an assignment.



15. Indemnification

The laws and Constitution of West Virginia prohibit the Lessees from protecting, holding harmless or indemnifying Lessor from and against any liability, obligations, losses, claims or damages whatsoever. Therefore, the Lessees only agree to be responsible for their own actions under this Agreement.

16. Personal Property

The Equipment is and shall at all times during the Agreement term be and remain, personal property.

17. Option to Purchase

Lessees shall be entitled to purchase the Equipment as follows:

- (a) upon payment of all lease and other payments required under an appendix; or
- (b) upon written notice delivered to Lessor by the appropriate Lessee at least thirty (30) days before the proposed date for payment, and upon the payment of such date of the purchase option price for that appendix.

As used herein, purchase option price means the amount equal to the outstanding principal, as set forth in the payment schedule, plus a premium equal to one percent (1%) of the outstanding principal, plus any unpaid interest that has accrued on such principal to date of payment of the purchase option price, provided that any other sum due under this Agreement has or is being paid, payable at the option of Lessee for the purpose of purchasing the Equipment.

In the event of an over-funded escrow as set forth in the third paragraph of Section 4 of this Agreement and in the event of a casualty loss of an item of Equipment as set forth in Section 11 of this Agreement, a Lessee may make partial prepayments of a portion of the purchase option price, and in such event, Lessor shall not charge or assess a prepayment premium. Except as expressly provided in the immediately preceding sentence of this paragraph, there shall be no partial prepayments of the purchase option price.

A revised payment schedule reflecting all partial prepayments permitted by the preceding paragraph, consistent with the financing structure contemplated herein, to reflect such partial prepayment shall be attached to the related appendix as a change order to the appendix, and any such partial prepayments shall entitle Lessee to a release of any security interest on the item(s) of Equipment prepaid in full.

18. Event of Default

The following constitute an "Event of Default" under this Agreement:

- (a) failure by a Lessee to pay any lease payment or required to be paid under an appendix within forty-five (45) days of when due; or
- (b) failure by a Lessee to maintain insurance on the Equipment in accordance with this Agreement; or
- (c) failure by a Lessee to observe and perform any other covenant, condition or agreement on its part to be observed or performed for a period of thirty (30) days after written notice is given to the Lessee by Lessor, specifying such failure and requesting that it be remedied,

- provided that if the failure stated in such notice cannot be corrected within such thirty (30) day period, the Lessor will not unreasonably withhold its consent to an extension of such time if corrective action is instituted by Lessee within the applicable period and diligently pursued until the default is corrected; or
- (d) initiation by or against a Lessee of a proceeding under any federal or state bankruptcy or insolvency laws.

For the purposes of an event of default, a default under one appendix shall not be deemed an event of default under any other appendix. An event of non-appropriation shall not be deemed an event of default.

19. Remedies on Default

Upon the occurrence of an event of default as specified in this Agreement, Lessor shall provide written notification of default which that Lessee must remedy within thirty (30) days from the date of notice of default, or Lessor shall have the right, at its option, without any further demand or notice, to pursue any one or more of the following remedial steps:

- (a) Terminate this agreement and retake possession of the Equipment and sell, lease, sublease or make other disposition of the Equipment in a reasonable and commercial manner;
- (b) Declare an amount equal to all payments due during the fiscal year in which the default occurred to be immediately due and payable, whereupon the same shall become immediately due and payable; or
- (c) Proceed by appropriate court action to enforce performance by the Lessee of the applicable covenants of this Agreement or to recover for the breach thereof.

All of Lessee's right, title and interest in any Equipment, the possession of which is retaken by Lessor upon the occurrence of an event of default, shall terminate immediately upon such repossession. Lessee agrees to return the Equipment to Lessor to a site within a fifty (50) mile radius of the city of Baltimore, Maryland together with a release of all that Lessee's title and interest therein. It is the intent of the parties hereto that any transfer of title to Lessor shall occur automatically without the necessity of any bill of sale, certificate of title or other instrument of conveyance. Lessee agrees, nevertheless, to execute and deliver any such instruments as Lessor may reasonably request to evidence such transfer.

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 Agreement or now hereafter existing at law or in equity.

20. Force Majeure

If by reason of force majeure, Lessor or a Lessee is unable, in whole or in part, to carry out its obligations under this Agreement, other than payments of lease payments or other payments required hereunder, Lessor or Lessee, as the case may be, shall not be deemed in default during the continuance of such inability. The term "force majeure" as used herein shall mean, without limitation, the following; acts of God; strikes; lockouts or other industrial disturbances; acts of public enemies; orders or restraints of any kind of the government of the United States of America or any other governmental entity or any of their departments, agencies or officials, or any civil or military authority; insurrections; riots; landslides; earthquakes; fires; storms; droughts; floods; or explosions.

21. Lessor Relationship

The relationship of the Lessor to the Lessee will be that of an independent contractor and no principal-agent relationship or employer-employee relationship is contemplated or created by the parties to this Agreement. The Lessor as an independent contractor is solely liable for the acts and omissions of its employees and agents.

Lessor shall be responsible for selecting, supervising and compensating any and all individuals employed pursuant to the terms of this Agreement. Neither the Lessor or any employees or contractors of the Lessor shall be deemed to be employees of the Lessee for any purposes whatsoever.

Lessor shall be exclusively responsible for the payment to his/her employees and contractors of all wages and salaries, taxes, withholding payments, penalties, fees, fringe benefits, professional liability insurance premiums, contributions to insurance and pension or other deferred compensation plans, including but not limited to Workers' Compensation and Social Security obligations, and licensing fees, etc. and the filing of all necessary documents, forms and returns pertinent to all the foregoing.

Lessor shall not bring, shall hold harmless, and shall provide the Lessee with a defense against any and all claims that the Lessee is held responsible for, relating in any way to the foregoing payments, withholdings, contributions, taxes, social security taxes and employer income tax returns.

The Lessor shall not assign, convey, transfer or delegate any of its responsibilities and obligations under this contract to any person, corporation, partnership, association or entity without express written consent to the Lessee. RFP 3.3.4.

22. Escrow Agent

Lessor shall have the right to designate an entity to act as the Escrow Agent for the purpose of holding and administering special trust funds designated as Acquisition Funds for the benefit of Lessor and the appropriate Lessee. The appointment of SunTrust Bank, a Georgia banking corporation, as Escrow Agent is hereby acknowledged.

Lessor shall deposit the amount specified in each Appendix in a separate Acquisition Fund. Monies held by the Escrow Agent hereunder shall be invested and reinvested by the Escrow Agent upon order of a representative of the appropriate Lessee in Qualified Investments, as hereinafter defined, maturing or subject to redemption at the option of the holder thereof prior to the date on which it is expected that such funds will be needed. Such investments shall be held by the Escrow Agent in the appropriate Acquisition Fund, and any interest earned on such investments shall be deposited in that Acquisition Fund. The Escrow Agent may act as purchaser or agent in the making or deposing of any investment.

Qualified Investments means (a) direct general obligations of the United States of America; (b) obligations the timely payment of the principal of and interest on which is fully and unconditionally guaranteed by the United States of America; or (c) certificates of deposit, time deposits or demand deposits with any bank or savings institution including the Escrow Agent or any affiliate thereof, provided that such is insured by the Federal Deposit Insurance Corporation. "Qualified Investments" shall include the STI Classic Institutional US Treasury Securities Money Market Fund ("Fund"), which is invested exclusively in U.S. Treasury bills, notes, bond and components of these securities and repurchase agreements (but not

reverse repurchase agreements) which are 100% collateralized by these securities; Provided, however, that should the investment strategy or focus of said Fund change in any respect from that described herein, the Escrow Agent shall obtain the written consent of Lessee prior to making any further investments under this Agreement in said Fund.

Monies in each Acquisition Fund shall be used to pay for the cost of acquisition of the equipment specified on the appropriate Appendix. Payment shall be made from the appropriate Acquisition Fund for the cost of acquisition of part or all of the Equipment upon presentation to the Escrow Agent of one or more Payment Request and Acceptance Certificates, properly executed by the appropriate Lessee and approved by Lessor, together with an invoice for the cost of the acquisition for the Equipment.

