

RESOLUTION NO.

22-17

Series of 2022

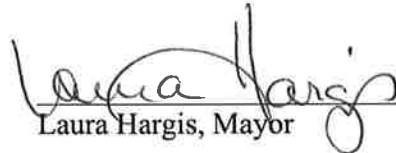
TITLE: A RESOLUTION APPROVING AN AGREEMENT WITH BENCHMARK SOLUTIONS, LLC, FOR SOFTWARE SERVICES

NOW THEREFORE BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF HUDSON, COLORADO, AS FOLLOWS:

Section 1. The Town Council hereby approves the services agreement with Benchmark Solutions, LLC, doing business as Benchmark Analytics, LLC, in substantially the form attached hereto and authorizes the Mayor to execute the same on behalf of the Town.


INTRODUCED, READ and PASSED this 2nd day of March, 2022.

TOWN OF HUDSON, COLORADO



Laura Hargis, Mayor

ATTEST:



Heather Meierkort, CMC, Interim Town Clerk





BENCHMARK ANALYTICS® SOFTWARE AS A SERVICE AGREEMENT

Benchmark Solutions LLC DBA Benchmark Analytics LLC ("Benchmark") 1801 West Warner Avenue Suite 301 Chicago, IL 60613 support@benchmarkanalytics.com accounting@benchmarkanalytics.com	This Software as a Service Agreement "Agreement" is not valid until accepted and signed by an authorized representative of Benchmark in Chicago, Illinois. Effective Date: 2/28/2022
Client Information	
Client: Town of Hudson Police Department Address: 50 S Beach Street, Hudson, CO 80642	Contact: Kyle Wilkins Title: Partnership Development Representative Telephone: (260) 402-3447 Email: kyle.wilkins@benchmark.analytics.com

I. Subscription Fees:

Client shall pay Benchmark annual subscription fees ("Fees"), inclusive of integrations noted in Section III below, in the amount of \$7,500, for year 1 of the Term. Fees are subject to an annual increase up to 4% in each subsequent year of the Term. Client shall pay Fees for year 1 of the Term within 30 days from the effective date set forth above (the "Effective Date") and, subject to annual appropriation and unless terminated as provided below, shall pay Fees for each subsequent year of the Term on or before the subsequent anniversary of the Effective Date. The annual subscription fee is subject to sales and use taxes; taxes will be charged unless a tax exemption form is provided.

II. Service Level Specifications:

Other than scheduled downtime, Benchmark strives for a high level of system availability above 99%. ("Service Level Specifications"). Benchmark will use commercially reasonable efforts to conform to the Service Level Specifications when accessed and used in accordance with this Agreement. If in a calendar month the Service Level Specifications are not met Benchmark shall credit Client with one month of Fees, to be applied toward the following year's subscription. Benchmark shall be responsible only for failures to meet the Service Level Specifications due to conditions that are within Benchmark's reasonable control. In order to obtain a service credit, Client must notify Benchmark in writing of any problem. Other than termination as provided below, Client's sole and exclusive remedy and Benchmark's sole and exclusive obligation with respect to any breach of the Service Level Specifications is the credit set forth in this Article II.

