

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY
AND RECORD OF ACTION**

March 29, 2022

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Maintenance and Support Services with Hitachi Vantara Corporation for Storage Platforms

RECOMMENDATION(S)

1. Authorize the Purchasing Agent to issue a purchase order to Consiliant Technologies, LLC, in the amount of \$304,190, for Hitachi Storage Platforms Maintenance and Support Services, for the period of April 1, 2022 through March 31, 2023.
 2. Approve Warranty and Maintenance and Support Terms, including non-standard terms **(County Contract No. 22-245)**, with Hitachi Vantara Corporation, for maintenance and support services for the Hitachi storage platform, effective April 1, 2022 and continuing until terminated by Hitachi or the County does not renew services.
- (Presenter: Larry Ainsworth, Chief Information Officer, 388-5501)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). Sufficient appropriation for Hitachi Storage Platforms Maintenance and Support Services is included in the Innovation and Technology Department (ITD) Computer Operations 2021-22 budget and will be included in future recommended budgets. ITD's operating costs are recovered via service rates approved annually by the Board of Supervisors (Board).

BACKGROUND INFORMATION

The ITD Computer Operations division manages and maintains the Hitachi storage platform, which provides data for critical County applications, such as FileNet, Sheriff's Jail Management Information System and other various database systems on the enterprise server. This infrastructure is critical to ensure connectivity for the services provided by ITD and is a large part of the County disaster recovery strategy.

On March 24, 2020 (Item No. 29), the Board approved the Warranty and Maintenance and Support Terms (County Contract No. 20-146) with Hitachi for the period of April 1, 2020, through March 31, 2021, for Hitachi Storage Platforms Maintenance and Support Services and authorized the Purchasing Agent to issue a purchase order to Consiliant in the amount of \$251,332, for the same period.

On March 9, 2021 (Item No. 22), the Board approved the Warranty and Maintenance and Support Terms (County Contract No. 21-174) with Hitachi Vantara Corporation for the period of

**Maintenance and Support Services with Hitachi Vantara Corporation
for Storage Platforms
March 29, 2022**

April 1, 2021 through March 31, 2022, for Hitachi Storage Platforms Maintenance and Support Services and authorized the Purchasing Agent to issue a purchase order to Consiliant in the amount of \$281,620, for the same period.

The Hitachi Warranty and Maintenance and Support Terms remain valid until replaced by a newer version, terminated by Hitachi, or the County decides not to renew a service period. Subject to the County's acceptance of a quote, and payment in full of the applicable fees by no later than the end of the prior service period, the maintenance and support services will be renewed for the applicable period and fees stated in the quote.

Hitachi's Warranty and Maintenance and Support Terms are recommended for approval as presented in Hitachi's standard commercial contract, which contains terms that differ from the standard County contract. Hitachi is unwilling to negotiate these terms. The non-standard terms include the following:

1. Hitachi may update the Service Descriptions from time to time.
 - The County standard contract requires that any changes to the contract to be reduced to writing, executed and attached to the original Contract and approved by the person(s) authorized to do so on behalf of Contractor and County.
 - Potential Impact: Hitachi may change the Service Descriptions without notice at any time. The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board.
2. There is no restriction on Hitachi's assignment of the contract.
 - The County must approve any assignment of the contract.
 - Potential Impact: Hitachi may assign the contract to a third party without notice to the County and without the County's approval. This could allow the contract to be assigned to a business with which the County is legally prohibited from doing business with due to issues of Federal debarment or suspension and conflict of interest, without the County's knowledge.
3. The contract does not address attorneys' fees and costs.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: There is no provision in the contract addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, another jurisdiction's laws may affect a party's requirement to pay the prevailing party in a legal action where no specific provision is provided in the contract.
4. Governing law is based on the laws of the Local Service Jurisdiction, which is the location of the state, province or country of the Hitachi entity that sold County the product.
 - The County standard contract requires California governing law.
 - Potential Impact: The County is not purchasing the product directly from Hitachi, so it is impossible to identify the location of the state, province or country of the Hitachi entity "selling" the product to the County. This results in uncertainty over which state's, province's, or country's laws will govern the interpretation of the

contract, and leads to ambiguity in interpretation of the contract terms. Any questions, issues or claims arising under this contract would require the County to first determine from Hitachi which law it intends to govern the contract, then to hire outside counsel competent to advise on the applicable law, which may result in fees that exceed the total contract amount.