Each Acquisition Fund shall terminate upon the occurrence of the earlier of (a) the presentation of a proper Payment Request and Acceptance Certificate designated "Final Acceptance Certificate" properly executed by that Lessee or a properly executed notice by the Lessee that no additional funds will be needed from that Acquisition Fund, or (b) the presentation of written notice by Lessor, or an assignee or subassignee of all of Lessor's interest in this Agreement or an Agent on their behalf, that an Event of Default or Non-appropriation has occurred with respect to the appropriate Appendix or that such Lessee has terminated the Agreement. Upon termination as described in clause (a) of this paragraph, any amount remaining in that Acquisition Fund shall be used to prepay the principal component of Rental Payments for that Appendix, unless otherwise directed by Lessor and Lessee, and the Payment Schedule shall be revised accordingly. Upon termination as described in clause (b) of this paragraph, any amount remaining in that Acquisition Fund shall be immediately paid to Lessor or, pro rata, to any assignee or subassignees of Lessor.

The Escrow Agent may resign by giving at least 30 days' written notice to Lessee and Lessor, but such resignation shall not take effect until the appointment of a successor Escrow Agent. The substitution of another bank or trust company to act as Escrow Agent under this Escrow Agreement may occur by written agreement of Lessor and Lessee. In addition, the Escrow Agent may be removed at any time, with or without cause, by an instrument in writing executed by Lessor and Lessee. In the event of any resignation or removal of the Escrow Agent, a successor Escrow Agent shall indicate its acceptance of such appointment by an instrument in writing delivered to Lessor, Lessee and the predecessor Escrow Agent. Thereupon such successor Escrow Agent shall, without any further act or deed, be fully vested with all the trusts, powers, rights, duties and obligations as Escrow Agent under this Agreement, and the predecessor Escrow Agent shall deliver all monies and securities held by it under this Agreement to such successor Escrow Agent.

The Escrow Agent shall incur no liability to make any disbursements except from funds held in the appropriate Acquisition Fund. The Escrow Agent makes no representations or warranties as to the title to any Equipment or as to the performance of any obligations of Lessor or Lessee. In executing this Agreement, the Escrow Agent agrees to be bound by the provisions of this Section.

### 23. Renewal

Upon mutual agreement of the parties, financing by Lessor under this Agreement may be extended for a term of up to one (1) year, with a maximum of four (4) one-year renewals, or until such reasonable time thereafter as is necessary to obtain a new contract. The "reasonable time" period shall not exceed twelve (12) months.

24. Notices

All notices to be given under this Agreement shall be made in writing and mailed to the other party at its address set forth in the appropriate appendix or at such address as to the party may provide in writing from time to time. Any such notice shall be deemed to have been received five (5) days subsequent to mailing.

25. Binding Effect

This Agreement shall inure to the benefit of and shall be binding upon Lessor and Lessees and their respective successors and assigns.

26. Severability

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

27. Amendments

All amendments, modifications, alterations or changes to this Agreement shall be in writing and signed by both parties.

28. Execution in Counterparts

This Agreement may be executed in several counterparts. The parties hereto agree that multiple originals of this Agreement have been executed. The parties agree that any duly executed counterpart of an appendix that is in the possession of a Lessee or the Department of Administration shall not constitute "chattel paper" as such term is used in the Uniform Commercial Code.

29. 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 Agreement.

30. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of West Virginia.

31. Delivery of Related Documents

Upon the request of the Lessor, a Lessee will provide all documentation reasonably requested by the Lessor. In the event an Internal Revenue Service Form 8038 needs to be filed in connection with this transaction, Lessee will prepare, execute and file the form. A copy of the form filed will be sent to Lessor for its records.

32. Entire Agreement: Waiver

This Agreement, together with the Request for Proposals (RFP) dated February 16, 2004, Purchase Order(s) and other attachments hereto, and other documents or instruments executed by Lessor, Purchasing and Lessees in connection herewith, constitute the entire agreement between the parties with respect to the Equipment. The waiver by one party of any breach of any term, covenant or condition hereto must be in writing and shall not operate as a waiver of any subsequent breach thereof. In the event of any conflict, the terms and conditions of this Agreement shall control.

WITNESS THE FOLLOWING SIGNATURES:

LESSOR:  
SUNTRUST LEASING CORPORATION

BY: [Signature]  
TITLE: Secy

STATE OF WEST VIRGINIA:  
Department of Administration

BY: [Signature]  
TITLE: Acting Secretary

ESCROW AGENT:  
SUNTRUST BANK

BY: [Signature]  
TITLE: Group Vice President

PURCHASING DIVISION  
Department of Administration

BY: [Signature]  
TITLE: Director

Approved as to form this 27<sup>th</sup> day of August, 20 04.

By: [Signature]  
Deputy Attorney General

Counterpart NO. 2 - Lessee's Copy

## LIST OF POTENTIAL CLOSING DOCUMENTS

### Appendices (if any)

- Copies of Purchase Orders
- Payment Schedule
- Certificate of Essential Use by Lessee
- Instruments of title to the Equipment, if necessary, (MSO's etc.)
- IRS Forms 8038G or 8038-GC
- UCC Financing Statement(s)
- Certificate of Incumbency
- Sales Tax Exemption, if necessary
- Equipment Acceptance Certificate and Request For Payment

Opinion of Lessee's Counsel

Certificate of Incumbency

Notice and Consent to Assignment, if necessary

Equipment Acceptance Certificate and Request For Payment

**MASTER LEASE PURCHASE FINANCING AGREEMENT  
PURCHASE ORDER \_\_\_\_\_  
APPENDIX # \_\_\_\_\_**

**THIS APPENDIX** ("Appendix"), made this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, by and between SunTrust Leasing Corporation, ("Lessor") and the \_\_\_\_\_, ("Lessee"), to that MASTER LEASE PURCHASE FINANCING AGREEMENT ("Agreement") dated \_\_\_\_\_ 2004, by and between Lessor and the Purchasing Division of the Department of Administration of the State of West Virginia ("Purchasing").

The parties hereto do mutually covenant and agree, as follows:

1. This Appendix is made a part of the Agreement and hereby attached thereto and the terms and conditions of the Agreement control this Appendix.
2. The term of this Appendix shall commence \_\_\_\_\_ 20\_\_\_\_, and shall terminate in accordance with the Agreement.
3. The Equipment financed by Lessor is listed in the attached Equipment Schedule.
4. Payments shall be made by Lessee in accordance with the attached Payment Schedule and the Agreement.
5. Funds in the amount of \$\_\_\_\_\_ will be deposited in an escrow account. If the dollar amount in this paragraph 5 is zero, then no funds have been deposited into escrow for this Appendix.

This is one of two serially numbered, manually executed counterparts of this document. To the extent that this Appendix constitutes chattel paper under the Uniform Commercial Code, a security interest in this Appendix may be created through the transfer and possession of Counterpart No. 1 only, without the need to transfer possession of any other original or counterpart or copy of this Appendix or any original or counterpart or copy of any exhibits, addenda, schedules, certificates, riders or other documents and instruments executed and delivered in connection with this Appendix.

WITNESS THE FOLLOWING SIGNATURES:

LESSOR: \_\_\_\_\_ LESSEE: \_\_\_\_\_

BY: \_\_\_\_\_ BY: \_\_\_\_\_

TITLE: \_\_\_\_\_ TITLE: \_\_\_\_\_

APPROVED: \_\_\_\_\_  
Department of Administration

**Counterpart No. 1 - Lessor's Original**



**MASTER LEASE PURCHASE FINANCING AGREEMENT  
PURCHASE ORDER \_\_\_\_\_  
APPENDIX # \_\_\_\_\_**

**THIS APPENDIX** ("Appendix"), made this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, by and between SunTrust Leasing Corporation, ("Lessor") and the \_\_\_\_\_, ("Lessee"), to that MASTER LEASE PURCHASE FINANCING AGREEMENT ("Agreement") dated \_\_\_\_\_ 2004, by and between Lessor and the Purchasing Division of the Department of Administration of the State of West Virginia ("Purchasing").

The parties hereto do mutually covenant and agree, as follows:

1. This Appendix is made a part of the Agreement and hereby attached thereto and the terms and conditions of the Agreement control this Appendix.
2. The term of this Appendix shall commence \_\_\_\_\_ 20\_\_\_\_, and shall terminate in accordance with the Agreement.
3. The Equipment financed by Lessor is listed in the attached Equipment Schedule.
4. Payments shall be made by Lessee in accordance with the attached Payment Schedule and the Agreement.
5. Funds in the amount of \$\_\_\_\_\_ will be deposited in an escrow account. If the dollar amount in this paragraph 5 is zero, then no funds have been deposited into escrow for this Appendix.

