

THE STATE OF TEXAS §

**Personal Services Contract with
FITNESS NOW LLC**

COUNTY OF COLLIN §

THIS CONTRACT is entered into on this 20th day of September, 2017, by and between the **CITY OF MCKINNEY, TEXAS**, a municipal corporation located in Collin County, Texas (hereinafter referred to as "CITY"), acting by and through its City Manager or his designee, and **FITNESS NOW LLC**, a Limited Liability Company (hereinafter referred to as "Contractor").

WITNESSETH:

WHEREAS, CITY desires to obtain personal services in connection with the performance of a Personal Training Program (hereinafter referred to as the "PROGRAM"); and

WHEREAS, FITNESS NOW LLC is qualified to provide such services and is willing to undertake such services for CITY in exchange for fees hereinafter specified; NOW, THEREFORE,

THAT IN CONSIDERATION of the covenants and agreements hereinafter contained and subject to the terms and conditions hereinafter stated, the parties hereto do mutually agree as follows:

**I.
Employment of Contractor**

Contractor will perform as an independent contractor all services under this Contract to the prevailing standards consistent with the level of care and skill ordinarily exercised by members of its profession, both public and private, currently practicing in the same locality under similar conditions, including reasonable, informed judgments and prompt, timely action. If Contractor is representing that it has special expertise in one or more areas to be utilized in this Contract, then Contractor agrees to perform those special expertise services to the appropriate local, regional or national professional standards.

**II.
Scope of Services**

The activities and services herein described shall be conducted by and under the supervision of the Contractor as an independent contractor subject to the following conditions outlined in Attachment A.

III. **Compensation**

CITY agrees to pay to Contractor for satisfactory completion of all services included in this Contract a total fee not to exceed sixty percent (60%) of the total registration fees collected by CITY from participants in the PROGRAM. CITY shall pay such fee to Contractor on a monthly basis following receipt of a statement for services from Contractor identifying the names of each participant served and the dates and times on which such services were provided. All payments required under this contract shall be paid in accordance with the Prompt Payment Act, Chapter 2251 of the Texas Government Code.

Notwithstanding the foregoing, nothing contained in this Contract shall require CITY to pay for any work that is unsatisfactory as determined by CITY or which is not submitted in compliance with the terms of this Contract. CITY will not be required to make any payments to Contractor when Contractor is in default under this Contract, nor shall this paragraph constitute a waiver of any right at law or in equity to which CITY may be justly entitled if Contractor is in default, including the right to bring legal action for damages or for specific performance of this Contract. Waiver of any default under this Contract shall not be deemed a waiver of any subsequent default.

The Scope of Services shall be strictly limited. CITY shall not be required to pay any amount in excess of the original proposed amount unless CITY shall have approved in writing in advance (prior to the performance of additional work) the payment of additional amounts.

IV. **Term**

Contractor shall provide the PROGRAM to CITY for a 12 month period beginning on September 20, 2017 and ending on September 19, 2018. CITY reserves the right to extend the contract for up to four (4) additional one (1) year periods. CITY shall provide Contractor written notice of CITY's desire to extend the Contract for an additional one (1) year term at least sixty (60) days before the end of the then current term.

V. **Termination**

CITY or Contractor may terminate this Contract upon thirty (30) days written notice to the other party. Upon receipt of termination notice, Contractor shall stop all work in progress, including subcontracts. All materials purchased for the PROGRAM will be delivered to CITY and shall become the property of CITY upon final payment to Contractor. Contractor shall provide all fees to the CITY for all work performed within thirty (30) days of termination notice. CITY shall not be responsible for payment of any invoices received after the expiration of thirty (30) days from notice of termination.

VII. **Insurance**

Contractor shall purchase, maintain and keep in force during the term of this Contract such insurance as is set forth below. Contractor shall not commence work under this Contract until it has obtained all the insurance required under the Contract and such insurance has been approved by CITY; nor shall Contractor allow any subcontractor to commence work on his subcontract until all similar insurance of the subcontractor has been obtained and approved. All insurance policies provided under this Contract shall be written on an "occurrence" basis.

1. Workers' Compensation, as required by law, with the policy endorsed to provide a waiver of subrogation as to the CITY; Employer's Liability insurance of not less than \$100,000 for each accident, \$100,000 disease - each employee \$500,000 disease - policy limit.

2. Commercial General Liability Insurance, covering, but not limited to the indemnification provisions of this Contract, fully insuring Contractor's liability for injury to or death of employees of CITY and third parties, extended to include personal injury liability coverage, and for damage to property of third parties, with a Combined Single Limit of \$500,000. This policy shall have no coverages removed by exclusions. This policy shall be written with CITY as an additional insured and the policy phrase "other insurance" shall not apply to CITY where CITY is an additional insured shown on the policy.