5. County will defend, indemnify and hold Hitachi harmless from and against any and all losses, damages, liabilities, judgments, settlements, costs and other expenses (including reasonable legal fees) that Hitachi incurs because of the County's failure to maintain data and technical, local and physical access controls and to ensure that, prior to removal by or return to Hitachi for any reason, all data is removed from any Product or Hitachi property.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Hitachi, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against Hitachi without such limitations and the County would be responsible to defend and reimburse Hitachi for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, another jurisdiction's laws may limit or expand this contract term.
6. The contract does not require Hitachi to indemnify the County, including for intellectual property infringement claims.
 - The standard contract provision for intellectual property indemnity is: Contractor will indemnify, defend, and hold harmless County and its officers, employees, agents and volunteers, from any and all third party claims, costs (including without limitation reasonable attorneys' fees), and losses for infringement of any United States patent, copyright, trademark or trade secret (Intellectual Property Rights) by any goods or services. The County standard contract general indemnity provision requires the Contractor to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors or omissions of any person.
 - Potential Impact: Hitachi is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Hitachi's negligent or intentional acts and intellectual property infringement. If the County is sued for any claim based on its use of Hitachi's services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent another jurisdiction's laws may allow the County to require Hitachi to defend or indemnify it absent an express provision in the contract.
7. The contract does not require Hitachi to meet the County's insurance standards.
 - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: The contract does not include County standard insurance requirements. This means that the County has no assurance that Hitachi will be

**Maintenance and Support Services with Hitachi Vantara Corporation
for Storage Platforms
March 29, 2022**

financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total contract amount.

8. Except for liability arising from death, bodily injury or damage to tangible property arising from Hitachi's negligent acts or omissions, and for willful misconduct, Hitachi's maximum aggregate liability for all claims is limited to fifty thousand US dollars (\$50,000) or monetary equivalent in the currency of the Local Service Jurisdiction, calculated on the date of the claim.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited. County Counsel cannot advise on, whether and to what extent, another jurisdiction's laws may limit or expand the exclusion of limits to the extent prohibited by applicable law.
9. The term of the contract is indefinite so long as there is an active purchase of Storage Platforms Maintenance and Support Services. The County can end the contract by not renewing the services at any subsequent renewal date.
 - County Policy 11-04 does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: There is no end term to the contract and the County is bound to the terms and conditions of the contract so long as there is an active purchase of Storage Platforms Maintenance and Support Services.
10. There is no termination for convenience.
 - The County standard contract gives the County the right to terminate the Contract, for any reason, with a 30 day written notice of termination without any obligation other than to pay amounts for services rendered and expenses reasonably incurred prior to the effective date of termination.
 - Potential Impact: The Services are non-cancellable and non-refundable.
11. Jurisdiction is based on the laws of the Local Service Jurisdiction, which is the location of the state, province or country of the Hitachi entity that sold County the product.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: The County is not purchasing the product directly from Hitachi, so it is impossible to identify the location of the state, province or country of the Hitachi entity "selling" the product to the County. This results in uncertainty over the location where legal disputes would be required to be resolved. Having a venue outside of the County of San Bernardino may result in additional expenses that exceed the amount of the contract.

ITD recommends approval of the Warranty and Maintenance and Support Terms, including non-standard terms with Hitachi, and the issuance of the purchase order to Consiliant in order to maintain Hitachi's 100% no-data loss guarantee, which requires Storage Platforms Maintenance and Support Services to be purchased through authorized resellers.

**Maintenance and Support Services with Hitachi Vantara Corporation
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PROCUREMENT

On January 21, 2020, ITD released Request for Proposals (RFP) No. ISD120-ADM-3666 via the County's Electronic Procurement Network (ePro) for Hitachi Storage Platforms Maintenance and Support Services from authorized resellers. Consiliant, an authorized reseller, was selected solely based on the lowest cost proposal. The RFP included a one-year term and an option to renew for four additional one-year terms. ITD is exercising the second one-year renewal option.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on February 9, 2022; Purchasing (Tevan Stremel, Buyer III, 387-2092) on February 10, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on February 17, 2022; Finance (Sofia Almeida, Administrative Analyst, 387-4378) on February 28, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on February 28, 2022.

**Maintenance and Support Services with Hitachi Vantara Corporation
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Dawn Rowe
Ayes: Col. Paul Cook (Ret.), Janice Rutherford, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 29, 2022



cc: IT - Lewis w/agree
Contractor - C/O IT w/agree
File - w/agree
CCM 04/6/2022