

**AGREEMENT FOR CITY OF MILPITAS RECREATION SERVICES
Personal Trainer/Fitness Instructor Contract**

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| Instructor Name: Theresa Guerrero | Tax ID Number: - |
| Address: 736 Guerrero Street, San Francisco, CA 94110 | Social Security Number: [REDACTED] |
| Phone Number: (510) 708-7477 | |

This Agreement for Recreation Services is made by and between the City of Milpitas (“City”) and Theresa Guerrero (“Contractor”). This Agreement will be in effect from July 1, 2010 (“Effective Date”), to June 30, 2011 (“Ending Date”), in Milpitas, California.

AGREEMENT

Section 1. EMPLOYEE STATUS

1.1 Independent Contractor. At all times during the term of this Agreement, Contractor will be an independent Contractor and will not be an employee of City. City will have the right to control Contractor only insofar as to the results of Contractor’s services rendered pursuant to this Agreement. Otherwise, City will not have the right to control the means by which Contractor accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Contractor and any of its employees, agents, and subcontractors providing services under this Agreement will not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.

1.2 Contractor Not Agent. Except as City may specify in writing, Contractor will have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Contractor will have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

Section 2. SERVICES Subject to the terms and conditions set forth in this Agreement, Contractor will provide to City the services described in the Scope of Services, attached as Exhibit A, at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, this Agreement will prevail.

2.1 Term of Services. The term of this Agreement will begin on the Effective Date and will end on the Ending Date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 4. The time provided to Contractor to complete the services required by this Agreement will not affect the City’s right to terminate the Agreement, as provided for in Section 4.

2.2 Standard of Performance. Contractor will perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which Contractor is engaged in the geographical area in which Contractor

practices his profession. Contractor will conform to the standards of quality normally observed by a person practicing in Contractor's profession.

2.3 **Assignment and Subcontracting.** City and Contractor recognize and agree that this Agreement contemplates personal performance by Contractor and is based upon a determination of Contractor's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Contractor. Contractor may not assign this Agreement or any interest therein without the prior written approval of the City. Contractor will not subcontract any portion of the performance contemplated and provided for herein without prior written approval of the City.

2.4 **Time.** Contractor will devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Section 2.2 above and to complete Contractor's obligations hereunder.

Section 3. **COMPENSATION**

3.1 **Half-hour and Hourly Fees.** Contractor compensation will be computed monthly based on the classes and training sessions taught as reported in Contractor's timely submitted invoice. The City will pay the Contractor \$27.72 per half-hour (30-minute) personal training session and \$55.44 per hour (60-minute) personal training session and \$55.44 per fitness class. Total contractor compensation will not exceed \$48,000 per fiscal year.

3.2 **Invoices.** Contractor will submit invoices monthly during the term of this Agreement. Invoices will contain the following information:

- Serial identification of classes and personal training sessions taught;
- The beginning and ending dates of the billing period;
- A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement;
- The Contractor's signature.

3.3 **Monthly Payment.** City will make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City will have thirty (30) days from the receipt of an invoice that complies with all of the requirements above and is otherwise acceptable to the City to pay Contractor. In the event that an invoice is not acceptable to the City, said invoice will be returned to Contractor within thirty (30) days of the City's receipt of the invoice with a detailed explanation of the deficiency. City's obligation to pay a returned invoice will not arise earlier than thirty (30) days after resubmission of the corrected invoice.

Section 4. **INSURANCE REQUIREMENTS.** Consultant shall procure "occurrence coverage" insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the City within 30 days of the Effective Date. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement and shall

produce said policies to the City upon demand. The cost of such insurance shall be included in the Consultant's price.

4.1 Workers' Compensation. Consultant shall perform all work under this Agreement and shall not maintain or hire any employees to accomplish said work. Consultant represents that he or she is performing such services in an individual capacity as a sole proprietor and shall not perform any such work as an employee of any firm, corporation, partnership or other sole proprietorship. As such, Consultant represents that he or she is not required to maintain Worker's Compensation coverage. Verification of such exemption from Workers' Compensation requirements shall be required solely in the discretion of the City Attorney. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

If insurance is provided, an endorsement shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

4.2 Commercial General and Automobile Liability Insurance.

4.2.1 General requirements. Consultant, at his or her own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

4.2.2 Minimum scope of coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.

4.2.3 Additional requirements. Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:

- a. City and its officers, employees, agents, contractors, consultants, and volunteers shall be covered as insureds with respect to each of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied, or used by Consultant; and automobiles

owned, leased, or used by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City or its officers, employees, agents, contractors, consultants, or volunteers.

