

AGENDA ITEM SUMMARY

DATE: ~~5-5-14~~ 5-19-14

DEPARTMENT: Legal

DEPT. HEAD SIGNATURE: \_\_\_\_\_

SUBJECT:

City Engineer's General Services Agreements

AUTHORITY:  ID Code \_\_\_\_\_  IAR \_\_\_\_\_  City Ordinance/Code \_\_\_\_\_  
(IF APPLICABLE)

BACKGROUND/SUMMARY OF ALTERNATIVES CONSIDERED:

As you may recall, Hailey selected Galena Engineering as the new primary City Engineer and Benchmark Associates as the new secondary City Engineer. I have reviewed the personal services contracts provided by Galena and Benchmark. They have agreed to use the same basic contract. The contracts are the same except for the names, addresses and rates. In addition, paragraph 1.2 of the contracts are slightly different in that this provision explains who is the primary and secondary engineer.

Ned

FISCAL IMPACT / PROJECT FINANCIAL ANALYSIS: Caselle # \_\_\_\_\_  
Budget Line Item # \_\_\_\_\_ YTD Line Item Balance \$ \_\_\_\_\_  
Estimated Hours Spent to Date: \_\_\_\_\_ Estimated Completion Date: \_\_\_\_\_  
Staff Contact: \_\_\_\_\_ Phone # \_\_\_\_\_  
Comments: \_\_\_\_\_

ACKNOWLEDGEMENT BY OTHER AFFECTED CITY DEPARTMENTS: (IF APPLICABLE)

___ City Attorney	___ Clerk / Finance Director	___ Engineer	___ Building
___ Library	___ Planning	___ Fire Dept.	_____
___ Safety Committee	___ P & Z Commission	___ Police	_____
___ Streets	___ Public Works, Parks	___ Mayor	_____

RECOMMENDATION FROM APPLICABLE DEPARTMENT HEAD:

Discuss the proposed General Services Agreements and conduct a public hearing. If acceptable, make a motion to approve the General Services Agreements and Resolution No. 2014-45 and authorize the mayor to sign the agreements and resolution.

FOLLOW-UP REMARKS:

**CITY OF HAILEY  
RESOLUTION NO. 2014-45**

**RESOLUTION OF THE CITY COUNCIL FOR THE CITY OF HAILEY  
AUTHORIZING THE EXECUTION OF GENERAL SERVICES AGREEMENT WITH  
GALENA ENGINEERING and BENCHMARK ENGINEERS, FOR SEPARATE  
CONTRACTS FOR ENGINEERING SERVICES AS NEEDED FOR THE CITY OF  
HAILEY**

WHEREAS, the City of Hailey desires to enter into an agreement with Galena Engineering and Benchmark Engineers which will perform contract engineering services for the City of Hailey.

WHEREAS, the City of Hailey and Galena Engineering and Benchmark Engineers have agreed to the terms and conditions of the General Services Agreements, copies of which are attached hereto.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF HAILEY, IDAHO,** that the City of Hailey approves the General Services Agreements, between the City of Hailey and Galena Engineering and Benchmark Engineers and that the Mayor is authorized to execute the attached Agreement,

Passed this 19th day of May, 2014.

City of Hailey

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Fritz X. Haemmerle, Mayor

ATTEST:

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Mary Cone, City Clerk

## GENERAL SERVICES AGREEMENT

Galena Engineering, Inc.  
317 North River Street  
Hailey, ID 83333  
(208)788-1705  
Fax (208)788-4612

And

City of Hailey  
115 Main Street Suite H  
Hailey, ID 83333  
(208) 788-4421

## GENERAL SERVICES AGREEMENT

This General Services Agreement ("Agreement"), is entered into and effective this \_\_\_\_ day of May 2014, by and between Galena Engineering, Inc. (hereinafter "GALENA") with its principal place of business located at 317 North River Street, Hailey, Idaho 83333 and The City of Hailey (hereinafter "Client") with its principal place of business located at 115 Main Street, Suite H, Hailey, ID 83333.

### SECTION 1: PERFORMANCE OF SERVICES

#### 1.1 Effective Date

The effective date of this Agreement shall be the date first above written. This Agreement shall terminate on September 30, 2014, and continue for successive one (1) year terms thereafter unless either party provides thirty (30) days advance notice of its intent to terminate this Agreement.

#### 1.2 Services to be Performed by Engineer/Surveyor

The general engineering and general surveying services required by Client shall be performed as Client may from time to time request, and as mutually agreed between Client and GALENA. Client and GALENA understand that GALENA shall be the primary City Engineer for the City of Hailey, but in the event GALENA represents a third party who is seeking approval or who is reasonably likely to need approval from the Client, GALENA shall not act as City Engineer.

#### 1.3 Standard Of Care

GALENA represents that it will perform its services in accordance with generally accepted professional practices existing at the time of performance for the locality where the services are performed. NO OTHER REPRESENTATION, EXPRESS OR IMPLIED, IS MADE OR INTENDED BY THE RENDERING OF THE SERVICES PROVIDED.

