TOWN OF HOT SULPHUR SPRINGS, COLORADO
RESOLUTION NO. 2012-9-2

A RESOLUTION OF THE BOARD OF TRUSTEES OF THE TOWN OF HOT SULPHUR SPRINGS, COLORADO, RATIFYING THE APPROVAL OF THE PROFESSIONAL SERVICES AGREEMENT FOR PROPOSED WASTEWATER TREATMENT PLANT UPGRADES AND REPAIRS WITH MERRICK & COMPANY AND AUTHORIZING THE MAYOR TO EXECUTE THE SAME

WHEREAS, as directed by the Colorado Department of Public Health and Environment ("CDPHE"), the Town has received an enforcement order requiring repairs and upgrades to the existing wastewater treatment plant ("WWTP") and the sewer collection system to be capable of satisfying the WWTP discharge requirements; and

WHEREAS, the Town has applied for, and received approval for, a Water Pollution Control Revolving Fund ("WPCR") loan from the Colorado Water Resources and Power Development Authority ("Authority"), for proposed repairs and improvements to the Town's Wastewater Treatment Plant and sewer collection system; and

WHEREAS, the Town desires to have certain professional services completed in order to receive final approval from CDPHE for Authority funding, to receive and spend the funding, and to complete the WWTP Repairs and Upgrades; and

WHEREAS, the Town desires to engage the Contractor to provide the services subject to the terms and conditions of a Professional Services Agreement attached hereto as Exhibit A ("PSA"); and

WHEREAS, the Town Board wishes to adopt this resolution ratifying its action in approving the PSA and its authorization to the Mayor to execute the same on behalf of the Town.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE TOWN OF HOT SULPHUR SPRINGS, COLORADO:

Section 1. The Board of Trustees (a) approves the Professional Services Agreement for Proposed Wastewater Treatment Plant Upgrades and Repairs with Merrick & Company as attached hereto as Exhibit A, including all exhibits thereto, (b) authorizes the Mayor and the Town Attorney to make such changes as may be needed to correct any nonmaterial errors or language that do not increase the obligations of the Town, and (c) authorizes the Mayor to execute the same on behalf of the Town.

Section 2. Adoption of this Resolution ratifies the action of the Board of Trustees taken by motion on August 16, 2012 and supersedes such motion if and only to the extent any conflict exists.

Section 3. If any section, paragraph, clause or provision of this Resolution shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such section, paragraph, clause or provision shall not affect any of the remaining issues of this Resolution.

Section 4. This Resolution shall be effective immediately upon approval of the Board of Trustees for the Town of Hot Sulphur Springs.

ADOPTED by a vote of 10 in favor and 0 against, and 0 abstaining, this 20th day of September, 2012.

By: ________________

Herschel Deputy, Mayor

ATTEST:
By: ________________

Sandy White, Town Clerk

MS Word: Resolution 2012: 2012-9-2 Resolution ratifying approval of Merrick PSA
1/2
TOWN OF HOT SULPHUR SPRINGS
PROFESSIONAL SERVICES AGREEMENT
Independent Contractor
Time & Materials – Not to Exceed Contract
Town Board of Trustees Approval

Project/Services Name: Proposed Wastewater Treatment Plant Upgrades and Repairs

THIS PROFESSIONAL SERVICES AGREEMENT ("Agreement") is entered into by and between MERRICK & COMPANY, a Colorado corporation whose business address is 2450 S. Peoria Street, Aurora, Colorado 80014 (the "Contractor"), and the TOWN OF HOT SULPHUR SPRINGS, COLORADO ("Town"), a statutory municipality of the State of Colorado. The Town and the Contractor may be collectively referred to as the "Parties."

RECITALS AND REPRESENTATIONS

WHEREAS, the Town has applied for, and received approval for, a Water Pollution Control Revolving Fund ("WPCR") loan from the Colorado Water Resources and Power Development Authority ("Authority"), for proposed repairs and improvements to the Town’s Wastewater Treatment Plant and sewer collection system; and

WHEREAS, the Town has yet to complete any final agreements with the Authority for receipt of funding under WPCR; and

WHEREAS, as directed by the Colorado Department of Public Health and Environment ("CDPHE"), the Town has received an enforcement order requiring repairs and upgrades to the existing wastewater treatment plant ("WWTP") and the sewer collection system to be capable of satisfying the WWTP discharge requirements; and

WHEREAS, the Town desires to have certain professional services completed in order to receive final approval from CDPHE for Authority funding, to receive and spend the funding, and to complete the WWTP Repairs and Upgrades; and

WHEREAS, the Town desires to have performed the professional services as described in this Agreement; and

WHEREAS, the Contractor represents that the Contractor has the skill, ability, and expertise to perform the services described in this Agreement, within the deadlines provided by the Agreement; and

WHEREAS, the Town desires to engage the Contractor to provide the services described in this Agreement subject to the terms and conditions of the Agreement; and

WHEREAS, the Contractor expressly recognizes that the Town’s obligation to make any payments or provide any compensation hereunder shall be contingent on the Town receiving full funding for the WWTP Upgrades and Repairs as set forth in the Town’s WPCR application for such funding; and
WHEREAS, execution of this Agreement by the Town was approved by the Town Board of Trustees by motion at its meeting on August 16, 2012 and ratified by Resolution No. 2012-9-1 at its meeting on September 20, 2012.

