

**REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS  
OF SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT  
AND RECORD OF ACTION**

**March 29, 2022**

**FROM**

**DAN MUNSEY, Fire Chief/Fire Warden, San Bernardino County Fire Protection District**

**SUBJECT**

Terms of Use Agreement with Lansweeper, Inc., for Information Technology Asset Management

**RECOMMENDATION(S)**

Acting as the governing body of the San Bernardino County Fire Protection District, approve non-financial Terms of Use **Agreement No. 22-247** with Lansweeper, Inc., including the non-standard terms, for software and support, which shall remain in effect for as long as the underlying software subscription plan is in place or unless terminated.

(Presenter: Dan Munsey, Fire Chief/Fire Warden, 387-5779)

**COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES**

**Improve County Government Operations.**

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

**Provide for the Safety, Health and Social Service Needs of County Residents.**

**FINANCIAL IMPACT**

Approval of this agreement will not result in the use of Discretionary General Funding (Net County Cost). The Terms of Use Agreement is non-financial in nature and does not commit the San Bernardino County Fire Protection District (SBCFPD) to make any purchases. If future purchases are made in conjunction with this Terms of Use Agreement, SBCFPD will adhere to County purchasing policies and return to the Board of Directors (Board) for approval, if necessary.

**BACKGROUND INFORMATION**

SBCFPD uses multiple Information Technology (IT) products to provide professional and modern fire protection and advanced life support services. Lansweeper, Inc. (Lansweeper) is an IT Asset Management solution that gathers hardware and software information of computers and other devices on a computer network for management, compliance, and audit purposes. Lansweeper allows SBCFPD to gather information about network switches, servers, desktops, laptops, and printers, as well as providing user information and warranty status. Lansweeper license agreements are for a one-year period and SBCFPD has the option of renewing the license agreement each year or discontinuing the use of the product.

Lansweeper license agreements are governed by Lansweeper's Terms of Use Agreement. The Terms of Use Agreement with Lansweeper, which incorporates by reference the Data Processing Addendum, includes terms that differ from the standard SBCFPD contract and omits certain SBCFPD standard contract terms. Lansweeper is unwilling to negotiate these terms.

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Pursuant to Policy 11-05, contracts that contain non-standard contract language require approval by the Board. The non-standard and missing terms include the following:

1. Governing law is Texas and court venue is Williamson County, Texas.
  - SBCFPD's standard contract term is that governing law is California, and venue is San Bernardino County.
    - Potential Impact: County Counsel has reviewed Lansweeper's Terms of Use Agreement but cannot provide advice as to its legal form without retaining outside counsel licensed to practice law in Texas. In the event of any resulting lawsuit, this term could result in costs associated with the retention of outside counsel and travel to Texas.
2. The Terms of Use Agreement states that Lansweeper has no obligation to indemnify or defend SBCFPD against claims related to infringement of intellectual property rights, and there is no general indemnify provision in favor of SBCFPD. The Terms of Use Agreement also requires SBCFPD to indemnify Lansweeper and Lansweeper's subsidiaries, affiliates, officers, agents, employees, partners, distributors and licensors from any claim, demand, loss, or damage, including reasonable attorneys' fees, arising out of or related to use of the Product, or violation of the Terms of Use Agreement.
  - The SBCFPD standard contract indemnity provision requires the Contractor to indemnify, defend, and hold SBCFPD 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 SBCFPD 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: Lansweeper is not required to defend, indemnify or hold SBCFPD harmless from any claims, including indemnification for claims arising from Lansweeper's negligent or intentional acts and intellectual property infringement. If SBCFPD is sued for any claim, including intellectual property infringement based on its use of Lansweeper's software or services, SBCFPD may be solely liable for the costs of defense and damages, which could exceed the total contract amount. In addition, SBCFPD must indemnify Lansweeper and Lansweeper's subsidiaries, affiliates, officers, agents, employees, partners, distributors and licensors from any claim, demand, loss, or damage, including reasonable attorneys' fees, arising out of or related to use of the product, or violation of the Terms of Use Agreement. County Counsel cannot advise on this provision or whether and to what extent Texas law may allow SBCFPD to require Lansweeper to defend or indemnify it absent an express provision in the Terms of Use Agreement.
3. Except for the indemnity provision in favor of Lansweeper, the Terms of Use Agreement does not address attorneys' fees and costs.
  - SBCFPD's standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
  - Potential Impact: Except for the indemnity provision in favor of Lansweeper, there is no provision in the Terms of Use Agreement addressing each party's responsibility for paying attorneys' fees. County Counsel cannot advise on, whether and to what extent, Texas law may affect a party's requirement to pay the prevailing party's attorneys' fees and costs in a legal action where no specific provision is provided in the contract.

