

**AGREEMENT FOR CONSULTANT SERVICES
BETWEEN
THE CITY OF SAN JOSE
AND
CLUB ONE, INC.
(FY 2011-2012)**

THIS AGREEMENT is made and entered into this ____ day of _____, 2011, by and between the CITY OF SAN JOSE, a municipal corporation (hereinafter "CITY"), and CLUB ONE, INC. (hereinafter "CONSULTANT").

RECITALS

The purpose for which this AGREEMENT is made, and all pertinent recitals, is listed on EXHIBIT A, entitled "RECITALS," which is attached hereto and incorporated herein.

THE PARTIES HEREBY AGREE AS FOLLOWS:

SECTION 1. SCOPE OF SERVICES.

CONSULTANT shall perform those services specified in detail in EXHIBIT B, entitled "SCOPE OF SERVICES," which is attached hereto and incorporated herein.

SECTION 2. TERM OF AGREEMENT.

A. The term of this AGREEMENT shall be from November 1, 2011 to October 31, 2012, inclusive, subject to the provisions of SECTION 12 of this AGREEMENT.

B. City has the right to extend the terms of this Agreement for four (4) additional twelve (12) month terms (the "Additional terms"), to continue to perform the scope of work, based upon the same conditions as the Initial Term, at the rate provided in EXHIBIT D for the option years. City shall notify Consultant, in writing, of its exercise of its option for the Additional Term no less than thirty (30) days prior to the end of each preceding term, provided, however, that such notification shall be subject to City Council approval of the annual appropriation for this Agreement.

SECTION 3. SCHEDULE OF PERFORMANCE.

The services of CONSULTANT are to be completed according to the schedule set out in EXHIBIT C, entitled "SCHEDULE OF PERFORMANCE," which is attached hereto and incorporated herein. Time is of the essence in this AGREEMENT.

SECTION 4. COMPENSATION.

The compensation to be paid to CONSULTANT for professional services for the initial term of this Agreement shall not exceed One Hundred Fifteen Thousand Dollars (\$115,000). The rate and schedule of payment is set out in EXHIBIT D, entitled "COMPENSATION", which is attached hereto and incorporated herein.

SECTION 5. METHOD OF PAYMENT.

Each month, CONSULTANT shall furnish to the CITY a statement of the work performed for compensation during the preceding month.

SECTION 6. INDEPENDENT CONTRACTOR.

It is understood and agreed that CONSULTANT, in the performance of the work and services agreed to be performed by CONSULTANT, shall act as and be an independent contractor and not an agent or employee of CITY; and as an independent contractor, CONSULTANT shall obtain no rights to retirement benefits or other benefits which accrue to CITY's employees, and CONSULTANT hereby expressly waives any claim it may have to any such rights.

SECTION 7. ASSIGNABILITY.

The parties agree that the expertise and experience of CONSULTANT are material considerations for this AGREEMENT. CONSULTANT shall not assign or transfer any interest in this AGREEMENT nor the performance of any of CONSULTANT's obligations hereunder, except as authorized under this AGREEMENT, without the prior written consent of CITY, and any attempt by CONSULTANT to so assign this AGREEMENT or any rights, duties or obligations arising hereunder shall be void and of no effect.

SECTION 8. SUBCONTRACTOR.

A. Notwithstanding Section 7 above, and subject to the prior written approval of CITY's Fire Chief, CONSULTANT may use a licensed physician, with emergency medical experience, as a subcontractor to perform the work of CONSULTANT under this AGREEMENT, for a maximum of four weeks.

B. CONSULTANT shall be responsible for directing the work of the approved subcontractor and for any compensation due the subcontractor. CITY assumes no responsibility whatsoever concerning such compensation.

C. CONSULTANT shall change or add subcontractors only with the written approval of CITY's Fire Chief.

D. Any subcontractor used by CONSULTANT in performing services under this AGREEMENT shall be obligated to comply with all terms and conditions of this AGREEMENT to the same extent as would be required of CONSULTANT if CONSULTANT was performing those services. CONSULTANT shall notify any subcontractor used by CONSULTANT in the performance of work under this AGREEMENT of the terms and conditions hereof by providing such subcontractor with a full and complete copy of this AGREEMENT.

SECTION 9. INDEMNIFICATION.

CONSULTANT shall defend, indemnify and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from

work performed under this AGREEMENT due to the willful or negligent acts (active or passive) or omissions by CONSULTANT's officers, employees or agents. The acceptance of said services and duties by CITY shall not operate as a waiver of such right of indemnification.