NOW, THEREFORE, in consideration of the benefits and obligations of this Agreement, the Parties mutually agree as follows:

1.0 SERVICES AND CONTRACTOR PERFORMANCE

1.1 WPCRF Project and Deferred Compensation. The Parties acknowledge and agree that the Town has applied for and received approval for WPCRF funding through the Authority but that the Authority has yet to give final approval for the funding and the Town has not yet been assured of financing or entered into any agreements for receipt of funding under WPCRF. The Contractor therefore acknowledges and agrees that any compensation due for the provision of any services under this Agreement may be deferred until such time as the funding under WPCRF is available to the Town or until October 31, 2012, whichever occurs first.

1.2 Services. As directed by and under the supervision of the Mayor or his designee for the Town of Hot Sulphur Springs, the Contractor shall provide the Town with the services described in Exhibit A (the "Services").

1.3 Changes to Services. The Town may request a change or changes in the Services. Any changes that are mutually agreed upon between the Town and the Contractor shall be made in writing and upon execution by both Parties shall become an amendment to the Services described in this Agreement. To be effective, any written change must be signed by the Contractor and by the Town Board of Trustees, the Mayor or his designee, or by a person expressly authorized in writing to sign on behalf of the Town. Contractor will assist the Town with the development of scope and budget estimates for revisions to the Services or the scope of work, on request.

1.4 Independent Contractor. The Contractor shall perform the Services as an independent contractor and shall not be deemed by virtue of this Agreement to have entered into any partnership, joint venture, employer/employee or other relationship with the Town other than as a contracting party and independent contractor. The Town shall not be obligated to secure, and shall not provide, any insurance coverage or employment benefits of any kind or type to or for the Contractor or the Contractor’s employees, sub-consultants, contractors, agents, or representatives, including coverage or benefits related but not limited to: local, state, or federal income or other tax contributions; insurance contributions (e.g., FICA); workers’ compensation; disability, injury, or health; professional liability insurance, errors and omissions insurance; or retirement account contributions.

1.5 Standard of Performance. In performing the Services, the Contractor and any subcontractors performing Services hereunder shall use that degree of care, skill, and professionalism ordinarily exercised under similar circumstances by members of the same profession practicing in the State of Colorado. Contractor represents to the Town that the Contractor is, and its employees or subcontractors performing such Services are, properly licensed and/or registered.
within the State of Colorado for the performance of the Services (if licensure and/or registration is required by applicable law) and that the Contractor and employees possess the skills, knowledge, and abilities to competently, timely, and professionally perform the Services in accordance with this Agreement.

1.6 **Subcontractors.** The Parties recognize and agree that Subcontractors may be utilized by Contractor for the performance of certain Services hereunder but the engagement or use of Subcontractors will not relieve or excuse the Contractor from performance of any obligations imposed in accordance with this Agreement and Contractor shall remain solely responsible for ensuring that any Subcontractors engaged to perform Services hereunder shall perform such Services in accordance with all terms and conditions of this Agreement.

2.0 **COMPENSATION**

2.1 **Commencement of and Compensation for Services.** The Contractor is authorized to commence performance of the Services as described in Exhibit A subject to the requirements and limitations on compensation as provided by this Section 2.0 and its subsections.

A. **Time and Materials Contract – Not to Exceed Amount.** The Contractor shall perform the Services and shall invoice the Town for work performed based on the rates and/or compensation methodology described in Exhibit B. Total compensation (including all reimbursable expenses) shall not exceed One Hundred and Seven Thousand and Four Hundred and Twenty Dollars ($107,420.00).

B. **Reimbursable Expenses.** The following shall be considered "reimbursable expenses" for purposes of this Agreement and may be billed to the Town without administrative mark-up and must be accounted for by the Contractor and proof of payment shall be provided by the Contractor with the Contractor's monthly invoices:

- Vehicle Mileage (billed at not more than the prevailing per mile charge permitted by the Internal Revenue Service as a deductible business expense)
- Printing and Photocopying Related to the Services
- Long Distance Telephone Charges Related to the Services
- Charges incidental to securing needed information (e.g., charges imposed to obtain recorded documents)
- Postage and Delivery Services

C. **Non-reimbursable Costs, Charges, Fees, or Other Expenses.** Any fee, cost, charge, or expense incurred by the Contractor not otherwise specifically authorized by this Agreement shall be deemed a non-reimbursable cost and shall be borne by the Contractor and shall not be billed or invoiced to the Town and shall not be paid by the Town.

D. **Increases in Compensation or Reimbursable Expenses.** Any increases or modification of compensation or reimbursable expenses shall be subject
to the approval of the Town and shall be made only by written amendment of this Agreement executed by both Parties.