- b. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- c. An endorsement must state that coverage is primary insurance with respect to the City and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.
- d. Any failure of Consultant to comply with reporting provisions of the policy shall not affect coverage provided to City and its officers, employees, agents, and volunteers.
- e. An endorsement shall state that coverage shall not be suspended, voided, or canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

4.3 (intentionally omitted)

4.4 **Requirements for All Policies.**

4.4.1 **Acceptability of insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A.

4.4.2 **Verification of coverage.** Verification of coverage shall be made as set forth in Section 4 above. 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. The City reserves the right to require complete, certified copies of all required insurance policies at any time.

4.4.3 **Subcontractors.** Not Applicable

4.4.4 **Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the approval of City for the self-insured retentions and deductibles.

During the period covered by this Agreement, only upon the prior express written authorization of the City, Consultant may increase such deductibles or self-insured retentions with respect to City, its officers, employees, agents, contractors, consultants, and volunteers. The City may condition approval of an increase in deductible or self-insured retention levels with a requirement that Consultant procure a bond, guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to the City.

4.4.5 **Notice of Reduction in Coverage.** In the event that any coverage required by this section is reduced, limited, or materially affected in any other manner, Consultant shall

provide written notice to City at Consultant's earliest possible opportunity and in no case later than five (5) days after Consultant is notified of the change in coverage.

4.5 Remedies. In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the timeframe herein required, City may, at its sole option, exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Declare Consultant in material breach of the Agreement and terminate the Agreement.

4.6 Waiver. The City Attorney jointly with the Risk Manager (Finance Director) of the City have the authority to waive or vary any provision of Sections 4.2 through 4.5. Any such waiver or variation shall not be effective unless made in writing and included in the Scope of Work attached as Exhibit A

Section 5. TERMINATION AND MODIFICATION

5.1 Termination. City may terminate this Agreement at any time by ten (10) working days written notice to the Contractor. In addition, if the Contractor is convicted of any crime or offense, fails or refuses to comply with the written policies or reasonable directive of City, is guilty of serious misconduct in connection with performance hereunder, or materially breaches provisions of this Agreement, City at any time may terminate the engagement of the Contractor immediately and without prior written notice to the Contractor.

In the event of termination, Contractor will be entitled to compensation for services performed prior to the effective date of termination as provided in Section 3. City, however, may condition payment of such compensation upon Contractor delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Contractor or prepared by or for Contractor or the City in connection with this Agreement.

5.2 Extension. City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond the Ending Date. Any such extension will require a written amendment to this Agreement, as provided for herein. Contractor understands and agrees that, if City grants such an extension, City will have no obligation to provide Contractor with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the City, City will have no obligation to reimburse Contractor for any otherwise reimbursable expenses incurred during the extension period.

5.3 Amendments. The parties may amend this Agreement only by a writing signed by all the parties.

5.4 **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Contractor will survive the termination of this Agreement.

5.5 **Options upon Breach by Contractor.** If Contractor materially breaches any of the terms of this Agreement, City's remedies will include, but not be limited to, any or all of the following:

5.5.1 Immediate cancellation of the Agreement;

5.5.2 Retention of the plans, specifications, drawings, reports, design documents, and any other work product prepared by Contractor pursuant to this Agreement prior to cancellation; and

5.5.3 Retention of a different contractor at Contractor's cost to complete the work described in Exhibit A not finished by Contractor.

Section 6. **LEGAL REQUIREMENTS**

6.1 **Governing Law.** The laws of the State of California will govern this Agreement.

6.2 **Compliance with Applicable Laws.** Contractor will comply with all laws applicable to the performance of the work hereunder.

6.3 **Licenses and Permits.** Contractor represents and warrants to City that Contractor and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that is legally required to provide services pursuant to this Agreement.