This is one of two serially numbered, manually executed counterparts of this document. To the extent that this Appendix constitutes chattel paper under the Uniform Commercial Code, a security interest in this Appendix may be created through the transfer and possession of Counterpart No. 1 only, without the need to transfer possession of any other original or counterpart or copy of this Appendix or any original or counterpart or copy of any exhibits, addenda, schedules, certificates, riders or other documents and instruments executed and delivered in connection with this Appendix.

WITNESS THE FOLLOWING SIGNATURES:

LESSOR: \_\_\_\_\_ LESSEE: \_\_\_\_\_

BY: \_\_\_\_\_ BY: \_\_\_\_\_

TITLE: \_\_\_\_\_ TITLE: \_\_\_\_\_

APPROVED: \_\_\_\_\_  
Department of Administration

**Counterpart No. 2 - Lessee's Copy**

Equipment Schedule to APPENDIX # \_\_\_\_\_

See Attached Purchase Order(s)

PO#	VENDOR	ITEM	QUANTITY	UNIT PRICE	TOTAL	INVOICE #	BALANCE
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**CERTIFICATE OF ESSENTIAL USE**

THE UNDERSIGNED, \_\_\_\_\_ of the \_\_\_\_\_, on behalf of the named Lessee in that certain Appendix No. \_\_\_\_\_ to the Lease Purchase Financing Agreement ("Appendix") dated \_\_\_\_\_, 20\_\_\_\_ with \_\_\_\_\_, Lessor, hereby certifies as follows:

1. The Equipment will be used by the lessee for the specific purpose of \_\_\_\_\_.
2. The Equipment is essential for the functioning of the Lessee and is immediately needed by Lessee. Such need is neither temporary nor expected to diminish during the term of the Agreement. The Equipment is expected to be used by Lessee for a period in excess of the term of the Appendix.
3. Funds for lease payments are expected to come from \_\_\_\_\_.
4. The Appendix was issued under and pursuant to West Virginia law to finance the acquisition of the Equipment described therein.
5. Pursuant to the Appendix, Lessee is entitled to receive the Equipment in consideration for the obligation under the Appendix. The Equipment will be used in furtherance of the public purposes of Lessee. The Lessee does not intend to sell or to otherwise dispose of the Equipment during the term of the Appendix.
6. Lessee expects to make lease payments from its annual appropriation. The remaining funds of the Lessee are not reasonably expected to be used to make such payments and no other monies are pledged to the Appendix.
7. Lessee has not received notice that this certificate may not be relied upon with respect to its own debt issues nor has it been advised that any adverse action by the Commissioner of the Internal Revenue Service is contemplated.
8. None of the proceeds of the Appendix or the investment earnings thereon will be used, directly or indirectly, in any trade or business carried on or by any person other than a "governmental unit" within the meaning of Section 141(b) (6) of the Internal Revenue code of 1986, as amended ("Code").
9. In compliance with Section 149 (a) of the Code, Lessee agrees to affix a copy of each notification of assignment to Lessee's counterpart of the Appendix.
10. No more than 10% of the use of the Equipment in any month will be by persons or entities other than the Lessee or its employees on matters relating to such

employment, and no more than 5% of use of the Equipment in any month will be unrelated to use by or for the Lessee. No management contract shall be entered into with respect to the Equipment unless (a) at least half of the compensation is on a periodic, fixed-fee, basis; (b) no compensation is based on a share of net profits; and (c) Lessee is able to terminate the contract without penalty at the end of any commitment period.

- 11. The undersigned has the power and authority to execute this Certificate on behalf of Lessee.

To the best of my knowledge, information and belief, the expectations expressed herein are reasonable and there are no facts, estimates or circumstances other than those expressed herein that would materially affect the expectations herein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
\_\_\_\_\_, Lessee

**OPINION OF COUNSEL LETTER (FOR MASTER LEASE)**

SunTrust Leasing Corporation  
29 Susquehanna Avenue - Suite 400  
Towson, Maryland 21204

Re: WV Master Lease Purchase Financing Agreement

Dear Sir or Madam:

As counsel for the Purchasing Division of the Department of Administration of the State of West Virginia (the "State"), I have examined duly executed originals of the Master Lease Purchasing Financing Agreement (the "Agreement") dated \_\_\_\_\_, 2004, between the State and SunTrust Leasing Corporation, Lessor. Based upon this examination and upon such other examination as I have deemed appropriate, I am of the opinion that:

1. The Agreement has been duly authorized, executed and delivered by the State and is a legal, valid and binding obligation, enforceable in accordance with its terms.
2. To the best of my knowledge, no litigation is pending or threatened in any court or other tribunal, state or federal, in any way affecting the validity of the Agreement.
3. The signatures of the officials of the State, as they appear on the Agreement are true and genuine. I know said officials and know them to hold the positions set forth below their names.
4. West Virginia is a political subdivision within the meaning of Section 103 of the Internal Revenue Code of 1986, as amended, and the related regulations and rulings.

Very truly yours

Deputy Attorney General

**ACCEPTANCE CERTIFICATE AND REQUEST FOR PAYMENT**

NUMBER \_\_\_\_\_

APPENDIX # \_\_\_\_\_

The Lessee, \_\_\_\_\_, hereby accepts the Equipment described below and requests the Lessor, SunTrust Leasing Corporation, to pay to the person or corporation designated below as Payee, the sum set forth below in payment of the acquisition and installation costs of the Equipment in accordance with the Appendix issued to that Agreement between Lessor and the Purchasing Division of the Department of Administration of the State of West Virginia, on behalf of Lessee, dated \_\_\_\_\_, 20\_\_\_. The amount shown below is due and payable under the invoice of the Payee with respect to the Equipment and has not formed the basis of any prior request for payment. This Certificate is based upon facts, circumstances, estimates and expectations of Lessee as of the date on which the Appendix was executed, and to the best of my knowledge and belief, as of this date, such facts, circumstances and estimates are true and correct and such expectations are reasonable.

PAYEE:

AMOUNT: \$

DESCRIPTION OF EQUIPMENT: See Attached

DATED:

LESSEE:

BY: \_\_\_\_\_

NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

LESSOR:

BY: \_\_\_\_\_

NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

**OPINION OF COUNSEL LETTER (FOR EACH APPENDIX)**

SunTrust Leasing Corporation  
 29 West Susquehanna Avenue - Suite 400  
 Towson, Maryland 21204

Re: Appendix # \_\_\_\_\_ to WV Master Lease  
 Purchase Financing Agreement

Dear Sir or Madam:

As counsel for the \_\_\_\_\_, Lessee, I have examined a duly executed original of the Appendix to the Master Lease Purchase Financing Agreement ("Appendix") dated \_\_\_\_\_, 2004, between Lessee and SunTrust Leasing Corporation, Lessor. Based upon this examination and upon such other examination as I have deemed appropriate, I am of the opinion that:

1. Lessee is a public agency, legally existing under the laws of the State of West Virginia.
2. The Appendix has been duly authorized, executed and delivered by Lessee and is a legal, valid and binding obligation of Lessee, enforceable in accordance with its terms.
3. To the best of my knowledge, no litigation is pending or threatened in any court or other tribunal, state, or federal, in any way affecting the validity of the Appendix.
4. The signature of the official of Lessee, as it appears on the Appendix, is true and genuine. I know said official and know him to hold the position set forth below his name.
5. The Equipment leased pursuant to the Appendix constitutes personal property and when subjected to use by Lessee will not be or become fixtures under applicable law.
6. West Virginia is a political subdivision within the meaning of Section 103 of the Internal Revenue Code of 1986, as amended, and the related regulations and rulings.

Very truly yours,

Deputy Attorney General



**TAX COMPLIANCE AGREEMENT  
AND  
NO ARBITRAGE CERTIFICATE**

THIS TAX COMPLIANCE AGREEMENT AND NO ARBITRAGE CERTIFICATE ("Certificate") is issued in connection with the Master Lease Purchase Agreement dated as of \_\_\_\_\_, 2004 (the "Agreement") by and between SunTrust Leasing Corporation, ("Lessor") and the Purchasing Division of the Department of Administration of the State of West Virginia ("Purchasing"), on behalf of duly organized and existing agencies thereof that enter into appendices pursuant thereto ("Lessees").