2.2 **Payment Processing.** The Contractor shall submit invoices and requests for payment in a form acceptable to the Town. Invoices shall not be submitted more often than once each month unless otherwise approved by this Agreement or in writing by the Town. Unless otherwise directed or accepted by the Town, all invoices shall contain sufficient information to account for all Contractor time (or other appropriate measure(s) of work effort) and all authorized reimbursable expenses for the Services during the stated period of the invoice. Following receipt of a Contractor’s invoice, the Town shall promptly review the Contractor’s invoice. Upon the Town entering into an agreement for funding under the WPCRF and in the event such agreement requires different processes, rules, regulations or requirements for payment processing, the Contractor and the Town agree to amend this Agreement to reflect such processes, rules, regulations or requirements.

2.3 **Payment Timing and Contingency.** The Town shall pay the Contractor within thirty (30) days of the receipt of an invoice for any undisputed charges. Such payment obligations of the Town shall begin and are contingent upon the receipt by the Town of sufficient funding under WPCRF to allow the Town to pay such submitted invoices with WPCRF funds. In the event that less than full funding is received as is set forth and requested in the Town’s application for WPCRF funding, all contractors with whom the Town enters into agreements to provide services for completion of the WWTP Upgrades shall be paid on a pro rata basis determined by the level of funding actually received.

2.4 **Dispute of Invoice.** The Town may dispute any Contractor time, reimbursable expense, and/or compensation requested by the Contractor described in any invoice and may request additional information from the Contractor substantiating any and all compensation sought by the Contractor before accepting the invoice. When additional information is requested by the Town, the Town shall advise the Contractor in writing, identifying the specific item(s) that are in dispute and giving specific reasons for any request for information. The Town shall pay the Contractor within thirty (30) days of the receipt of an invoice for any undisputed charges or, if the Town disputes an item or invoice and additional information is requested, within thirty (30) days of acceptance of the item or invoice by the Town following receipt of the information requested and resolution of the dispute. To the extent possible, undisputed charges within the same invoice as disputed charges shall be timely paid in accordance with this Agreement. Payment by the Town shall be deemed made and completed upon hand delivery to the Contractor or designee of the Contractor or upon deposit of such payment or notice in the U.S. Mail, postage pre-paid, addressed to the Contractor.

3.0 **CONTRACTOR’S GENERAL RESPONSIBILITIES**

3.1 The Contractor shall become fully acquainted with the available information related to the Project. The Contractor is obligated to affirmatively request from the Town such information that the Contractor, based on the Contractor’s professional experience, should reasonably expect is available and which would be relevant to the performance of the Services.
3.2 The Contractor shall perform the Services in accordance with this Agreement and shall promptly inform the Town concerning ambiguities and uncertainties related to the Contractor's performance that are not addressed by the Agreement.

3.3 The Contractor shall provide all of the Services in a timely and professional manner.

3.4 The Contractor shall promptly comply with any written Town request for the Town or any of its duly authorized representatives to reasonably access and review any books, documents, papers, and records of the Contractor that are pertinent to the Contractor's performance under this Agreement for the purpose of the Town performing an audit, examination, or other review of the Services.

3.5 The Contractor shall comply with all applicable federal, state and local laws, ordinances, regulations, and resolutions.

3.6 The Contractor shall be responsible at the Contractor's expense for obtaining, and maintaining in a valid and effective status, all licenses and permits necessary to perform the Services unless specifically stated otherwise in this Agreement.

4.0 TERM AND TERMINATION

4.1 Term. This Agreement shall be effective on the 21st day of September, 2012 at 12:01 a.m., (the "Effective Date") and shall terminate at 11:59 p.m. on September 30, 2013, or on a prior date of termination as may be permitted by this Agreement; provided, however, that the Parties may mutually agree in writing to the monthly extension of this Agreement for up to twelve (12) consecutive calendar months.

4.2 Continuing Services Required. The Contractor shall perform the Services in accordance with this Agreement commencing on the Effective Date until such Services are terminated or suspended in accordance with this Agreement. The Contractor shall not temporarily delay, postpone, or suspend the performance of the Services without the written consent of the Town Board of Trustees, the Mayor or his designee, or a person expressly authorized in writing to direct the Contractor's services.

4.3 Town Unilateral Termination. This Agreement may be terminated by the Town for any or no reason upon written notice delivered to the Contractor at least ten (10) days prior to termination. In the event of the Town's exercise of the right of unilateral termination as provided by this paragraph:

A. Unless otherwise provided in any notice of termination, the Contractor shall provide no further services in connection with this Agreement after receipt of a notice of termination; and

B. All finished or unfinished documents, data, studies and reports prepared by the Contractor pursuant to this Agreement shall be delivered by the Contractor to the Town and shall become the property of the Town; and
C. The Contractor shall submit to the Town a final accounting and final invoice of charges for all outstanding and unpaid Services and reimbursable expenses performed prior to the Contractor's receipt of notice of termination and for any services authorized to be performed by the notice of termination as provided by Section 4.3(A) above. Such final accounting and final invoice shall be delivered to the Town within thirty (30) days of the date of termination; thereafter, no other invoice, bill, or other form of statement of charges owing to the Contractor shall be submitted to or accepted by the Town.

