

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

May 18, 2021

FROM

SHARON NEVINS, Director, Department of Aging and Adult Services

SUBJECT

Agreement with WellSky Corporation for Social Assistance Management System Software

RECOMMENDATION(S)

1. Approve the Master License and Services **Agreement No. 21-326** with WellSky Corporation for software, cloud services, professional services, and maintenance and support services for the contract period from August 1, 2020 until all licensed software and services expire or are terminated.
2. Approve the Order Form **Agreement No. 21-327** with WellSky Corporation to license Social Assistance Management System software and provide maintenance and support in an amount not to exceed \$64,638 for the two-year period of August 1, 2020 through July 31, 2022.

(Presenter: Sharon Nevins, Director, 891-3917)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

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

FINANCIAL IMPACT

This item does not impact Discretionary General Funding (Net County Cost). The cost of this software will not exceed \$64,638 for the two-year period of August 1, 2020 through July 31, 2022. These expenditures are funded with Title III and VII sources; approximately 94% Federal (\$60,760) and 6% State (\$3,878). Adequate appropriation and revenue have been included in the Department of Aging and Adult Services' (DAAS) 2020-21 budget and will be included in the 2021-22 recommended budget.

BACKGROUND INFORMATION

Under the terms of the recommended agreement, WellSky Corporation (WellSky) will provide DAAS staff with software that allows access to, and the use of, the features and functions of the National Aging Program Information Systems (NAPIS) State Program Report (SPR) for California. The NAPIS SPR is a statistical compilation of performance data (client demographics, units of service) and expenditures by individual programs. DAAS inputs data to NAPIS quarterly and annually submits a compilation to the California Department of Aging (CDA).

In 1998, CDA collaborated with WellSky (formerly Synergy Software Technologies, Inc.) on the development of the Social Assistance Management System (SAMS), in order to comply with United States Administration on Aging reporting requirements for Title III (Support Services and Senior Center Programs) and Title VII (Prevention of Elder Abuse, Neglect and Exploitation)

programs administered through Older Americans Act. The services that require mandated reporting include, but are not limited to: supportive services, nutrition, and caregiver support.

WellSky's Master License and Services Agreement is its standard commercial contract, as negotiated, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. WellSky may assign the Agreement to an affiliate or in connection with any merger, reorganization or sale of substantially all of WellSky's assets or other change of control transaction without notice and without the County's consent.
 - The County must approve any assignment of the Agreement.
 - Potential Impact: WellSky may 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.
2. WellSky party is entitled to recover attorney and collection fees arising from WellSky's efforts to collect any unpaid balance from County.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: If WellSky institutes a collection action for late or non-payment, WellSky will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount.
3. The County is obligated to defend, indemnify, and hold WellSky and its officers, directors, and employees harmless from and against any third party claim and associated costs and expenses (including reasonable attorneys' fees) arising out of or resulting from County's use of the Licensed Software, Test Scripts, and Cloud Services, or any claim by any party receiving services from the County in connection with the Licensed Software or Cloud Services.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify WellSky, 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 WellSky without such limitations and the County would be responsible to defend and reimburse WellSky for costs, expenses, and damages, which could exceed the total contract amount.
4. The Agreement only requires WellSky to secure and maintain appropriate liability insurance coverage during the term of the Agreement based on its obligations under the Agreement. The Agreement does not require WellSky to meet the County's insurance standards as required pursuant to County Policy 11-07.
 - The County Policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the County standard contract.
 - Potential Impact: The Agreement does not include County standard insurance requirements. This means that the County has no assurance that WellSky 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.

