

**PURCHASE AND SALE AGREEMENT BETWEEN THE CITY OF RAPID CITY AND
HILLS MATERIALS COMPANY FOR REAL PROPERTY LOCATED AT 225 E. MAIN
STREET NORTH**

THIS PURCHASE AND SALE AGREEMENT (herein called this “*Agreement*”) is made and entered into this ___ day of _____, 2013, by and among **HILLS MATERIALS COMPANY**, a South Dakota corporation (herein called “*Seller*”); and **CITY OF RAPID CITY**, South Dakota, a South Dakota municipality (herein called “*Buyer*”).

WITNESSETH:

1. Agreement to Sell and Purchase. For and in consideration of the Initial Earnest Money, in hand paid by Buyer to Seller, the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Seller and Buyer, Seller hereby agrees to sell and convey to Buyer, and Buyer hereby agrees to purchase and take from Seller, subject to and in accordance with all of the terms and conditions of this Agreement, the following:

(a) All that certain lot, tract or parcel of improved real estate more particularly described on Schedule 1(a) attached hereto, together with all plants, shrubs and trees located thereon, and together with all rights, ways and easements appurtenant thereto (herein collectively called the “*Land*”);

(b) All buildings, structures and other improvements located on the Land and all fixtures attached or affixed, actually or constructively, to the Land or to any such buildings, structures or other improvements (herein collectively called the “*Improvements*”) provided however that the ready-mix concrete plant, which includes the batch plant and conveyors, the portable batch plant, the charge bins and ramp, related storage sheds, above ground fuel storage tank, the precast items, all aggregates, forms, rebar, miscellaneous wood beams, electrical boxes, tires, tire racks, and the ramp (hereinafter the “*Reserved Ready-Mix Plant*”), the current location of the Reserved Ready-Mix Plant being generally identified in Schedule 1(b) attached hereto shall be excluded from the definition of Improvements;

The Land and Improvements are herein collectively referred to as the “*Property*”.

2. Purchase Price; Method of Payment. The purchase price for the Property (herein called the “*Purchase Price*”), shall be **FIVE HUNDRED FIVE THOUSAND AND NO/100 DOLLARS (\$505,000.00)**. At Closing (as hereinafter defined), Buyer shall pay to the Seller the Purchase Price, after crediting the Earnest Money (if any), and subject to the prorations and adjustments herein described (the “*Closing Date Payment*”).

3. Earnest Money.

(a) Contemporaneously with Buyer’s execution and delivery of this Agreement, Buyer shall deliver to Seller the sum of **ZERO AND NO/100 DOLLARS (\$0.00)** (herein called the “*Earnest Money*”).

(b) At Closing, the Earnest Money (if any) will be applied as part payment of the Purchase Price.

4. Closing.

(a) The closing of the purchase and sale of the Property (herein called "**Closing**"), shall be held at the offices of First American Title Company, or at such location in Pennington County, South Dakota, on July 18, 2013, provided however that each party agrees, upon request by the other party, to cooperate in arranging for an escrow Closing, whereby the Closing documents shall be delivered to the Escrow Agent or to such other third party as is reasonably agreed upon by Seller and Purchaser, thereby obviating the need for representatives of Seller or Purchaser to attend the Closing.

(b) In connection with the preparation of the documentation for Closing, Buyer shall be responsible for such preparation, and shall cause Buyer's counsel and the closing agent to prepare such documents sufficiently in advance so that all closing documents may be executed by the authorized representatives of Seller at Seller's offices in advance of Closing, and attendance by the authorized representatives of Seller at Closing will not be necessary.

(c) As a condition to Closing, Buyer acknowledges that Seller is procuring a new parcel of property to use in connection with its ready-mix concrete business. In the event that Seller fails to have a purchase agreement in place for the acquisition of the new parcel prior to Closing, or in the event that Seller does have a purchase agreement in place for its new parcel of property as of the Closing, but the contingencies protecting the Seller under that agreement have not been satisfied or waived as of the Closing, Seller shall not be under any obligation to consummate the Closing hereunder. Seller shall provide Buyer with notice, prior to the Closing, as to whether the condition described under this paragraph has been satisfied, and if such conditions have not been satisfied, then the parties may mutually agree to extend the time for Closing, or Seller may terminate this Agreement and refund Buyer's Earnest Money (if any), otherwise to continue in full force and effect.

5. Access and Inspection; Examination by Buyer.

(a) Between the date of this Agreement and the Closing, Buyer and Buyer's agents, employees, contractors, representatives and other designees (hereinafter collectively called "**Buyer's Designees**") shall have the right to enter the Property for the purposes of inspecting the Property, conducting soil tests, conducting surveys, mechanical and structural engineering studies, and conducting any other investigations, examinations, tests and inspections as Buyer may reasonably require to assess the condition of the Property; **provided, however,** that (i) any activities by or on behalf of Buyer, including, without limitation, the entry by Buyer or Buyer's Designees onto the Property, or the other activities of Buyer or Buyer's Designees with respect to the Property (hereinafter called "**Buyer's Activities**") shall not damage the Property in any manner whatsoever, (ii) in the event the Property is altered or damaged in any manner in connection with any Buyer's Activities, Buyer shall immediately return the Property to the condition existing prior to Buyer's Activities, and (iii) Buyer shall indemnify, defend and hold Seller harmless from and against any and all claims, liabilities, damages, losses, costs and

expenses of any kind or nature whatsoever (including, without limitation, attorneys' fees and expenses and court costs) suffered, incurred or sustained by Seller as a result of, by reason of, or in connection with any Buyer's Activities. Notwithstanding any provision of this Agreement to the contrary, Buyer shall not have the right to undertake any environmental studies or testing beyond the scope of a standard "Phase I" evaluation without the prior written consent of Seller.