6.4 **Insurance.** Should Contractor employ any party or person in connection with Contractor's operations under this contract, Contractor will obtain Worker's Compensation Insurance and will provide the City with proof thereof. The Labor Code of California states that an employer must cover employees for work-related injury and illness. As an Independent Contractor, and not an agent or employee of City, Contractor and any employees thereof will not be covered under the City's Worker's Compensation Fund. City will also not obtain unemployment insurance for Contractor. City's insurer will not defend or pay claims brought against Contractor. Contractor understands that as an Independent Contractor, he/she is responsible for his/her own insurance and liability coverage. _____ Contractor initials.

6.5 **Waiver of Subrogation.** Contractor hereby grants to City a waiver of any right to subrogation that any insurer of said Contractor may acquire against the City by virtue of the payment of any loss under such insurance. This provision applies regardless of whether or not the City has requested or received a waiver of subrogation endorsement from the insurer.

6.6 **Special Risks or Circumstances.** City reserves the right to modify these insurance requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

- 6.7** **Permission.** Contractor grants full permission to the City of Milpitas for use of his/her name and photographs, videos, motion pictures or recordings for any publicity and promotion purposes without obligation or liability to contractor.
- 6.8** **Background Checks.** If class/program is open to youth under the age of 18 years, Contractor and any assistant instructors/subcontractors agree to fulfill all fingerprint/background checks prior to first class. Independent Contractor/assistant instructor/subcontractor is not eligible to work until the clearance is received from the Department of Justice and notified by a Recreation Services representative. The Independent Contractor attests that they have never been convicted of a crime, including military offenses, other than minor traffic offenses, which resulted in conviction and/or imprisonment.
- 6.9** **Indemnification.** Contractor will defend and indemnify City and its officers, agents, employees and volunteers (collectively, "City Parties") against any and all claims, deductibles, self-insured retentions, demands, liability, judgments, awards, fines, mechanics' liens, or other liens, labor disputes, losses, damages, expenses, charges or costs, of any kind or character, including attorneys' fees and court costs (collectively, "Claims"), which arise out of or are in any way connected to this Agreement or Contractor's activities pursuant to this Agreement, including without limitation, Claims caused by the concurrent negligent act, error, or omission, whether active or passive, of City Parties. Contractor will have no obligation to defend or indemnify City Parties from a Claim if it is determined by a court of competent jurisdiction that such Claim was caused by the sole negligence or willful misconduct of City Parties. For purposes of Section 2782 of the Civil Code, the parties hereto recognize and agree that this Agreement is not a construction contract. For purposes of Section 2782.8 of the Civil Code, the parties hereto recognize and agree that this Agreement is not for design professional services.
- 6.10** **Noncompliance and Equal Opportunity.** Contractor will not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any participant in, recipient of, or applicant for any services or programs provided by Contractor under this Agreement. Contractor will comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Contractor thereby.
- 6.11** **Severability.** In the event that any one or more of the provisions contained herein will for any reason be held to be unenforceable in any respect under any statute, rule or law of any state or of the United States of America, such unenforceability will not affect any other provision of this Agreement, but, with respect only to the jurisdiction holding the provision to be unenforceable, this Agreement will then be construed as if such unenforceable provision or provisions had never been contained herein.
- 6.12** **Counterparts.** This Agreement may be executed in counterparts, and each counterpart will have the same force and effect as an original and will constitute an effective, binding agreement on the part of each of the undersigned.
- 6.13** **Successors and Assigns.** The provisions of this Agreement will inure to the benefit of and will apply to and bind the successors and assigns of the parties.

Section 7. MISCELLANEOUS PROVISIONS

- 7.1 Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret any provision of this Agreement, the prevailing party will be entitled to reasonable attorneys' fees not exceeding a total of \$10,000 for any legal representation whether in a court of law or at formal or informal arbitration or mediation relating to the performance by either party of the terms of this Agreement.
- 7.2 Venue.** In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action will be vested exclusively in the state courts of California in the County of Santa Clara or in the United States District Court for the Northern District of California.
- 7.3 Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged will remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement will not void or affect the validity of any other provision of this Agreement.
- 7.4 No Implied Waiver of Breach.** The waiver of performance or any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 7.5 Conflict of Interest.** Contractor may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Contractor in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 et seq.

Contractor will not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City will have any financial interest in this Agreement that would violate California Government Code Sections 1090 et seq.