#### 1.4 Authorization To Perform

GALENA represents it is appropriately licensed and registered to perform its Services in the location(s) contemplated by this Agreement.

#### 1.5 Site Observation

If construction or site inspections/observations are required within the scope of GALENA'S Services, GALENA shall make visits to the site at intervals appropriate to the various stages of construction as GALENA deems necessary in order to observe the progress of Contractor(s)' work. GALENA shall not, during such visits or as a result of such observations of Contractor(s)' work in progress, supervise, direct or have control over Contractor(s)' work. GALENA shall not have any authority over or responsibility for the means, methods, techniques, sequences, or procedures

of construction selected by Contractor(s), for safety precautions and programs incident to the work of Contractor(s) or for any failure of Contractor(s) to comply with laws, rules, regulations, ordinances, codes or orders applicable to Contractor(s) furnishing and performing their Work. Accordingly, GALENA can neither guarantee the performance of the construction contracts by Contractor(s) nor assume responsibility for Contractor(s)' failure to furnish and perform their work in accordance with the Contract Documents

It is understood and agreed that GALENA shall have no constructive use or control of Owner's site, and therefore shall have no responsibility whatsoever for construction site safety. Such responsibility has been wholly vested in the general contractor.

### SECTION 2: CLIENT RESPONSIBILITIES

Client shall timely provide all criteria and information as may be identified by GALENA. GALENA may use such information, requirements, reports, data, surveys and instructions in performing its Services and is entitled to rely upon the accuracy and completion thereof. Client shall designate a person to act with authority on Client's behalf with respect to all aspects of the project. Client shall examine and respond promptly to GALENA's submittals and requests. Client shall give prompt written notice to GALENA whenever Client observes or otherwise becomes aware of any defect in the Work.

### SECTION 3: COMPENSATION

In consideration for the Services performed by GALENA, Client shall pay GALENA the compensation based on the rates shown on attached Exhibit "A". Invoices will be submitted by GALENA periodically, approximately once a month and are due within thirty (30) calendar days of invoice date. If Client objects to all or any portion of an invoice, Client shall notify GALENA within fourteen (14) calendar days of invoice date, identify the cause of disagreement, and pay when due that portion of the invoice not in dispute. All outstanding balances will accrue a finance charge of 1.0% per month for each month the invoice is outstanding. With the exception of sales tax specifically relating to procurement, GALENA shall pay its appropriate taxes, fees or assessments imposed by local, state, or federal government in effect at the time GALENA renders its professional services. Any taxes, fees, or assessments enacted by local, state, or federal government subsequent to the date of this Agreement, will be added to amounts due to GALENA under this Agreement.

### SECTION 4: DELAYS

GALENA shall not be responsible for delays caused

by factors beyond GALENA's reasonable control, including but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, accidents, acts of God, failure of any governmental or other regulatory authority to act in a timely manner, failure of the Client to furnish timely information or approve or disapprove of GALENA's Services or work product promptly, or delays caused by faulty performance by the Client or by contractors of any level. When such delays beyond GALENA's reasonable control occur, the Client agrees that GALENA shall not be responsible for any damages, nor shall GALENA be deemed to be in default of this Agreement. In the event of such delay, the Schedule shall be extended for a period of time equal to such delay and GALENA shall be compensated for any costs, expenses or damages incurred as a result of such delay.

#### **SECTION 5: Reserved.**

#### **SECTION 6: SUSPENSION AND TERMINATION**

##### **6.1 Termination For Cause**

Either party shall have the right to terminate this Agreement should the other fail to cure any material breach of this Agreement within seven (7) days notice from the non-breaching party.

##### **6.2 Termination For Convenience**

Client shall have the right to terminate this Agreement for convenience after providing GALENA thirty (30) days written notice.

##### **6.3 Termination Compensation**

In case of such termination, GALENA shall be paid:

- (a) For completed and acceptable Services executed in accordance with the Contract Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Services;
- (b) For expenses sustained prior to the effective date of termination in performing Services and furnishing labor, materials or equipment as required by the Contract Documents in connection with uncompleted Services, plus fair and reasonable sums for overhead and profit on such expenses;
- (c) For all claims, costs, losses and damages incurred in settlement of terminated contracts with subcontractors, suppliers and others; and
- (d) For reasonable expenses directly attributable to termination.

#### **SECTION 7: INDEMNIFICATION**

GALENA agrees, to the fullest extent permitted by law, to indemnify and hold the Client harmless from any claim, damage, liability or cost (including reasonable attorneys' fees and costs of defense) to the

extent caused by GALENA's negligent acts, errors or omissions in the performance of professional services under this Agreement and those of its subconsultants or anyone for whom GALENA is legally liable. Notwithstanding the above, GALENA's obligation to defend, indemnify and hold harmless shall extend only to GALENA's percentage of negligence contributing to such claim, damage, loss or expense on a comparative basis of fault and responsibility between GALENA and Client. It is the express intent of this indemnity clause that GALENA shall not be obligated to indemnify Client for Client's own negligence.