(b) Buyer shall have until **the date thirty (30) days after the Effective Date** (herein called the "***Due Diligence Date***"), to perform such investigations, examinations, tests and inspections as Buyer shall deem necessary or desirable to determine whether the Property is suitable and satisfactory to Buyer. In the event Buyer shall determine that the Property is not suitable and satisfactory to Buyer, Buyer shall have the right to terminate this Agreement by giving written notice to Seller on or before the Due Diligence Date. In the event Buyer gives Seller the notice and delivers to Seller the items required by the immediately preceding sentence, all rights and obligations of the parties under this Agreement shall expire, and this Agreement shall become null and void. If Buyer does not terminate this Agreement in accordance with this **paragraph 5** on or before the Due Diligence Date, Buyer shall have no further right to terminate this Agreement pursuant to this **paragraph 5**.

(c) Prior to any entry by Buyer or any of Buyer's Designees onto the Property, Buyer shall: (i) if Buyer does not then have such a policy in force, procure a policy of commercial general liability insurance, issued by an insurer reasonably satisfactory to Seller, covering all Buyer's Activities, with a single limit of liability (per occurrence and aggregate) of not less than **\$2,000,000.00**; and (ii) deliver to Seller a Certificate of Insurance, evidencing that such insurance is in force and effect, and evidencing that Seller has been named as an additional insured thereunder with respect to any Buyer's Activities (such Certificate of Insurance shall be delivered to Seller, at the address for notices set forth below Seller's execution of this Agreement). Such insurance shall be written on an "occurrence" basis, and shall be maintained in force until the earlier of (x) the termination of this Agreement and the conclusion of all Buyer's Activities, or (y) Closing.

6. Prorations and Adjustments to Purchase Price. The following prorations and adjustments shall be made between Buyer and Seller at Closing, or thereafter if Buyer and Seller shall agree:

(a) All city, state and county ad valorem taxes and similar impositions levied or imposed upon or assessed against the Property (herein called the "***Taxes***"), for the year in which Closing occurs shall be prorated as of the Closing.

(b) Any other items which are customarily prorated in connection with the purchase and sale of properties similar to the Property shall be prorated as of the Closing.

In the event that the amount of any item to be prorated is not determinable at the time of Closing, such proration shall be made on the basis of the best available information, and the parties shall re-prorate such item promptly upon receipt of the applicable bills therefor and shall make between themselves any equitable adjustment required by reason of any difference between the estimated amount used as a basis for the proration at Closing and the actual amount subject to proration. In the event any prorated item is due and payable at the time of Closing, the same

shall be paid at Closing. If any prorated item is not paid at Closing, Seller shall deliver to Buyer the bills therefor promptly upon receipt thereof and Buyer shall be responsible for the payment in full thereof within the time fixed for payment thereof and before the same shall become delinquent. In making the prorations required by this **paragraph 6**, the economic burdens and benefits of ownership of the Property for the Closing shall be allocated to Buyer.

7. Title.

(a) For the purposes of this Agreement, “**good and marketable fee simple title**” shall mean good and merchantable title to all of the property described in **paragraph 1 of Schedule 1(a)** hereof according to the title standards adopted by the State of South Dakota, which shall include such title as is insurable by a title insurance company licensed to do business in South Dakota, under its standard form of ALTA owner’s policy of title insurance, 1992 Form B, at its standard rates, subject only to the following (hereinafter called the “**Permitted Exceptions**”): (i) the standard or printed exclusions in the form of owner’s policy of title insurance referenced above; (ii) such matters as would be disclosed by a current and accurate survey and inspection of the Property; (iii) the lien for Taxes not due and payable on or before the Closing; (iv) zoning ordinances affecting the Property; (v) all easements, covenants, restrictions, reservations, rights-of-way and other similar matters of record as of the date of Seller’s execution of this Agreement; (vi) the state of compliance or non-compliance of the Property, as of the date of Seller’s execution of this Agreement, with any laws, codes, ordinances, rules, regulations or private restrictive covenants applicable to or affecting the Property; and (vii) all matters, if any, waived by Buyer pursuant to this **paragraph 7**.

(b) Buyer shall have until **the date ten (10) days prior to the Due Diligence Date** in which to examine title to the Property and in which to give Seller written notice of any objections which render Seller’s title less than good and marketable fee simple title. Buyer may reexamine title to the Property up to and including the Closing and give Seller written notice of any additional objections appearing of record subsequent to the date of Buyer’s initial examination, but Buyer’s failure to specify in its initial notice of title objections any objection appearing of record as of the date of such initial notice shall be deemed to be, and shall constitute, a waiver of any such objection, and such objection shall thereafter constitute a Permitted Exception under this Agreement; and, if Buyer shall fail so to examine title to the Property or to give Seller such initial notice of title objections, Buyer shall be deemed to have waived all objections appearing of record as of **the date ten (10) days prior to the Due Diligence Date**, and all such objections shall thereafter constitute Permitted Exceptions under this Agreement.