SECTION 10. INSURANCE REQUIREMENTS.

CONSULTANT agrees to have and maintain the policies set forth in EXHIBIT E, entitled "INSURANCE," which is attached hereto and incorporated herein. All policies, endorsements, certificates and/or binders shall be subject to approval by the Director of Finance or the Director's authorized designee ("Risk Manager") as to form and content. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. CONSULTANT agrees to provide CITY with a copy of said policies, certificates and/or endorsements before work commences under this AGREEMENT.

SECTION 11. NONDISCRIMINATION.

CONSULTANT shall not discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, or national origin, in connection with or related to the performance of this AGREEMENT.

SECTION 12. TERMINATION.

A. CITY shall have the right to terminate this AGREEMENT, without cause, by giving not less than seven (7) days written notice of termination.

B. If CONSULTANT fails to perform any of its material obligations under this AGREEMENT, in addition to all other remedies provided by law, CITY may terminate this AGREEMENT immediately upon written notice.

C. CITY's Fire Chief is empowered to terminate this AGREEMENT on behalf of CITY.

D. In the event of termination, CONSULTANT shall deliver to CITY copies of all reports, documents, and other work performed by CONSULTANT under this AGREEMENT, and upon receipt thereof, CITY shall pay CONSULTANT for services performed to the date of termination.

SECTION 13. GOVERNING LAW.

CITY and CONSULTANT agree that the law governing this AGREEMENT shall be that of the State of California.

SECTION 14. COMPLIANCE WITH LAWS.

CONSULTANT shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local governments.

SECTION 15. CONFIDENTIAL INFORMATION.

All data, documents, discussions or other information developed or received by or for

CONSULTANT in performance of this AGREEMENT are confidential and not to be disclosed to any person except as authorized by CITY, or as required by law.

SECTION 16. OWNERSHIP OF MATERIALS.

All reports, documents or other materials developed or discovered by CONSULTANT or any other person engaged directly or indirectly by CONSULTANT to perform the services required hereunder shall be and remain the property of CITY without restriction or limitation upon their use.

SECTION 17. WAIVER.

CONSULTANT agrees that waiver by CITY of any breach or violation of any term or condition of this AGREEMENT shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term or condition. The acceptance by CITY of the performance of any work or services by CONSULTANT shall not be deemed to be a waiver of any term or condition of this AGREEMENT.

SECTION 18. CONSULTANT'S BOOKS AND RECORDS.

A. CONSULTANT shall maintain any and all ledgers, books of account, invoices, vouchers, cancelled checks, and other records or documents evidencing or relating to charges for services, or expenditures and disbursements charged to CITY for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to CONSULTANT pursuant to this AGREEMENT.

B. CONSULTANT shall maintain all documents and records, which demonstrate performance under this AGREEMENT for a minimum period of three (3) years, or for any longer period required by law, from the date of termination or completion of this AGREEMENT.

C. Any records or documents required to be maintained pursuant to this AGREEMENT shall be made available for inspection or audit at no cost to CITY, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to CITY for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at CONSULTANT's address indicated for receipt of notices in this AGREEMENT.

D. Where CITY has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of CONSULTANT's business, CITY may, by written request by any of the above-named officers, require that custody of the records be given to CITY and that the records and documents be maintained in City Hall. Access to such records and documents shall be granted to any party authorized by CONSULTANT, CONSULTANT's representatives, or CONSULTANT's successor-in-interest.

SECTION 19. CONFLICT OF INTEREST.

CONSULTANT shall avoid all conflict of interest or appearance of conflict of interest in performance of this AGREEMENT.

SECTION 20. GIFTS.

A. CONSULTANT is familiar with CITY's prohibition against the acceptance of any gift by a CITY officer or designated employee, which prohibition is found in Chapter 12.08 of the San Jose Municipal Code.

B. CONSULTANT agrees not to offer any CITY officer or designated employee any gift prohibited by said Chapter.

C. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this AGREEMENT by CONSULTANT. In addition to any other remedies CITY may have in law or equity, CITY may terminate this AGREEMENT for such breach as provided in SECTION 12 of this AGREEMENT.

SECTION 21. DISQUALIFICATION OF FORMER EMPLOYEES.

CONSULTANT is familiar with the provisions relating to the disqualification of former officers and employees of CITY in matters, which are connected with former duties or official responsibilities as set forth in Chapter 12.10 of the San Jose Municipal Code ("Revolving Door Ordinance"). CONSULTANT shall not utilize either directly or indirectly any officer, employee, or agent of CONSULTANT to perform services under this AGREEMENT, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

SECTION 22. SPECIAL PROVISIONS.