In connection with the execution and delivery of Appendix No. \_\_\_\_ and related documents (consisting of a Payment Schedule, Equipment Schedule to Appendix No. \_\_\_\_, Certificate of Essential Use, and Opinion of Lessee's Counsel), all dated as of \_\_\_\_\_, 20\_\_ and constituting Appendix No. \_\_\_\_ under the Agreement (collectively, the "Appendix"), Purchasing and the Lessee ("Lessee") that will be using the items of Equipment subject to the Appendix, by duly authorized officers, hereby certify as follows with respect to the financing of \$\_\_\_\_\_ (the "Takedown Amount") of Equipment pursuant to the Appendix and the Agreement:

1. In General.

- 1.1 This Certificate is executed for the purpose of establishing the reasonable expectations of Purchasing and the Lessee on the date hereof as to future events regarding the financing of certain equipment by Lessee as described in the Agreement and all related documents executed pursuant thereto, including the Appendix.
- 1.2 The undersigned are duly authorized to, and are executing and delivering this Certificate with respect to Purchasing on behalf of Purchasing as an officer of Purchasing, and with respect to the Lessee on behalf of Lessee as an officer of Lessee, each delegated with the responsibility of reviewing, executing and administering the Agreement and the Appendix. This Certificate may be relied upon as the certificate of Purchasing and the Lessee.
- 1.3 The undersigned are familiar with the facts, circumstances and estimates herein certified. To the best of the undersigned's knowledge, information and belief, the expectations contained in this Certificate are reasonable.
- 1.4 Neither Purchasing nor the Lessee has been notified of any listing or proposed listing of it by the Internal Revenue Service as an issuer whose certifications as to arbitrage and related matters may not be relied upon, or of any disqualification of Purchasing or the Lessee by the Internal Revenue Service because a certification made by Purchasing or the Lessee contains a material misrepresentation.

2. Purpose of the Appendix.

The Appendix has been entered into by the Lessee for the purpose of financing the cost of acquiring, equipping and installing certain equipment which is essential to the governmental functions of the Lessee (the "Equipment"), which Equipment is or will be more specifically described in the Acceptance Certificates and Requests for Payment executed or to be executed by the Lessee and made a part of the Appendix. The Appendix was executed and delivered by the Lessee pursuant to the Lease for the purpose of obtaining funds to be paid to the vendors of the Equipment. Included as part of the Appendix is a Payment Schedule which sets forth the principal and interest components of each Lease Payment to be made by the Lessee under the financing transaction evidenced by the Appendix and the Lease. The aggregate principal amount of the financing shown on the Payment Schedule, being the Takedown Amount, is expected to be used to pay the acquisition cost of the Equipment to vendors of the Equipment within six months of the date hereof, with the acquisition cost of each item of Equipment to be paid to the vendor thereof upon execution and delivery by the Lessee to the Lessor of an Acceptance Certificate and Request for Payment with respect thereto.

3. Proceeds of Appendix.

3.1 Of the total Takedown Amount of \$ \_\_\_\_\_, \$ \_\_\_\_\_ is to be paid to Lessee or the vendors of the Equipment by the Lessor on the date hereof pursuant to Acceptance Certificate(s) and Request(s) for Payment executed by Lessee and attached to the Appendix. The remaining balance of the Takedown Amount, or \$ \_\_\_\_\_, plus interest earnings thereon (the "Acquisition Fund") is expected to be used to pay the remaining acquisition costs of the Equipment on or before the six-month anniversary of the date hereof as a result of the Lessee submitting Acceptance Certificate(s) and Request(s) for Payment with respect thereto by such date. Pending use of the Acquisition Fund to pay Equipment acquisition costs, such amount will be held by the Escrow Agent in escrow, with interest earnings thereon being credited to the account of the Lessee. In the event that the full Acquisition Fund, plus interest earnings thereon, has not been used to pay acquisition costs of Equipment on or before the six-month anniversary of the date hereof, the Lessee hereby agrees that such failure shall constitute notice that no additional funds are needed from the Acquisition Fund created with the proceeds of the Appendix and directs the Lessor to apply such remaining amount, less expenses, on such date first against the lease payment due on that date or, if no lease payment, with any amount remaining after such application to be applied to prepayment of Lessee's lease payment obligation under the Appendix.

3.2 To the extent that the Acquisition Fund is invested in certificates of deposit, time deposits or demand deposits with a bank or savings institution provided that such is insured by the Federal Deposit Insurance Corporation, the Lessee will insure that the certificates of deposit are traded on an active secondary market or the financial

institution accepting such deposits has certified that the deposits produce a market yield equal to or in excess of the yield on Treasury securities or comparable obligations traded on an active secondary market.

- 3.3 Payments due under the Payment Schedule included as part of the Appendix will be made from funds of Lessee with monies appropriated to it. Lessee does not expect that any sinking or other similar fund for the payment of the principal of and interest on the amount financed pursuant to the Appendix will be created or established.
- 3.4 The Lessee does not expect to sell or otherwise dispose of the Equipment being financed pursuant to the Appendix, in whole or in part, at a date which is significantly earlier than the due date of the final lease payment due under the Payment Schedule included as part of the Appendix.
- 3.5 The Takedown Amount represents and equals the purchase price of Appendix. By a Certificate attached hereto as Exhibit A, the Lessor has set out information regarding the fair market value at which the Lessor could transfer its interest in the lease of Equipment pursuant to the Appendix.

4. Exempt Use.

- 4.1 None of the proceeds of the financing pursuant to the Appendix, or the Equipment, will be used in any "private business use" within the meaning of Section 141(b)(6) of the Internal Revenue Code of 1986, as amended (the "Code").
- 4.2 None of the proceeds of the financing pursuant to the Appendix will be used, directly or indirectly, to make or finance any loans to non-governmental entities or to any governmental agencies other than Lessee.

5. No Federal Guarantee.

- 5.1 Payment of the principal or interest due under the Payment Schedule included as part of the financing pursuant to the Appendix is not directly or indirectly guaranteed, in whole or in part, by the United States or an agency or instrumentality thereof.
- 5.2 No portion of the proceeds of the financing pursuant to the Appendix shall be (i) used in making loans the payment of principal or interest of which are to be guaranteed, in whole or in part, by the United States or any agency or instrumentality thereof, or (ii) invested, directly or indirectly, in federally insured deposits or accounts if such investment would cause the financing pursuant to the Appendix to be "federally guaranteed" within the meaning of Section 149(b) of the Code.

6. Miscellaneous.

- 6.1 The Lessee agrees to comply with the rebate requirement set forth in Section 148(f) of the Code in the event that for any reason the entire proceeds of the Appendix are not expended, and the Acquisition Fund fully depleted, within six months from the date hereof such that Section 148(f)(4)(B) is applicable to the financing pursuant to the Appendix.
- 6.2 The Lessee shall keep a complete and accurate record of all owners or assignees of the Agreement and the financing of Equipment pursuant to the Appendix in form and substance satisfactory to comply with Section 149(a) of the Code.
- 6.3 The Lessor or the Escrow Agent, as applicable shall maintain complete and accurate records establishing the expenditure of the proceeds of the financing pursuant to the Appendix and interest earning thereon.

IN WITNESS WHEREOF, We have executed this Tax Compliance Agreement and No Arbitrage Certificate on behalf of the Purchasing Division of the Department of Administration of the State of West Virginia and the agency of the State of West Virginia named below, as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

ATTEST:

STATE OF WEST VIRGINIA  
Purchasing Division of the Department  
Of Administration

\_\_\_\_\_

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

ATTEST:

Lessee:

\_\_\_\_\_

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

**EXHIBIT A****TO TAX COMPLIANCE AGREEMENT  
AND NO ARBITRAGE CERTIFICATE****CERTIFICATE OF LESSOR**

SunTrust Leasing Corporation, as Lessor ("Lessor"), under the Master Lease Purchase Financing Agreement dated as of \_\_\_\_\_, 2004 (the "Agreement") between the Lessor and the Purchasing Division of the Department of Administration of the State of West Virginia ("Purchasing"), on behalf of the agencies of the State specified as lessees on the appendices attached to the Agreement ("Lessees") and under the Appendix and related documents constituting Appendix No. \_\_\_\_ under the Agreement (the "Appendix"), which Appendix relates to the financing of \$ \_\_\_\_\_ of Equipment and was executed and delivered by \_\_\_\_\_, as the Lessee (the "Lessee") to the Lessor on the date hereof, hereby certifies as follows in connection with the Lessee's execution of the Appendix.