III. Additional Terms:

1. **Access and Use.** Benchmark has developed a software application designed for its clients' personnel to enter, manage, track, report and analyze various law enforcement-related information and to perform other incidental and subsidiary functions, known as "Benchmark Analytics" (the "Services"). Subject to and conditioned on Client's payment of Fees and compliance with all other terms and conditions of this Agreement, Benchmark hereby grants Client a non-exclusive, non-transferable right to access and use the Services indicated below, during the Term, solely for use by Client's administrators, employees and other Client-authorized persons or entities ("Users") in accordance with the terms and conditions herein and any additional terms applicable to Users. Such use is limited to Client's internal use. Benchmark shall provide to Client the necessary passwords, security codes and network links or connections to allow Client to access the Services ("Access Credentials").
 - Benchmark Management System® (BMS)
 - Use of Force
 - Training – FTO only
 - Internal Affairs
 - Performance Evaluation
 - Officer Profile
 - Activity
 - Community Engagement
 - Trigger Based Early Warning
 - First Sign® Early Intervention System (35% of total license fee attributable to First Sign® if BMS and C.A.R.E. are selected)
 - Case Action Response Engine® (C.A.R.E.)
 - 1 Total Quantity of Integrations: TBD
2. **Term.** The term of this Agreement begins on the Effective Date and, subject to Client's annual appropriation of funds and unless terminated earlier pursuant to this Agreement's express provisions, will continue in effect until three (3) years from the Effective Date (the "Initial Term"), and will automatically renew, subject to Client's annual appropriation of funds, for up to two (2) additional one (1) year terms (collectively the "Term").
3. **Restrictions.**
 - a. Client may only use the Services strictly in accordance with (1) all applicable laws, including without limitation, employment laws and data privacy and security laws, (2) the supporting materials ("User Materials") provided by Benchmark, and (3) any other restrictions and requirements set forth herein. Client agrees that while the Services and the reports generated for Client ("Client Reports") may be used by Client in employment-related matters, they are not designed to be, nor shall they be, utilized as the substantial or sole factor in any employment-related decisions and are only designed to provide information to Client. Benchmark shall not be responsible for Clients' or its Clients' employees' use of the Services or any Client Reports generated by the Service. All employment-related decisions of Client, including without limitation the termination or discipline of any employee of Client, and Client's use of the Services, is at the sole discretion and responsibility of Client, and Benchmark shall have no responsibility whatsoever for any such decisions. In no event shall Benchmark be required to monitor or supervise the use of the Services by Client or any authorized users and compliance with the terms of this Agreement by all authorized users shall at all times be and remain the Client's sole responsibility.
 - b. Client shall not use the Services for any purposes beyond the scope of the access granted in this Agreement. Client shall not at any time, directly or indirectly, permit any Users or any third-party to: (i) copy, modify, or create derivative works of the Services or User Materials, in whole or in part; (ii) rent, lease, lend, sell, license, sublicense, assign, distribute, publish, transfer, or otherwise make available the Services or User Materials; (iii) reverse engineer, disassemble, decompile, decode, adapt, or otherwise attempt to derive or gain access to any software component of the Services, in whole or in part; (iv) remove any proprietary notices from the Services or User Materials, misappropriates, or otherwise violates any intellectual property (IP) right or other right of any person, or that violates any applicable law; or (v) use the Services or User Materials for the purpose of creating any competing or similar service or software.
4. **Intellectual Property.**
 - a. Benchmark acknowledges that, as between Benchmark and Client, Client owns all right, title, and interest, including all intellectual property rights, in and to information, data, and other content, in any form or medium, that is submitted, posted, or otherwise transmitted by or on behalf of Client or a User through the Services ("Client Data"). Client hereby grants to Benchmark (i) a non-exclusive, royalty-free, worldwide license to reproduce, distribute, and otherwise use and display the Client Data and perform all acts with respect to the Client Data as may be necessary for Benchmark to provide the Services to Client; and (ii) a non-exclusive, perpetual, irrevocable, royalty-free, worldwide license to reproduce, distribute, modify, and otherwise use, prepare derivative works from, and display Client Data (a) to evaluate, enhance and improve the Services and future products and services (subject to the confidentiality obligations in Section 8); (b) for Research Purposes; and (c) to the extent incorporated within the Aggregated Statistics. "Research Purposes" means the use of Client Data