Special provisions, if any, to this AGREEMENT are specified in EXHIBIT F, entitled, "SPECIAL PROVISIONS," which is attached hereto and incorporated herein.

SECTION 23. NOTICES.

All notices and other communications required or permitted to be given under this AGREEMENT shall be in writing and shall be personally served or mailed, postage prepaid and return receipt requested, addressed to the respective parties as follows:

To CITY: Fire Chief
Fire Department
1661 Senter Rd, Ste 300
San Jose, CA 95112

To CONSULTANT: Bonnie Wheatley
Club One, Inc
555 Market Street, Ste 1300
San Francisco, CA 94105

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail.

SECTION 24. VENUE.

In the event that suit shall be brought by either party to this contract, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San Jose, California.

SECTION 25. PRIOR AGREEMENTS AND AMENDMENTS.

This AGREEMENT, including all Exhibits attached hereto, represents the entire understanding of the parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This AGREEMENT may only be modified by a written amendment duly executed by the parties to this AGREEMENT.

WITNESS THE EXECUTION HEREOF on the day and year first hereinabove written.

“CITY”

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

BRIAN DOYLE
Senior Deputy City Attorney

By _____
Deputy City Manager

“CONSULTANT”

By _____
BILL MCBRIDE
President & Chief Operating Officer
Club One, Inc
555 Market Street, Ste 1300
San Francisco, CA 94105

EXHIBIT A
RECITALS

WHEREAS, the CITY OF SAN JOSE desires to obtain consultant services to conduct a comprehensive Wellness Program with the employees of the San Jose Fire Department; and

WHEREAS, CLUB ONE, INC. has the necessary professional expertise and skill to perform such services;

NOW, THEREFORE, the purpose of this AGREEMENT is to retain CLUB ONE, INC. as CONSULTANT to CITY to perform those services specified in SECTION 1 of this AGREEMENT.

EXHIBIT B
SCOPE OF SERVICES

CONSULTANT shall perform the following services:

1. ACT AS A FULL SERVICE CONTRACTOR FOR THE WELLNESS PROGRAM

- Capable of supporting all aspects of the Fire Department Wellness Program.
- Provide a staffing sufficient to carry out all required operations simultaneously.

2. PROVIDE A CERTIFIED EXERCISE SPECIALIST

- A Certified Exercise Specialist will be assigned specifically to the Fire Department to work weekly at on a full-time (40hrs) schedule. The individual will be responsible for conducting job analyses and remaining current on literature pertaining to fitness and fire fighting. The CITY shall have the opportunity for review and approval of the job description for this position. The selection process of the Certified Exercise Specialist shall include a member of San Jose Fire Department in the selection panel.

The Certified Exercise Specialist will be an employee of Club One and possess the following minimum qualifications:

- Fitness related degree and/or nationally recognized fitness certification.
 - Two (2) years fitness/wellness program administration and management
 - Strong organizational, administrative skills and the ability to work in a self-directed, autonomous environment.
 - A flexible attitude lending itself to accomplishing the task in a diverse working environment. The ability to interact positively with Fire Department employees,
 - Knowledge of, and the ability to apply, principles and practices of current industry wellness programs to the diverse environment of the Fire Department.
 - Experience working within a municipal environment and/or fire department will
- The Certified Exercise Specialist will report daily (except weekends and holidays) to Fire Administration and work 8 hours during Fire Department

business hours under the direct supervision of the Fire Department Safety Officer.

- Work with the Department Workers' Compensation Coordinator to implement a wellness-oriented program as part of the return-to-work process for all job- and non-job- related injuries of Fire Department employees to minimize the risk of being reinjured. Employee participation in the personalized program would be voluntary.
- Implement semi-annually or every six (6) months health risk assessments (HRA) to the extent outline by the Fire Department. The Certified Exercise Specialist will deliver results and update the health risk assessment database. The Certified Exercise Specialist will work with the Wellness Program Coordinator to implement the Wellness Assessment Testing, working closely with the Fire Department to develop a testing schedule to first screen all sworn (mandatory) and non-sworn (optional) personnel and the every 6-months wither retest only high-risk individuals or retest the entire Department staff based on the budget and request of the Fire Department. Personal results will be delivered to each employee 72-hours after their assessment is completed and aggregate reports will be delivered 1-week after the completion of Department testing.
- Work with HR and Fire Department staff to develop strategies to reduce the incidence of injuries and illnesses among Department personnel.
- Attend monthly Fire Department Safety Committee meetings.
- Coordinate the Department's participation in the CPAT program.
- Work closely with the Department Safety Officer to maximize effectiveness of all programs.