Contractor warrants that he or she did not participate in any manner in the forming of this Agreement. Contractor understands that, if this Agreement is made in violation of Government Code Sections 1090 et seq., the entire Agreement is void and Contractor will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Contractor will be required to reimburse the City for any sums paid to the Contractor. Contractor understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of Government Code Section 1090 and, if applicable, may be disqualified from holding public office in the State of California.

Contractor certifies that he or she has not paid any direct or contingent fee, contribution, donation or consideration of any kind to any firm, organization, or person in connection with procuring this Agreement, nor has Contractor agreed to employ or retain any firm, organization, or person in connection with the performance of this Agreement as a condition for obtaining this Agreement.

- 7.6 Solicitation.** Contractor agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.

7.7 Contract Administration. This Agreement will be administered by Bonnie Greiner, who is authorized to act for, and on behalf of, City. All correspondence will be directed to or through the Contract Administrator or his or her designee.

7.8 Notices. Any written notice to Contractor will be sent to:

Theresa Guerrero
736 Guerrero Street,
San Francisco, CA 94110

Any written notice to City will be sent to:

Bonnie Greiner, Parks and Recreation Director
City of Milpitas
455 East Calaveras Boulevard
Milpitas, California 95035

7.9 Exhibits. All exhibits referenced in this Agreement are incorporated by reference herein.

7.10 Integration. This Agreement, including the exhibits, represents the entire and integrated agreement between City and Contractor and supersedes all prior negotiations, representations, or agreements, either written or oral.

CITY OF MILPITAS

CONTRACTOR

Thomas C. Williams, City Manager

Name

Taxpayer Identification Number

APPROVED AS TO CONTENT AND FORM:

Michael J. Ogaz, City Attorney

EXHIBIT A-1

SCOPE OF SERVICES

Consultant shall provide professional services in the following areas:

- Contractor shall provide fitness class instruction for the City of Milpitas Sports Center:
 - Interval Mix, Tuesday 9:30-10:30 a.m., 12:00-1:00 p.m., and Thursday 9:30-10:30 a.m.
 - Interval Mix, Thursday 9:30-10:30 a.m.
 - Butts & Guts, Thursday 12:00-1:00 p.m., and 6:00-7:00 p.m.
 - Fitness Class Substitution when agreed upon by the City of Milpitas and Contractor.
- Contractor shall provide personal training instruction for the City of Milpitas Sports Center as directed by the City.
- Contractor shall maintain current and valid certification and training for fitness class instruction and personal training.

AGREEMENT FOR CITY OF MILPITAS RECREATION SERVICES
Personal Trainer/Fitness Instructor Contract

| | |
|---|---|
| Instructor Name: Tatsiana Lahunovich | Tax ID Number: - |
| Address: 325 Union Ave Apt. 353 Campbell, CA 95008 | Social Security Number: [REDACTED] |
| Phone Number: (408) 823-8922 | |

This Agreement for Recreation Services is made by and between the City of Milpitas (“City”) and Tatsiana Lahunovich (“Contractor”). This Agreement will be in effect from July 1, 2010 (“Effective Date”), to June 30, 2011 (“Ending Date”), in Milpitas, California.

AGREEMENT

Section 1. EMPLOYEE STATUS

1.1 Independent Contractor. At all times during the term of this Agreement, Contractor will be an independent Contractor and will not be an employee of City. City will have the right to control Contractor only insofar as to the results of Contractor’s services rendered pursuant to this Agreement. Otherwise, City will not have the right to control the means by which Contractor accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Contractor and any of its employees, agents, and subcontractors providing services under this Agreement will not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.

1.2 Contractor Not Agent. Except as City may specify in writing, Contractor will have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Contractor will have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

Section 2. SERVICES Subject to the terms and conditions set forth in this Agreement, Contractor will provide to City the services described in the Scope of Services, attached as Exhibit A, at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, this Agreement will prevail.

2.1 Term of Services. The term of this Agreement will begin on the Effective Date and will end on the Ending Date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 4. The time provided to Contractor to complete the services required by this Agreement will not affect the City’s right to terminate the Agreement, as provided for in Section 4.

