

SUBSCRIPTION AND SUPPORT

AGREEMENT FOR

**City Santa Ana,
CA**

This Subscription and Support Agreement (the "Agreement"), is hereby entered into as of November 3, 2021 (the "Effective Date") by and between City of Santa Ana, CA, a charter city and municipal corporation organized and existing under the Constitution and laws of the State of California. ("Client") and Healthy Outcomes, Inc., DBA Balancing Act, located at 7897 E. 24th Avenue, Denver, CO, 80238 ("Balancing Act"). Client and Balancing Act are collectively referred to as "the Parties" and individually referred to as "Party."

WHEREAS, Balancing Act is in the business of developing web software and sites capable of hosting public policy simulations and related projects promoting an exchange of information and ideas for use by governmental and other entities;

WHEREAS, Client desires to subscribe to access Balancing Act's proprietary web applications to be used for public education and engagement, and

NOW, THEREFORE, in consideration of the foregoing recitals and mutual covenants contained herein, the parties agree as follows:

1. SCOPE OF ENGAGEMENT.

- A. Subscription Agreement. Balancing Act shall provide Client with access to the products and features of the Balancing Act web application specified in Exhibit A to this agreement and agrees to provide all of the technical, administrative and professional support services necessary to perform this Agreement. Client is granted a non-exclusive, non-transferable, and revocable license to access and use the Balancing Act website. Client shall have the right to test and approve the application prior to it going live.
- B. Support Services. Balancing Act shall perform and provide certain support services to Client in accordance with the terms and conditions of this Agreement and the SOW (the Services described under "Support Services", the "Support Services"). If Client hereafter requests additional services not described on Exhibit A ("Additional Services") or Exhibit B ("Proposal"), and Balancing Act is willing and able to provide those Additional Services, the parties shall mutually agree upon and execute one or more additional SOWs that contain the terms and conditions of the Additional Services to be performed. Each such

SOW shall be attached to and incorporated into this Agreement as an Exhibit through an Amendment to the Agreement signed by both Parties. Except as otherwise provided, any Additional Services to be performed by Balancing Act shall be subject to the terms of this Agreement.

- C. Fees. Client shall pay Balancing Act pursuant to the Fee Schedule selected by Client and attached hereto as Exhibit “C.” The total amount to be expended during the Term of this Agreement shall not exceed \$55,000.

2. FEE PAYMENT AND TIMING.

- A. Fees. In consideration of Balancing Act’s granting of access to the Site and performance of the Services, hereunder, Client shall pay Balancing Act fees, and reimburse Balancing Act for expenses, each in the amounts and in accordance with the payment terms and conditions specified in this Agreement and on Exhibit C attached hereto (collectively, the “Fees”).
- B. Late Payment. Except with respect to amounts disputed in good faith, all amounts due under this Agreement, if not paid within 45 days of the due date, shall be considered late and shall accrue interest at the rate of one and one-half percent per month or the highest amount allowed by applicable law, whichever is less. Should collection activities become necessary, Client agrees to pay all fees relating to said activity.
- C. Client’s Failure to Pay. Client’s incurring of a late payment (as determined in accordance with Section 2(B)) shall be considered a material breach of this Agreement. As such, until such breach is cured by way of full payment, Balancing Act may (i) refuse to deliver the reports, materials, and other deliverables that it would otherwise be obligated to deliver hereunder, (ii) cease performance of any Services, (iii) issue a notice of non-payment to Client, which, if not satisfied within 15 days after the receipt thereof, shall constitute grounds for Balancing Act to terminate this Agreement or the SOW applicable to the Services. These rights are not exclusive, and Balancing Act reserves its right to seek any other rights or remedies provided in law or equity.
- D. Taxes. All amounts payable to Balancing Act as specified herein are in United States dollars. Client shall be responsible for any taxes imposed on the transactions contemplated by this Agreement, including all sales, use, value-added, excise and other similar taxes (but specifically excluding taxes in, or measured by, Balancing Act’s income).

3. CLIENT OBLIGATIONS.

Client shall be responsible for the accuracy of all data utilized by Balancing Act under this Agreement and shall comply with all laws and governmental regulations affecting its use, including all open and public records laws. Balancing Act shall have no responsibility to advise Client about the applicability of any laws or regulations that may apply to this Agreement.