4.4 **Termination for Non-Performance.** Should a party to this Agreement fail to materially perform in accordance with the terms and conditions of this Agreement, this Agreement may be terminated by the performing party if the performing party first provides written notice to the non-performing party which notice shall specify the non-performance, provide both a demand to cure the non-performance and reasonable time to cure the non-performance, and state a date upon which the Agreement shall be terminated if there is a failure to timely cure the non-performance. For purpose of this Section 4.4, “reasonable time” shall be not less than five (5) business days. In the event of a failure to timely cure a non-performance and upon the date of the resulting termination for non-performance, the Contractor prepare a final accounting and final invoice of charges for all performed but unpaid Services and authorized reimbursable expenses. Such final accounting and final invoice shall be delivered to the Town within thirty (30) days of the date of termination; thereafter, no other invoice, bill, or other form of statement of charges owing to the Contractor shall be submitted to or accepted by the Town. Provided that notice of non-performance is provided in accordance with this Section 4.4, nothing in this Section 4.4 shall prevent, preclude, or limit any claim or action for default or breach of contract resulting from non-performance by a Party.

4.5 **Unilateral Suspension of Services.** The Town may suspend the Contractor's performance of the Services at the Town's discretion and for any reason by delivery of written notice of suspension to the Contractor which notice shall state a specific date of suspension. Upon receipt of such notice of suspension, the Contractor shall immediately cease performance of the Services on the date of suspension except: (1) as may be specifically authorized by the notice of suspension (e.g., to secure the work area from damage due to weather or to complete a specific report or study); or (2) for the submission of an invoice for Services performed prior to the date of suspension in accordance with this Agreement.

4.6 **Reinstatement of Services Following Town's Unilateral Suspension.** The Town may at its discretion direct the Contractor to continue performance of the Services following suspension. If such direction by the Town is made within (30) days of the date of suspension, the Contractor shall recommence performance of the Services in accordance with this Agreement. If such direction to recommence suspended Services is made more than thirty-one (31) days following the date of suspension, the Contractor may elect to: (1) provide written notice to the Town that such suspension is considered a unilateral termination of this Agreement pursuant to Section 4.3; or (2) recommence performance in
accordance with this Agreement; or (3) if suspension exceeded sixty (60) consecutive days, request from the Town an equitable adjustment in compensation or a reasonable re-start fee and, if such request is rejected by the Town, to provide written notice to the Town that such suspension and rejection of additional compensation is considered a unilateral termination of this Agreement pursuant to Section 4.3. Nothing in this Agreement shall preclude the Parties from executing a written amendment or agreement to suspend the Services upon terms and conditions mutually acceptable to the Parties for any period of time.

4.7 Delivery of Notice of Termination. Any notice of termination permitted by this Section 4.0 and its subsections shall be addressed to the person signing this Agreement on behalf of either Town or Contractor at the address shown below or such other address as either party may notify the other of and shall be deemed given upon delivery if personally delivered, or forty-eight (48) hours after deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested.

5.0 INDEMNIFICATION

5.1 Contractor Indemnification. Contractor shall indemnify, defend and hold harmless the Town and its affiliates from and against all liability, claims, adjudications and demands (including reasonable attorneys’ fees and expenses) caused by any errors, omissions, willful misconduct or negligent acts of the Contractor in providing the Services contemplated by this Agreement. The Contractor shall investigate, handle, respond to, and provide defense for and defend against any such liability, claims, and demands, and to bear all other costs and expenses related thereto, including court costs and attorneys' fees so long as Contractor is deemed liable under this Agreement. The Contractor's indemnification obligations hereunder shall not apply to the extent any damages have been caused by the act, omission, or other fault of the Town and affiliates, nor shall such obligations apply to any claim contesting the validity or constitutionality of the Town's ordinances or resolutions relating to the Services.

5.2 Town Indemnification. The Town cannot and by this Agreement does not agree to indemnify, hold harmless, exonerate or assume the defense of the Contractor or any other person or entity whatsoever for any purpose whatsoever.

6.0 INSURANCE

6.1 Insurance Generally. The Contractor shall obtain and shall continuously maintain during the term of this Agreement insurance of the kind and in the amounts specified as follows:*(Required Insurance)*:

A. Worker’s Compensation Insurance in the amount required by applicable law for all employees and other persons as may be required by law. Such policy of insurance shall be endorsed to include the Town as a Certificate Holder.

B. Comprehensive General Liability insurance with the combined single limits of Two Million Dollars ($2,000,000) each occurrence and aggregate. The policy shall be applicable to all premises and
all operations of the Contractor. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, independent contractors, products, and completed operations. The policy shall contain a severability of interests provision. Coverage shall be provided on an "occurrence" basis as opposed to a "claims made" basis. Such insurance shall be endorsed to name the Town as Certificate Holder and name the Town, and its elected officials, officers, employees and agents as additional insured parties.

