

Date: March 29, 2012

**Contracting Party:** Mr. Jim Eichhorst  
JB Henderson Construction  
10100 Trumbull Ave SE  
Albuquerque, NM 87123

**Project:** Pool Conditioning/Dehumidification System Analysis  
Stanley, NM

This is an AGREEMENT for Professional Engineering services to be furnished by Beaudin Ganze Consulting Engineers, Inc. (BGCE), to the Contracting Party in accordance with the following mutually agreed conditions.

#### **DESCRIPTION OF SERVICES:**

Provide mechanical/electrical engineering investigation/analysis and recommendations for modifications to the existing pool conditioning/dehumidification system. The system is currently not maintaining industry standards or owner/user required space temperature and or humidification levels. The mechanical system components are not regional and are problematic related to service and maintenance. The SCOPE OF SERVICES is anticipated to be:

##### **Phase I:**

1. Perform review of existing installed mechanical system/controls and available construction documents.
2. Perform review of existing pool/hot tub room layout and associated air conditioning distribution.
3. Perform investigation of the existing building layout for viability of options related to placement of system components etc.
4. Provide follow-up report for the conditioning system which includes our findings, recommendations, executive summary and prioritized list of proposed actions (if applicable) concerning the mechanical system. Construction Cost estimates related to proposed Modification to be provided in conjunction with JB Henderson.

**FEE (Phase I): Hourly with an estimate of \$5,000.00** (owner to be notified prior to exceeding estimate).

Travel and Reimbursable expenses are include in the estimate and billed at standard rates.

It is anticipated that a total of 3 three trips to the Ranch will be required.

Two for investigation/data collection and One for review with client/owner.

##### **Phase II:**

1. If determined necessary for installation of modification and upon authorization, design alterations to the existing pool conditioning/dehumidification system in conjunction with JB Henderson.
2. Anticipated deliverable is construction documents for existing pool conditioning/dehumidification system modifications.

**FEE (Phase II): Hourly with an estimated range of \$3,000 to \$6,000.**

Note, the actual effort for this phase cannot be closely estimated at this time and is largely dependent on the results of Phase I.

**FEE BASIS:**

Contracting Party agrees to pay BGCE's fee as invoiced for this project based on BGCE's fees set forth above and all, incurred interest, REIMBURSABLE EXPENSES and COMPLEMENTARY/SUPPLEMENTAL SERVICES.

**COMPLEMENTARY SERVICES (UPON REQUEST):**

- I. **Construction Phase Services:** Including site observation, submittal review, respond to contractor questions, etc.
- II. **Commissioning Services for Construction of Alterations**
- III. **Testing, Adjusting, and Balancing of HVAC Systems** – either for further evaluation phase information gathering and/or after construction of alterations
- IV. **Infrared Thermal Imaging Study of Existing Envelope**

**COMPLEMENTARY/SUPPLEMENTAL SERVICES FEES**

Any services requested by the Contracting Party not defined in the above Basic Scope of Services are deemed COMPLEMENTARY/SUPPLEMENTAL SERVICES and shall be invoiced in accordance with the standard hourly rates and reimbursable expenses. The 2012 standard hourly rates as follows: Senior Principal \$195.00; Principal \$185.00; Senior Associate/Senior Project Manager \$165.00; Associate/Project Manager \$150.00; Senior Project Engineer/Senior Commissioning Agent \$135.00; Project Engineer/Commissioning Agent \$125.00; Engineer II/Commissioner II \$115.00; Engineer I/Commissioner I \$105.00; CADD Director/Designer II \$85.00; CADD II/Designer I \$75.00; CADD Technician I \$70.00; Administrative II \$65.00; Administrative I \$55.00. Contracting Party understands and acknowledges that BGCE's standard hourly rates are adjusted annually.

**REIMBURSABLE EXPENSES**

REIMBURSABLE EXPENSES include expenses incurred by BGCE and BGCE's consultants directly related to the project as follows:

- A. Transportation (airfare, rental car, etc), lodging, meals and other transportation related expenses;
- B. Travel time from BGCE office to job site and meeting sites charged at standard billing rates (see SUPPLEMENTAL SERVICES);
- C. Fees paid for securing approval of authorities having jurisdiction over the Project;
- D. Large format printing and reproductions;
- E. Postage, handling and delivery;
- F. Tools and testing equipment (none anticipated with base scope)

REIMBURSABLE EXPENSES shall be in addition to our FEE and are to be invoiced at cost plus fifteen percent (15%). Mileage is to be charged at the current federal rate at the time of occurrence.