(c) Seller shall have until **the date three (3) days prior to the Due Diligence Date**, in which to review Buyer’s initial notice of title objections and, if Seller elects, in which to give Buyer written notice of any valid objections specified therein which Seller does not intend to attempt to satisfy. If Seller gives Buyer such written notice with respect to any objection specified in Buyer’s initial notice of title objections, and if Buyer thereafter does not elect to terminate this Agreement pursuant to **paragraph 5** hereof, Buyer shall be deemed to have waived any objection specified in Buyer’s initial notice of title objections as to which Seller has given Buyer such notice, and any such objection shall thereafter constitute a Permitted Exception under this Agreement.

(d) Seller shall have until the Closing to satisfy all valid objections other than those waived by Buyer pursuant to **subparagraphs (b) and (c)** of this **paragraph 7**, and, if Seller fails to so satisfy any such valid objections, then, at the option of Buyer, and as its sole and exclusive alternatives and remedies, Buyer may elect to: (i) terminate this Agreement in which event the Earnest Money (if any) shall be refunded to Buyer promptly upon request, all rights and obligations of the parties under this Agreement shall expire, and this Agreement shall become null and void; or (ii) waive such satisfaction and performance and elect to consummate the purchase and sale of the Property, in which event all unsatisfied objections shall constitute Permitted Exceptions under this Agreement; or (iii) extend the Closing for a period of up to sixty (60) days, during which time Seller shall cure such title objections. The remedies of Buyer as set forth in clauses (i), (ii) and (iii) of this **subparagraph (d)** shall be Buyer's sole and exclusive remedies in the event Seller fails to satisfy any valid objections, notwithstanding anything to the contrary contained herein. In the event of an extension of the Closing by Buyer under **clause (iii)**, above, and a subsequent failure of Seller to cure any objection specified in any notice of title objection given by Buyer, Buyer may then, to the extent applicable, elect among the alternatives specified in **clauses (i) and (ii)**, above.

8. Survey. Buyer, at Buyer's option, shall have the right to cause a surveyor selected by Buyer properly licensed under the laws of the State of South Dakota to prepare a current and accurate survey of the Property (herein called the "**Survey**"). If Buyer elects to obtain the Survey, Buyer shall cause **three (3)** prints of the Survey to be delivered to Seller's attorney at the address for copies of notices set forth below Seller's execution of this Agreement.

9. Proceedings at Closing. The Closing shall take place as follows:

(a) The Seller shall cause to be executed and delivered to Buyer the following (collectively, "**Related Instruments**"):

- (i) a warranty deed (the "**Warranty Deed**"), in recordable form, in the form of, and on the terms and conditions set forth in, that attached hereto as Exhibit 9(a)(i), conveying that portion of the Land and the Improvements identified in the Warranty Deed;
- (ii) if Seller is not a Foreign Person, a Certificate and Affidavit of Non-Foreign Status;
- (iii) A settlement statement setting forth the distribution of the Closing Date Payment at the Closing, and the payments of the expenses and prorations of the real property taxes as provided in this Agreement; and
- (iv) A lease (the "**Lease**"), in the form of, and on the terms and conditions set forth in, that attached hereto as Exhibit 9(a)(ii), leasing back to Seller, the Land and Improvements following closing, for the time period specified in the Lease.

(v) Such other documents or instruments as may be reasonably required by (A) Buyer to consummate the transaction set forth herein or (B) the title company issuing title policies to insure Buyer's interest in the Property, in conformity with **paragraph 7(a)** of this Agreement.

(b) Buyer shall cause to be executed and delivered to the Seller:

(i) counterparts of the Related Instruments to which Buyer is a party; and

(ii) such other documents or instruments as may be reasonably requested by the Seller to consummate the transaction contemplated by this Agreement.

(iii) By approval of this Agreement, the Buyer authorizes its Public Works Director to sign all closing documents and any other documents or instruments as required by this paragraph 9, including but not limited to any extension or amendment modifying the date of closing.

10. Title Insurance. Buyer shall procure a commitment for title insurance to be issued by a title company qualified to do business in South Dakota, which commits the title insurance company to issue to Buyer at the time of the delivery and recording of the Warranty Deed an owner's title insurance policy insuring the title in Buyer in the amount of its purchase price.

11. Costs of Closing. Buyer shall bear and pay the State of South Dakota recording fees payable in connection with the conveyance of the Property and Buyer's attorneys' fees. This transaction is exempt from transfer fees pursuant to SDCL 43-4-22(2). Buyer shall bear and pay all costs it incurs pursuant to **paragraph 10**. Buyer and Seller shall share equally all costs, fees and other charges for closing services.

12. Representations and Warranties; Disclaimer of Warranties.

(a) Seller does hereby represent to Buyer the following, to the actual knowledge of Seller:

(i) During the period of Seller's ownership of the Property, Seller has not used any portion of the Property (y) as a landfill or (z) as a cemetery.