1. On the date hereof, the Lessor has acquired its interest in the Appendix for the aggregate purchase price of \$ \_\_\_\_\_. No payment was made in respect to accrued interest on the Appendix.
2. The Lessor acknowledges that any assignment of the Appendix must comply with the terms of Article 14 of the Agreement.
3. As of the date hereof the fair market value of the Appendix is not greater than \$ \_\_\_\_\_.

IN WITNESS WHEREOF, this Certificate is executed on behalf of the Lessor as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

ATTEST/WITNESS:

SunTrust Leasing Corporation

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



STATE OF WEST VIRGINIA  
Department of Tax and Revenue  
State Tax Department

Rec'd  
MAR - 2 2004

Bob Wise  
Governor

Rebecca Melton Craig  
State Tax Commissioner

February 26, 2004

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

The Honorable Rodney Pyles  
Assessor of Monongalia County  
Courthouse Annex  
243 High Street  
Morgantown, WV 26505

Re: Property Tax Ruling 04-07  
Legal Log 04-021

Dear Mr. Pyles:

Pursuant to the provisions of West Virginia Code § 11-3-24a, you requested instructions from this Office concerning whether certain interests owned by Banc One Leasing Corporation are exempt from ad valorem property taxation.

Enclosed is our ruling. You are advised that under West Virginia Code § 11-3-24a, this ruling is binding unless either you or the taxpayer, or both, apply to the Circuit Court of Monongalia County for review of the ruling within thirty (30) days after adjournment of the Monongalia County Commission sitting as the Board of Equalization and Review. See W. Va. Code §§ 11-3-24a and 11-3-25.

Very truly yours,

  
Rebecca Melton Craig  
State Tax Commissioner

pc: Richard E. Boyle, Jr.  
Kay, Casto & Chaney, PLLC  
P.O. Box 2031  
Charleston, WV 25327



**STATE OF WEST VIRGINIA**  
 Department of Tax and Revenue  
 State Tax Department

Bob Wise  
 Governor

Rebecca Melton Craig  
 State Tax Commissioner

**PROPERTY TAX RULING 04-07**  
**ISSUED PURSUANT TO WEST VIRGINIA CODE § 11-3-24a**

FEBRUARY 23, 2004

**TAXPAYER: BANC ONE LEASING CORPORATION**

**ASSESSOR: RODNEY PYLES**  
**MONONGALIA COUNTY**

**SUBJECT: WHETHER BANC ONE LEASING CORPORATION OWNS A TAXABLE INTEREST IN TANGIBLE PERSONAL PROPERTY IN THE POSSESSION OF ANOTHER.**  
**LEGAL LOG 04-021**

West Virginia Code § 11-3-24a outlines procedures to be followed where the taxpayer and the county assessor disagree on the proper classification or taxability of property for ad valorem tax purposes. Under provisions of this section, the county assessor may, and if the taxpayer requests, the county assessor shall certify the question to the State Tax Commissioner for a ruling. The State Tax Commissioner has until February 28th of the assessment year to render his decision. This decision may be appealed to the Circuit Court of Monongalia County within thirty (30) days after the adjournment of the Monongalia County Commission sitting as the Board of Equalization and Review.

**STATEMENT OF FACTS**

On February 13, 2004, this Office received from the Assessor of Monongalia County (herein "Assessor") a request for a ruling on whether Banc One Leasing Corporation (herein "Taxpayer") has an interest under a lease purchase financing agreement (herein "Agreement") in certain tangible personal property that subject it to ad valorem taxation.

On January 30, 2004, Taxpayer provided to the Assessor both a cover letter discussing the transactions in issue and a memorandum of law as to why Taxpayer is not liable for ad valorem taxes on the property in issue.

[Letter Of January 30, 2004.]

Per our previous conversations in this regard, I am writing on behalf of Banc One Leasing Corporation ("Banc One"), an Ohio corporation, duly registered to conduct business in the State of West Virginia. On or about May 15, 1996, Banc One

entered into several secured sale transactions with the Purchasing Division of the Department of Administration of the State of West Virginia (the "State") for certain computer equipment and other personal property acquired by West Virginia University or its affiliate. Banc One objects to your assessment of ad valorem taxes for such computer equipment and, more particularly, to the assessment being attributed to Banc One. As more fully explained in the memorandum submitted herewith, the transactions between Banc One and the State were not leases, but a secured installment sale of goods, with title vesting in the State at the commencement of the transaction.

Thus, pursuant to § 11-3-24a of the West Virginia Code, Banc One hereby submits that the assessment against Banc One was improper because Banc One was not the "owner" of the computer equipment. Accordingly, Banc One respectfully requests that you sustain its protest and properly adjust the entries on the Monongalia County property books. In the alternative, if you do not sustain this protest, it is my understanding that you will timely certify the issues raised herein to the West Virginia State Tax Commissioner in accordance with § 11-3.24a.

[Memorandum of Law]

In Support of its position regarding the taxability of certain computer equipment and other personal property that is at issue in this matter, Banc One Leasing Corporation respectfully submits the following Memorandum.

BACKGROUND

Banc One Leasing Corporation (also referred to herein as "Banc One") is an Ohio Corporation duly registered to conduct business in the State of West Virginia. On or about May 15, 1996, Banc One entered into an agreement with the Purchasing Division of the Department of Administration of the State of West Virginia (also referred to herein as the "State"; collectively with Banc One referred to herein as the "Parties"), pursuant to a document entitled, "Master Lease Purchase Financing Agreement" (also referred to herein as the "Financing Agreement").<sup>1</sup>

Under the terms of the Financing Agreement, the State (and, in this case, one of its entities, West Virginia University) was provided the opportunity to purchase certain equipment (also referred to herein as "Equipment"), with Banc One designated as "Lessor" and the State designated as "Lessee" during the term of the Financing Agreement. (See Financing Agreement, ¶ 1.) Moreover, pursuant to

<sup>1</sup> Copies of the Financing Agreement and a representative sample of an Appendix used to purchase such equipment (Appendix No. 38) are attached hereto as Exhibit A. More specifically, pursuant to Appendix No 38, Banc One was designated as "Lessor" and the West Virginia Network for Educational Telecomputing, an affiliate of West Virginia University, was designated as "Lessee" of the subject property. However, because the underlying transaction was a secured installment sale and not a true lease, such designations are misnomers. Clearly, the Equipment Schedule appended to Appendix No. 38 identifies Bell Atlantic Network Integration, Inc. as the vendor/seller of the Equipment at issue. Banc One never took title or possession of the equipment, but merely financed the procurement.



paragraph 11, of the Financing Agreement, title to the Equipment vested immediately in the State, with title passing to Banc One only upon the event of default or termination by the State. (See *id.* ¶ 11.) Moreover, upon payment of the final monthly payment, the Equipment would be fully paid-for and, pursuant to paragraph 16(a) of the Financing Agreement, such final payment would constitute the exercise of the agreed option to purchase. (See Appendix No. 38; Appendix No. 38 Amortization Schedule; Financing Agreement ¶ 16(a).)

Banc One received a tax bill from the Monongalia County Assessor regarding the Equipment for the current year, and a great deal of correspondence has occurred between Banc One and the Office of the Monongalia County Assessor concerning the assessment at issue.

#### ISSUE

Whether Banc One is the proper party to be assessed ad valorem taxes for the Equipment during the term of the transaction.

#### ANALYSIS

THE SUBJECT PROPERTY IS NOT TAXABLE TO BANC ONE BECAUSE IT IS THE SUBJECT OF A SECURED TRANSACTION RATHER THAN A LEASE.