**BILLING AND PAYMENT PROVISIONS**

The Contracting Party recognizes that prompt payment of BGCE's invoices is an essential aspect of the overall consideration BGCE requires for providing service to the Contracting Party. Accordingly, the Contracting Party agrees to advise BGCE as to the preferred billing cycle, invoice format, person to whom invoices should be addressed, and such other pertinent details BGCE should observe to help the Contracting Party expedite payment.

Invoices shall be submitted by BGCE monthly and are due upon presentation and shall be considered Past Due if not paid within thirty (30) calendar days of this invoice.

Beaudin Ganze fully expects payment in full within sixty (60) calendar days of the invoice date. However, if payment is not received within sixty (60) calendar days of the invoice date, BGCE has the right to suspend services until all outstanding invoices are paid in full.

Please remit all payments to:

Beaudin Ganze Consulting Engineers, Inc.  
P. O. Box 9650  
Avon, CO 81620  
Attn: Debbie Eachus  
970.949.6108 ext 2232

### **COLLECTION COSTS**

In the event legal action is taken to enforce the payment terms of this Agreement, BGCE shall be entitled to collect from the Contracting Party all fees and Reimbursable Expenses then due, plus reasonable attorneys' fees, court costs and other expenses incurred by the Contracting Party for such collection action and, in addition, the reasonable value of BGCE's employees' time and BGCE's expense spent for such collection action, computed according to BGCE's prevailing fee schedule and expense policies.

### **DISPUTED INVOICES**

If the Contracting Party objects to any portion of an invoice, the Contracting Party shall notify BGCE in writing within ten (10) calendar days of receipt of the invoice. The Contracting Party shall identify in writing the specific cause of the disagreement and the amount in dispute and shall pay that portion of the invoice not in dispute in accordance with the other payment terms of this Agreement. Any dispute over invoiced amounts due which cannot be resolved within ten (10) calendar days after presentation of invoice by direct negotiation between the parties shall be resolved within thirty (30) calendar days in accordance with the Dispute Resolution provision of this Agreement. Interest as stated above shall be paid by the Contracting Party on all disputed invoice amounts that are subsequently resolved in BGCE's favor and shall be calculated on the unpaid balance from the due date of the invoice.

Payments to BGCE shall not be withheld, postponed or made contingent on the construction, completion or success of the project or upon receipt by the Contracting Party of offsetting reimbursement or credit from other parties who may have caused SUPPLEMENTAL SERVICES or expenses. No withholdings, deductions or offsets shall be made from BGCE's compensation for any reason unless BGCE has been found to be legally liable for such amounts.

### **SUSPENSION OF SERVICES**

If the Contracting Party fails to make payments in accordance with the BILLING AND PAYMENT PROVISIONS or otherwise is in breach of this Agreement, BGCE has the right to suspend performance of services upon seven (7) calendar days notice to the Contracting Party. If the default is not cured within seven (7) days, this Agreement may be terminated at the option of BGCE.

BGCE shall have no liability whatsoever to the Contracting Party for and the Contracting Party agrees to make no claim for any delay or damage as a result of such suspension caused by any breach of this Agreement by the Contracting Party. Upon receipt of payment in full of all outstanding sums due from the Contracting Party, BGCE shall resume services and there shall be an equitable adjustment to the remaining project schedule and fees as a result of suspension.

### **TERMINATION**

If the Contracting Party fails to make payment to BGCE in accordance with the payment terms herein, this shall constitute a material breach of this Agreement and shall be cause for termination of this Agreement by BGCE

If either party terminates the contract, the Contracting Party shall within fifteen (15) calendar days of termination pay BGCE for all services performed prior to termination, together with all REIMBURSABLE EXPENSES then due.