(b) EXCEPT AS SPECIFICALLY SET FORTH IN **PARAGRAPH 11(a)** ABOVE (HEREIN CALLED THE "**EXPRESS WARRANTIES**"), SELLER DOES NOT, BY THE EXECUTION AND DELIVERY OF THIS AGREEMENT, AND SELLER SHALL NOT, BY THE EXECUTION AND DELIVERY OF ANY DOCUMENT OR INSTRUMENT

EXECUTED AND DELIVERED IN CONNECTION WITH CLOSING, MAKE ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, OF ANY KIND OR NATURE WHATSOEVER, WITH RESPECT TO THE PROPERTY, AND ALL SUCH WARRANTIES ARE HEREBY DISCLAIMED. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, EXCEPT FOR THE EXPRESS WARRANTIES, SELLER MAKES, AND SHALL MAKE, NO EXPRESS OR IMPLIED WARRANTY AS TO MATTERS OF TITLE (OTHER THAN SELLER'S WARRANTY OF TITLE SET FORTH IN THE WARRANTY DEED TO BE DELIVERED AT CLOSING), ZONING, TAX CONSEQUENCES, PHYSICAL OR ENVIRONMENTAL CONDITION (INCLUDING, WITHOUT LIMITATION, LAWS, RULES, REGULATIONS, ORDERS AND REQUIREMENTS PERTAINING TO THE USE, HANDLING, GENERATION, TREATMENT, STORAGE OR DISPOSAL OF ANY TOXIC OR HAZARDOUS WASTE OR TOXIC, HAZARDOUS OR REGULATED SUBSTANCE), VALUATION, GOVERNMENTAL APPROVALS, GOVERNMENTAL REGULATIONS OR ANY OTHER MATTER OR THING RELATING TO OR AFFECTING THE PROPERTY, (HEREINAFTER COLLECTIVELY CALLED THE "DISCLAIMED MATTERS"). BUYER AGREES THAT, WITH RESPECT TO THE PROPERTY, BUYER HAS NOT RELIED UPON AND WILL NOT RELY UPON, EITHER DIRECTLY OR INDIRECTLY, ANY REPRESENTATION OR WARRANTY OF SELLER, BUYER WILL CONDUCT SUCH INSPECTIONS AND INVESTIGATIONS OF THE PROPERTY (INCLUDING, BUT NOT LIMITED TO, THE PHYSICAL AND ENVIRONMENTAL CONDITION THEREOF) AND RELY UPON SAME AND, UPON CLOSING, SHALL ASSUME THE RISK THAT ADVERSE MATTERS, INCLUDING, BUT NOT LIMITED TO, THE DISCLAIMED MATTERS, MAY NOT HAVE BEEN REVEALED BY BUYER'S INSPECTIONS AND INVESTIGATIONS. SUCH INSPECTIONS AND INVESTIGATIONS OF BUYER SHALL BE DEEMED TO INCLUDE AN ENVIRONMENTAL AUDIT OF THE PROPERTY, AN INSPECTION OF THE PHYSICAL COMPONENTS AND GENERAL CONDITION OF ALL PORTIONS OF THE PROPERTY, SUCH STATE OF FACTS AS AN ACCURATE SURVEY AND INSPECTION OF THE PROPERTY WOULD SHOW, PRESENT AND FUTURE ZONING AND LAND USE ORDINANCES, RESOLUTIONS AND REGULATIONS OF THE CITY, COUNTY AND STATE WHERE THE PROPERTY IS LOCATED AND THE VALUE AND MARKETABILITY OF THE PROPERTY. SELLER SHALL SELL AND CONVEY TO BUYER, AND BUYER SHALL ACCEPT, THE PROPERTY "AS IS", "WHERE IS", AND WITH ALL FAULTS, AND THERE ARE NO ORAL AGREEMENTS, WARRANTIES OR REPRESENTATIONS, COLLATERAL TO OR AFFECTING THE PROPERTY BY SELLER OR ANY THIRD PARTY. WITHOUT IN ANY WAY LIMITING ANY PROVISION OF THIS **PARAGRAPH 11(b)**, BUYER SPECIFICALLY ACKNOWLEDGES AND AGREES THAT IT HEREBY WAIVES, RELEASES AND DISCHARGES ANY CLAIM IT HAS, MIGHT HAVE HAD OR MAY HAVE AGAINST SELLER WITH RESPECT TO (i) THE DISCLAIMED MATTERS, (ii) THE CONDITION OF THE PROPERTY, EITHER PATENT OR LATENT, (iii) THE PAST, PRESENT OR FUTURE CONDITION OR COMPLIANCE OF THE PROPERTY WITH REGARD TO ANY ENVIRONMENTAL PROTECTION, POLLUTION CONTROL OR LAND USE LAWS, RULES, REGULATIONS, ORDERS OR REQUIREMENTS, INCLUDING, WITHOUT LIMITATION, CERCLA, AND (iv) ANY OTHER STATE OF FACTS THAT EXISTS WITH RESPECT TO THE PROPERTY. THE TERMS AND CONDITIONS OF THIS **PARAGRAPH 11(b)** SHALL EXPRESSLY

SURVIVE THE CONSUMMATION OF THE PURCHASE AND SALE OF THE PROPERTY ON THE CLOSING, THE DELIVERY OF THE DEED AND THE PAYMENT OF THE PURCHASE PRICE, WITHOUT REGARD TO ANY LIMITATIONS UPON SURVIVAL SET FORTH IN THIS AGREEMENT.