Client agrees, to the fullest extent permitted by law, to indemnify and hold GALENA harmless from any claim, damage, liability or cost (including reasonable attorneys' fees and costs of defense) arising in whole or in part and in any manner from the acts or failure to act, omissions, breach or default of Client, or those of its contractors, subcontractors or consultants or anyone for whom the Client is legally liable, and arising from the project that is the subject of this Agreement. In addition, Client agrees to indemnify, defend and hold GALENA harmless from or against any claim or allegation that any process, technology, equipment, materials or information provided by Client in connection with this Agreement constitutes an infringement of any U.S. patent, trade secret, trademark, copyright or other proprietary rights of any third party.

The indemnification obligations of GALENA provided in this Section shall expire on the fifth year anniversary from the termination or completion of GALENA's professional services provided under this Agreement. Notwithstanding the foregoing indemnification, neither party shall be liable to the other for consequential, special or indirect losses, including and not limited to loss of use, loss of revenue and loss of profit, even if advised of the possibility of such loss.

#### **SECTION 8: INSURANCE**

##### **8.1 Limits**

During the performance of the Services under this Agreement, GALENA shall maintain the following insurance:

- (a) General Liability insurance with bodily injury and property damage of not less than \$1,000,000 for each occurrence and not less than \$2,000,000 in the aggregate.
- (b) Automobile Liability insurance with bodily injury and property damage limits of not less than \$1,000,000 for each accident.
- (c) Workers' Compensation insurance in accordance with statutory requirements and Employer's Liability Insurance with limits of not less than \$500,000 for each occurrence.
- (d) Professional Liability insurance with limits of not less than \$1,000,000 annual aggregate.

### 8.2 Endorsements

Client shall be named as an additional insured on policies(a) and (b) listed above to the extent claims arise from the Services which are performed pursuant to this Agreement.

### 8.3 Proof Of Insurance

GALENA shall furnish to Client a certificate of insurance evidencing the above and including a provision that such insurance shall not be canceled without at least thirty (30) days written notice to Client.

## SECTION 9: LIMITATION OF LIABILITY

Client agrees to limit GALENA's liability for insurable events arising from GALENA's performance to the insurance limits stated in Section 8, above. GALENA's liability for non-insurable events including breach of contract or breach of warranty shall not exceed \$100,000.00.

Neither GALENA nor CLIENT nor either party's suppliers, agents, officers, and directors shall have any liability to the other party or any other person or entity for any indirect, incidental, special, or consequential damages whatsoever, including but not limited to loss of revenue or profit, loss of use, failure to realize anticipated profits or savings, loss of or damage to data or other commercial or economic loss, even if GALENA has been advised of the possibility of such damages, that such damages are foreseeable, or of potential claims by a third party.

## SECTION 10: INDEPENDENT CONTRACTOR

GALENA agrees it shall operate as an independent contractor and will not be an agent, joint venturer, partner or employee of the Client, nor will it be entitled to any employee benefits provided by the Client. GALENA shall be responsible for payment of any and all unemployment, social security, withholding, and other payroll taxes for its employees as applicable.

## SECTION 11: DOCUMENTS

### 11.1 Ownership and Reuse of Documents

(a) The Client acknowledges that GALENA's drawings and specifications, including all documents on electronic media, are instruments of service and, unless otherwise provided, GALENA shall be deemed the author of the drawings and specifications and shall retain all common law, statutory and other reserved rights, including the copyright. The Client shall be permitted to retain copies, including reproducible copies, of the drawings and specifications for the Client's information and reference. The Client agrees to waive any claim against GALENA arising from any unauthorized transfer, reuse or modification of the

drawings and specifications.

(b) Electronic files furnished by GALENA shall be subject to an acceptance period of thirty (30) days during which the Client agrees to review and/or perform appropriate acceptance tests. GALENA shall correct any discrepancies or errors detected and reported within the acceptance period at no charge to the Client. After the acceptance period, the electronic files shall be deemed to be accepted and GALENA shall have no obligation to correct errors or maintain electronic files. The Client is aware that differences may exist between the electronic files delivered and the printed hard-copy documents. In the event of a conflict between the signed or sealed hard-copy documents prepared by GALENA and the electronic files, the hard-copy documents shall govern.

(c) The Client agrees, to the fullest extent permitted by law, to indemnify and hold GALENA harmless from any claim, liability or cost (including reasonable attorneys' fees and defense costs) arising or allegedly arising out of any reuse or modification of the documents by the Client or any person or entity that acquires or obtains the documents from or through the Client.

### 11.2 Documents Supplied by Others

The parties agree that from time to time GALENA may need information from Client for the rendering of the Services hereunder and Client agrees to provide GALENA such information as is then available. Client recognizes that it is impossible for GALENA to assure the sufficiency and accuracy of such information. Accordingly, Client waives any claim against GALENA for liability or injury or loss allegedly arising from errors, omissions, or inaccuracies in documents, drawings, plans or data provided to GALENA by Client or by other third parties. If any of the work or Services must be redone because of errors in drawings, plans, or data supplied to GALENA, then GALENA shall be compensated for such extra Services and the Schedule shall be adjusted accordingly.