### **LIMITS OF LIABILITY**

Contracting Party and BGCE have discussed their respective risks, benefits of the project and BGCE's total fee for services. The Parties' risks have been allocated such that the Contracting Party agrees that the total liability of BGCE owners, employees, and its consultants to Contracting Party or anyone claiming through or for Contracting Party for any and all injuries, claims, losses, expenses, costs, damages, or claims expenses arising out of this Agreement or BGCE's work on the project, shall not exceed the total amount of \$50,000. Such causes include but are not limited to BGCE's negligence, error, omissions, strict liability, and breach of contract or breach of warranty.

### **DESIGN WITHOUT CONSTRUCTION PHASE SERVICES**

It is understood and agreed that BGCE's Basic Services under this Agreement do not include construction administration of the contract for construction, nor project observations, review of the Contractor's performance or any other construction-phase services ("Construction Contract Administration Services"), and that such construction-phase services will be provided by the others. In such event, the Contracting Party assumes all responsibility for interpretation of the Contract Documents and for construction observation and supervision and waives any claims against BGCE that may be in any way connected thereto.

In addition, the Contracting Party agrees to the fullest extent permitted by law, to indemnify and hold BGCE harmless from any losses, expenses, damages, claims or costs, including reasonable attorneys' fees and costs of defense, arising or resulting from the performance of Construction by other persons or entities except for claims arising from the sole negligence or willful misconduct of BGCE

If the Contracting Party requests in writing that BGCE provide any specific Construction Services and if BGCE agrees in writing to provide such Construction Services, then BGCE shall be compensated for as SUPPLEMENTAL SERVICES as provided above.

### **HAZARDOUS MATERIALS**

BGCE shall have no responsibility for the identification, discovery, presence, handling, removal, disposal of, or exposure of, persons to hazardous materials in any form at the project site.

### **REMODELING/EXISTING CONDITIONS**

Inasmuch as the remodeling and/or rehabilitation of the pre-existing structures and systems require that certain assumptions be made by BGCE regarding existing conditions, and because some of the assumptions may not be verifiable without the Owner's and Contracting Party's expending substantial sums of money or destroying otherwise adequate or serviceable portions of the structure, the Contracting Party agrees to bear all risks, costs, losses, damages, and expenses, including the cost of BGCE's SUPPLEMENTAL SERVICES, arising from the discovery of concealed or unknown conditions in the existing structure and systems.

### **CONSEQUENTIAL DAMAGES**

Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, neither the Contracting Party nor BGCE, their respective officers, directors, partners, employees, contractors or sub consultants shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of or connected in any way to the project or to this Agreement. This mutual waiver of consequential damages shall include, but is not limited to, loss of use, loss of profit, loss of business, loss of income, loss of reputation and any other consequential damages that either party may have incurred from any cause of action including negligence, strict liability, breach of contract and breach of strict or implied warranty. Both the Contracting Party and BGCE shall require similar waivers of consequential damages protecting all the entities or persons named herein in all contracts and subcontracts with others involved in this project.

### **CERTIFICATE OF MERIT**

The Contracting Party shall make no claim for professional negligence, either directly or by way of a cross-complaint against BGCE unless the Contracting Party has first provided BGCE with a written certification executed by an independent engineering consultant currently practicing in the same discipline as BGCE and licensed in the State of New Mexico containing the information as follows: (a) the name and license number of the certifying engineer; (b) itemization of the alleged acts and omissions that the certifying engineer contends are not in conformance with the standard of care of an engineer performing professional services under the same or similar circumstances; and (c) state in detail the basis for the certifying engineer's opinion that such acts or omissions do not conform to the standard of care. This certificate shall be provided to BGCE not less than thirty (30) calendar days prior to the filing of any claim or the institution of any arbitration or judicial proceeding. This Certificate of Merit clause shall take precedence over any existing state law in force at the time of the claim or demand for arbitration.

### **CODE COMPLIANCE**

BGCE shall put forth reasonable professional efforts to comply with applicable laws, codes and regulations in effect as of the date of submission of its Instruments of Service to building authorities. Design changes made necessary by newly enacted laws, codes and regulations after this date shall entitle BGCE to a reasonable adjustment in the schedule and additional compensation in accordance with the SUPPLEMENTAL SERVICES provisions of this Agreement.