13. Possession at Closing.

(a) Seller shall deliver legal possession of the Property to Buyer at Closing, subject to the Permitted Exceptions, and further subject to the Lease.

14. Remedies.

(a) If the purchase and sale of the Property contemplated hereby is not consummated in accordance with the terms and provisions of this Agreement due to circumstances or conditions which constitute a default by Buyer under this Agreement, the Earnest Money (if any) shall be delivered to and retained by Seller as Seller's full liquidated damages for such default; **provided, however**, that the foregoing liquidated damages shall not apply to any duty, obligation, liability or responsibility which Buyer may have under the indemnification provisions of **paragraphs 5 and 17** of this Agreement, as to which Seller shall have all rights and remedies provided for or allowed by law or in equity.

(b) If the purchase and sale of the Property contemplated hereby is not consummated in accordance with the terms and provisions of this Agreement due to circumstances or conditions which constitute a default by Seller under this Agreement, the Earnest Money shall be refunded to Buyer promptly upon request, and Buyer, as its sole and exclusive remedies, may exercise the following additional rights and remedies: **(i)** in the event of any default by Seller, Buyer shall have the right to terminate this Agreement, in which event all rights and obligations of the parties under this Agreement shall expire, and this Agreement shall become null and void; and **(ii)** if, and only if, Seller's default is a refusal by Seller to convey the Property to Buyer as required by this Agreement, then Buyer shall have the right to sue Seller for specific performance of this Agreement. In no event shall Buyer have the right to recover from Seller any special or consequential damages. The inability of Seller to convey good and marketable fee simple title to the Property at Closing shall not constitute a default by Seller under this Agreement unless such inability is caused by a defect in Seller's title to the Property which is not a Permitted Exception under this Agreement, which arises subsequent to the date of Seller's execution of this Agreement, and which arises solely by reason of an affirmative act of Seller. Seller shall have no other liability to Buyer under this Agreement.

15. Damage or Destruction.

(a) If any portion of the Improvements is damaged or destroyed by casualty prior to Closing, Seller shall give Buyer prompt written notice thereof. If any portion of the Improvements is damaged or destroyed by casualty on or before the Due Diligence Date, and Buyer shall not elect to terminate this Agreement pursuant to **paragraph 5** hereof, then Buyer shall have no right to terminate this Agreement by reason of such damage or destruction. If any

portion of the Improvements is damaged or destroyed by casualty after the Due Diligence Date and prior to Closing, and the cost of repair of such damage or destruction is reasonably estimated to exceed **\$1,000**, Buyer shall have the right, at Buyer's option, to terminate this Agreement by giving written notice to Seller on or before the date **ten (10) days** after the date upon which Seller gives Buyer written notice of such casualty, in which event the Earnest Money (if any) shall be refunded to Buyer promptly upon request, all rights and obligations of the parties under this Agreement shall expire, and this Agreement shall become null and void. In the event of lesser damage or destruction after the Due Diligence Date, Buyer shall have no right to terminate this Agreement by reason of such damage or destruction.

(b) If any portion of the Improvements is damaged or destroyed by casualty prior to Closing and the purchase and sale of the Property contemplated by this Agreement is thereafter actually consummated: (i) the Purchase Price shall be reduced by the total of any insurance proceeds actually received by Seller on or before the Closing with respect to such casualty and not expended by Seller prior to Closing for the repair or restoration of the Improvements; and (ii) at Closing, Seller shall assign to Buyer all rights of Seller in and to any insurance proceeds payable thereafter by reason of such casualty.

16. Condemnation.

(a) In the event of commencement of eminent domain proceedings respecting any portion of the Property prior to Closing, Seller shall give Buyer prompt written notice thereof. If all or any part of the Property is taken by eminent domain proceedings, or if there is the commencement or bona fide threat of the commencement of any such proceedings, on or before the Due Diligence Date, and Buyer shall not elect to terminate this Agreement pursuant to **paragraph 5** hereof, Buyer shall have no right to terminate this Agreement by reason of such taking. If all or any material part of the Property is taken by eminent domain proceedings after the Due Diligence Date, and prior to Closing, Buyer shall have the right, at Buyer's option, to terminate this Agreement by giving written notice to Seller on or before the date **ten (10) days** after the date upon which Seller gives Buyer written notice of such taking, in which event the Earnest Money shall be refunded to Buyer promptly upon request, all rights and obligations of the parties under this Agreement shall expire, and this Agreement shall become null and void. In the event of a taking of less than all or a material part of the Property after the Due Diligence Date, Buyer shall have no right to terminate this Agreement by reason of such taking.

(b) If all or any part of the Property is taken by eminent domain proceedings prior to Closing and the purchase and sale of the Property contemplated by this Agreement is thereafter actually consummated: (i) the Purchase Price shall be reduced by the total of any awards or other proceeds actually received by Seller on or before Closing with respect to any taking and not expended by Seller prior to Closing for the repair or restoration of the Property; and (ii) at Closing, Seller shall assign to Buyer all rights of Seller in and to any awards or other proceeds payable thereafter by reason of such taking.

(c) For the purposes of this **paragraph 16**, a taking shall be deemed to be of a "material" part of the Property only if such taking involves the taking of more than **ten percent (10%)** of the area of the Land.