2.2 Standard of Performance. Contractor will perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of

the profession in which Contractor is engaged in the geographical area in which Contractor practices his profession. Contractor will conform to the standards of quality normally observed by a person practicing in Contractor's profession.

2.3 **Assignment and Subcontracting.** City and Contractor recognize and agree that this Agreement contemplates personal performance by Contractor and is based upon a determination of Contractor's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Contractor. Contractor may not assign this Agreement or any interest therein without the prior written approval of the City. Contractor will not subcontract any portion of the performance contemplated and provided for herein without prior written approval of the City.

2.4 **Time.** Contractor will devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Section 2.2 above and to complete Contractor's obligations hereunder.

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3.2 **Invoices.** Contractor will submit invoices monthly during the term of this Agreement. Invoices will contain the following information:

- Serial identification of classes and personal training sessions taught;
- The beginning and ending dates of the billing period;
- A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement;
- The Contractor's signature.

3.3 **Monthly Payment.** City will make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City will have thirty (30) days from the receipt of an invoice that complies with all of the requirements above and is otherwise acceptable to the City to pay Contractor. In the event that an invoice is not acceptable to the City, said invoice will be returned to Contractor within thirty (30) days of the City's receipt of the invoice with a detailed explanation of the deficiency. City's obligation to pay a returned invoice will not arise earlier than thirty (30) days after resubmission of the corrected invoice.

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produce said policies to the City upon demand. The cost of such insurance shall be included in the Consultant's price.

4.1 Workers' Compensation. Consultant shall perform all work under this Agreement and shall not maintain or hire any employees to accomplish said work. Consultant represents that he or she is performing such services in an individual capacity as a sole proprietor and shall not perform any such work as an employee of any firm, corporation, partnership or other sole proprietorship. As such, Consultant represents that he or she is not required to maintain Worker's Compensation coverage. Verification of such exemption from Workers' Compensation requirements shall be required solely in the discretion of the City Attorney. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

If insurance is provided, an endorsement shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

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4.2.1 General requirements. Consultant, at his or her own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

4.2.2 Minimum scope of coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.

4.2.3 Additional requirements. Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:

- a. City and its officers, employees, agents, contractors, consultants, and volunteers shall be covered as insureds with respect to each of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied, or used by Consultant; and automobiles

owned, leased, or used by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City or its officers, employees, agents, contractors, consultants, or volunteers.

- b. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- c. An endorsement must state that coverage is primary insurance with respect to the City and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.
- d. Any failure of Consultant to comply with reporting provisions of the policy shall not affect coverage provided to City and its officers, employees, agents, and volunteers.
- e. An endorsement shall state that coverage shall not be suspended, voided, or canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

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4.4.2 **Verification of coverage.** Verification of coverage shall be made as set forth in Section 4 above. 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. The City reserves the right to require complete, certified copies of all required insurance policies at any time.

4.4.3 **Subcontractors.** Not Applicable

4.4.4 **Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the approval of City for the self-insured retentions and deductibles.

During the period covered by this Agreement, only upon the prior express written authorization of the City, Consultant may increase such deductibles or self-insured retentions with respect to City, its officers, employees, agents, contractors, consultants, and volunteers. The City may condition approval of an increase in deductible or self-insured retention levels with a requirement that Consultant procure a bond, guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to the City.

4.4.5 **Notice of Reduction in Coverage.** In the event that any coverage required by this section is reduced, limited, or materially affected in any other manner, Consultant shall

provide written notice to City at Consultant's earliest possible opportunity and in no case later than five (5) days after Consultant is notified of the change in coverage.

4.5 Remedies. In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the timeframe herein required, City may, at its sole option, exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Declare Consultant in material breach of the Agreement and terminate the Agreement.

4.6 Waiver. The City Attorney jointly with the Risk Manager (Finance Director) of the City have the authority to waive or vary any provision of Sections 4.2 through 4.5. Any such waiver or variation shall not be effective unless made in writing and included in the Scope of Work attached as Exhibit A.

Section 5. TERMINATION AND MODIFICATION

5.1 Termination. City may terminate this Agreement at any time by ten (10) working days written notice to the Contractor. In addition, if the Contractor is convicted of any crime or offense, fails or refuses to comply with the written policies or reasonable directive of City, is guilty of serious misconduct in connection with performance hereunder, or materially breaches provisions of this Agreement, City at any time may terminate the engagement of the Contractor immediately and without prior written notice to the Contractor.