C. Comprehensive Automobile Liability insurance with the combined single limits for bodily injury and property damage of Two Million Dollars ($2,000,000) each occurrence with respect to each of the Contractor’s owned, hired and non-owned vehicles assigned to or used in performance of the Services. The policy shall contain a severability of interests provision. Such coverage must include all automotive equipment used in the performance of the Agreement, both on and off any work site, and such coverage shall include non-ownership and hired cars (vehicles and equipment) coverage. Such insurance shall be endorsed to name the City, and its elected officials, officers, employees and agents as additional insured parties.

D. Professional Liability (errors and omissions) Insurance with a limit of coverage of Two Million Dollars ($2,000,000) per claim and annual aggregate. Such policy of insurance shall be obtained and maintained for one (1) year following completion of all Services under this Agreement. Such policy of insurance shall be endorsed to include the Town as a Certificate Holder.

E. Excess Liability Insurance with limits of Five Million Dollars ($5,000,000).

The Required Insurance shall be procured and maintained with insurers with an A- or better rating as determined by Best’s Key Rating Guide. All Required Insurance shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Contractor.

6.2 Additional Requirements for All Policies. In addition to specific requirements imposed on insurance by this Section 6.0 and its subsections, insurance shall conform to all of the following:

A. All policies of insurance shall be primary insurance, and any insurance carried by the Town, its officers, or its employees shall be excess and not contributory insurance to that provided by the Contractor; provided, however, that the Town shall not be obligated to obtain or maintain any insurance whatsoever for any claim, damage, or purpose arising from or related to this Agreement and the Services. The Contractor shall not be an insured party for any Town-obtained insurance policy or coverage.
B. The Contractor shall be solely responsible for any deductible losses.

C. No policy of insurance shall contain any exclusion for bodily injury or property damage arising from completed operations.

6.3 Failure to Obtain or Maintain Insurance. The Contractor's failure to obtain and continuously maintain policies of insurance in accordance with this Section 6.0 and its subsections shall not limit, prevent, preclude, excuse, or modify any liability, claims, demands, or other obligations of the Contractor arising from performance or non-performance of this Agreement. Failure on the part of the Contractor to obtain and to continuously maintain policies providing the required coverage, conditions, restrictions, notices, and minimum limits shall constitute a material breach of this Agreement upon which the Town may immediately terminate this Agreement, or, at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the Town shall be repaid by Contractor to the Town immediately upon demand by the Town, or at the Town's sole discretion, the Town may offset the cost of the premiums against any monies due to the Contractor from the Town pursuant to this Agreement.

6.4 Insurance Certificates. Prior to commencement of the Services, the Contractor shall submit to the Town certificates of insurance for all Required Insurance. Insurance limits, term of insurance, insured parties, and other information sufficient to demonstrate conformance with this Section 6.0 and its subsections shall be indicated on each certificate of insurance. Certificates of insurance shall reference the Project Name as identified on the first page of this Agreement. The Town may request and the Contractor shall provide within three (3) business days of such request a current certified copy of any policy of Required Insurance and any endorsement of such policy. The Town may, at its election, withhold payment for Services until the requested insurance policies are received and found to be in accordance with the Agreement.

7.0 OWNERSHIP OF DOCUMENTS/COPYRIGHT

Any materials, methodology and other proprietary work provided by the Contractor to the Town, unless specifically created and delivered pursuant to the Services outlined in this Agreement, may be protected by a copyright held by the Contractor. The Contractor reserves all rights granted to it any copyright. The Town shall not reproduce, sell, or otherwise make copies of any copyrighted material, subject to the following exceptions: (1) for exclusive use internally by Town staff and/or employees; or (2) pursuant to a request under the Colorado Open Records Act, §24-72-203, C.R.S., to the extent that such statute applies; or (3) pursuant to law, regulation, or court order. The Contractor waives any right to prevent its name from being used in connection with the Services.

8.0 CONFLICT OF INTEREST

The Contractor shall refrain from providing services to other persons, firms, or entities that would create a conflict of interest for the Contractor with regard to providing the Services pursuant to this Agreement. The Contractor shall not offer or provide anything of benefit to any Town official or employee that would place the official or employee in a position of violating the
public trust as provided by C.R.S. § 24-18-109, as amended, or any Town–adopted Code of Conduct or ethical principles.

9.0 REMEDIES

In addition to any other remedies provided for in this Agreement, and without limiting its remedies available at law, the Town may exercise the following remedial actions if the Contractor substantially fails to perform the duties and obligations of this Agreement. Substantial failure to perform the duties and obligations of this Agreement shall mean a significant, insufficient, incorrect, or improper performance, activities or inactions by the Contractor. The remedial actions include:

A. Suspend the Contractor's performance pending necessary corrective action as specified by the Town without the Contractor's entitlement to an adjustment in any charge, fee, rate, price, cost, or schedule; and/or

B. Withhold payment to the Contractor until the necessary services or corrections in performance are satisfactorily completed; and/or

C. Deny payment for those services which have not been satisfactorily performed, and which, due to circumstances caused by the Contractor, cannot be performed, or if performed would be of no value to the Town; and/or

D. Terminate this Agreement in accordance with this Agreement.

The foregoing remedies are cumulative and the Town, at its sole discretion, may exercise any or all of the remedies individually or simultaneously.