17. Confidentiality Obligation. Intentionally Omitted.

18. Broker and Commission.

(a) All negotiations relative to this Agreement and the purchase and sale of the Property as contemplated by and provided for in this Agreement have been conducted by and between Seller and Buyer without the intervention of any person or other party as agent or broker. Seller and Buyer warrant and represent, each unto the other, that Seller and Buyer have not entered into any agreement or arrangement and have not received services from any broker or broker's employees or independent contractors which would give rise to any claim of lien or lien against the Property, and there are and will be no broker's commissions or fees payable in connection with this Agreement or the purchase and sale of the Property by reason of their respective dealings, negotiations or communications.

19. Survival. Notwithstanding anything to the contrary set forth in this Agreement, the provisions of **paragraph 5** of this Agreement shall also survive any termination of this Agreement in accordance with its terms.

20. Seller's Tax Deferred Exchange. Buyer acknowledges that Seller is selling the Property described herein in order to conduct an exchange pursuant to the provisions of Section 1031 of the Internal Revenue Code (the "Exchange"). Purchaser agrees that Seller's rights hereunder shall be assignable as necessary to First American Exchange Company, LLC to conduct the Exchange. Seller agrees that the responsibility to carry out the Exchange shall be its own and Buyer agrees that it shall assist Seller in effectuating the same. Buyer agrees to cooperate in any such Exchange, and Buyer further agrees to execute any and all documents as are reasonably necessary in connection with any such Exchange.

21. General Provisions.

(a) **Notices.** Whenever any notice, demand or request is required or permitted under this Agreement, such notice, demand or request shall be in writing and shall be delivered by hand, be sent by registered or certified mail, postage prepaid, return receipt requested, or be sent by nationally recognized commercial courier for next business day delivery, to the addresses set forth below their respective executions hereof, or to such other addresses as are specified by written notice given in accordance herewith, or shall be transmitted by facsimile to the number for each party set forth below their respective executions hereof, or to such other numbers as are specified by written notice given in accordance herewith. All notices, demands or requests delivered by hand shall be deemed given upon the date so delivered; those given by mailing as hereinabove provided shall be deemed given on the date of deposit in the United States Mail; those given by commercial courier as hereinabove provided shall be deemed given on the date of deposit with the commercial courier; and those given by facsimile shall be deemed given on the date of facsimile transmittal. Nonetheless, the time period, if any, in which a response to any notice, demand or request must be given shall commence to run from the date of receipt of the notice, demand or request by the addressee thereof. Any notice, demand or request not received because of changed address or facsimile number of which no notice was given as hereinabove

provided or because of refusal to accept delivery shall be deemed received by the party to whom addressed on the date of hand delivery, on the date of facsimile transmittal, on the first calendar day after deposit with commercial courier, or on the third calendar day following deposit in the United States Mail, as the case may be.

(b) **Facsimile as Writing.** The parties expressly acknowledge and agree that, notwithstanding any statutory or decisional law to the contrary, the printed product of a facsimile transmittal shall be deemed to be “written” and a “writing” for all purposes of this Agreement.

(c) **Assignment.** This Agreement may be assigned by Buyer without the prior written consent of Seller, so long as such assignee agrees in writing to assume all of Buyer’s obligations under this Agreement. Subject to the foregoing, this Agreement shall be binding upon and enforceable against, and shall inure to the benefit of, Buyer and Seller and their respective legal representatives, successors and permitted assigns. No assignment shall relieve Buyer of liability for the performance of Buyer’s duties and obligations under this Agreement.

(d) **Headings.** The use of headings, captions and numbers in this Agreement is solely for the convenience of identifying and indexing the various provisions in this Agreement and shall in no event be considered otherwise in construing or interpreting any provision in this Agreement.

(e) **Exhibits.** Each and every exhibit referred to or otherwise mentioned in this Agreement is attached to this Agreement and is and shall be construed to be made a part of this Agreement by such reference or other mention at each point at which such reference or other mention occurs, in the same manner and with the same effect as if each exhibit were set forth in full and at length every time it is referred to or otherwise mentioned.

(f) **Defined Terms.** Capitalized terms used in this Agreement shall have the meanings ascribed to them at the point where first defined, irrespective of where their use occurs, with the same effect as if the definitions of such terms were set forth in full and at length every time such terms are used.

(g) **Pronouns.** Wherever appropriate in this Agreement, personal pronouns shall be deemed to include the other genders and the singular to include the plural.

(h) **Severability.** If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall ever be held to be invalid or unenforceable, then in each such event the remainder of this Agreement or the application of such term, covenant, condition or provision to any other person or any other circumstance (other than those as to which it shall be invalid or unenforceable) shall not be thereby affected, and each term, covenant, condition and provision hereof shall remain valid and enforceable to the fullest extent permitted by law.

(i) **Non-Waiver.** Failure by any party to complain of any action, non-action or breach of any other party shall not constitute a waiver of any aggrieved party’s rights hereunder. Waiver by any party of any right arising from any breach of any other party shall not

constitute a waiver of any other right arising from a subsequent breach of the same obligation or for any other default, past, present or future.