Section 11-3-8 of the West Virginia Code states, in pertinent part, "Personal property mortgaged or pledged shall, for the purpose of taxation, be deemed the property of the party who has the possession . . ." W. Va. Code § 11-3-8 (2003) (emphasis added). Although the West Virginia Supreme Court of Appeals has had several opportunities to address the issue of what constitutes "possession" in the context of real property, see, e.g., Cole v. State, 80 S.E. 487 (W. Va. 1913), there does not appear to be any readily available case law in West Virginia clearly defining who is deemed to have "possession" of personal property that is the corpus of a secured transaction.

In *RCA Corp. v. State Tax Commissioner of Missouri*, 513 S.W.2d 313 (Mo. 1974),<sup>2</sup> a case with remarkable similarities to this matter, the Supreme Court of Missouri recognized that whether a transaction is properly classified as a lease or secured transaction is a critical distinction in determining the party to whom ad valorem taxes are properly assessed. Accordingly, that court proclaimed,

The ultimate question for decision is whether under the equipment lease and service agreements between RCA and these two state agencies[,] RCA is the "owner" of the equipment, liable as such for the payment of ad valorem personal property taxes therein, or whether RCA has nothing more than a nontaxable security interest therein.  
*id.* at 314.

In making its determination, the RCA Corp. Court relied upon the applicable tax statute: "Every person owning or holding [ . . . ] tangible personal property on the first day of January [ . . . ] shall be liable for taxes thereon during the same calendar year." *Id.* (citing § 137.075, RSMO 1969). Similarly, section 11-3-1 of the West Virginia Code makes clear that "All property shall be assessed annually as of the first day of July at its true and actual value. . . The taxes upon all property shall be paid by those who are the owners thereof on that day, whether it be assessed to them or others." W. Va. Code § 11-3-1 (2003) (emphasis added). Reading section 11-3-1 in light of RCA Corp., as well as its plain meaning, it is clear that only the "owner" of a particular piece of property is liable for the payment of taxes.

For purposes of secured transactions, section 46-1-201(37) of the West Virginia Code defines "Security Interest" as follows:

"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of consignor and a buyer of accounts, chattel paper, a payment intangible or a promissory note in a transaction that is subject to article nine. The special property interest of a buyer of goods on identification of those goods to a contract for sale under section 2-401 [§ 46-2-401] is not a "security interest," but a buyer may also acquire a "security interest" by complying with article nine. Except as otherwise provided in section 2-505 [§ 46-2-505], the right of a seller or lessor of goods under article two or two-a of this chapter to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with article nine of this chapter. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 2-401 [§ 46-2-401]) is limited in effect to a reservation of a "security interest".

(a) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:

- (i) The original term of the lease is equal to or greater than the remaining economic life of the goods;
- (ii) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
- (iii) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or
- (iv) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(b) A transaction does not create a security interest merely because it

provides that:

(i) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;

(ii) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording or registration fees, or service or maintenance costs with respect to the goods;

(iii) The lessee has an option to renew the lease or to become the owner of the goods;

(iv) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or

(v) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(c) For purposes of this subsection (37):

(i) Additional consideration is not nominal if: (i) When the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(ii) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(iii) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

W. Va. Code § 46-1-201(37) (2003) (emphasis added).<sup>3</sup>

A. Absent Exemption, the State Would Be the Proper Taxable Party Because Title to the Equipment Vested in the State upon Execution of the Financing Agreement.

Although not specifically provided for in section 46-1-201(37), it is critical to

<sup>3</sup> Like many, if not most states, West Virginia has adopted, in significant part, the Revised Uniform Commercial Code to govern secured transactions

note at the outset, that, on its face, the Master Lease Purchase Financing Agreement sets forth that "[d]uring the term of this Lease, title to the Equipment, shall vest in the related Lessee. . . ." (Master Lease Purchase Financing Agreement ¶ 11 [hereinafter Financing Agreement]; see also id., ¶ 12.) Thus, it was clearly the intent of the Parties from the outset of the transaction, that the State would hold title to the subject property. Indeed, this position is consistent with the parties understanding that, because The State is exempt from federal, state, and local taxation, no tax liability would be incurred by either party to the transaction. (See Financing Agreement ¶ 12.)

It is also noteworthy that the very document governing the transaction at issue was entitled a "Master Lease Purchase Financing Agreement," which, by the inclusion of the words "Purchase Financing connotes the intent and understanding of the Parties that they were entering an agreement for the financing of the State's purchase of the Equipment. Thus, absent an exemption, the State would be the proper party to be assessed ad valorem taxes on the subject property because, by the very language of the Financing Agreement, the Parties intended the State to be the "owner" of the Equipment.

**B. The Transaction Meets the First Tier of the Statutory Secured Interest Determination Because the State Intended to Be Obligated under the Financing Agreement for the Entire Financing Period.**

As set forth above, in toto, section 46-1-201(37) of the West Virginia Code states,

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and [any of four additional criteria].

W. Va. Code § 46-1-201(37) (2003) (emphasis added). From the plain language of section 46-1-201(37), which states that whether a particular transaction creates a lease or security interest depends upon the specific facts of each case, it is reasonable to conclude that the West Virginia Legislature recognized that there can never be a "perfect fit" between the facts of a particular matter and the statutory language.

As set forth above, section 46-1-201(37), sets forth a two-tiered test, under which transactions like the one at issue in this matter are analyzed to determine whether such a transaction is properly characterized as a "lease" or an "security interest." See id. The threshold criteria that a particular transaction must meet is that the lessor is obligated for the complete term of the agreement. See id.

In this matter, the Financing Agreement clearly evidences that "Lessees intend [sic.] to make lease payments for the full term of this lease. . . ." (Financing

Agreement ¶ 8.) Thus, the very language contained in the Financing Agreement should permit this transaction to overcome the first hurdle of the two-tiered test. However, Banc One recognizes the potential for an alternative argument based upon the inclusion of a "non-appropriation clause" in the Financing Agreement. (See *id.* ¶ 6.) Indeed, Banc One acknowledges that the Financing Agreement does contain such a clause, which, if invoked, would relieve the State from being further bound under the Financing Agreement, as it pertains to a particular appendix - Appendix No. 38 in this matter. (See *id.*) However, as discussed above, section 46-1-201 (37) mandates that the determination of whether a particular transaction creates a lease or security interest must be based upon the unique facts of each case. See W. Va. Code § 46-1-201 (37). Thus, the inclusion of a non-appropriation clause cannot be considered in isolation.

In analyzing this issue, it is also critical to recognize and consider the nature of the parties primarily involved in the underlying transaction: Banc One, a corporation acting in a financier capacity in the transaction and the State, an entity whose funding depends entirely upon an annual appropriation by the State Legislature. Indeed, because funding for the various educational initiatives of the State is determined on an annual basis, there is no guarantee that funding will continue throughout the term of any particular secured transaction. Thus, if the State was to lose its funding for any particular year, the absence of an applicable non-appropriation clause would logically lead to an event of default under the Financing Agreement. It is even more critical to note that Banc One understands that the State has no control over whether it continues to receive an appropriation of funds for the Equipment. Thus, whether the non-appropriation clause ever becomes operative is out of the hands of the State. In other words, the State has no direct control over the appropriation and, therefore, cannot elect to terminate the transaction.

Moreover, as stated above, the Financing Agreement states that "Lessees intend [sic.] to make lease payments for the full term of this lease. . . ." (Financing Agreement ¶ 8.) Thus, viewing the non-appropriation clause in light of the facts underlying the transaction, it is clear that "use of the goods is an obligation for the term of the lease not subject to termination by the lessee," as envisaged by section 46-1-201 (37) of the West Virginia Code. See W. Va. Code 46-1-201 (37).

Therefore, because the State intended to be obligated under the Financing Agreement for the entire period, the transaction at issue satisfies the first tier of the statutory security interest determination.

C. The Transaction Meets the Second Tier of the Statutory Secured Interest Determination Because the State had the Option to Become the Owner of the Goods with No Additional Consideration.