## SECTION 12: CONFIDENTIALITY

It is understood that the parties may supply to each other confidential or proprietary data during the performance of this Agreement. The parties agree to protect such data from disclosure to outside parties, except where access to such data is necessary for the purpose of performing the services hereunder. Such data shall be marked "Confidential" or "Proprietary" or defined as confidential or proprietary in a separate writing. This confidentiality requirement shall not apply to data that is known to the parties prior to the execution of this Agreement or is in the public domain. In the event such data is subpoenaed by court order, or other legal process, the receiving party shall notify the other party within five (5) business days of

receipt of such court order or legal process.

### SECTION 13: DISPUTE RESOLUTION

#### 13.1 Exclusive Manner of Dispute Resolution

Unless otherwise agreed to by the parties, the sole means and method of resolving disputes shall be as set forth in this Agreement. Any lawsuit filed to adjudicate a claim shall be promptly dismissed by the filing party.

#### 13.2 Negotiation Between Executives

The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement, or any breach hereof or any Work performed hereunder, promptly by negotiation between executives who have authority to settle the controversy. Any party may give the other party written notice of any dispute not resolved during the normal course of business, such notice to include the statement of that party's position and summary of arguments, and the name and title of the executive who will be representing that party and of any other person who will accompany the executive. The receiving party shall respond in kind within fifteen (15) days of the date of notice. Within thirty (30) days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place and use good faith efforts to resolve the dispute. Negotiations pursuant to this Section shall be confidential and shall be treated as compromise and settlement negotiations for purposes of Law and rules of evidence.

#### 13.3 Mediation

In the event that the parties are unable to settle the dispute through direct negotiations as set forth above, all remaining controversies or claims shall then be submitted to mediation following the Commercial Mediation Rules published by the American Arbitration Association. Unless the parties agree otherwise, mediation shall be held in Hailey, Idaho. This Agreement to mediate and any other agreement, or consent to mediate entered into in accordance with this Agreement shall be specifically enforceable under the prevailing law of any court having jurisdiction. The parties shall share equally the costs and fees of the mediator.

#### 13.4 Litigation

In the event mediation proves unsuccessful within sixty (60) days of the appointment of the mediator, then all claims, disputes and other matters in question arising out of, or relating to, this Agreement or the breach thereof shall be decided by litigation, unless the parties mutually agree otherwise. The court of competent jurisdiction shall not have the authority to consider or award punitive damages as part of the court's judgment. Unless the parties agree otherwise, litigation shall be held in Fifth District Court, Hailey, Idaho.

### SECTION 14: MISCELLANEOUS

#### 14.1 Notices

Any notice hereunder shall be deemed served immediately if hand-delivered in writing to an officer or other duly appointed representative of the party to whom the notice is directed. Notices shall also be deemed served five (5) business days after transmittal by United States mail, or within two (2) days if by any overnight service(s), to the business address identified below, or to the address specified in the Task Order for a particular project:

For GALENA:  
Galena Engineering, Inc.  
317 North River Street  
Hailey, ID 83333

For Client:  
City of Hailey  
115 Main Street, Suite H  
Hailey, ID 83333

#### 14.2 Applicable Law and Venue

This Agreement and all rights, obligations, liabilities, and responsibilities of the parties hereto shall be governed by, construed, and enforced in accordance with the laws and venue of the State of Idaho.

#### 14.3 Subcontractors

At its request, Client shall have the right to pre-approve the subcontracting of any services to be performed under this Agreement, which approval shall not be unreasonably withheld.

#### 14.4 Successors and Assigns

Client and GALENA each binds itself and its partners, successors, executors, administrators, assigns and legal representatives to the other party to this Agreement and to the partners, successors, executors, administrators, assigns, and legal representatives of such other party, in respect to all covenants, agreements, and obligations of this Agreement. This Agreement shall not be assigned by either party without the other party's express written consent. Provided, however, GALENA shall be entitled to subcontract portions of its work to other companies in which GALENA has an ownership interest without first obtaining the written consent provided for under this Section.

#### 14.5 Equal Opportunity Employment

GALENA and Client expressly agree not to discriminate against any employee or applicant for employment because of race, color, religion, gender, national origin, or disability and shall during the performance of this Agreement comply with all applicable Executive Orders and federal regulations.

**14.6 Entire Agreement**

The terms and conditions herein represent the entire agreement between the parties, and shall not be modified except by written instrument duly executed by both parties.

**14.7 Severability**

If any provision of this Agreement is held to be in violation of any applicable law rendering such provision void and unenforceable, such provision shall be deemed severed from the Agreement and the remainder of the Agreement shall remain in full force and effect.

**14.8. Survival**

All representations, indemnifications, warranties and guarantees made in, required by or given in accordance with the Contract Documents, as well as all continuing obligations indicated in the Contract Documents, will survive final payment, completion

and acceptance of the Services and termination or completion of the Agreement.

**14.9 Attorneys Fees**

In the event of any dispute with regard to the interpretation or enforcement of this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorneys' fees incurred therein, whether or not a lawsuit is actually filed, and on any appeals, and in any bankruptcy proceeding.