It is agreed by all parties to this Contract that the insurance required under this Contract shall:

- (a) provide for thirty (30) days' notice of cancellation to CITY, for nonpayment of premium, material change or any other cause;
- (b) be written through companies duly authorized to transact that class of insurance in the State of Texas with a Best rating of A:VII;
- (c) waive subrogation rights for loss or damage so that Contractor and any insurers have no right to recovery or subrogation against CITY, it being the intention that the required insurance policies shall protect all parties to the Contract and be primary coverage for all losses covered by the policies; and

- (d) provide a Certificate of Insurance evidencing the required coverages to:

City of McKinney
Attn: John Lemmond
PO Box 517
McKinney, Texas 75070
Or email to:
jlemmond@mckinneytexas.org

CITY reserves the right to review the insurance requirements of this section during the effective period of the Contract and to adjust insurance coverages and their limits when deemed necessary by CITY's Risk Manager based upon changes in statutory law, court decisions or the claims history of the industry as well as Contractor.

VIII.

Right to Inspect Records

Contractor agrees that CITY shall have access to and the right to examine any directly pertinent books, documents, papers and records involving transactions relating to this Contract. Contractor agrees that CITY shall have access during normal working hours to all necessary facilities and shall be provided adequate and appropriate work space in order to conduct audits in compliance with the provisions of this section. CITY shall give Contractor reasonable advance notice of intended audits.

Contractor further agrees to include in subcontract(s), if any, a provision that any sub-contractor or consultant agrees that CITY shall have access to and the right to examine any directly pertinent books, documents, papers and records of such consultant or subcontractor involving transactions to the subcontract, and further, that CITY shall have access during normal working hours to all consultant or subcontractor facilities and shall be provided adequate and appropriate work space, in order to conduct audits in compliance with the provisions of this paragraph. CITY shall give Contractor or subcontractor reasonable advance notice of intended audits.

IX.

Safety of Participants in PROGRAM

Contractor shall be completely responsible for the safety of the participants and the conduct of the instructors and the class.

X.

Observation of Classes

Contractor shall allow the CITY to observe and evaluate any and all fitness classes.

XI.
Contractor's Responsibilities

Contractor accepts the following responsibilities:

1. Contractor shall schedule classes with participants and submit a schedule of activities specifically including the dates, times and facilities that Contractor proposes to use in conjunction with the provision of such classes as well as any available fitness equipment necessary thereto to the Program Coordinator at the beginning of each month.

2. Contractor shall provide a qualified substitute instructor in the event any regularly assigned instructor cannot instruct a scheduled class.

3. Contractor shall reimburse CITY for any and all damages caused by any instructor, qualified substitute instructor, students or other participants in the PROGRAM. Contractor shall immediately inform CITY or its designated representative of any damages it discovers to CITY's property or about which it otherwise becomes aware.

4. Contractor shall be responsible for inspecting, setting up, tearing down, moving, and storing all equipment needed for each class. Contractor shall immediately inform CITY or its designated representative of any repair, maintenance, purchase or replacement of equipment necessary to properly instruct and/or provide for the safety of participants in the PROGRAM.

XII.
CITY's Responsibilities

CITY's Parks and Recreation Department agrees to provide the following to Contractor for use in the performance of this Contract:

1. Use of Apex Centre on the dates and at the times set forth in Attachment A for the performance of the PROGRAM.

2. Use of any available fitness equipment owned by CITY as may be needed for any PROGRAM class.

XIII.
Indemnity

CONTRACTOR expressly agrees to release, indemnify, defend and hold harmless CITY and its officers, agents, representatives, employees, sponsors, volunteers and elected or appointed officials from and against any and all suits and causes of action, claims, charges, costs, damages, demands, expenses (including, but not limited to, attorney's fees and cost of litigation), judgments, civil fines and penalties, liabilities or losses of any kind or nature whatsoever, for death, bodily injury or personal injury to any person, including CONTRACTOR's employees and agents or damage or destruction to any property of either party hereto or third persons in

any manner arising by reason of, incident to or resulting from participation in the activities and at the locations designated in this Contract occasioned by any intentional conduct as well as any form of negligence whatsoever on the part of CONTRACTOR or CONTRACTOR's officers, agents, employees or subcontractors of any tier.

XIV. **Independent Contractor**

Contractor's status shall be that of an Independent Contractor and not an agent, servant, employee or representative of CITY in the performance of this Contract. No term or provision of or act of Contractor or CITY under this Contract shall be construed as changing that status. Contractor will have exclusive control of and the exclusive right to control the details of the work performed hereunder, and shall be liable for the acts and omissions of its officers, agents, employees, contractors, subcontractors, and consultants, and that the doctrine of respondent superior shall not apply between CITY and Contractor, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating a partnership or joint enterprise between CITY and Contractor.