4. The Terms of Use Agreement does not require Lansweeper to meet the SBCFPD's insurance standards as required pursuant to Policy 11-07.
  - Policy 11-07 requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the SBCFPD standard contract.
  - Potential Impact: The Terms of Use Agreement does not include SBCFPD's standard insurance requirements. This means that SBCFPD has no assurance that Lansweeper will be financially responsible for claims that may arise from SBCFPD's use of the software, which could result in expenses to SBCFPD that exceed the total contract amount.
5. The Terms of Use Agreement shall remain in effect for as long as the underlying software subscription plan is in place or unless terminated.
  - Policy 11-05 does not permit indefinite term or automatically renewing contracts unless approved by the Board.
  - Potential Impact: The Terms of Use Agreement shall remain in effect for as long as the underlying software subscription plan is in place, or terminated. The software subscription plan is for a one-year period.
6. The Terms of Use Agreement provides Lansweeper the right to assign the contract without notice to SBCFPD and without SBCFPD's approval.
  - SBCFPD's standard contract requires SBCFPD to approve any assignment of the contract.
  - Potential Impact: Lansweeper could assign the contract to a third party or business with which SBCFPD is legally prohibited from doing business with due to issues of Federal debarment or suspension and conflict of interest, without SBCFPD's knowledge. County Counsel cannot advise on whether and to what extent Texas law may permit or restrict a party's right to assign without an express provision in the contract.
7. Lansweeper disclaims all liability whatsoever to SBCFPD based on SBCFPD's use of its service and in no event shall Lansweeper's liability exceed the greater of (a) the prorated license fees paid to Lansweeper during the 12-month period preceding the date upon which the first claim arose; or (b) one hundred euros.
  - The SBCFPD standard contract does not include a limitation of liability.
  - Potential Impact: Claims could exceed the liability cap and the contract amount leaving SBCFPD financially liable for the excess. In addition, SBCFPD's liability under the contract is not similarly limited. County Counsel cannot advise on, whether and to what extent, any applicable law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
8. Lansweeper may update or modify the Terms of Use Agreement.
  - The SBCFPD standard contract requires any amendment to an agreement to be approved by both parties to the Agreement.
  - Potential Impact: Under certain express conditions, Lansweeper may change the terms of Agreement without SBCFPD approval.
9. Lansweeper provides a limited antivirus warranty, the breach of which Lansweeper will repair the impacted part of the product, as SBCFPD's sole and exclusive remedy.

Otherwise, the product is provided “as is”. Lansweeper’s licensors expressly disclaim all warranties and representations of any kind, including any warranty of non-infringement, title, fitness for a particular purpose, functionality or merchantability, whether express, implied or statutory. To the maximum extent permitted by applicable law there is no warranty that the product will be error-free, that access will be continuous or uninterrupted, that any information provided or used with the product will be secure, accurate, complete or timely, or that any content will be preserved or maintained without loss. The Terms of Use Agreement provides that to the maximum extent permitted by applicable law, Lansweeper shall not be liable for any product failures.

- The SBCFPD standard contract requires the vendor to fully warrant the product or provide a warranty or a revision that satisfies Policy 11-05.
- Potential Impact: Except for the limited warranty, SBCFPD bears all risk arising out of the performance and use of the product and documentation. County Counsel cannot advise on what warranties are available to SBCFPD under Texas law.

10. SBCFPD grants Lansweeper a non-exclusive, royalty-free, worldwide, sublicensable, transferable, license to (i) use SBCFPD’s Device Fingerprints to provide and improve certain product features and functionalities (including without limitation, to provide credential-free device recognition functionality), and (ii) aggregate Device Fingerprints into Aggregate Data for which Lansweeper obtains the license rights as provided in article 11.3, paragraph 2 of the Agreement. SBCFPD also grants Lansweeper a non-exclusive, royalty-free, perpetual, worldwide, sublicensable, transferable, license to use, reproduce, sell, publicize, or otherwise exploit: (i) Aggregate Data; and (ii) Installation Metadata, in any way, at Lansweeper’s sole discretion, including without limitation to provide SBCFPD with product features as per SBCFPD’s Subscription Plan, such as metrics and notifications, and to verify SBCFPD license compliance. Where Aggregate Data relates to SBCFPD and allows for identification of SBCFPD, such Aggregate Data shall only be used for internal Lansweeper purposes.

- The SBCFPD standard contract does not grant any transferable licenses to vendors.
- Potential Impact: Lansweeper will receive license to use the SBCFPD data described in the contract.

11. Payment is net 30 and the Terms of Use Agreement includes late fees.

- The SBCFPD standard contract provides that payment is 60 days with no late fees.
- Potential Impact: SBCFPD will be required to pay invoices in 30 days from invoice and any late payments will be subject to the late fees described in the agreement.

12. Lansweeper may identify SBCFPD as a Lansweeper user in Lansweeper’s promotional materials. SBCFPD may request that Lansweeper stop doing so by submitting an email to Lansweeper at a specific email address at any time.

- The SBCFPD standard contract does not include this type of provision.
- Potential Impact: SBCFPD has to affirmatively elect not to be identified as a Lansweeper user in Lansweeper’s promotional materials.

Notwithstanding the non-standard provisions, SBCFPD is recommending that the Board approve the Terms of Use Agreement as it will allow SBCFPD to continue to receive software and support from Lansweeper. The Terms of Use Agreement will be terminated when SBCFPD discontinues use of the Lansweeper licenses.

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**PROCUREMENT**

The Terms of Use Agreement, including non-standard terms, will be used to accompany future purchase orders to be approved, as necessary, per County Policy 11-04 Procurement of Goods, Supplies, Equipment and Services.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Scott Runyan, Supervising Deputy County Counsel, 387-5455) on March 18, 2022; Risk Management (Victor Tordesillas, Director, 386-8730) on March 17, 2022; Finance (Tom Forster, Administrative Analyst, 387-4635) on March 15, 2022; and County Finance and Administration (Diana Atkeson, Deputy Executive Officer, 387-5423) on February 23, 2022.


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Record of Action of the Board of Directors  
San Bernardino County Fire Protection District

**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, SECRETARY

BY   
DATED: March 29, 2022



cc: SBCFPD - Munsey w/agree  
Contractor - C/O SBCFPD w/agree  
File - w/agree  
CCM 04/6/2022