4. SERVICE LEVEL AGREEMENT

A. Support Services.

- (i) Balancing Act's web platform will be operational and available to Client at least 99.5% of the time in any calendar month (the "Balancing Act Application SLA"). If Balancing Act does not meet the Balancing Act Application SLA, Client will be eligible to receive the Support Service Credits described below:

Uptime Percentage	Support Service Credit (Days)
< 99.5% - >= 99.0%	3
< 99.0% - >= 95.0%	7
< 95.0%	15

- (ii) **Service Credit Request.** In order to receive any of the Support Service Credits described above, Client must notify Balancing Act within 30 days from the time Client becomes eligible to receive a Service Credit. Failure to comply with this requirement will forfeit Client's right to receive a Service Credit.
- (iii) **Maximum Service Credit.** The aggregate maximum number of Support Service Credits to be issued by Balancing Act to Client for all Downtime that occurs in a single calendar month shall not exceed fifteen days of Service added to the end of Client's term for the Service. Support Service Credits may not be exchanged for, or converted to, monetary amounts.
- (iv) **Application SLA Exclusions.** The Balancing Act Application SLA does not apply to any services that expressly exclude this Balancing Act Application SLA or any performance issues: (i) caused by factors described in the "Force Majeure" section of the Agreement; or (ii) that resulted from Client's equipment or third party equipment, or both (not within the primary control of Balancing Act).

5. TERM.

- A. Term.** This Agreement shall commence on the Effective Date and be effective for three years.
- B. Option to extend.** Client shall have the option to extend for up to two one-year renewals at the same yearly price as during the Term, in the City's sole discretion, exercisable through a writing executed by the City Manager and City Attorney.
- C. Termination.** This Agreement may be terminated by the Client or Balancing Act upon thirty (30) days written notice of termination. In such event, Balancing Act shall be entitled to receive and Client shall pay compensation for all services performed by Balancing Act prior to receipt of such notice of termination, except for work which fails to meet the required standard of performance.
- D. Early Termination Fee.** The yearly fee under this contract is based on a three-year term and as such is heavily discounted. If Client terminates before the completion of the three year term, Client agrees to pay an early termination fee of \$2,000 and an amount equal to the difference between the discounted fee and the regular fee for each year prior to notification of termination. The difference between the discounted fee and the regular fee is \$2,000 per year.

6. OWNERSHIP AND USE OF THE MATERIALS, USER CONTENT.

- A. Creative Materials.** The Parties acknowledge and agree that an integral part of the services is the creation of the Balancing Act application for Client, which includes the development of certain information, content, text, graphics, logos, photos, videos, software and other items, as well as their selection and arrangement ("Creative Materials"). Such Creative Materials are protected by copyrights, trademarks, patents, trade secrets and other intellectual property and proprietary rights, and Balancing Act shall be considered the author of such Creative Materials and retains all right, title and interest in and to such Creative Materials. Client's rights to use the Creative Materials are limited to use solely in connection with this Agreement, and the rights and obligations granted hereunder. Any rights granted to Client under this Agreement to use the Creative Materials shall cease upon the termination of this Agreement.
- B. User Content.** The Parties acknowledge and agree that the user content generated on the Balancing Act website by others who are not parties to this Agreement is not owned by either Balancing Act or Client but can be used by either Party for

promotional purposes or any other purpose during and after the term of this Agreement. Balancing Act acknowledges that the Client can and will retain the right to use any user content and the deliverables under this Agreement for any and all purposes related to the general business of the Client.

**7. LIMITATION OF LIABILITY; DISCLAIMER OF WARRANTIES
AND LIABILITY FOR ACTIONS OF THIRD PARTIES.**

- A.** Except for the terms and conditions set forth in this Agreement, Balancing Act makes no express or implied warranties about the performance of Balancing Act, including warranties of merchantability or fitness for a particular purpose.
- B.** Neither party shall be liable for false or defamatory statements, either orally or in writing, made by others who are not parties to this Agreement.

8. INSURANCE.

Vendor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with products and materials supplied to the Entity. The cost of such insurance shall be borne by the Vendor.