**14.10 Counterparts.**

This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same document.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed as of the date first above written.

**City of Hailey**

By: \_\_\_\_\_  
Fritz X. Haemmerle, Mayor

**Galena Engineering, Inc.**

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

Printed: \_\_\_\_\_

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

ATTEST:

\_\_\_\_\_  
Mary Cone, City Clerk

EXHIBIT A

GALENA ENGINEERING, INC.  
2014 Hourly Billing Rates

Principal Professional Engineer	\$115-\$120
Professional Engineer	\$100-\$115
Professional Land Surveyor	\$115
Survey Crew Party Chief	\$65-\$75
Surveyor	\$65
Drafting Technician	\$70
Clerical	\$60
GPS	\$50 per hour
Robotics Trimble	\$50 per hour
ATV	\$100 per day

Reimbursable Expenses at Cost  
05/01/14

## GENERAL SERVICES AGREEMENT

Benchmark Associates, P.A.  
100 Bell Drive  
P.O. Box 733  
Ketchum, ID 83340  
(208)726-9512

And

City of Hailey  
115 Main Street Suite H  
Hailey, ID 83333  
(208) 788-4421

## GENERAL SERVICES AGREEMENT

This General Services Agreement ("Agreement"), is entered into and effective this \_\_\_\_ day of May 2014, by and between Benchmark Associates, P.A. (hereinafter "BENCHMARK") with its principal place of business located at 100 Bell Drive, Ketchum, Idaho 83340 and The City of Hailey (hereinafter "Client") with its principal place of business located at 115 Main Street, Suite H, Hailey, ID 83333.

### SECTION 1: PERFORMANCE OF SERVICES

#### 1.1 Effective Date

The effective date of this Agreement shall be the date first above written. This Agreement shall terminate on September 30, 2014, and continue for successive one (1) year terms thereafter unless either party provides thirty (30) days advance notice of its intent to terminate this Agreement.

#### 1.2 Services to be Performed by Engineer/Surveyor

The general engineering and general surveying services required by Client shall be performed as Client may from time to time request, and as mutually agreed between Client and BENCHMARK. Client and BENCHMARK understand that GALENA ENGINEERING, INC. shall be the primary City Engineer for the City of Hailey, but in the event GALENA ENGINEERING, INC. represents a third party who is seeking approval or who is reasonably likely to need approval from the Client, BENCHMARK shall act as City Engineer.

#### 1.3 Standard Of Care

BENCHMARK represents that it will perform its services in accordance with generally accepted professional practices existing at the time of performance for the locality where the services are performed. NO OTHER REPRESENTATION, EXPRESS OR IMPLIED, IS MADE OR INTENDED BY THE RENDERING OF THE SERVICES PROVIDED.

#### 1.4 Authorization To Perform

BENCHMARK represents it is appropriately licensed and registered to perform its Services in the location(s) contemplated by this Agreement.

#### 1.5 Site Observation

If construction or site inspections/observations are required within the scope of BENCHMARK'S Services, BENCHMARK shall make visits to the site at intervals appropriate to the various stages of construction as BENCHMARK deems necessary in order to observe the progress of Contractor(s)' work. BENCHMARK shall not, during such visits or as a result of such observations of Contractor(s)' work in progress, supervise, direct or have control over Contractor(s)' work. BENCHMARK shall not have any authority over or responsibility for the means,

methods, techniques, sequences, or procedures of construction selected by Contractor(s), for safety precautions and programs incident to the work of Contractor(s) or for any failure of Contractor(s) to comply with laws, rules, regulations, ordinances, codes or orders applicable to Contractor(s) furnishing and performing their Work. Accordingly, BENCHMARK can neither guarantee the performance of the construction contracts by Contractor(s) nor assume responsibility for Contractor(s)' failure to furnish and perform their work in accordance with the Contract Documents

It is understood and agreed that BENCHMARK shall have no constructive use or control of Owner's site, and therefore shall have no responsibility whatsoever for construction site safety. Such responsibility has been wholly vested in the general contractor.

### SECTION 2: CLIENT RESPONSIBILITIES

Client shall timely provide all criteria and information as may be identified by BENCHMARK. BENCHMARK may use such information, requirements, reports, data, surveys and instructions in performing its Services and is entitled to rely upon the accuracy and completion thereof. Client shall designate a person to act with authority on Client's behalf with respect to all aspects of the project. Client shall examine and respond promptly to BENCHMARK's submittals and requests. Client shall give prompt written notice to BENCHMARK whenever Client observes or otherwise becomes aware of any defect in the Work.