- for research, educational or evaluative purposes including purposes of identifying best practices and improving outcomes as related to public safety and law enforcement; provided that if such Client Data is disclosed to a third-party, it shall not directly identify any individual or agency and shall comply with applicable confidentiality obligations and shall be subject to the provisions of Section 5(b) below.
- b. Client acknowledges that, as between Client and Benchmark, Benchmark and its licensors own all right, title, and interest, including all intellectual property rights, in and to the Services, all underlying software for the Services, the User Materials, and any and all intellectual property provided to Client or any User in connection with the foregoing, including, without limitation, Aggregated Statistics and any information, data, or other content derived from Benchmark's monitoring of Client's access to or use of the Services ("Benchmark IP"). For the avoidance of doubt, Benchmark IP excludes Client Data.
5. **Aggregate Statistics.**
 - a. Notwithstanding anything to the contrary in this Agreement, Benchmark may monitor Client's use of the Services and collect and compile data and information related to Client's use of the Services that is used by Benchmark in an aggregate and anonymized manner, including, but not limited to, compilation of statistical and performance information related to the provision and operation of the Services ("Aggregated Statistics"). As between Benchmark and Client, all right, title, and interest in Aggregated Statistics, and all intellectual property rights therein, belong to and are retained solely by Benchmark. Client acknowledges that Benchmark may compile Aggregated Statistics based on Client Data input into the Services; provided, that such Aggregated Statistics do not identify Client or Client's Confidential Information.
 - b. Client acknowledges that Benchmark engages with various research and academic institutions ("Research Institutions") both through its work with the National Police Early Intervention and Outcomes Consortium (the "Consortium") and otherwise, for Research Purposes. Notwithstanding anything to the contrary in this Agreement, Client hereby acknowledges and consents to Benchmark's sharing of anonymized Client Data with Research Institutions and/or the Consortium; provided that such shared Client Data shall (i) be anonymized, (ii) not identify Client or Client's Confidential Information, and; provided, further, that any recipient Research Institution and/or the Consortium shall be subject to confidentiality requirements. Client shall not hold Benchmark liable under, or in connection with, any of the activities described in Section 4 or this Section 5 under any legal or equitable theory for damages related to or arising from this Agreement.
 6. **Support Services.** Benchmark shall provide a customer support number for Client. The customer support line may be accessed through a toll-free telephone number (1-888-40-BENCH) or via e-mail (support@benchmarkanalytics.com) and will be available Monday through Friday 8:00AM – 6:00PM (CST), excluding all federal holidays. In the event of a system wide outage, Client shall be provided with a 24-hour hotline for immediate response.
 7. **Client's Obligations.**
 - a. Client is responsible and liable for all uses of the Services and User Materials resulting from access provided by Client, directly or indirectly, whether such access or use is permitted by or in violation of this Agreement. Without limiting the generality of the foregoing, Client is responsible for all acts and omissions of Users, and any act or omission by a User that would constitute a breach of this Agreement if taken by Client will be deemed a breach of this Agreement by Client. Client shall make all Users aware of this Agreement's provisions as applicable to such User's use of the Services, and shall cause Users to comply with all such provisions.
 - b. Client understands and agrees that (i) Client is responsible for obtaining and installing all software and/or hardware upgrade, fixes, or enhancements required by the applicable browser software; and (ii) that Benchmark is not responsible for any compromise of data transmitted across computer networks or telecommunications facilities, including, but not limited, to the Internet.
 - c. Client shall be responsible for: (i) securely administering the distribution and use of all Access Credentials and protection against any unauthorized access to or use of the Services; and (ii) controlling the content and use of Client Data, including the uploading or other provision of Client Data to or through the Services and the accuracy thereof. Client shall immediately notify Benchmark if Client becomes aware of any loss or theft or unauthorized use of any Access Credentials.
 - d. Client shall immediately notify Benchmark if it becomes aware that the Services, or Client's use of the Services, violates or potentially violates any applicable laws.