Deliverables:

- Provide Health Risk Assessments and analysis of results.
- Provide health, fitness, and wellness training programs for all Fire Department personnel to minimize injuries, health risks and improve quality of life. Work closely in improving the health and fitness of those employees needing improvement based on the HRA by implementing, monitoring and evaluating their progress on a continuous basis.
- Provide personalized fitness programs to employees returning from injury that will help to improve employee well being and prevent future injury.
- Provide evaluations of fitness equipment in all Fire Department facilities and follow up with training and equipment procurement activities.

- Coordinate fitness equipment maintenance and repairs.
- Publish information bulletins for Fire Department members.
- Coordinate and provide initial and ongoing training to Peer Fitness Instructors.

3. DELIVER PERSONNEL PHYSICAL FITNESS TESTING USING CONSULTANT SUPPLIED EQUIPMENT

- Provide semi annually (every six (6) months) comprehensive physical assessment, including a HRA, to 770 Fire Department Employees, sworn and non-sworn, during a one month period.
- Provide the specific International Association of Fire Chiefs/International Association of Fire Fighters (IAFC/IAFF) physical assessment protocol, to all Fire Department employees participating in the assessments. All testing will be conducted at Fire Department facilities.
- Provide questionnaire via CONSULTANT's online BeWell health portal to screen firefighters who may have possible health risks.
- Provide specific equipment needed to conduct the assessment protocols.

Deliverables:

- Complete all physical performance testing during the period designated by the Fire Department.
- Deliver report on physical assessments to all individuals participating in the wellness assessments.

4. PROVIDE A FITNESS INFORMATION DATABASE MANAGEMENT SYSTEM AND COMPREHENSIVE REPORTING

- CONSULTANT will provide a web-based fitness assessment dataset called BeWell that is transferable to the Fire Department and will be used for the HRA and wellness program tracking.
- CONSULTANT will enter appropriate data to track individual assessments and provide results to individuals confidentially.
- Consultant will enter appropriate date to track program-wide progress from year to year.

- CONSULTANT will provide a yearly summary of the results of the health risk assessments and total fitness of the Fire Department to the Fire Chief and to the Fire Department Safety Committee as needed. This summary will be based upon a statistical data analysis of the results and will not include confidential information specific to any employee.

Deliverables:

- A transferable software database that tracks individualized records from year to year.
- A transferable database that tracks program-wide records and is capable of generating reports as requested by the CITY.
- A yearly summary report.

5. PROVIDE A MAINTENANCE PROGRAM FOR FIRE DEPARTMENT FITNESS EQUIPMENT

- CONSULTANT will assess the existing equipment and provide a Preventative Maintenance Contract based on the number of pieces and frequency of visits.
- The schedule of Preventative Maintenance will outline 1, 2, to 3 times per quarter visits where CONSULTANT will identify issues. Repairs that do not require parts will be accommodated immediately during the visit. Repairs that require parts will be subject to authorization, ordering and scheduling based on part on approved delivery.

6. HEALTH AND FITNESS INCENTIVE

- CONSULTANT will provide a Health Management portable available to all employees at all times which includes a HRA, Personal Wellness Plan, Wellness Workshops, Health Education and Fitness & Nutrition Trackers.
- CONSULTANT will provide discounted membership dues of \$35/month to Club One Fitness Centers to all San Jose Fire Department employees who complete HRA testing. Additionally, each testing participant will receive a 1-week pass to the Club One Fitness Center location(s) of their choice. Registration and processing fees for membership enrollment within 30-days of testing will be waived.

EXHIBIT C
SCHEDULE OF PERFORMANCE

Work shall commence upon execution of the Agreement by CITY. Services shall be delivered on an on-going basis through the term of the Agreement. Wellness Assessments for 2011-12, including make-up Wellness Assessments for personnel unable to attend due to absence, shall be completed on or before March 1, 2012. If CITY exercises the option to renew for subsequent years, Wellness Assessments shall be completed on or before March 1st of each renewal year. The estimated time for completion is June 30, 2012.

The end of year summary report shall be provided within 60 days of the completion of Wellness Assessments. Semi-annual equipment maintenance shall be provided on or before December 31st and June 30th of each year; and on an on-going basis as specified in EXHIBIT B, "SCOPE OF SERVICES".