### SECTION 3: COMPENSATION

In consideration for the Services performed by BENCHMARK, Client shall pay BENCHMARK the compensation based on the rates shown on attached Exhibit "A". Invoices will be submitted by BENCHMARK periodically, approximately once a month and are due within thirty (30) calendar days of invoice date. If Client objects to all or any portion of an invoice, Client shall notify BENCHMARK within fourteen (14) calendar days of invoice date, identify the cause of disagreement, and pay when due that portion of the invoice not in dispute. All outstanding balances will accrue a finance charge of 1.0% per month for each month the invoice is outstanding. With the exception of sales tax specifically relating to procurement, BENCHMARK shall pay its appropriate taxes, fees or assessments imposed by local, state, or federal government in effect at the time BENCHMARK renders its professional services. Any taxes, fees, or assessments enacted by local, state, or federal government subsequent to the date of this Agreement, will be added to amounts due to BENCHMARK under this Agreement.

#### SECTION 4: DELAYS

BENCHMARK shall not be responsible for delays caused by factors beyond BENCHMARK's reasonable control, including but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, accidents, acts of God, failure of any governmental or other regulatory authority to act in a timely manner, failure of the Client to furnish timely information or approve or disapprove of BENCHMARK's Services or work product promptly, or delays caused by faulty performance by the Client or by contractors of any level. When such delays beyond BENCHMARK's reasonable control occur, the Client agrees that BENCHMARK shall not be responsible for any damages, nor shall BENCHMARK be deemed to be in default of this Agreement. In the event of such delay, the Schedule shall be extended for a period of time equal to such delay and BENCHMARK shall be compensated for any costs, expenses or damages incurred as a result of such delay.

#### SECTION 5: Reserved.

#### SECTION 6: SUSPENSION AND TERMINATION

##### 6.1 Termination For Cause

Either party shall have the right to terminate this Agreement should the other fail to cure any material breach of this Agreement within seven (7) days notice from the non-breaching party.

##### 6.2 Termination For Convenience

Client shall have the right to terminate this Agreement for convenience after providing BENCHMARK thirty (30) days written notice.

##### 6.3 Termination Compensation

In case of such termination, BENCHMARK shall be paid:

- (a) For completed and acceptable Services executed in accordance with the Contract Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Services;
- (b) For expenses sustained prior to the effective date of termination in performing Services and furnishing labor, materials or equipment as required by the Contract Documents in connection with uncompleted Services, plus fair and reasonable sums for overhead and profit on such expenses;
- (c) For all claims, costs, losses and damages incurred in settlement of terminated contracts with subcontractors, suppliers and others; and
- (d) For reasonable expenses directly attributable to termination.

#### SECTION 7: INDEMNIFICATION

BENCHMARK agrees, to the fullest extent permitted by law, to indemnify and hold the Client harmless from any claim, damage, liability or cost (including reasonable attorneys' fees and costs of defense) to the extent caused by BENCHMARK's negligent acts, errors or omissions in the performance of professional services under this Agreement and those of its subconsultants or anyone for whom BENCHMARK is legally liable. Notwithstanding the above, BENCHMARK's obligation to defend, indemnify and hold harmless shall extend only to BENCHMARK's percentage of negligence contributing to such claim, damage, loss or expense on a comparative basis of fault and responsibility between BENCHMARK and Client. It is the express intent of this indemnity clause that BENCHMARK shall not be obligated to indemnify Client for Client's own negligence.

Client agrees, to the fullest extent permitted by law, to indemnify and hold BENCHMARK harmless from any claim, damage, liability or cost (including reasonable attorneys' fees and costs of defense) arising in whole or in part and in any manner from the acts or failure to act, omissions, breach or default of Client, or those of its contractors, subcontractors or consultants or anyone for whom the Client is legally liable, and arising from the project that is the subject of this Agreement. In addition, Client agrees to indemnify, defend and hold BENCHMARK harmless from or against any claim or allegation that any process, technology, equipment, materials or information provided by Client in connection with this Agreement constitutes an infringement of any U.S. patent, trade secret, trademark, copyright or other proprietary rights of any third party.

The indemnification obligations of BENCHMARK provided in this Section shall expire on the fifth year anniversary from the termination or completion of BENCHMARK's professional services provided under this Agreement. Notwithstanding the foregoing indemnification, neither party shall be liable to the other for consequential, special or indirect losses, including and not limited to loss of use, loss of revenue and loss of profit, even if advised of the possibility of such loss.

#### SECTION 8: INSURANCE

##### 8.1 Limits

During the performance of the Services under this Agreement, BENCHMARK shall maintain the following insurance:

- (a) General Liability insurance with bodily injury and property damage of not less than \$1,000,000 for each occurrence and not less than \$2,000,000 in the aggregate.
- (b) Automobile Liability insurance with bodily

injury and property damage limits of not less than \$1,000,000 for each accident.

(c) Workers' Compensation insurance in accordance with statutory requirements and Employer's Liability Insurance with limits of not less than \$500,000 for each occurrence.

(d) Professional Liability insurance with limits of not less than \$1,000,000 annual aggregate.

### 8.2 Endorsements

Client shall be named as an additional insured on policies(a) and (b) listed above to the extent claims arise from the Services which are performed pursuant to this Agreement.

### 8.3 Proof Of Insurance

BENCHMARK shall furnish to Client a certificate of insurance evidencing the above and including a provision that such insurance shall not be canceled without at least thirty (30) days written notice to Client.