5. Limitation of WellSky's liability to the County to two times the fees paid under the order form for the affected software or services during the 12 months preceding the event giving rise to the claim, excluding WellSky's indemnification obligations.
 - 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 Agreement is not similarly limited.
6. Neither party may bring any legal claim (other than failures to pay) more than three years after the cause of action accrues.
 - The County standard contract does not include a limit on the time to bring action.
 - Potential Impact: Limiting the County's ability to bring suit to three years amounts to a waiver of the Statute of Limitations for claims and shortens the period of time in which the County may file a lawsuit under the Agreement.
7. During the term of this Agreement and for a period of one (1) year thereafter, the County agrees not to hire, directly or indirectly, any employee or former employee of WellSky, without obtaining WellSky's prior written consent.
 - The County standard contract does not include a non-solicitation/non-compete provision.
 - Potential Impact: The County is prohibited from hiring any employee of WellSky during the contract term and for one year following expiration or termination of the Agreement. Hiring a present or former WellSky employee will result in breach of the Agreement and WellSky may terminate the Agreement and seek any available legal remedies.
8. Payment terms are Net 30 from date of invoice. Invoices that are more than 10 days past due shall be subject to a finance charge at a rate of interest the lesser of one-and-a-half percent (1.5%) per month or the maximum permissible legal rate.
 - County standard payment terms are Net 60 days with no interest or late payment penalties.
 - Potential Impact: County standard processing time is 60 days or more. Failing to pay within 30 days from the invoice date will result in a material breach of the Agreement, which would allow WellSky to terminate the Agreement and seek other legal remedies, including charging the County interest at a rate of 1.5%, which would exceed the contract amount.
9. The term is set forth in an Order Form and the Agreement remains in effect until all Licensed Software and Services expire or are terminated.
 - County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board.
 - Potential Impact: There is no end term to the Agreement and the County is indefinitely bound to the terms and conditions of the Agreement so long as there is an active license or service term.

10. There is no termination for convenience. The Agreement can only be terminated for cause or when all Licensed Software licensed under the Agreement terminates, and all Services expire or are terminated.
- 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: There is no termination for convenience. The County can only terminate the Agreement while there is any active license or service agreement for an uncured breach by WellSky. Any attempted termination by County without cause would result in payment liability for the full contract amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
11. If the County institutes a legal action, then venue is in any court in the State of Kansas. If WellSky institutes the applicable legal action, then venue is in any county in the State of California.
- The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue outside the County of San Bernardino may result in additional expenses that exceed the amount of the Agreement.

PROCUREMENT

Per County Policy 11-05, contracts that contain certain non-standard contract language must be approved by the Board of Supervisors (Board). County Purchasing supports this non-competitive sole source procurement based on WellSky's collaboration with CDA to develop SAMS, which provides access to NAPIS allowing DAAS to comply with mandated reporting requirements. WellSky is the CDA selected collaborative vendor in the development of SAMS, and the only system that allows DAAS to comply with Title III and VII mandated reporting requirements of the Older Americans Act. The County Purchasing Agent has issued sole source Purchase Orders for these services with Synergy Software Technologies, Inc. (the former name for WellSky) since 1998.

Negotiation of the non-standard contract language with WellSky involved lengthy discussions between the County's and the vendor's counsels, with an agreement by both parties on the final contract language occurring on April 13, 2021. This item is being presented at this time, as this is the first date available following the negotiations and required operational, fiscal and legal reviews. The prior Purchase Order expired on July 31, 2020, and as the agreement terms were being negotiated in good faith by both parties, WellSky continued to provide DAAS with access to this software. Approval by the Board on this date will have no impact on DAAS' services or activities in relation to this Agreement.

REVIEW BY OTHERS

This item has been reviewed by Human Services Contracts (Jennifer Mulhall-Daudel, Contracts Manager, 388-0241) on April 13, 2021; County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on April 13, 2021; Purchasing (Stacey Chou, Buyer III, 387-3377) on April 12, 2021; Finance (Christopher Lange, Administrative Analyst, 386-8393) on April 13, 2021; and County Finance and Administration (Tanya Bratton, Deputy Executive Officer, 388-0332) on April 13, 2021.

**Agreement with WellSky Corporation for Social Assistance
Management System Software
May 18, 2021**

Record of Action of the Board of Supervisors
County of San Bernardino

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: May 18, 2021



cc: DAAS- Nevins w/agree
Contractor- C/O DAAS w/agree
File- w/agree
LA 05/19/2021