In the event of termination, Contractor will be entitled to compensation for services performed prior to the effective date of termination as provided in Section 3. City, however, may condition payment of such compensation upon Contractor delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Contractor or prepared by or for Contractor or the City in connection with this Agreement.

5.2 Extension. City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond the Ending Date. Any such extension will require a written amendment to this Agreement, as provided for herein. Contractor understands and agrees that, if City grants such an extension, City will have no obligation to provide Contractor with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the City, City will have no obligation to reimburse Contractor for any otherwise reimbursable expenses incurred during the extension period.

5.3 Amendments. The parties may amend this Agreement only by a writing signed by all the parties.

5.4 **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Contractor will survive the termination of this Agreement.

5.5 **Options upon Breach by Contractor.** If Contractor materially breaches any of the terms of this Agreement, City's remedies will include, but not be limited to, any or all of the following:

5.5.1 Immediate cancellation of the Agreement;

5.5.2 Retention of the plans, specifications, drawings, reports, design documents, and any other work product prepared by Contractor pursuant to this Agreement prior to cancellation; and

5.5.3 Retention of a different contractor at Contractor's cost to complete the work described in Exhibit A not finished by Contractor.

Section 6. **LEGAL REQUIREMENTS**

6.1 **Governing Law.** The laws of the State of California will govern this Agreement.

6.2 **Compliance with Applicable Laws.** Contractor will comply with all laws applicable to the performance of the work hereunder.

6.3 **Licenses and Permits.** Contractor represents and warrants to City that Contractor and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that is legally required to provide services pursuant to this Agreement.

6.4 **Insurance.** Should Contractor employ any party or person in connection with Contractor's operations under this contract, Contractor will obtain Worker's Compensation Insurance and will provide the City with proof thereof. The Labor Code of California states that an employer must cover employees for work-related injury and illness. As an Independent Contractor, and not an agent or employee of City, Contractor and any employees thereof will not be covered under the City's Worker's Compensation Fund. City will also not obtain unemployment insurance for Contractor. City's insurer will not defend or pay claims brought against Contractor. Contractor understands that as an Independent Contractor, he/she is responsible for his/her own insurance and liability coverage. _____ Contractor initials.

6.5 **Waiver of Subrogation.** Contractor hereby grants to City a waiver of any right to subrogation that any insurer of said Contractor may acquire against the City by virtue of the payment of any loss under such insurance. This provision applies regardless of whether or not the City has requested or received a waiver of subrogation endorsement from the insurer.

6.6 **Special Risks or Circumstances.** City reserves the right to modify these insurance requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

- 6.7** **Permission.** Contractor grants full permission to the City of Milpitas for use of his/her name and photographs, videos, motion pictures or recordings for any publicity and promotion purposes without obligation or liability to contractor.
- 6.8** **Background Checks.** If class/program is open to youth under the age of 18 years, Contractor and any assistant instructors/subcontractors agree to fulfill all fingerprint/background checks prior to first class. Independent Contractor/assistant instructor/subcontractor is not eligible to work until the clearance is received from the Department of Justice and notified by a Recreation Services representative. The Independent Contractor attests that they have never been convicted of a crime, including military offenses, other than minor traffic offenses, which resulted in conviction and/or imprisonment.
- 6.9** **Indemnification.** Contractor will defend and indemnify City and its officers, agents, employees and volunteers (collectively, "City Parties") against any and all claims, deductibles, self-insured retentions, demands, liability, judgments, awards, fines, mechanics' liens, or other liens, labor disputes, losses, damages, expenses, charges or costs, of any kind or character, including attorneys' fees and court costs (collectively, "Claims"), which arise out of or are in any way connected to this Agreement or Contractor's activities pursuant to this Agreement, including without limitation, Claims caused by the concurrent negligent act, error, or omission, whether active or passive, of City Parties. Contractor will have no obligation to defend or indemnify City Parties from a Claim if it is determined by a court of competent jurisdiction that such Claim was caused by the sole negligence or willful misconduct of City Parties. For purposes of Section 2782 of the Civil Code, the parties hereto recognize and agree that this Agreement is not a construction contract. For purposes of Section 2782.8 of the Civil Code, the parties hereto recognize and agree that this Agreement is not for design professional services.
- 6.10** **Noncompliance and Equal Opportunity.** Contractor will not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any participant in, recipient of, or applicant for any services or programs provided by Contractor under this Agreement. Contractor will comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Contractor thereby.
- 6.11** **Severability.** In the event that any one or more of the provisions contained herein will for any reason be held to be unenforceable in any respect under any statute, rule or law of any state or of the United States of America, such unenforceability will not affect any other provision of this Agreement, but, with respect only to the jurisdiction holding the provision to be unenforceable, this Agreement will then be construed as if such unenforceable provision or provisions had never been contained herein.
- 6.12** **Counterparts.** This Agreement may be executed in counterparts, and each counterpart will have the same force and effect as an original and will constitute an effective, binding agreement on the part of each of the undersigned.
- 6.13** **Successors and Assigns.** The provisions of this Agreement will inure to the benefit of and will apply to and bind the successors and assigns of the parties.