A. MINIMUM SCOPE AND LIMIT OF INSURANCE

Coverage shall be at least as broad as Insurance Services Office Commercial General Liability coverage (occurrence Form CG 00 01) and include products coverage.

(i) *Minimum Limits of Insurance*

Coverage shall be at least as broad as Insurance Services Form CG 00 01 covering CGL on an “occurrence” basis, including products and completed operations, property damage, bodily injury and personal & advertising injury with limits no less than **\$1,000,000** per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location (ISO CG 25 03 or 25 04) or the general aggregate limit shall be twice the required occurrence limit.

If the Vendor maintains broader coverage and/or higher limits than the minimums shown above, the Entity requires and shall be entitled to the broader coverage and/or the higher limits maintained by the contractor. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the Entity.

(ii) *Self-Insured Retentions*

Self-insured retentions must be declared to and approved by the Entity. The Entity may require the Vendor to purchase coverage

with a lower retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention. The policy language shall provide, or be endorsed to provide, that the self-insured retention may be satisfied by either the named insured or Entity.

B. OTHER INSURANCE PROVISIONS

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

(i) *Additional Insured Status*

The Entity, its officers, officials, employees, and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of the Vendor including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to the Vendor's insurance at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of **both** CG 20 10, CG 20 26, CG 20 33, or CG 20 38; **and** CG 2037 if a later edition is used).

(ii) *Primary Coverage*

For any claims related to this contract, the Vendor's insurance coverage shall be primary insurance coverage at least as broad as ISO CG 20 01 04 13 as respects the Entity, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the Entity, its officers, officials, employees, or volunteers shall be excess of the Vendor's insurance and shall not contribute with it.

(iii) *Notice of Cancellation*

Each insurance policy required above shall provide that coverage shall not be canceled, except with notice to the Entity.

(iv) *Acceptability of Insurers*

Insurance is to be placed with insurers authorized to conduct business in the state with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Entity.

(v) *Verification of Coverage*

Vendor shall furnish the Entity with original Certificates of Insurance including all required amendatory endorsements (or copies of the applicable policy language effecting coverage required by this clause) and a copy of the Declarations and Endorsement Page of the CGL policy listing all policy endorsements to Entity before work begins. However, failure to obtain the required documents prior to the work beginning shall

not waive the Vendor's obligation to provide them. The Entity reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

(vi) ***Waiver of Subrogation***

Vendor hereby grants to Entity a waiver of any right to subrogation which any insurer of said Vendor may acquire against the Entity by virtue of the payment of any loss under such insurance. Vendor agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the Entity has received a waiver of subrogation endorsement from the insurer

(vii) ***Special Risks or Circumstances***

Entity reserves the right to modify these requirements at any time, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

9. ASSIGNMENT. Either Party may assign all or a portion of its rights or obligations under this Agreement but only with the express written consent of the other Party.

10. CONFIDENTIALITY. During the term of this Agreement, each party (the "Disclosing Party") may provide the other (the "Receiving Party") with certain confidential and proprietary information ("Confidential Information"). Confidential Information includes, but is not limited to, (a) the Deliverables under this Agreement, (b) all business, financial and technical trade secrets, (c) any written information which is marked "Confidential", and (d) any information which is orally disclosed, identified as confidential at the time of disclosure and confirmed in writing as being confidential within 30 days thereafter. Confidential Information shall not include information that (a) is publicly known at the time of its disclosure; (b) is lawfully received by the Receiving Party from a third party not under an obligation of confidentiality to the Disclosing Party, or (c) is published or otherwise made known to the public by the Disclosing Party. The Receiving Party will refrain from using the Disclosing Party's Confidential Information except to the extent necessary to exercise its rights or perform its obligations under this Agreement. Except as required by law, including the California Public Records Act, the Receiving Party may not disclose the Disclosing Party's Confidential Information to any third party, other than its affiliates or representatives who have an absolute need to know such Confidential Information in order for the Receiving Party to perform its obligations and enjoy its rights under this Agreement, and only if such persons are informed of and are subject to the provisions of this Agreement. The Receiving Party remains liable for any unauthorized use or disclosure of the Confidential Information by any such representative or affiliate.