## SECTION 9: LIMITATION OF LIABILITY

Client agrees to limit BENCHMARK's liability for insurable events arising from BENCHMARK's performance to the insurance limits stated in Section 8, above. BENCHMARK's liability for non-insurable events including breach of contract or breach of warranty shall not exceed \$100,000.00.

Neither BENCHMARK nor CLIENT nor either party's suppliers, agents, officers, and directors shall have any liability to the other party or any other person or entity for any indirect, incidental, special, or consequential damages whatsoever, including but not limited to loss of revenue or profit, loss of use, failure to realize anticipated profits or savings, loss of or damage to data or other commercial or economic loss, even if BENCHMARK has been advised of the possibility of such damages, that such damages are foreseeable, or of potential claims by a third party.

## SECTION 10: INDEPENDENT CONTRACTOR

BENCHMARK agrees it shall operate as an independent contractor and will not be an agent, joint venturer, partner or employee of the Client, nor will it be entitled to any employee benefits provided by the Client. BENCHMARK shall be responsible for payment of any and all unemployment, social security, withholding, and other payroll taxes for its employees as applicable.

## SECTION 11: DOCUMENTS

### 11.1 Ownership and Reuse of Documents

(a) The Client acknowledges that BENCHMARK's drawings and specifications, including all documents on electronic media, are instruments of service and, unless otherwise provided, BENCHMARK shall be

deemed the author of the drawings and specifications and shall retain all common law, statutory and other reserved rights, including the copyright. The Client shall be permitted to retain copies, including reproducible copies, of the drawings and specifications for the Client's information and reference. The Client agrees to waive any claim against BENCHMARK arising from any unauthorized transfer, reuse or modification of the drawings and specifications.

(b) Electronic files furnished by BENCHMARK shall be subject to an acceptance period of thirty (30) days during which the Client agrees to review and/or perform appropriate acceptance tests. BENCHMARK shall correct any discrepancies or errors detected and reported within the acceptance period at no charge to the Client. After the acceptance period, the electronic files shall be deemed to be accepted and BENCHMARK shall have no obligation to correct errors or maintain electronic files. The Client is aware that differences may exist between the electronic files delivered and the printed hard-copy documents. In the event of a conflict between the signed or sealed hard-copy documents prepared by BENCHMARK and the electronic files, the hard-copy documents shall govern.

(c) The Client agrees, to the fullest extent permitted by law, to indemnify and hold BENCHMARK harmless from any claim, liability or cost (including reasonable attorneys' fees and defense costs) arising or allegedly arising out of any reuse or modification of the documents by the Client or any person or entity that acquires or obtains the documents from or through the Client.

### 11.2 Documents Supplied by Others

The parties agree that from time to time BENCHMARK may need information from Client for the rendering of the Services hereunder and Client agrees to provide BENCHMARK such information as is then available. Client recognizes that it is impossible for BENCHMARK to assure the sufficiency and accuracy of such information. Accordingly, Client waives any claim against BENCHMARK for liability or injury or loss allegedly arising from errors, omissions, or inaccuracies in documents, drawings, plans or data provided to BENCHMARK by Client or by other third parties. If any of the work or Services must be redone because of errors in drawings, plans, or data supplied to BENCHMARK, then BENCHMARK shall be compensated for such extra Services and the Schedule shall be adjusted accordingly.

## SECTION 12: CONFIDENTIALITY

It is understood that the parties may supply to each other confidential or proprietary data during the performance of this Agreement. The parties agree to protect such data from disclosure to outside parties, except where access to such data is necessary for the

purpose of performing the services hereunder. Such data shall be marked "Confidential" or "Proprietary" or defined as confidential or proprietary in a separate writing. This confidentiality requirement shall not apply to data that is known to the parties prior to the execution of this Agreement or is in the public domain. In the event such data is subpoenaed by court order, or other legal process, the receiving party shall notify the other party within five (5) business days of receipt of such court order or legal process.

### **SECTION 13: DISPUTE RESOLUTION**

#### **13.1 Exclusive Manner of Dispute Resolution**

Unless otherwise agreed to by the parties, the sole means and method of resolving disputes shall be as set forth in this Agreement. Any lawsuit filed to adjudicate a claim shall be promptly dismissed by the filing party.

#### **13.2 Negotiation Between Executives**

The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement, or any breach hereof or any Work performed hereunder, promptly by negotiation between executives who have authority to settle the controversy. Any party may give the other party written notice of any dispute not resolved during the normal course of business, such notice to include the statement of that party's position and summary of arguments, and the name and title of the executive who will be representing that party and of any other person who will accompany the executive. The receiving party shall respond in kind within fifteen (15) days of the date of notice. Within thirty (30) days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place and use good faith efforts to resolve the dispute. Negotiations pursuant to this Section shall be confidential and shall be treated as compromise and settlement negotiations for purposes of Law and rules of evidence.

#### **13.3 Mediation**

In the event that the parties are unable to settle the dispute through direct negotiations as set forth above, all remaining controversies or claims shall then be submitted to mediation following the Commercial Mediation Rules published by the American Arbitration Association. Unless the parties agree otherwise, mediation shall be held in Hailey, Idaho. This Agreement to mediate and any other agreement or consent to mediate entered into in accordance with this Agreement shall be specifically enforceable under the prevailing law of any court having jurisdiction. The parties shall share equally the costs and fees of the mediator.