XV. **Default**

CITY reserves the right to terminate this Contract immediately upon breach of any term or provision of this Contract by Contractor; or, if at any time during the term of this Contract, Contractor shall fail to commence the work in accordance with the provisions of this Contract or fail to diligently provide services in an efficient, timely and careful manner and in strict accordance with the provisions of this Contract or fail to use an adequate number or quality of personnel to complete the work or fail to perform any of its obligations under this Contract, then CITY shall have the right, if Contractor shall not cure any such default after thirty (30) days written notice thereof, to terminate this Contract and complete the work in any manner it deems desirable, including engaging the services of other parties therefor. Any such act by CITY shall not be deemed a waiver of any other right or remedy of CITY. If after exercising any such remedy due to Contractor's nonperformance under this Contract, the cost to CITY of the performance of the balance of the work is in excess of that part of the Contract sum which has not theretofore been paid to Contractor hereunder, Contractor shall be liable for and shall reimburse CITY for such excess.

XVI. **Changes**

CITY may, from time to time, require changes in the scope of the services to be performed under this Contract. Such changes as are mutually agreed upon in writing by and between CITY and Contractor shall be incorporated by written modification to this Contract.

XVII.
Conflict of Interest

Contractor covenants and agrees that Contractor and its associates and employees will have no interest, and will acquire no interest, either direct or indirect, which will conflict in any manner with the performance of the services called for under this Contract. All activities, investigations and other efforts made by Contractor pursuant to this Contract will be conducted by employees, associates or subcontractors of Contractor.

XVIII.
Mailing Address

All notices and communications under this Contract to be mailed or delivered to CITY shall be sent to the address of CITY's agent as follows, unless and until Contractor is otherwise notified:

City of McKinney
Purchasing Manager
PO Box 517
McKinney, Texas 75070

Notices and communications to be mailed or delivered to Mike Thornton shall be sent to the address of Fitness Now LLC as follows, unless and until CITY is otherwise notified:

Mike Thornton
Fitness Now LLC
13580 Valencia Drive
Frisco, Texas 75035

Any notices and communications required to be given in writing by one party to the other shall be considered as having been given to the addressee on the date the notice or communication is posted by the sending party.

Notices and communications which are faxed are sufficient if the notice or communication is also sent by regular mail, and shall be deemed as having been given to the addressee on the date the notice or communication is faxed.

XIX.
Successors and Assigns

CITY and Contractor each binds himself and his successors, executors, administrator and assigns to the other party of this Contract and to the successor, executors, administrators and assigns of such other party in respect to all covenants of this Contract. Neither CITY nor

Contractor shall assign or transfer its interest herein without the prior written consent of the other.

XX.
Applicable Law

This Contract is entered into subject to the Charter and ordinances of CITY as they may be amended from time to time, and is subject to and is to be construed, governed and enforced under all applicable State of Texas and Federal laws. Contractor will make any and all reports required per Federal, State or local law including, but not limited to, proper reporting to the Internal Revenue Service, as required in accordance with Contractor's income. Situs of this Contract is agreed to be Collin County, Texas, for all purposes including performance and execution.

XXI.
Severability

If any of the terms, provisions, covenants, conditions or any other part of this Contract are held for any reason to be invalid, void or unenforceable, the remainder of the terms, provisions, covenants, conditions or any other part of this Contract shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

XXII.
Remedies

No right or remedy granted herein or reserved to the parties is exclusive of any other right or remedy herein by law or equity provided or permitted, but each shall be cumulative of every other right or remedy given hereunder. No covenant or condition of this Contract may be waived without consent of the parties. Forbearance or indulgence by either party shall not constitute a waiver of any covenant or condition to be performed pursuant to this Contract.

XXIII.
Entire Agreement

This Contract embodies the complete agreement of the parties hereto, superseding all oral or written previous and contemporaneous agreements between the parties relating to matters herein, and except as otherwise provided herein, cannot be modified without written agreement of the parties.

XXIV.
Non-Waiver

It is further agreed that one (1) or more instances of forbearance by CITY in the exercise of its rights herein shall in no way constitute a waiver thereof.

XXV.
Headings

The headings of this Contract are for the convenience of reference only and shall not affect in any manner any of the terms and conditions hereof.

XXVI.
Venue

The parties to this Contract agree and covenant that this Contract will be enforceable in McKinney, Texas; and that if legal action is necessary to enforce this Contract, exclusive venue will lie in Collin County, Texas.