10.0 MISCELLANEOUS PROVISIONS

10.1 No Waiver of Rights: A waiver by any Party to this Agreement of the breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by either Party. The Town's approval or acceptance of, or payment for, services shall not be construed to operate as a waiver of any rights or benefits to be provided under this Agreement. No covenant or term of this Agreement shall be deemed to be waived by the Town except in writing signed by the Town Board of Trustees or by a person expressly authorized to sign such waiver by resolution of the Town Board of Trustees of the Town of Hot Sulphur Springs, and any written waiver of a right shall not be construed to be a waiver of any other right or to be a continuing waiver unless specifically stated.

10.2 No Waiver of Governmental Immunity: Nothing in this Agreement shall be construed to waive, limit, or otherwise modify any governmental immunity that may be available by law to the Town, its officials, employees, contractors, or agents, or any other person acting on behalf of the Town and, in particular, governmental immunity afforded or available pursuant to the Colorado Governmental Immunity Act, Title 24, Article 10, Part 1 of the Colorado Revised Statutes.
10.3 **Affirmative Action:** Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Contractor will take affirmative action to ensure applicants are employed, and employees are treated during employment without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

10.4 **Binding Effect:** The Parties agree that this Agreement, by its terms, shall be binding upon the successors, heirs, legal representatives, and assigns; provided that this Section 11.4 shall not authorize assignment, assignment being governed by the provisions of Section 11.9.

10.5 **No Third Party Beneficiaries:** Nothing contained in this Agreement is intended to or shall create a contractual relationship with, cause of action in favor of, or claim for relief for, any third party, including any agent, sub-consultant or subcontractor of Contractor. Absolutely no third party beneficiaries are intended by this Agreement. Any third-party receiving a benefit from this Agreement is an incidental and unintended beneficiary only.

10.6 **Article X, Section 20/TABOR:** The Parties understand and acknowledge that the Town is subject to Article X, § 20 of the Colorado Constitution ("TABOR"). The Parties do not intend to violate the terms and requirements of TABOR by the execution of this Agreement. It is understood and agreed that this Agreement does not create a multi-fiscal year direct or indirect debt or obligation within the meaning of TABOR and, therefore, notwithstanding anything in this Agreement to the contrary, all payment obligations of the Town are expressly dependent and conditioned upon the continuing availability of funds beyond the term of the Town's current fiscal period ending upon the next succeeding December 31. Financial obligations of the Town payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available in accordance with the rules, regulations, and resolutions of Town of Hot Sulphur Springs, and other applicable law. Upon the failure to appropriate such funds, this Agreement shall be terminated.

10.7 **Governing Law, Venue, and Enforcement:** This Agreement shall be governed by and interpreted according to the law of the State of Colorado. Venue for any action arising under this Agreement shall be in the appropriate court for Grand County, Colorado. To reduce the cost of dispute resolution and to expedite the resolution of disputes under this Agreement, the Parties hereby waive any and all right either may have to request a jury trial in any civil action relating primarily to the enforcement of this Agreement. The Parties agree that the rule that ambiguities in a contract are to be construed against the drafting party shall not apply to the interpretation of this Agreement. If there is any conflict between the language of this Agreement and any exhibit or attachment, the language of this Agreement shall govern.

10.8 **Survival of Terms and Conditions:** The Parties understand and agree that all terms and conditions of the Agreement that require continued performance, compliance, or effect beyond the termination date of the Agreement shall survive
such termination date and shall be enforceable in the event of a failure to perform or comply.

10.9 Assignment and Release: All or part of the rights, duties, obligations, responsibilities, or benefits set forth in this Agreement shall not be assigned by Contractor without the express written consent of the Town Board of Trustees for Town of Hot Sulphur Springs. Any written assignment by Contractor shall expressly refer to this Agreement, specify the particular rights, duties, obligations, responsibilities, or benefits so assigned, and shall not be effective unless approved by resolution or motion of the Town Board of Trustees for the Town of Hot Sulphur Springs. No assignment shall release the Applicant from performance of any duty, obligation, or responsibility unless such release is clearly expressed in such written document of assignment. The Town may assign all of its rights and obligations under this Agreement to its Water and Sewer Enterprise without need for further approval or consent of Contractor.

10.10 Paragraph Captions: The captions of the paragraphs are set forth only for the convenience and reference of the Parties and are not intended in any way to define, limit or describe the scope or intent of this Agreement.

10.11 Integration and Amendment: This Agreement represents the entire and integrated agreement between the Town and the Contractor and supersedes all prior negotiations, representations, or agreements, either written or oral. Any amendments to this must be in writing and be signed by both the Town and the Contractor.

10.12 Severability: Invalidation of any of the provisions of this Agreement or any paragraph sentence, clause, phrase, or word herein or the application thereof in any given circumstance shall not affect the validity of any other provision of this Agreement.

10.13 Incorporation of Exhibits: Unless otherwise stated in this Agreement, exhibits, applications, or documents referenced in this Agreement shall be incorporated into this Agreement for all purposes. In the event of a conflict between any incorporated exhibit and this Agreement, the provisions of this Agreement shall govern and control.