As set forth above, section 46-1-201 (37) of the West Virginia Code provides, in part, that although the facts of a particular matter are relevant to a determination whether a transaction is a lease or a security interest,

[A] transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:

\*\*\*

(iv) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

W. Va. Code § 46-1-201 (37) (2003) (emphasis added).

As stated above, under the combined terms of the Financing Agreement, Sample Appendix No. 38, and the Amortization Schedule attached and referenced in said Sample Appendix No. 38,<sup>4</sup> with the payment of the final regular monthly installment, the principal balance would be fully repaid. Moreover, under the terms contained in paragraph 16(a) of the financing Agreement, such complete payment would constitute the exercise of the agreed option to purchase. (See Sample Appendix No. 38; Appendix No. 38 Amortization Schedule; Financing Agreement ¶ 16(a).) Thus, under the terms of the agreement between the Parties, at the conclusion of the lease period, the State would have retired the amount owing and would have executed its option to purchase. (*Id.*)

It is also worth noting again that the Parties agreed that upon entering the transaction, title would vest in the State, not Banc One. Thus, the "option to purchase" clause was a purely technical provision because, throughout the term of the transaction, the State was already the owner of the Equipment. Therefore, because the State had the option to become the owner of the goods with no additional consideration, the transaction satisfies the second tier of the statutory security interest determination and, with the transaction having met both statutory requirements to be a secured transaction, Banc One should be deemed to merely have a nontaxable security interest in the Equipment.

#### CONCLUSION

The Equipment that is the subject of the Financing Agreement and Appendix No. 38 is not taxable to Banc One because the underlying transaction is a secured installment sale and not a true lease. Absent exemption, the State would be the proper taxable party because, pursuant to the Financing Agreement, title to the Equipment vested in the State at the outset of the transaction. The transaction meets the first tier of the two-tiered statutory secured interest determination because the State intended to be obligated under the financing agreement for the entire financing period. The transaction also meets the second tier of the secured interest

<sup>4</sup> More accurately, Sample Appendix No. 38 refers to an attached "payment schedule." (See Appendix No. 38, ¶ 4.) However, in the absence of an attachment actually entitled "payment schedule," it is reasonable to conclude that the Parties intended the attached Amortization Schedule to serve such purpose. Note that the payment schedule separates each payment into Principal and Interest components, further demonstrating that this is a Financing Agreement and not a Lease.

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determination because, notwithstanding the fact that it was already the title holder to the Equipment, the State had the option to become the owner of the goods with no additional consideration.

On February 13, 2004, the Assessor responded to the Taxpayer, stating the reasons for the decision denying exemption.

This will serve as a response to your letter of January 30 regarding property leased to West Virginia University by your client, Banc One Leasing Corporation. The additional information you provided has not changed the opinion of this office that the personal property in question is taxable to Banc One Leasing Corporation. This decision was reached after consideration of the following issues:

The Circuit Court of Monongalia County in *WVU Medical Corporation v. John W. Pyles, Assessor and Charles O. Lorensen, State Tax Commissioner* Civil Action No. 89-P-44) upheld a taxability ruling declaring General Electric Medical System to be responsible for taxes on equipment leased to WVU.

The agreement governing the equipment being disputed by Banc One is titled "Master Lease Purchase Financing Agreement" and WVU has included the property on its master list of leased property. These facts seem to indicate that the agreement is a lease rather than a "secured installment agreement" as argued by Banc One.

The Assessor must assume that the agreement is actually a lease purchase agreement because any other type of deferred payment agreement would be unlawful under WV Code 12-3-17. Lease purchase agreements have been upheld by an Attorney General's opinion, January 22, 1980.

As the lessor of the personal property, Banc One has a chattel interest in the property. Chattel interests in real or tangible personal property are defined to be an interest in real or tangible personal property and are to be assessed and taxed like real or tangible personal property is taxed, (11-3-7A, WV Code)

Section 18 of the lease agreement provides "Remedies on Default," one of which is "Proceed by appropriate court action to enforce performance by the lessee..." This language seems to establish Banc One as the owner of the personal property being leased. Whether a person may sue for and recover possession seems to be a test by which such person is to be considered the owner for tax purposes. (*Cole v. State*, 73 W.Va. 410, 80 S.E. 487, (1916).

The remedies provided in Section 18 of the Lease Agreement show that Banc One has a security interest in the lease of the personal property, and this interest is taxable. For tax purposes, the value of this security interest is the replacement cost new less depreciation of the leased equipment.

I call your attention to the letter of July 18, 2003, from Assistant Prosecutor Philip

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Magro that was sent to Andrew Kalgreen at Banc One. This letter included a copy of the Monongalia - WVU Medical Corporation decision that I assume you have.

Due to the fact that we are cannot agree with your client's position in this matter, the issue will be submitted to the State Tax Commissioner for a taxability ruling as you requested.

The Assessor in his ruling request to this Office stated the following.

Pursuant to section 11-3-24a of the West Virginia Code, I hereby request that you issue a taxability ruling concerning a proposed assessment by this office for certain computer equipment located in Monongalia County, which is the subject of a "Master Lease Purchasing Agreement" between Banc One Leasing Corporation ("Banc One") and the Purchasing Division of the Department of Administration of the State of West Virginia (the "State").

This office intends to issue an assessment for ad valorem tax regarding this personal property. Banc One denies that it is the "owner" of such equipment on the grounds that the transaction is a secured installment sale rather than a lease and, therefore, disagrees that it is the properly taxable party. Therefore, this office requests a ruling from the State Tax Commissioner on the issue of whether or not Banc One may properly be assessed ad valorem personal property taxes.

I have enclosed with this letter a legal memorandum that Banc One submitted to this office setting forth its argument in opposition to the assessment, along with a copy of a letter written by the Assistant Prosecuting Attorney and a copy of the WVU schedule of capital leases that was the basis for our assessment. Mr. Margo's letter was written at our request, after Banc One protested being billed for 2003 taxes.

### ISSUE

Whether Banc One Leasing Corporation owns a taxable interest in tangible personal property in the possession of another.

### DISCUSSION

West Virginia Constitution Article X, Section 1 in part provides the following:

§1. Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law ... but property used for educational, literary, scientific, religious or charitable purposes, ... may by law be exempted from taxation;...

The foregoing does not of itself exempt any property from taxation; it merely



authorizes the legislature to provide exemption in certain situations. In re Hillcrest Memorial Gardens, 146 W.Va.337, 119 S.E.2d 753 (1961). Additionally, it must be pointed out that according to the Constitution it is the use of the property, not the status of the property owner, which determines exemption. Therefore, the Taxpayer's Section 501(c)(3) status may not be relevant to the issue.

Taxation of all property, both real and personal, is the general rule fixed by constitutional mandate, while exemption from taxation constitutes the exception. id. The constitutional and statutory provisions exempting property from taxation are strictly construed. id. If any doubt arises as to exemption, that doubt must be decided against the person who claims the exemption. State v. McDowell Lodge No. 112 A.F.&A.M., 96 W.Va. 611, 123 S.E. 561 (1924); Central Realty Co. v. Martin, 126 W.Va. 915, 30 S.E.2d 720 (1944). This is because all exemptions evade the operation of the general principle that taxation laws should be equal and uniform, so as to place the public burdens, as nearly as may be, upon all property and citizens alike. In re Hillcrest Memorial Gardens, 146 W.Va. 337, 119 S.E.2d 753 (1961); State v. Kittle, 87 W.Va. 526, 105 S.E. 775 (1921).

While one must look to the Constitution to determine the extent of legislative authority to provide for exemption of property from taxation, one must look to the statute itself to determine the extent to which the legislature has exercised such authority. In re Hillcrest Memorial Gardens, id.

Taxpayer asserts that under the Agreement it possesses only a security interest in the property at issue that, under the authority of West Virginia Constitution Article X, Section 1a and West Virginia Code § 11-1C-1b, would not be subject to ad valorem taxation. The Assessor asserts that the interest possessed by the Taxpayer is a chattel interest subject to taxation under West Virginia Code § 11-3-7a. West Virginia Constitution Article X, Section 1b in pertinent part provides the following.

§ 1a. Notwithstanding the provisions of sections one and one-b of this Article, ... all intangible personal property shall be exempt from ad valorem property taxation: Provided, that intangible personal property may be made subject to such taxation only to the extent provided by the legislature by general law not inconsistent with this section.

Any intangible personal property which would be subject to ad valorem property taxation under prior provisions of this Constitution shall continue to be subjected to such taxation as provided by and in accordance with current statutory law for the assessment of such taxes upon such property, which laws are hereby validated for such purpose or purposes, until the first day of July in the year one thousand nine hundred eighty-five or until the first statewide reappraisal of property pursuant to section one-b of this article shall be first implemented and employed to fix values for ad valorem property taxation, whichever shall last occur, and thereafter no intangible personal property shall be subject to such taxation save for and except

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as provided by the legislature by general law enacted after the ratification of the amendment of this section in the year one thousand nine hundred eighty-four.  
(Emphasis added.)