### **STANDARD OF CARE**

Services and Instruments of Services (e.g. drawing and specifications) provided by BGCE under this Agreement will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. As such, the Contracting Party and BGCE recognize and agree that there will be errors and omissions in these Instruments of Service. Consequently, the Contracting Party has established a contingency amount within the total project budget/funding allocation to cover the costs of any errors or omissions, including all impacts and influences whether directly or indirectly related. BGCE agrees to provide services as specified by its contractual agreement to assist the Contracting Party in correcting any errors or omissions.

BGCE agrees to provide these services without additional compensation beyond BGCE's basic services compensation per its contractual agreement with the Contracting Party. The Contracting Party and BGCE agree that BGCE's liability for any and all errors and omissions, including all impacts and influences, shall be limited to providing the services outlined in this paragraph. The Contracting Party agrees that BGCE shall not be responsible or liable for any direct or indirect cost of errors or omissions, including but not limited to: materials, equipment, labor, delay or acceleration costs, impact and sequencing costs, coordination costs, extended overhead and/or cost of deferred or lost profit by any or all parties associated with the project.

### **BETTERMENT**

If, due to BGCE's negligence, a required item or component of the project is omitted from BGCE's construction documents, BGCE shall not be responsible for paying the cost required to add such item or component to the extent that such item or component would have been required and included in the original construction documents. In no event will BGCE be responsible for any cost or expense that provides betterment or upgrades or enhances the value of the project.

### **DISPUTE RESOLUTION/NON-BINDING MEDIATION**

It is understood and agreed that, in the event any dispute, controversy or conflict arises in connection with the design and construction of the project, the parties hereto will cooperate in good faith, and, if possible, resolve the issues without resort to arbitration or litigation. Should the parties be unable to reach agreement themselves, the parties shall mutually select an independent mediator and engage in mediation to assist in a further effort to resolve the dispute. Costs of mediation shall be shared equally between the parties, unless mutually agreed otherwise at the time the mediator is engaged.

**PROFESSIONAL CREDIT**

The Contracting Party recognizes BGCE's business development relies in part on demonstration of project experience. BGCE reserves the right to publish project-related information for the purposes of business development including, but not limited to: photographs taken by BGCE employees or sub consultants; rendering or photographs created by other parties, if BGCE has obtained appropriate permission therefore and general project description and project details which fell within the scope of BGCE's services.

**ASSIGNMENT OF CONTRACT**

The Contracting Party and BGCE respectively, bind themselves, their successors, permitted assigns and legal representatives to this Agreement. Neither Contracting Party nor BGCE shall assign this Agreement without the prior written consent of the other.

**CHANGED CONDITIONS**

If, during the term of this Agreement, circumstances or conditions that were not originally contemplated by or known to BGCE are revealed, to the extent that they affect the scope of services, compensation, schedule, allocation of risks or other material terms of this Agreement, BGCE may request renegotiation of appropriate portions of this Agreement. BGCE shall notify the Contracting Party of the changed conditions necessitating renegotiation, and BGCE and the Contracting Party shall promptly and in good faith enter into renegotiation of this Agreement to address the changed conditions. If terms cannot be agreed to, the parties agree that either party has the absolute right to terminate this Agreement in accordance with the Termination provision hereof.

**ACCEPTANCE**

Time is of the essence with respect to this Agreement. This Agreement is conditioned upon BGCE receiving written acceptance by Contracting Party of all the terms and conditions of this Agreement on or before fifteen (15) days from the date of this Agreement was signed by BGCE. This Agreement shall be deemed withdrawn if written acceptance is not received within said fifteen-day period. Notwithstanding anything to the contrary, any services verbally requested by the Contracting Party and performed by BGCE prior to the execution of this Agreement shall be subject to the terms and conditions of this Agreement.

This Agreement represents the entire mutual agreement between BGCE and this undersigned Contracting Party and this Agreement supersedes all prior negotiations, representations or agreements, written or oral, prior to execution date of the Contracting Party below.

Please execute and return one copy to BGCE as authorization to begin services.

**BEAUDIN GANZE  
CONSULTING ENGINEERS, Inc.**

**CONTRACTING PARTY  
Signed**

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

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

Name: Morgan B Royce \_\_\_\_\_

Name: \_\_\_\_\_

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

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

Date: March 29, 2012 \_\_\_\_\_

Date: \_\_\_\_\_