10.14 Employment of or Contracts with Illegal Aliens: [Applicable if required by Colorado law for this Agreement]. Contractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement. Contractor shall not contract with a subcontractor that fails to certify that the subcontractor does not knowingly employ or contract with any illegal aliens. By entering into this Agreement, Contractor certifies as of the date of this Agreement it does not knowingly employ or contract with an illegal alien who will perform work under the public contract for services and that the contractor will participate in the e-verify program or department program in order to confirm the employment eligibility of all employees who are newly hired for employment to perform work under the public contract for services. The Contractor is prohibited from using either the e-verify program or the department program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed. If the Contractor obtains actual knowledge that a subcontractor performing work
under this Agreement knowingly employs or contracts with an illegal alien, the Contractor shall be required to notify the subcontractor and the Town within three (3) days that the Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien. The Contractor shall terminate the subcontract if the subcontractor does not stop employing or contracting with the illegal alien within three (3) days of receiving the notice regarding Contractor's actual knowledge. The Contractor shall not terminate the subcontract if, during such three days, the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien. The Contractor is required to comply with any reasonable request made by the Department of Labor and Employment made in the course of an investigation undertaken to determine compliance with this provision and applicable state law. If the Contractor violates this provision, the Town may terminate this Agreement, and the Contractor may be liable for actual and/or consequential damages incurred by the Town, notwithstanding any limitation on such damages provided by such Agreement.

10.15 Notices: Unless otherwise specifically required by a provision of this Agreement any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by certified mail or registered mail, postage and fees prepaid, addressed to the Party to whom such notice is to be given at the address set forth below or at such other address as has been previously furnished in writing, to the other Party. Such notice shall be deemed to have been given when deposited in the United States Mail properly addressed to the intended recipient.

<table>
<thead>
<tr>
<th>If to the Town</th>
<th>If to the Contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mayor</td>
<td>Merrick &amp; Company</td>
</tr>
<tr>
<td>Town of Hot Sulphur Springs</td>
<td>2450 S. Peoria Street, Aurora, Colorado 80014</td>
</tr>
<tr>
<td>513 Aspen Street</td>
<td>Attention: Barney Fix, PE</td>
</tr>
<tr>
<td>P.O. Box 116</td>
<td></td>
</tr>
<tr>
<td>Hot Sulphur Springs, CO 80541</td>
<td></td>
</tr>
<tr>
<td>With Copy to:</td>
<td>With Copy to:</td>
</tr>
<tr>
<td>Maureen Juran, Town Attorney Widner Michow &amp; Cox LLP</td>
<td></td>
</tr>
<tr>
<td>13133 E. Arapahoe Road, Suite 100</td>
<td></td>
</tr>
<tr>
<td>Centennial, Colorado 80112</td>
<td></td>
</tr>
</tbody>
</table>

11.0 AUTHORITY

The individuals executing this Agreement represent that they are expressly authorized to enter into this Agreement on behalf of Town of Hot Sulphur Springs and the Contractor and bind their respective entities.

THIS AGREEMENT is executed and made effective as provided above.
TOWN OF HOT SULPHUR SPRINGS, COLORADO

By: Hershal Deputy, Mayor

ATTEST:
Kendra White
Town Clerk

APPROVED AS TO FORM:
For Town Attorney’s Office

CONTRACTOR: MERRICK & COMPANY

By: 
Name: 
Position: 
President
EXHIBIT A
SERVICES DESCRIPTION

Project/Services Name: Proposed Wastewater Treatment Plant (WWTP) Upgrades

Design and the preparation of contract documents for bidding of the following major improvements:

- Addition of a new aeration process to be retrofitted into the two aerated lagoon basins.
- Addition of blowers, conduits and ancillary piping to accommodate the new aeration system.
- Modifications to the existing facilities to provide enhanced pre-treatment for the lagoon system.
- Building modifications and new structures to house the wastewater improvements.
- Modifications to the interconnecting piping between the aerated lagoons to provide for more flexible operations.
- Addition of a water service line to the wastewater facilities.
- Corrections to the sewer collection system to reduce infiltration and inflow.

Task 1 – Project Management and Coordination

1. **Meetings.** Conduct and document a total of approximately six meetings with the Town and other involved parties such as the Colorado Department of Public Health and the Environment (CDPHE). These meetings will be to coordinate the planning and construction requirements for the recommended plan. This task includes one project kick-off meeting with the Town's staff.

2. **Town Coordination.** Coordination with the Town's staff, including management and operations personnel during the design process to incorporate input for planning, evaluation, and design activities.

3. **Loan and Grants.** Assist the Town's staff with ongoing loan coordination and grant acquisition to support the project.

Task 2 – Preliminary Design

1. **Base Drawings, Investigations, and Documentation.** Conduct site visits to document existing conditions at the wastewater facilities. Based on photographs, field notes, preliminary field measurements, existing documentation and record drawings, prepare base drawings for the facility design. Property and topographic surveys of the wastewater treatment facility site will be provided by the Town. Geotechnical investigations and analyses for the wastewater facilities will be provided by the Town on an as needed basis.
Contractor will develop the base facilities layout and draft equipment procurement specifications utilizing efforts completed with previous Comprehensive Performance Evaluation, Composite Correction Program, and Preliminary Engineering Reports.