11. WEB SOFTWARE AND SITE TERMS OF USE AND PRIVACY

POLICY. Balancing Act shall include on the Balancing Act website its privacy policy ("Privacy Policy") that applies to the activities of Balancing Act and the users of Balancing Act, including the use of users' personal information. Client represents that it has read and is familiar with the Privacy Policy and, to the extent applicable, shall govern itself in accordance therewith.

12. INDEPENDENT CONTRACTOR. Client and Balancing Act intend at all times to be independent contractors. Neither party is an employee, joint venture, agent or partner of the other, nor is either party authorized to assume or create any obligations or liabilities, express or implied, on behalf of or in the name of the other. The employees, methods, facilities and equipment of each Party shall at all times be under the exclusive direction and control of that Party.

13. GOVERNING LAW AND VENUE. This agreement shall be construed in accordance with and governed by the laws of the State of California and any claim or lawsuit brought to enforce the terms of this Agreement shall be brought in the state or federal courts serving City of Santa Ana, CA.

14. FULL AUTHORITY. The person agreeing to the terms and conditions of this Agreement states and affirms that they have the full authority of Client to enter into and execute this Agreement.

[Remainder of This Page Intentionally Left Blank; Signature Page Follows.]

IN WITNESS WHEREOF, CLIENT and BALANCING ACT have executed this Agreement as of the Effective Date.

ATTEST:

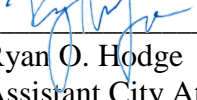
CITY OF SANTA ANA

Daisy Gomez
Clerk of the Council

Kristine Ridge
City Manager


Date

APPROVED AS TO FORM:
SONIA R. CARVALHO
City Attorney

By: 

Ryan O. Hodge
Assistant City Attorney

RECOMMENDED FOR APPROVAL:




Kathryn Downs (Oct 19, 2021 12:14 PDT)
Kathryn Downs
Executive Director
Finance and Management Services

Oct 19, 2021

Date

BALANCING ACT

7897 E. 24th Avenue, Denver, CO, 80238



Chris Adams
President

10/13/2021

Date

**EXHIBIT A SUBSCRIPTION
AND SUPPORT**

**FOR SUBSCRIPTION, SUPPORT AGREEMENT BETWEEN BALANCING ACT AND
the City of Santa Ana.**

1. Client Information.

Name: City of Santa Ana, CA
Contact Person: Waldo Barela
Phone: 714-647-5428
Email: wbarela@santa-ana.org

2. SUPPORT SERVICES

A. Balancing Act staff will provide one (1) training session via web conference for client staff. The training session will cover the following items:

- i) Setting up site, general orientation, strategic advice
- ii) Unlimited technical support and help understanding how to use features

B. Balancing Act staff will be reasonably available during business hours and days to provide technical support and strategic advice, as requested.

3. SUBSCRIPTION AGREEMENT

A. Design and Launch of the Site (s)

- i) Client will have access to design and launch Site (s) beginning on the date of execution of the agreement.

B. Live Site (s)

- ii) The Site (s) shall include the Balancing Act Simulate for Budget, Prioritize and Taxpayer Receipt products.
- iii) Client is responsible for selecting and uploading all content specific to its intended use of the Balancing Act products, including categories, subcategories, supporting information, additional details, numerical amounts, pictures, graphs or videos.
- iv) Client is solely responsible for the time and cost associated with content creation and inputting.

4. SUPPORT SERVICES

A. Administration and Site Support

- i) Balancing Act will provide up to two (2) hours per live site each month of Site administration, maintenance and support, including Client and user support during the Term. Support Services include, but may not be limited to the following:
 - General user support (password reset, site navigation issues, site utilization questions, etc.)
- ii) Any Support Services requested by Client other than Site administration, maintenance and support will be considered custom development and billed to client as outlined in Exhibit C.



Proposal for Santa Ana, CA

Balancing Act is a suite of tools designed to educate and engage residents about a local government's financial issues.