Under the authority of Section 1a, intangible personal property is exempt from ad valorem taxation except to the extent that the Legislature may otherwise provide. West Virginia Code § 11-1C-1b provides the following information.

Notwithstanding anything in this code to the contrary, intangible personal property with tax situs in this state that would have been taxable prior to the effective date of this act shall be exempt from ad valorem property tax beginning tax year one thousand nine hundred ninety-eight: Provided, That such property shall be subject to ad valorem property tax and taxed at fifty percent of assessed value for tax year one thousand nine hundred ninety-eight; at forty percent of assessed value for the tax year one thousand nine hundred ninety-nine; at thirty percent of assessed value for the tax year two thousand; at twenty percent of the assessed value for the tax year two thousand one; at ten percent of the assessed value for the tax year two thousand two and eliminated completely for the tax year two thousand three and thereafter. (Emphasis added.)

Under Article X, Section 1a, if the property interest is a security interest, it would be intangible personal property that would be subject to taxation as directed in Section 11-1C-1b. However, if the interest is a chattel interest, then Section 11-3-7a states specifically that the interests are not intangible personal property.

For ad valorem property tax purposes, chattel interests in real property and chattel interest in tangible personal property are hereby defined to be interests in tangible personal property and are to be assessed and taxed as such. As so defined, chattel interest in real property and chattel interests in tangible personal property are not intangible personal property for ad valorem property tax purposes.

It is interesting to note that Sections 11-1C-1b and 11-3-7a were enacted in the same bill in 1997 and that Section 11-3-7a was subsequently amended in 2000. Therefore, the prohibition in Section 11-1C-1b is not applicable and chattel interests are taxable. We must therefore review several paragraphs of the Agreement in order to determine whether the interest is a chattel interest or a security interest.

Under the Agreement, Taxpayer is "Lessor" and the many government agencies are "Lessees".

Para. 1, Entitled "Lease" states that the agencies specified in the appendices agree "to lease from Lessor the various items of equipment specified ... ."

Para. 5, Term, provides the following.

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The term of the financing available under this Lease shall be for an original term of one year, commencing from the date of execution subject to renewal in accordance with Section 21 of this Lease. The term of each appendix, evidencing each financing, shall commence on the date specified in each appendix and shall terminate upon the first to occur:

- (a) The payment of the purchase option price;
  - (b) the payment of all lease payments;
  - (c) an event of non-appropriation; or
  - (d) an event of default.
- (Emphasis added.)

The terms and conditions contained in this Lease shall be the terms and conditions of each appendix, and shall be the same as the terms and conditions during any renewal of the financing available under this lease.

Paragraph 5 states that the lease terminates when any one of four actions occur. While none of those possible actions is clearly indicative of whether the Agreement is a security interest or a chattel interest, it is important to note that default by the Lessee is possible and if it occurs, the lease terminates. Additionally, an event of default may occur without an event of non-appropriation. Para. 6 explains what happens as a result of "non-appropriation." This paragraph, in addition to stating that the Equipment will be returned to Lessor, provides the following.

It is the intention of the parties that any transfer of title to Lessor pursuant to this Section shall occur automatically without the necessity of any bill of sale, certificate of title or other instrument of conveyance. Lessee agrees, nevertheless, to execute and deliver any such instruments as Lessor may reasonably request to evidence such transfer.

We are here discussing the "purchase" of equipment by a governmental agency as well as the return of the equipment if the agency does not pay for the equipment. This paragraph states that transfer to Lessor of title to equipment owned by the government shall occur automatically. It would seem that if full and complete title is originally transferred to the agency, then that title could not be surrendered so easily. Para. 11, Title to Leased Equipment, provides the following.

During the term of this lease, title to the Equipment listed in an appendix shall vest in the related Lessee so long as such Lessee shall not be in default or this Lease shall not have been terminated as to such Equipment. To secure all obligations hereunder, the related Lessee hereby grants to Lessor a security interest in any and all right, title and interest of Lessee in the Equipment. Lessee shall promptly discharge any mechanics' lien, materialman's lien or other liens placed on the Equipment.

Lessor shall convey all of the Lessor's right and interest in and to the Equipment listed in an appendix to Lessee upon payment of all the lease payments

required in accordance with the related appendix or the purchase option price set forth in the applicable payment schedule, if the Lessee is not on such date in default as to any terms of this Lease. (Emphasis added.)

Paragraph 11 vests title in the Lessee (agency) so long as the Lessee is not in default of the Agreement. Additionally, Lessee grants a security interest to the Lessor. Because it appears that title in the Lessee is conditional, there is a question as to whether there is an actual security interest in the Lessor.

Para. 12 discusses taxation: Lessees are exempt from federal, state and local taxation; Lessees represent that to the best of their respective knowledge, no personal property taxes are due on the equipment; but if the equipment is subject to taxation, "each Lessee agrees to provide reasonable assistance to Lessor in its endeavors to have such taxes waived or decreased."

Para. 16, Option to Purchase, provides the following.

Lessees shall be entitled to purchase the Equipment as follows:

- (a) Upon payment of all lease and other payments required under an appendix; or
- (b) upon written notice delivered to Lessor by the appropriate Lessee at least thirty (30) days before the proposed date for payment, and upon the payment on such date of the purchase option price for that appendix.

As used herein, purchase option means the amount equal to the outstanding principal, as set forth in the payment schedule, plus any unpaid interest that has accrued on such principal to the date of payment of the purchase option price, provided that any other sum due under this Lease has or is being paid, payable at the option of Lessee for the purpose of purchasing the Equipment.

A Lessee may, at Lessee's option, make partial prepayments of a portion of the purchase option price upon written notice delivered at least thirty (30) days in advance of the proposed date for payment and upon payment on such date of the partial prepayment, being an amount equal to a portion of the outstanding principal set forth in the prepayment schedule and any unpaid interest that has accrued on such portion of the outstanding principal to the date of payment of the partial prepayment. As provided herein, if any portion of the Equipment is not accepted or the cost of the Equipment is less than the funding under an appendix, then the amount of the funding remaining shall be applied as a partial prepayment toward that appendix.

A revised prepayment schedule reflecting all partial prepayments, consistent with the financing structure contemplated herein, to reflect such partial prepayment shall be attached to the related appendix as a change order to the appendix. Partial prepayments shall entitle Lessee to a release of any security interest on the item(s) of Equipment prepaid in full.

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Paragraph 16 provides an option to purchase. Unless the option is exercised by the Lessee, no purchase occurs. It is merely a lease until purchase occurs.

Paragraph 18, Remedies on Default, provides the Lessor's options if any Event of Default occurs. It should be noted that all of Lessee's right, title and interest in the Equipment ends when possession is retaken by Lessor if default occurs. Additionally, Lessee is required to return the Equipment to the Lessor.

When read in *pari materia*, the foregoing is rather instructive. It definitely demonstrates that Taxpayer possesses an interest in the tangible personal property. In accordance with Black's Law Dictionary, 6<sup>th</sup> Edition, a "chattel" is an article of personal property. As a result, it may be said that Taxpayer possesses a chattel interest in the property in issue.

Taxpayer asserts that it has a security interest. That, however, begs the question as to whether a chattel interest may include a security interest? We are of the opinion that the question begets a positive response. Section 11-3-7a only requires a chattel interest in tangible personal property, and it lays no conditions on the nature of that chattel interest. As a result, Taxpayer's interest in the property is a chattel interest in tangible personal property for which no exemption is found.

#### RULING OF THE TAX COMMISSIONER

Based upon the information provided and a review of the applicable law, it my ruling that the interest of Banc One Leasing Corporation in the tangible personal property that is the subject of a Master Lease Purchase Finance Agreement and the Purchasing Division of the State of West Virginia, on behalf of specified lessees, is a chattel interest subject to ad valorem taxation under the authority of West Virginia Code § 11-3-7a.

Given under my hand this 26<sup>th</sup> day of February, 2004.

  
Rebecca Melton Craig  
State Tax Commissioner