3. **CDPHE Permitting and Funding Support.** Prepare a Design Report on the design of the new wastewater treatment facilities and to support the process for CDPHE site application and design review. Assist with Site Application.

4. **Preliminary Design.** Develop 60% preliminary structural, civil and mechanical design for the project, to include:
   - process design criteria listing process parameters for support equipment not provided by the aeration vendor
   - process unit sizes and capacity for pretreatment equipment
   - plant process schematic
   - preliminary plan and section drawings showing installation of new equipment

The Contractor will not provide mechanical, process and instrumentation drawings and information for the aeration system which include proprietary equipment. That will be provided by the aeration equipment supplier under separate agreement with the Town. The Contractor and aeration equipment drawings will be submitted to CDPHE for their design review.

6. **Preliminary Electrical Design.** Develop the preliminary electrical design for the WWTP project, to include:
   - Electrical one-line diagram
   - Plant controls description, providing an overview of plant and process control and monitoring features
   - Identification of location of major electrical equipment

The Contractor will not provide plant controls description and an overview of plant and process control and monitoring features for all equipment provided by the aeration equipment vendor, who will be under separate agreement with the Town.

7. **Opinion of Probable Construction Cost.** Contractor shall develop an Opinion of Probable Construction Cost for the project.

8. **Permit and Agency Coordination.** Contractor shall develop the design review submittal, including the engineering report, plans, and specifications for the Town, the County and the State to review and sign off on. Contractor will coordinate the submittal review process with designated State staff.

**Task 3. - Final Design and Procurement Documents**

1. **Design and Contract Documents.** Final design tasks shall include preparation of final design drawings, specifications and technical procurement documents. Following review with CDPHE, Town staff and others, the drawings,
specifications and contract documents shall be completed to the 100 percent level, suitable for procurement and construction.

2. **Opinion of Probable Construction Cost.** Contractor shall update the preliminary Opinion of Probable Construction Costs for the project.

3. **Permit and Agency Coordination.** Contractor shall incorporate the State review comments with the 100% design documents and follow through with the State to obtain final design approval from designated State staff.

4. **Procurement and Construction Coordination.** As the Town is expected to be the general contractor for the improvements, the Contractor will coordinate with the Town to determine how the procurement of equipment and overall construction phase of the project shall move forward. Construction support services for the Contractor will be negotiated with the Town under this task.

**Timeline for Completion of Services**

The schedule for completing the design engineering services will include key milestone completion dates as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>October 17, 2012</td>
<td>Submittal of 60% complete design documents to CDPHE</td>
</tr>
<tr>
<td>November 20, 2012</td>
<td>Submittal of &quot;Approvable&quot; design documents to CDPHE</td>
</tr>
<tr>
<td>December 20, 2012</td>
<td>Submittal of &quot;Ready for Bid&quot; Drawings and Specifications to the Town of Hot Sulphur Springs</td>
</tr>
</tbody>
</table>

The schedule for completing the design engineering services is dependent upon the CDPHE schedule for design review and approval. Extended CDPHE review time requirements may require modification of the milestone completion dates.

The schedule for completing the construction engineering services will be as necessary to accommodate the Town’s construction schedule. Key milestone construction completion dates will be developed in coordination with the Town and the selected construction contractor(s).

**Reporting to Town on Progress of Services**

Progress reports via telephone, email, or written reports, will be provided to the Town on a weekly schedule until the design engineering services are completed (December 20, 2012). Progress reports during the bidding support and construction engineering services shall vary as necessary to accommodate the Town’s requirements and the construction contractor’s schedule, but in no circumstances shall the reporting be less frequent than once per month or more frequent than once per week.

**Services Not Included**

It is anticipated that this project will be confined to the existing wastewater treatment plant site and the immediate surrounding areas. Other exclusions — boundary and topographic surveys of the wastewater treatment plant site, easement surveys or descriptions, construction material sampling and testing.
Information to be Provided by the Town

Information to be provided by the Town to Merrick includes:

- All existing maps, reports, and design drawings for the existing wastewater treatment plant
- Boundary and topographic survey of the wastewater treatment plant property
- Influent wastewater quality and quantity data
EXHIBIT B
RATES FOR SERVICE AND REIMBURSABLE EXPENSES

The total fee to complete the Services is summarized below:

<table>
<thead>
<tr>
<th>Service</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project Coordination</td>
<td>$ 10,650.00</td>
</tr>
<tr>
<td>Preliminary Design</td>
<td>$ 65,650.00</td>
</tr>
<tr>
<td>Final Design and Procurement</td>
<td>$ 31,120.00</td>
</tr>
<tr>
<td>Total Project Estimated Fee</td>
<td>$ 107,420.00</td>
</tr>
</tbody>
</table>

A detailed breakdown of costs and hours by task is provided on Exhibit C to the General Engineering Services Agreement.