Full Suite of Budget Engagement Software:

- **Simulate:** this tool provides a way for a government to frame tough financial tradeoffs and puts residents in the shoes of policymakers. It offers several different ways to interact with budget items and produces detailed, visual reports. Simulate is most often used for the general fund, but can also be used for capital budgets or special purposes, such as ARPA funding.
- **Prioritize:** this tool offers a simple, visual way to present projects and costs. Government sets an overall budget and users select projects up to the specified amount, and then rank order them. The report provides weighted and unweighted results and can identify top projects based on three different voting techniques, including instant runoff. This is well suited to ARPA outreach, capital projects, and participatory budgeting.
- **Taxpayer Receipt:** this app asks a few questions to generate an estimate of taxes paid and then creates a "receipt" showing how much a resident pays for each service. It is a way of demonstrating the value that government provides.

Annual Subscription:

Balancing Act is available as an annual subscription that includes all three tools, as well as unlimited subscription to Analytics: which gives you detailed insight into who is using the simulation and how they would balance tradeoffs, and Meeting Mode: which modifies Balancing Act for use in face-to-face or online synchronous meetings. Onboarding and unlimited technical support are included. Balancing Act is a SaaS product and requires no installation.

Contract Duration: Three years at \$10,000 per year (five-year rate), with two one-year optional renewals (at City of Santa Ana's discretion) at \$10,000 per year.

Contact:

Amy Flynn

amy@abalancingact.com

415.294.8787

Healthy Outcomes, Inc., DBA Balancing Act

Chris Adams, President

7897 E. 24th Ave. Denver, CO 80238

303.877.0111

Taxpayer ID# 84-1452641

Proposal Valid through 11/30/21

EXHIBIT C

FEEs

FOR SUBSCRIPTION, SUPPORT AGREEMENT BETWEEN BALANCING ACT AND City of Santa Ana DATED September 19, 2021

The following is a summary of the Fees associated with the Services provided by Balancing Act hereunder.

1. Licensing Fee (published budget)

- i. Subscription fee is \$10,000 per year. Invoice will be sent for the yearly licensing fee within 30 days of the effective date of the contract and every year at approximately the same time thereafter for the duration of this Agreement. Invoice for any agreed-upon additional services will be sent within 15 days of delivery.

2. General

- a. Except as otherwise provided herein or in an applicable SOW, all Fees due to Balancing Act will be payable within 30 days of receipt of the applicable invoice.
- b. All payments of the Fees must be made by cash or cash equivalent to Balancing Act at 7897 E. 24th Avenue, Denver, CO, 80238 or by ACH. Credit card payment can be arranged, but may incur a 3% fee.

2021 BALANCING ACT RATE SCHEDULE AND REIMBURSEMENT SCHEDULE FOR "ADDITIONAL SERVICES" AND CUSTOM DEVELOPMENT

Effective January 1, 2021

HOURLY RATE SCHEDULE

Description	Rate in USD
Principal Staff	\$200 / hour
Custom Development	\$180 / hour
Customer Success	\$150
Support Staff	\$60 / hour

These rates listed above are valid for the initial Term of this Agreement, and Balancing Act may, as a condition to agreeing to any extension of the Term, require that the rates be adjusted.

11.03.21 Balancing Act Agreement w Exhibits Signed by Legal Counsel and BA 1

Final Audit Report

2021-10-19

Created:	2021-10-19
By:	Kristin Andrade (kandrade@santa-ana.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAAsfV7WFFL1cb6joNP5Fi-bz7QZ3mg3JAF

"11.03.21 Balancing Act Agreement w Exhibits Signed by Legal Counsel and BA 1" History

 Document created by Kristin Andrade (kandrade@santa-ana.org)


2021-10-19 - 7:09:00 PM GMT- IP address: 98.153.69.210

 Document emailed to Kathryn Downs (kdowns@santa-ana.org) for signature

2021-10-19 - 7:09:27 PM GMT

 Email viewed by Kathryn Downs (kdowns@santa-ana.org)

2021-10-19 - 7:14:25 PM GMT- IP address: 98.153.69.210

 Document e-signed by Kathryn Downs (kdowns@santa-ana.org)

Signature Date: 2021-10-19 - 7:14:42 PM GMT - Time Source: server- IP address: 98.153.69.210

 Agreement completed.

2021-10-19 - 7:14:42 PM GMT