XXVII.
No Discrimination Allowed

CITY prohibits discrimination against any worker, employee or applicant for employment because of race, age, color, creed, religion, sex, national origin, or disability nor will they otherwise commit unfair employment practices. City prohibits discrimination on the basis of race, age, color, creed, religion, sex, national origin, or disability in the provision of goods and/or services to the general public. Complaints or concerns on alleged discrimination may be filed with either City's Parks and Recreation Department, the Office of the City Manager, PO Box 517, McKinney, Texas 75070, or the Office of Equal Opportunity, U.S. Department of the Interior, Washington, D.C. 20241. By entering into this Agreement, Contractor agrees to abide by this policy in all respects.

IN WITNESS WHEREOF, the parties have hereunto set their hands by their representatives duly authorized on the day and year first written above.

FITNESS NOW LLC,
A Limited Liability Company

BY _____

Printed/Typed Name and Title

Tax Identification No.

CITY OF MCKINNEY, TEXAS

By:

PAUL G. GRIMES
City Manager

Date Signed: _____

ATTEST:

SANDY HART, TRMC, MMC
City Secretary
DENISE VICE, TRMC
Assistant City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney

THE STATE OF TEXAS,
COUNTY OF _____

This instrument was acknowledged before me on the _____ day of _____, 20____, by _____, in his capacity as Owner/Operator of Fitness Now, a Limited Liability Company, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he is the Owner/Operator of Fitness Now, a Limited Liability Company and that he executed the same on behalf of and as the act of the Fitness Now.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, THIS THE ____ DAY OF _____, 2017.

Notary Public, _____ County, Texas

My Commission Expires_____

THE STATE OF TEXAS,
COUNTY OF COLLIN

BEFORE ME, the undersigned authority, in and for said County, Texas, on this day personally appeared PAUL G. GRIMES, City Manager of the CITY OF MCKINNEY, a Texas Municipal Corporation, known to me to be the person who's name is subscribed to the foregoing instrument, and acknowledged to me that he has executed the same on the City's behalf.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, THIS THE ____ DAY OF _____, 2017.

Notary Public, _____ County, Texas

My Commission Expires_____

DRAFT

ATTACHMENT A

Contractor will provide an Individualized Personal Training Program for participants based on a regionally or nationally recognized program subject to the consent of the CITY, which consent will not be unreasonably withheld.

The PROGRAM will be offered by Contractor at the Apex Centre.

Contractor will provide a minimum of two (2) staff members to administer and provide or operate the PROGRAM.

Scope: To instruct individuals and groups about exercise activities that improve strength, cardiovascular endurance and flexibility. In addition, personal trainer is nationally certified by an NCCA accredited organization such as American Council on Exercise (ACE), American College of Sports Medicine (ACSM), National Academy of Sports Medicine (NASM), National Strength, Conditioning Association (NSCA), etc. and CPR & AED certified.

Release Forms and Liability Waivers:

Personal trainer should have on file an informed consent, release, assumption of the risk form signed by the client, and a physician release form if required. **Fitness Assessments**

The City requests that personal trainers have their clients' complete fitness assessment forms. Such forms include: a Physical Activity Readiness Questionnaire (PAR-Q), Objective and Subjective information, movement and cardiovascular assessments, etc.

Uniforms:

In order to ensure a professional appearance is maintained, the City requests Personal Trainer adhere to the following uniform standards:

Shirt: Fitness style shirts or polo worn by personal trainer to include the word "TRAINER" or "INSTRUCTOR" added to the back of the shirt.

Pants: Black athletic and yoga style pants or shorts are recommended. Denim is not recommended

Shoes: Athletic shoes are preferred. Flip flops and/or sandals are prohibited.

Hats: Athletic hats are optional. If used, same color as shirt and/or pants

Non-Service Responsibilities:

Non-service responsibilities are duties performed outside of operating hours that have been 'purchased' by a member that require service such as personal training and group training. We require that all personal trainers have a mix of service and non-service hours.

Service Set-Up and Communication:

- Set up exercise floor and equipment- Equipment being supplied by the Apex Centre
- Available after scheduled sessions (answer questions, educate members about fitness related matters)

- Provide suggestions for usage of fitness related services

Delivery of Fitness:

- The Personal Trainer shall deliver fitness consultations. Personal trainers should possess the skills to orient all new members to the facility via the fitness consultation, regardless of outcome.
- The Personal Trainer shall create a compensation package that encourages the highest quality delivery of fitness services that will help with obtaining and keeping clients in the Apex Centre. The Personal Trainer will be directing the scheduling and delivery of the fitness consultation, therefore it's important to keep record of fitness consultations and session service. These records are required when Personal Trainer invoices for training sessions.