EXHIBIT D
COMPENSATION

The maximum amount of compensation to be paid to CONSULTANT under this AGREEMENT for professional services for the initial term of this Agreement shall not exceed One Hundred Fifteen Thousand Dollars and Four Cents (\$115,000.00). Any hours worked for which payment would result in a total exceeding the maximum amount of compensation set forth herein shall be at no cost to CITY.

There shall be no reimbursement for expenses under this Agreement.

Project	Description	Labor Category	Hourly Rate	Estimated Total Hours	Estimated Costs
1	Wellness Administration	Exercise Specialist	\$25.96	2080	\$54,000
2	Testing 1	Fitness Trainers	\$24	350	\$8,400
3	Testing 2	Fitness Trainers	\$24	100	\$2,400
4	BeWell Portal				\$6,000
5	Management Fee				\$42,000
6	Equipment Maintenance				\$2,200

EXHIBIT E

INSURANCE

CONSULTANT, at CONSULTANT'S sole cost and expense, shall procure and maintain for the duration of this AGREEMENT insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by CONSULTANT, its agents, representatives, employees or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and
2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles.
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors and Omissions insurance for all professional services.

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

B. Minimum Limits of Insurance

CONSULTANT shall maintain limits no less than:

1. Commercial General Liability: \$2,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident; and
4. Professional Liability Errors and Omissions \$1,000,000 Aggregate Limit.

C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by CITY's Risk Manager. At the option of CITY, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officer, employees, agents and contractors; or CONSULTANT shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY's Risk Manager.

D. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverages

a. The City of San Jose, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, CONSULTANT; products and completed operations of CONSULTANT; premises owned, leased or used by CONSULTANT; and automobiles owned, leased, hired or borrowed by CONSULTANT. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.

b. CONSULTANT's insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents or contractors shall be excess of CONSULTANT's insurance and shall not contribute with it.

c. Any failure to comply with reporting provisions of the policies by CONSULTANT shall not affect coverage provided CITY, its officers, employees, agents, or contractors.

d. Coverage shall state that CONSULTANT's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

e. Coverage shall contain waiver of subrogation in favor of the City of San Jose, its officers, employees, agents and contractors

2. Workers' Compensation and Employers' Liability

Coverage shall contain waiver of subrogation in favor of the City of San Jose, its officers, employees, agents and contractors

3. All Coverages

Each insurance policy required by this AGREEMENT shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to CITY, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

E. Acceptability of Insurers

Insurance is to be placed with insurers acceptable to CITY's Risk Manager.

F. Verification of Coverage

CONSULTANT shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this AGREEMENT. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to:
Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San Jose - Human Resources
Risk Management
200 East Santa Clara St., 2nd Floor - Wing
San Jose, CA 95113-1905

G. Subcontractors

CONSULTANT shall include all subcontractors as insured under its policies or shall obtain separate certificates and endorsements for each subcontractor.

EXHIBIT F

SPECIAL PROVISIONS

Notwithstanding Section 16 of the Agreement, the following special provisions apply to applicable project materials:

1. **Proprietary Marks.** CONSULTANT employs now or hereafter will employ certain distinctive and identifying marks, trade names, trademarks, service marks (including without limitation the "Club One" service mark), copyrights, logos, emblems and advertising or promotional slogans (collectively referred to herein as "Proprietary Marks"). All Proprietary Marks are not "works for hire" under this Agreement, and shall remain the sole property of CONSULTANT during and after the Term set forth in Section 2.A. No license to use the Proprietary Marks beyond uses contemplated by Exhibit B, SCOPE OF SERVICES, is conferred by this Agreement.

2. **Proprietary Materials.** CONSULTANT has developed or will in the future develop health and fitness manuals, and software for use in its business (collectively referred to herein as the "Proprietary Materials"). All Proprietary Materials are not "works for hire" under this Agreement and shall remain the sole property of CONSULTANT during and after the Term set forth in Section 2.A. CONSULTANT hereby grants to CITY a royalty-free, non-exclusive license to use the Proprietary Materials to fulfill the purposes of the SCOPE OF SERVICES in Exhibit B, during and after the Term, provided that copyright notices indicating CONSULTANT's ownership of the Proprietary Materials are not altered or removed. No other license to use the Proprietary Materials beyond uses contemplated by Exhibit B, SCOPE OF SERVICES, is conferred by this Agreement.