

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF BOARD GOVERNED COUNTY SERVICE AREAS
AND RECORD OF ACTION**

September 26, 2023

FROM

BRENDON BIGGS, Director, Department of Public Works – Special Districts

SUBJECT

Legal Terms and Conditions for Use of Barracuda Networks, Inc. Products

RECOMMENDATION(S)

Acting as the governing body of the Board Governed County Service Areas, approve Legal Terms and Conditions (**Contract No. 23-1022**) for All Barracuda Products with Barracuda Networks, Inc., including non-standard terms, as required to proceed with the purchase of software and hardware support for data backup appliances from authorized reseller Datel Systems, Inc. in the amount of \$27,000, for the period of October 13, 2023 through October 12, 2024.

(Presenter: Brendon Biggs, Director, 387-7906)

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). Although the Barracuda Networks, Inc. (Barracuda), Legal Terms and Conditions for All Barracuda Products (Terms and Conditions) is non-financial in nature, it does allow the Department of Public Works – Special Districts, Water and Sanitation Division (Division) to proceed with a purchase, through Barracuda's authorized reseller Datel Systems, Inc. (Datel), of software and hardware support for the Division's data backup appliances. The purchase amount of \$27,000 will be funded through existing revenue sources of the Board Governed County Service Areas (CSAs) that provide water and sanitation services. Sufficient appropriation for this item is included in the CSAs 2023-24 budget and will be included in the 2024-25 budget.

BACKGROUND INFORMATION

The Division is responsible for providing water and sewer services to approximately 13,700 accounts within various unincorporated areas of San Bernardino County. The Division's utility billing software maintains customer account information that is vital to providing customer service to these residents. The Division's control system is critical in enabling operations staff to provide water and sewer service. The data backups of the control system performed by the Division's current Barracuda backup appliances are integral for operation of the system, providing data protection and a disaster recovery plan for the Division's essential systems.

On October 4, 2022 (Item No. 50), the Board of Supervisors approved the legal terms and conditions with Barracuda (County Contract No. 22-991), including non-standard terms, for licensing and support services for data backup. The current term of Barracuda's licensing and

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support services for data backup is set to expire on October 12, 2023. The Division is seeking another annual subscription for continued licensing and support services through October 12, 2024.

Barracuda does not sell its products directly to customers. Instead, a purchase is made through Barracuda's authorized resellers, which requires acceptance of Barracuda's Terms and Conditions for licensing and use of services. Barracuda's Terms and Conditions, which set forth general terms applicable with the software and hardware licenses and services, includes terms that differ from and omit certain County standard contract language. The non-standard and missing terms include the following:

1. The County is obligated not to disclose the information claimed by Barracuda to be its confidential information, including not disclosing the terms of the Terms and Conditions.
 - (c) The County standard contract does not require the County to maintain the confidentiality of a contractor's information.
 - (d) Potential Impact: The County is obligated to maintain the confidentiality of information that Barracuda deems confidential. The County will need to be aware of its obligation to notify Barracuda prior to any disclosure, including in response to a Public Records Act request. The County may incur liability from failing to disclose information pursuant to a California Public Records Act request or open public meetings requirements (Brown Act and County Sunshine Ordinance). In addition, the County could be deemed in breach of contract and incur liability to Barracuda for disclosure of Barracuda's information, regardless of whether the disclosure is intentional or inadvertent, which could exceed the contract amount.
2. The Terms and Conditions waive both Barracuda's and the County's liability for any indirect, incident, consequential, special, exemplary, or punitive damages related to use of Barracuda's products or services. This includes any claims based on warranty, tort (including negligence), or otherwise. The limitation of liability also does not exclude indemnification obligations, gross negligence, willful misconduct, and violations of the law by Barracuda. The limitation of the total aggregate liability of Barracuda, its affiliates, suppliers or resellers shall not exceed the amount paid for the services and software.
 - 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. County Counsel cannot advise on, whether and to what extent, California law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
3. The Terms and Conditions warrant that hardware will be free from defects in materials and workmanship for one year and software will perform substantially in accordance with applicable specifications for 90 days from the delivery date. The warranty provides that the sole remedy for any breach of these warranties shall be repair, replacement, and refund of the cost of any non-conforming products. Other than the warranties expressly listed, the warranty provides that the software is "AS IS" and disclaims all warranties of any kind.
 - The County standard contract provides that a vendor/contractor fully warrants its services and product they provide to the County.
 - Potential Impact: The County's use of the hardware and software is at its own risk following one year and 90 days, respectively, and remedies are limited to only repair,

replacement and refund. Under California law, sellers are not required to provide any warranty.

4. The venue for arbitration is Santa Clara County, California.
 - The County standard contract requires venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District.
 - Potential Impact: A venue in Santa Clara County may result in additional expenses that exceed the amount of the contract.
5. All disputes arising under the Terms and Conditions must be settled by binding arbitration.
 - The County standard contract does not require arbitration.
 - Potential Impact: The Terms and Conditions require binding arbitration for all disputes between the parties. Disputes that might otherwise be settled in small claims court would incur arbitration costs that would exceed the costs of a small claims action. Arbitration decisions are not appealable.
6. The rights and obligations under the Terms and Conditions may be assigned without notice to and without the consent of the County.
 - The County standard contract indicates the County must approve any assignment of the contract.
 - Potential Impact: The rights and obligation under the Terms and Conditions may be assigned 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.
7. The Terms and Conditions do not require Barracuda 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 Barracuda will be 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. The Terms and Conditions do not require Barracuda to indemnify the County, including for intellectual property infringement claims.
 - The County standard contract 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. 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.
 - Potential Impact: Barracuda is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Barracuda's negligent or intentional acts and intellectual property infringement. If the County is sued

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for any claim, including intellectual property infringement based on its use of Barracuda's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.

The Division recommends approval of Barracuda's Terms and Conditions, including the non-standard terms, to acquire a new term of licenses and services for continued utilization of the software for the Division's control system, operation, data protection and backup needs.

PROCUREMENT

The recommended Terms and Conditions will be used to accompany all future purchase orders for Barracuda products. This includes the purchase of software and hardware support for data backup appliances for the period of October 13, 2023, through October 12, 2024. A competitive solicitation from Barracuda authorized resellers for these services was completed on August 8, 2023, and the following three quotes were received:

- Datel Systems, Inc. - \$27,000.00
- Netsync - \$28,294.32
- Saitech, Inc. - \$29,952.00

Datel was selected as they provided the lowest quote.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Aaron Gest, Deputy County Counsel, 387-5455) on August 31, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on September 14, 2023; Finance (Tom Forster, Administrative Analyst, 387-4635) on September 1, 2023; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on September 11, 2023.

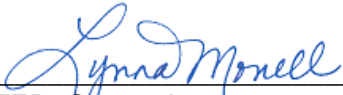
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Record of Action of the Board of Supervisors
Board Governed County Service Areas

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: September 26, 2023



cc: SDD - Cho w/ agree
Contractor c/o SDD w/ agree
File w/ agree
JLL 09/27/2023