(j) **Time of Essence; Dates.** Time is of the essence of this Agreement. Anywhere a day certain is stated for payment or for performance of any obligation, the day certain so stated enters into and becomes a part of the consideration for this Agreement. If any date set forth in this Agreement shall fall on, or any time period set forth in this Agreement shall expire on, a day which is a Saturday, Sunday, federal or state holiday, or other non-business day, such date shall automatically be extended to, and the expiration of such time period shall automatically be extended to, the next day which is not a Saturday, Sunday, federal or state holiday or other non-business day. The final day of any time period under this Agreement or any deadline under this Agreement shall be the specified day or date, and shall include the period of time through and including such specified day or date. All references to the “*Effective Date*” shall be deemed to refer to the later of the date of Buyer’s or Seller’s execution of this Agreement, as indicated below their executions hereon.

(k) **Applicable Law.** This Agreement shall be governed by, construed under and interpreted and enforced in accordance with the laws of the State of South Dakota.

(l) **Entire Agreement; Modification.** This Agreement supersedes all prior discussions and agreements among Seller and Buyer with respect to the purchase and sale of the Property and other matters contained herein, and this Agreement contains the sole and entire understanding among Seller and Buyer with respect thereto. This Agreement shall not be modified or amended except by an instrument in writing executed by or on behalf of Seller and Buyer.

(m) **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of such counterparts together shall constitute one and the same instrument.

(n) **Attorney’s Fees.** In the event of any litigation between Buyer and Seller, each party waives and agrees that it will not request nor seek attorney’s fees in connection with such litigation.

(o) **Authority.** Each party hereto warrants and represents that such party has full and complete authority to enter into this Agreement and each person executing this Agreement on behalf of a party warrants and represents that he has been fully authorized to execute this Agreement on behalf of such party and that such party is bound by the signature of such representative.

(p) **Counsel.** Each party hereto warrants and represents that each party has been afforded the opportunity to be represented by counsel of its choice in connection with the execution of this Agreement and has had ample opportunity to read, review, and understand the provisions of this Agreement.

(q) **No Construction Against Preparer.** No provision of this Agreement shall be construed against or interpreted to the disadvantage of any party by any court or other governmental or judicial authority by reason of such party's having or being deemed to have prepared or imposed such provision.

(r) **No Lien.** This Agreement is not and shall not be deemed or considered to convey or be an interest in or lien against the Property.

[Signature Pages Follow]

IN WITNESS WHEREOF, the parties have caused their duly authorized representatives to execute, seal and deliver this Agreement, all as of the day and year first written above.

Signed, sealed and delivered in the presence of:

Unofficial Witness

Notary Public

My Commission Expires:

(NOTARIAL SEAL)

SELLER:

HILLS MATERIALS COMPANY, a
South Dakota corporation

By: _____
Lynn Kading
President

Initial address for notices:

Hills Materials Company
3975 Sturgis Road
Rapid City, SD 57702
Attn: Lynn Kading
Telephone Number: (605) 394-3300
Telecopy Number: (605) 341-3446

With a copy to:

Kyle C. Jackson
Oldcastle Law Group
700 Ashwood Parkway, Suite 600
Atlanta, GA 30338
Telephone Number: (515) 422-5429
Telecopy Number: (515) 263-3878

Date of Seller's Execution:

BUYER:

**CITY OF RAPID CITY, SOUTH
DAKOTA**, a South Dakota municipality

By: _____
Sam Kooiker, Mayor

ATTEST

Pauline Sumption, Finance Officer

Notary Public

My Commission Expires:

(NOTARIAL SEAL)

Initial address for notices:

300 Sixth Street
Rapid City, SD 57701
Attention: Public Works Director
Telephone Number: (605)394-4165
Telecopy Number: (605)355-3083

With a copy to:

300 Sixth Street
Rapid City, SD 57701
Attention: City Attorney
Telephone Number: (605) 394-4140
Telecopy Number: (605) 394-6633

Date of Buyer's Execution:

Schedule 1(a)
Legal Description

Tract 30B Revised in Block Twelve (12) of Simmons Addition to the City of Rapid City, as Shown by the Plat Recorded in Book 18 of Plats on Page 128 in the Office of the Register of Deeds, Pennington County, South Dakota.

Schedule 1(b)
Location of Reserved Ready Mix Plant Items



Exhibit 9(a)(ii)
Form of Lease

LEASE AGREEMENT

This Lease Agreement (“the ***Agreement***”), is entered into this ___ day of _____, 2013 (the “***Effective Date***”), by and between Hills Materials Company, a South Dakota corporation (“***Lessee***”) of 3975 Sturgis Road, Rapid City, SD 57702 and the City of Rapid City, South Dakota, a South Dakota municipality (“***Lessor***”) of 300 Sixth Street, Rapid City, SD 57701.

RECITALS

A. Lessor and Lessee entered into a real estate purchase agreement (the “***REPA***”) bearing a date of _____, 2013, the subject of which is real property situated in Rapid City, Pennington County, South Dakota, more particularly described in Exhibit A attached hereto and made a part hereof (the “***Property***”).

B. Lessee has operated a ready-mixed concrete plant on the property, and will continue to operate, and subsequently dismantle, said ready-mixed concrete plant from the Property during the Term of this Agreement.

C. The REPA requires that Lessor and Lessee enter into this Agreement on the Closing Date, as that term is defined in the REPA.

D. To effectuate the terms of the REPA, Lessor and Lessee hereby enter into this Agreement.

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

AGREEMENT

1. Term: This Agreement shall commence on the Effective Date, and expire on March 31, 2014.

2. Rental: Lessee shall pay \$10.00 to Lessor as rent. Said rental payment has been delivered to Lessor on the Closing Date, as defined in the REPA.