#### **13.4 Litigation**

In the event mediation proves unsuccessful within sixty (60) days of the appointment of the mediator, then all claims, disputes and other matters in question arising out of, or relating to, this Agreement or the

breach thereof shall be decided by litigation, unless the parties mutually agree otherwise. The court of competent jurisdiction shall not have the authority to consider or award punitive damages as part of the court's judgment. Unless the parties agree otherwise, litigation shall be held in Fifth District Court, Hailey, Idaho.

### **SECTION 14: MISCELLANEOUS**

#### **14.1 Notices**

Any notice hereunder shall be deemed served immediately if hand-delivered in writing to an officer or other duly appointed representative of the party to whom the notice is directed. Notices shall also be deemed served five (5) business days after transmittal by United States mail, or within two (2) days if by any overnight service(s), to the business address identified below, or to the address specified in the Task Order for a particular project:

**For BENCHMARK:**  
**Benchmark Associates, P.A.**  
**P.O. Box 733**  
**Ketchum, ID 83340**

**For Client:**  
**City of Hailey**  
**115 Main Street, Suite H**  
**Hailey, ID 83333**

#### **14.2 Applicable Law and Venue**

This Agreement and all rights, obligations, liabilities, and responsibilities of the parties hereto shall be governed by, construed, and enforced in accordance with the laws and venue of the State of Idaho.

#### **14.3 Subcontractors**

At its request, Client shall have the right to pre-approve the subcontracting of any services to be performed under this Agreement, which approval shall not be unreasonably withheld.

#### **14.4 Successors and Assigns**

Client and BENCHMARK each binds itself and its partners, successors, executors, administrators, assigns and legal representatives to the other party to this Agreement and to the partners, successors, executors, administrators, assigns, and legal representatives of such other party, in respect to all covenants, agreements, and obligations of this Agreement. This Agreement shall not be assigned by either party without the other party's express written consent. Provided, however, BENCHMARK shall be entitled to subcontract portions of its work to other companies in which BENCHMARK has an ownership interest without first obtaining the written consent provided for under this Section.

#### **14.5 Equal Opportunity Employment**

BENCHMARK and Client expressly agree not to

discriminate against any employee or applicant for employment because of race, color, religion, gender, national origin, or disability and shall during the performance of this Agreement comply with all applicable Executive Orders and federal regulations.

**14.6 Entire Agreement**

The terms and conditions herein represent the entire agreement between the parties, and shall not be modified except by written instrument duly executed by both parties.

**14.7 Severability**

If any provision of this Agreement is held to be in violation of any applicable law rendering such provision void and unenforceable, such provision shall be deemed severed from the Agreement and the remainder of the Agreement shall remain in full force and effect.

**14.8. Survival**

All representations, indemnifications, warranties and guarantees made in, required by or given in

accordance with the Contract Documents, as well as all continuing obligations indicated in the Contract Documents, will survive final payment, completion and acceptance of the Services and termination or completion of the Agreement.

**14.9 Attorneys Fees**

In the event of any dispute with regard to the interpretation or enforcement of this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorneys' fees incurred therein, whether or not a lawsuit is actually filed, and on any appeals, and in any bankruptcy proceeding.

**14.10 Counterparts.**

This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same document.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed as of the date first above written.

**City of Hailey**

By: \_\_\_\_\_  
Fritz X. Haemmerle, Mayor

ATTEST:

\_\_\_\_\_  
Mary Cone, City Clerk

**Benchmark Associates, P.A.**

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

Printed: \_\_\_\_\_

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

EXHIBIT A

**BENCHMARK ASSOCIATES, P.A**  
CIVIL ENGINEERING, LAND PLANNING, SURVEYING, MAPPING  
(208)726-9512 : PO BOX 733, KETCHUM, IDAHO 83340  
2014 Hourly Billing Rates

Principal	\$117.00
Professional Level 1 Licensed Professional/P.E./P.L.S./A.I.C.P.	\$106.00
Professional Level 2 Senior Engineer/Senior Surveyor/Project Manager/EIT	\$98.00
Professional Level 3	\$86.00
Professional Level 4	\$83.00
Professional Level 5	\$77.00
Tech. Level &Production Support	\$54.00
GPS & TCA Instrument	\$60.00

**NOTES**

- Overtime charges or extra work for a client will accrue only with specific authorization from client
- Any time in excess of eight hours per day or any time on a holiday, Saturday or Sunday may be charged at 150% if above quoted rates.
- "Overnight, out of town" days will be charged at a premium rate to be determined prior to commencement of such work. Said rate to depend on complexity and liability of case.
- All rates are portal to portal
- Reimbursable costs, graphic reproduction, and incidentals will be charged at cost plus 15%.
- Accounts are billed monthly. A rebilling charge (at annual rate of 18%) shall be added to all accounts no paid within thirty days.