 - e. Client is solely responsible for maintaining the confidentiality of Client's user name(s) and password(s).
 - f. Client is responsible to ensure that its use of the Service will not introduce, install or inject any malware (e.g., virus, timer, clock, counter, time lock, time bomb, Trojan horse, worm, file infector, boot sector infector, or other limiting design, instruction, or routine) into Benchmark's network, hardware or software. Client will immediately notify Benchmark, and in any event within three (3) days, after it becomes aware of a breach of this Section 7(f) and in such event (or upon any independent discovery by Benchmark of malware originating from Client), Benchmark may restrict or deny access to the Services pending resolution of the malware threat.
 8. **Mutual Obligations.** "Confidential Information" means any information that includes the following: (a) for Benchmark, all information relating to its business affairs, products, technology (including, but not limited to, source code, research and/or analytics), confidential intellectual property, trade secrets, third-party confidential information and other sensitive or proprietary information; and (b) for Client, the identities of its Users, records of interactions with the Users, and Client Data (including, but not limited to, information regarding Client's employees). Neither party shall disclose any Confidential Information of the other party to any person or entity, except to those of its employees or contractors who require access to it in order for the party to be able to perform its obligations under this Agreement, and who are bound by confidentiality obligations consistent with the terms of this Section, and except to the extent otherwise permitted by the licenses granted in Sections 5. The receiving party shall be responsible and liable for compliance with this Section by its employees and contractors. "Confidential Information" does not include any information that (i) becomes generally publicly available other than as a result of improper disclosure by the receiving party; (ii) is independently developed by the receiving party without use of the Confidential Information of the disclosing party; (iii) becomes available on a non-confidential basis from a third-party that is not bound by confidentiality; or (iv) is known to the receiving party at the time of disclosure. To the extent required by any applicable law, regulation, or order of any court or governmental body, disclosure of Confidential Information is not a breach of this Agreement; provided, that the party required to disclose it (a) promptly, and prior to such disclosure, notifies the other party so that it can seek a protective order or other remedy, and (b) prior to any disclosure, asserts the confidential nature of the Confidential Information.
 9. **Indemnification.** Benchmark shall indemnify, defend, and hold harmless Client from and against any and all losses, damages, liabilities, costs (including reasonable attorneys' fees) ("Losses") incurred by Client resulting from any third-party claim, suit, action, or proceeding ("Third-Party Claim") that the Services, or any use of the Services in accordance with this Agreement, infringes or misappropriates such third-party's valid U.S. patent or copyright, provided that Client promptly notifies Benchmark in writing of the claim, cooperates with Benchmark, and allows Benchmark sole authority to control the defense and settlement of such claim. If such a claim is made or appears possible, Client agrees to permit Benchmark, at Benchmark's sole discretion, to (i) modify or replace the Services, or component or part thereof, to make it non-infringing, or (ii) obtain the right for Client to continue use. This Section will not apply to the extent that the alleged infringement arises from: (i) use of the Services in combination with data, software, or technology not provided by Benchmark or authorized by Benchmark in writing; (ii) modifications to the Services not made by Benchmark; (iii) failure to timely implement any modifications, upgrades, replacements or enhancements made available to Client by or on behalf of Benchmark; or (iv) Client Data or any other Client materials. THIS SECTION SETS FORTH CLIENT'S SOLE REMEDIES AND BENCHMARK'S SOLE LIABILITY AND OBLIGATION FOR ANY ACTUAL, THREATENED, OR ALLEGED CLAIMS THAT THE SERVICES INFRINGE, MISAPPROPRIATE, OR OTHERWISE VIOLATE ANY INTELLECTUAL PROPERTY RIGHTS OF ANY THIRD-PARTY.
 10. **Limited Warranty; Disclaimer of Warranties.**
 - a. Benchmark warrants that the Services will substantially perform according to written functional specifications provided by Benchmark from time to time.
 - b. THE SERVICES AND BENCHMARK IP ARE PROVIDED "AS IS" AND BENCHMARK HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE. BENCHMARK SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE

PRACTICE. EXCEPT AS STATED IN SECTION 9, BENCHMARK MAKES NO WARRANTY OF ANY KIND THAT THE SERVICES AND BENCHMARK IP, OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET CLIENT'S OR ANY OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY SOFTWARE, SYSTEM OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE, OR ERROR FREE.

11. **Insurance; Limitation of Liability.** Throughout the term of this Agreement, Benchmark shall maintain a commercial general liability insurance policy with policy limits reasonably commensurate with the magnitude of its business risk. A certificate of insurance will be provided to Client upon request. IN NO EVENT WILL BENCHMARK BE LIABLE UNDER OR IN CONNECTION WITH THIS AGREEMENT UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE, FOR ANY: (a) CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED, OR PUNITIVE DAMAGES; (b) DAMAGES OF ANY NATURE WHATSOEVER IN CONNECTION WITH, RELATED TO OR ARISING OUT OF ANY TERMINATION OR DISCIPLINE OF A CLIENT EMPLOYEE, OR ANY CLIENT EMPLOYMENT-RELATED MATTER, (c) INCREASED COSTS, DIMINUTION IN VALUE OR LOST BUSINESS, PRODUCTION, REVENUES, OR PROFITS; (d) LOSS OF GOODWILL OR REPUTATION; (e) USE, INABILITY TO USE, LOSS, INTERRUPTION, DELAY OR RECOVERY OF ANY CLIENT DATA, OR BREACH OF CLIENT DATA OR SYSTEM SECURITY; OR (f) COST OF REPLACEMENT GOODS OR SERVICES, IN EACH CASE REGARDLESS OF WHETHER BENCHMARK WAS ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE. IN NO EVENT WILL BENCHMARK'S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, AND OTHERWISE EXCEED THE INSURANCE COVERAGE REQUIRED BY THIS AGREEMENT.
12. **Time to File Claims.** No action, regardless of form, arising out of or relating to this Agreement may be brought by either party more than two (2) years after the cause of action was discovered or should have been discovered.
13. **Termination.**
 - a. In addition to any other express termination right set forth in this Agreement, this Agreement may be terminated as follows: by Benchmark, if Client is in breach of any payment obligation contained in this Agreement and fails to cure such breach within ninety (90) days written notice of such breach by Benchmark; or by either party, by written notice to the other party effective sixty (60) days after the receipt of such notice. In addition, Benchmark may terminate this Agreement immediately upon notice to Client in the event Client breaches its obligations under Section 4 above. Upon expiration or earlier termination of this Agreement, (i) Client shall immediately discontinue use of the Benchmark IP and, without limiting Client's obligations under Section 8, Client shall delete, destroy, or return all copies of the Benchmark IP; and (ii) Benchmark may immediately deactivate Client's account, and, after providing Client with ninety (90) days limited access to the Services for the sole purpose of permitting Client to retrieve Client Data, delete Client's account and bar any further access to such information and the Services. Client understands and agrees that Benchmark is not liable to Client, its Users, or any third-party for any termination of Client's access to the Services or deletion of Client Data or any other data of any kind.
 - b. This Section 13, and Sections 3, 4, 5, 8, 9, 10, 11, 12, 13 and 15 through 22 of Article III will survive any termination or expiration of this Agreement.
14. **Public Disclosure.** Client grants to Benchmark the right to publicly disclose the fact that Client is using the Services of Benchmark.
15. **Severability.** Each paragraph and provision of this Agreement is severable from the entire Agreement, and, if one provision is declared invalid, the remaining provisions shall remain in effect and the invalid provision shall be reformed and amended to the extent needed to be valid.
16. **Force Majeure.** In no event shall Benchmark be liable to Client, or be deemed to have breached this Agreement, for any failure or delay in performing its obligations under this Agreement, if and to the extent such failure or delay is caused by any circumstances beyond Benchmark's reasonable control, including but not limited to acts of God, flood, fire, earthquake, explosion, war, terrorism, invasion, riot or other civil unrest, strikes, labor stoppages or slowdowns or other industrial disturbances, or passage of law or any action taken by a governmental or public authority, including imposing an embargo.
17. **Taxes.** Fees do not include any local or state sales, value added, use or other applicable excise taxes now in force or enacted in the future, any assessment of which shall be paid by Client. Without limiting the foregoing, Client shall promptly pay to Benchmark any amounts actually paid or required to be collected or paid by Benchmark pursuant to any statute, ordinance, rule or regulation of any legally constituted taxing authority.
18. **Entire Agreement; Amendment; Waiver.** This Agreement supersedes all prior agreements and understandings between Client and Benchmark, including any representations, expressed or implied. Client acknowledges that this Agreement may not be changed or terminated orally. No change, termination or attempted waiver of any of the provisions of this Agreement shall be binding unless in writing and signed by an authorized representative of the party against who the same is sought to be enforced. The parties, each acting under proper authority, have signed this Agreement on the date indicated below. Except as otherwise set forth in this Agreement, (i) no failure to exercise, or delay in exercising, any rights, remedy, power, or privilege arising from this Agreement will operate or be construed as a waiver thereof and (ii) no single or partial exercise of any right, remedy, power, or privilege hereunder will preclude any other or further exercise thereof or the exercise of any other right, remedy, power, or privilege.
19. **Notices.** Any notices required or permitted under this Agreement shall be in writing and shall be effective when delivered in person or sent by registered or certified mail, return receipt requested, with proper postage affixed, or by personal courier to the address set forth in this Agreement or any more recent address to which the sending party has been apprised.
20. **Relationship of the Parties.** Benchmark and Client are independent contractors. Neither party shall make any contracts, warranties, representations, or assume or create any other obligations, whether express or implied, in the other party's name or on its behalf.
21. **Assignment.** Neither party may assign this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the other party; provided that Benchmark shall have the right to assign its rights and obligations hereunder to its parent, subsidiary, or affiliate or a successor (including any successor through merger, consolidation or any other form of acquisition resulting in a change of control of Benchmark) upon notice to Client. Any purported assignment of rights in violation of this Section is null and void.
22. **Third-party Beneficiaries.** This Agreement does not and is not intended to confer any rights or remedies upon any person or entities other than Benchmark and Client.
23. **Governmental Immunity.** The Client and its officers, attorneys and employees, are relying on, and do not waive or intend to waive by any provision of this Agreement, the monetary limitations or any other rights, immunities or protections provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, et seq., as amended, or otherwise available to the Town and its officers, attorneys or employees.
24. **Subject to Annual Appropriation.** Consistent with Article X, § 20 of the Colorado Constitution, any financial obligation of the Client not performed during the current fiscal year is subject to annual appropriation, shall extend only to monies currently appropriated, and shall not constitute a mandatory charge, requirement, debt or liability beyond the current fiscal year.
25. **Governing Law; Venue.** This Agreement shall be governed by the laws of the State of Colorado, and any legal action concerning the provisions hereof shall be brought in Weld County, Colorado.

BY SIGNING BELOW, EACH PARTY CERTIFIES THAT IT HAS READ AND AGREES WITH AND SHALL BE BOUND BY THE TERMS HEREOF.

Client:



Benchmark Solutions LLC DBA Benchmark Analytics LLC

Signature: *Laura Hargis*
Name: Laura Hargis
Title: Mayor
Date: 3/2/2022

Signature: *Ron Huberman*
Name: Ron Huberman
Title: CEO
Date: 2-23-22

Attest:

Signature: *Heather Meierkort*
Name: Heather Meierkort
Title: Interim Town Clerk