Section 7. MISCELLANEOUS PROVISIONS

- 7.1 Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret any provision of this Agreement, the prevailing party will be entitled to reasonable attorneys' fees not exceeding a total of \$10,000 for any legal representation whether in a court of law or at formal or informal arbitration or mediation relating to the performance by either party of the terms of this Agreement.
- 7.2 Venue.** In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action will be vested exclusively in the state courts of California in the County of Santa Clara or in the United States District Court for the Northern District of California.
- 7.3 Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged will remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement will not void or affect the validity of any other provision of this Agreement.
- 7.4 No Implied Waiver of Breach.** The waiver of performance or any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 7.5 Conflict of Interest.** Contractor may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Contractor in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 et seq.

Contractor will not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City will have any financial interest in this Agreement that would violate California Government Code Sections 1090 et seq.

Contractor warrants that he or she did not participate in any manner in the forming of this Agreement. Contractor understands that, if this Agreement is made in violation of Government Code Sections 1090 et seq., the entire Agreement is void and Contractor will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Contractor will be required to reimburse the City for any sums paid to the Contractor. Contractor understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of Government Code Section 1090 and, if applicable, may be disqualified from holding public office in the State of California.

Contractor certifies that he or she has not paid any direct or contingent fee, contribution, donation or consideration of any kind to any firm, organization, or person in connection with procuring this Agreement, nor has Contractor agreed to employ or retain any firm, organization, or person in connection with the performance of this Agreement as a condition for obtaining this Agreement.

- 7.6 Solicitation.** Contractor agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.

7.7 Contract Administration. This Agreement will be administered by Bonnie Greiner, who is authorized to act for, and on behalf of, City. All correspondence will be directed to or through the Contract Administrator or his or her designee.

7.8 Notices. Any written notice to Contractor will be sent to:
Tatsiana Lahunovich
325 Union Ave Apt. 353
Campbell, CA 95008

Any written notice to City will be sent to:

Bonnie Greiner, Parks and Recreation Director
City of Milpitas
455 East Calaveras Boulevard
Milpitas, California 95035

7.9 Exhibits. All exhibits referenced in this Agreement are incorporated by reference herein.

7.10 Integration. This Agreement, including the exhibits, represents the entire and integrated agreement between City and Contractor and supersedes all prior negotiations, representations, or agreements, either written or oral.

CITY OF MILPITAS

CONTRACTOR

Thomas C. Williams, City Manager

Name

Taxpayer Identification Number

APPROVED AS TO CONTENT AND FORM:

Michael J. Ogaz, City Attorney

EXHIBIT A-1

SCOPE OF SERVICES

Consultant shall provide professional services in the following areas:

- Contractor shall provide fitness class instruction for the City of Milpitas Sports Center:
 - Body Architect, Monday, 12:00-1:00 p.m., and Wednesday, 5:30-6:30p.m.
 - Yogalates, Monday, 5:10-6:05 p.m.
 - Pilates, Friday, 12:00-1:00 p.m.
 - Fitness Class Substitution when agreed upon by the City of Milpitas and Contractor.
- Contractor shall provide personal training instruction for the City of Milpitas Sports Center as directed by the City.
- Contractor shall maintain current and valid certification and training for fitness class instruction and personal training.