3. Use: Lessee shall use the Premises, consistent with its past use, for the conduct of its ready-mixed batch plant and related construction materials business, including but not limited to the operation of the ready-mixed plant currently located on the Property.

4. Maintenance: All maintenance of the leased premises shall be provided by Lessee, including but not limited to keeping all grounds, sidewalks, fences, landscaping,

buildings, and all other structures in a safe, and repaired condition. Lessee shall be responsible for all infrastructure maintenance and upkeep while the Ready-Mix Plant is operational. During the removal of the Ready-Mix Plant, Lessee shall be responsible for safeguarding its employees, agents, contractors, and the general public from harm due to conditions present on the property.

5. Utilities: Lessee shall be responsible for all utilities.

6. Return of the Leased Premises: Upon expiration of the Term of this Agreement, Lessee shall remove the Reserved Ready-Mix Plant from the Property, as that term is defined and depicted in the REPA. In removing the Reserved Ready-Mix Plant, Landlord and Tenant agree that Tenant shall disconnect all underground utilities servicing the Reserved Ready-Mix Plant, but the utilities may remain buried or as they were as of the Effective Date, and do not need to be trenched out or otherwise removed from the Property. Landlord and Tenant further agree that all building and plant foundations for the Reserved Ready-Mix Plant will be removed to ground level, but concrete floors will remain in place. The washout pit will be filled in and leveled off to grade. All fencing and gates shall remain. To the extent that any concrete pavement is broken during the process of removing the Reserved Ready-Mix Plant, Landlord agrees to accept the same back in its then condition, and broken concrete pavement shall not need to be repaired based upon the Landlord's indicated future desired use for the Property.

7. Taxes: Lessor shall pay all real estate taxes and assessments levied against the Premises from and after the Effective Date. Lessee shall pay all taxes and assessments levied against its operations, including any taxes related to its equipment or materials.

8. Warranties: Lessor warrants that during the Term of this Agreement and any renewal thereof, that it owns the Premises in fee, has full authority to enter into this Agreement and that it will not lease the Premises to any other person or entity. Lessor also warrants the terms and conditions of this Agreement shall remain effective until expiration of the Term and any renewal thereof if the Premises are sold to a third party. .

9. Liability and Insurance: Lessee agrees to defend, hold harmless, and indemnify the Lessor from any and all claims, demands, actions, suits, and liability, including reasonable attorney fees, in respect to bodily injury, death, and property damage arising from the use by Lessee of the leased premises by its officers, directors, agents and/or employees. Lessee agrees to purchase and maintain liability insurance for each occurrence of injury or property damage in the minimum amount of Two Million Dollars (\$2,000,000) with participant's injury liability of at least One Million Dollars (\$1,000,000) per occurrence. The City of Rapid City shall be named an additional insured in said policy or policies, and Lessee shall annually furnish to the Lessor evidence of insurance by a certificate of insurance of required coverage.

10. Condition of Premises; No Warranties; Release: Lessee acknowledges that it has had sole possession of the leased premises prior to this Lease Agreement. As such, THE

PREMISES ARE BEING LEASED HEREUNDER “**AS IS,**” WITHOUT ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, BY THE CITY OF RAPID CITY, excepting only those express warranties or representations set forth in this Lease Agreement to the contrary. Lessee’s taking of possession of the leased premises shall be conclusive evidence that the Lessee (i) accepts the premises as suitable for the purposes for which same are leased; (ii) accepts the premises and each and every part and appurtenance thereof as being in a good and satisfactory condition, and (iii) waives any defects in the premises and its appurtenances. Lessor shall not be liable, and Lessee hereby releases the Lessor, for injury or damage which may be sustained by Lessee, or any invitee or their property, caused by or resulting from the state of repair of the premises.

11. Assignment and Subletting: This Lease Agreement shall not be assigned nor shall the leased premises be sublet by Lessee except upon written consent and approval of the Lessor, which consent shall not be unreasonably withheld.

12. Heirs and Assigns: This Agreement shall inure to the benefit of the heirs, successors and assigns of either party.

13. Applicable Law: This Agreement is to be construed and enforced in accordance with the laws of the State of South Dakota.

14. No Presumption Against Drafter: Lessor and Lessee understand, agree, and acknowledge that this Lease has been freely negotiated by both parties, and that in any controversy, dispute, or contest over the meaning, interpretation, validity, or enforceability of this Lease or any of its terms or conditions, there shall be no inference, presumption or conclusion drawn whatsoever against either party by virtue of that party having drafted the Lease or any portion thereof.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first herein set forth.

LESSEE:

HILLS MATERIALS COMPANY,
a South Dakota corporation

By: _____
Lynn Kading
President

LESSOR:

**CITY OF RAPID CITY, SOUTH
DAKOTA,** a South Dakota municipality

By: _____
Name: _____
Title: _____

EXHIBIT "A"
LEGAL DESCRIPTION OF LEASED PROPERTY

Tract 30B Revised in Block Twelve (12) of Simmons Addition to the City of Rapid City, as Shown by the Plat Recorded in Book 18 of Plats on Page 128 in the Office of the Register of Deeds, Pennington County, South Dakota.