

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

March 26, 2024

FROM

LYNN FYHRLUND, Chief Information Officer, Innovation and Technology Department

SUBJECT

Non-Financial Agreement to End User Services Agreement with F5, Inc. for Server Network Traffic Distribution Services

RECOMMENDATION(S)

Approve non-financial End User Services **Agreement No. 24-288**, including non-standard terms, simultaneously terminating Contract No. 23-818 with F5, Inc., to continue to utilize server network traffic distribution services to provide an uninterrupted, redundant, and secure method of accessing County resources such as websites and computer applications, effective upon execution and continuing until terminated by either party.

(Presenter: Lynn Fyhrlund, 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). The End User Services Agreement (Agreement) with F5, Inc. (F5) is non-financial in nature and does not commit the County to make any purchases. If future purchases are made under the Agreement, the Innovation and Technology Department (ITD) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

ITD utilizes F5 web application protection equipment and software to provide County departments and the public with secure and reliable access to County websites, messaging services, and application hosting. Support and maintenance for this solution is critical to the 24 hours a day, seven days a week operation of ITD's datacenter, disaster recovery and business continuity efforts. Approving the Agreement will allow ITD to continue to utilize the F5 portal to access software updates, including enhancements to F5 software features and patches for security vulnerabilities. It will also allow F5 to continue provide server network traffic distribution services to provide an uninterrupted, redundant, and secure method of accessing County resources such as websites and computer applications.

On July 25, 2023 (Item No. 32), the Board approved the End User Services Agreement No. 23-818 (Agreement No. 23-818), including non-standard terms, with F5 for server network traffic distribution, in purchase amounts as authorized by County Policy, effective upon electronic acceptance, and continuing until terminated by either party. The County recently negotiated updated Agreement terms, and additional language was added to accommodate various County

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standard terms. The County is now required to accept the Agreement referenced in Recommendation No. 1, which will automatically terminate Agreement No. 23-818, to continue utilizing the F5 portal to access software updates.

The Agreement is F5's standard commercial contract, which includes terms that differ from or are omitted from the standard County contract. While the parties negotiated certain contract terms to County standards, F5 would not agree to all County standard terms. The non-standard and missing terms include the following:

1. F5 may assign the Agreement without notice to the County and without the County's approval.
 - (c) The County standard contract requires that the County must approve any assignment of the contract.
 - (d) Potential Impact: F5 could assign the Agreement to a third party or business with which the County is legally prohibited from doing business due to issues of Federal debarment or suspension and conflict of interest, without the County's knowledge. Should this occur, the County could be out of compliance with the law until it becomes aware of the assignment and terminates the Agreement.
2. The prevailing party is entitled to recover attorneys' fees and costs.
 - (c) The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - (d) Potential Impact: If either party institutes any legal proceedings related to the Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total Agreement amount.
3. The County is required to indemnify F5 against third party claims arising from the County's
 - (a) breach of the Agreement, (b) use of data, (c) violation of law, (d) alleged infringement of third-party rights by County data, (e) deployment or configuration of County application, and (f) gross negligence, fraudulent misrepresentation, or willful misconduct.
 - (c) The County standard contract does not include any indemnification or defense by the County of a contractor.
 - (d) Potential Impact: By agreeing to indemnify F5, 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 F5 without such limitations and the County could be responsible to defend and reimburse F5 for costs, expenses, and damages, which could exceed the total Agreement amount.
4. F5's maximum liability to the County is limited to the amount paid in the 12 months prior to the event giving rise to the claim, or, if no fees have been paid, \$100, except for claims arising from F5's gross negligence, willful misconduct, or violation of law. In addition, F5 limits its indemnification obligations to three times the amount paid or payable for the services that gave rise to the claim during the 12 months before the event giving rise to the claim.
 - (c) The County standard contract does not include a limitation of liability.
 - (d) Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess.
5. Payment terms are Net 30 with late payment interest of 1.5% per month, plus all bank charges and costs of collection. F5 may also terminate or suspend the County's account.

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- (c) County standard payment terms are Net 60 days with no interest or late payment penalties.
- (d) Potential Impact: County standard processing time is Net 60 days or more. Failing to pay within 30 days may result in a material breach of the Agreement, which could allow F5 to terminate the Agreement and seek other legal remedies, including charging the County interest at a rate of 1.5%, which could exceed the Agreement amount.

ITD recommends approval of the Agreement, including the non-standard terms, to allow ITD to continue utilizing the F5 portal to stay in compliance with F5 and utilize server network traffic distribution, for an uninterrupted, redundant, and secure method of accessing County resources such as websites and computer applications.

PROCUREMENT

The Agreement, including non-standard terms, will be used to accompany future purchases to be approved, as necessary, pursuant to County Policy 11-04 Procurement of Goods, Supplies, Equipment and Services, provided that F5 does not substantively modify the terms of the Agreement.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on February 22, 2024; Purchasing (Christina Reddix, Buyer III, 387-2060) on February 23, 2024; Risk Management (Gregory Utaszewski, Staff Analyst II, 386-9008) on February 22, 2024; Finance (Iliana Rodriguez, Administrative Analyst, 387-4205) on March 7, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on March 10, 2024.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY  _____
DATED: March 26, 2024



cc: IT - Onyango w/agree
Contractor - c/o IT w/agree
File - w/agree
CCM 03/29/2024