

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

June 11, 2024

FROM

CHRIS WILHITE, Assessor-Recorder-County Clerk

SUBJECT

Non-Financial Agreements with Mescius Inc. for Software Licensing Support and Amendment to Agreement with The Software Revolution, Inc. for a License Transfer Request

RECOMMENDATION(S)

1. Approve **Amendment No. 3 to Agreement No. 23-1006** with The Software Revolution, Inc., for the license transfer request of a Mescius Inc. Spread.NET developer license and to increase the agreement amount by \$1,652, from \$1,250,000 to \$1,251,652, with no change to the term of January 23, 2023 through January 22, 2025.
2. Approve non-financial General Terms and Conditions **Agreement No. 24-471** with Mescius Inc., including non-standard terms, for a total term of June 11, 2024, through June 10, 2029, for software licensing support.
3. Approve non-financial End-User License **Agreement No. 24-742** with Mescius Inc., including non-standard terms, for a total term of June 11, 2024, through June 10, 2029, for software licensing support.
4. Authorize the Assessor-Recorder-County Clerk to electronically accept the End-User License Agreement in Recommendation No. 3 related to the use of Mescius Inc. software licensing services.
5. Direct the Assessor-Recorder-County Clerk to transmit copies of the electronically accepted End-User License Agreement in Recommendation No. 3, related to the use of Mescius Inc. software licensing services, to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Chris Wilhite, Assessor-Recorder-County Clerk, 382-3208)

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 General Terms and Conditions Agreement and End-User License Agreement (collectively Agreements) with Mescius Inc. (Mescius) are non-financial in nature and do not commit the County to make any purchases. If future purchases are made under these agreements, the Assessor-Recorder-County Clerk (ARC) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

**Non-Financial Agreements with Mescius Inc. for Software Licensing
Support and Amendment to Agreement with The Software Revolution,
Inc. for a License Transfer Request
June 11, 2024**

The estimated cost to transfer the Mescius software license to the ARC, originally paid by The Software Revolution Inc. (TSRI), is not to exceed \$1,652, increasing the total agreement amount from \$1,250,000 to \$1,251,652. Adequate appropriation and revenue have been included in ARC's Property Information Management System (PIMS) Upgrade Project 2023-24 budget (3119992756).

BACKGROUND INFORMATION

The Assessor Division of ARC is responsible for locating, describing, and identifying ownership of property within the county; establishing a taxable value for properties subject to taxation; applying applicable legal exemptions; and publishing annual and supplemental assessment rolls. The ARC is the main data source for many internal and external public agencies, property owners, and business entities for public records. PIMS, the current Information Technology (IT) system that houses this data, is being modernized to a supportable IT platform that uses current and industry standard programming languages. The new modernized system will be called the Assessor's Information Management System (AIMS).

As stated in Recommendation Nos. 2 and 3, the Mescius Agreements are Mescius' standard commercial contracts, which include terms that differ from the standard County contract and omit certain County standard contract terms. The non-standard and missing terms include the following:

1. The Agreements governing law is not California law as required by County Policy 11-05.
 - The County standard contract requires California governing law.
 - Potential Impact: The Agreement will be interpreted under Pennsylvania law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Pennsylvania law, which may result in fees that exceed the total Agreement amount.
2. The Agreements venue for disputes arising under the Agreements is Allegheny County in Pennsylvania.
 - County Policy 11-05 requires venue for disputes in the Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Allegheny County, Pennsylvania may result in additional expenses that exceed the amount of the Agreement.
3. The Agreements do not require Mescius to indemnify the County, as required by County Policies 11-05 and 11-07.
 - 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: Mescius is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Mescius' negligent or intentional acts and intellectual property infringement. If the County is sued for any claim, including intellectual property infringement based on its use of

**Non-Financial Agreements with Mescius Inc. for Software Licensing
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Inc. for a License Transfer Request
June 11, 2024**

Mescius' software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount. County Counsel cannot advise on whether and to what extent Pennsylvania law may allow the County to require Mescius to defend or indemnify it absent an express provision in the Agreement.

4. The County is required to indemnify Mescius against claims made by third parties.
 - The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Mescius 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 Mescius without such limitations and the County could be responsible to defend and reimburse Mescius for costs, expenses, and damages, which could exceed the total Agreement amount. County Counsel cannot advise on, whether and to what extent, Pennsylvania law may limit or expand this Agreement term.
5. The Agreements do not require Mescius to meet the County's insurance standards as required by County Policies, 11-05, 11-07 and 11-07SP.
 - County policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and as set forth in County policy and in the County standard contract.
 - Potential Impact: The County has no assurance that Mescius will be financially responsible for claims that may arise under the Agreement, which could result in expenses to the County that exceed the total Agreement amount.
6. Mescius' maximum liability to the County is limited and indicates Mescius will not be liable for any direct, indirect, incidental, or consequential damages.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess. Counsel cannot advise on, whether and to what extent, Pennsylvania law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
7. Mescius provides the services and/or products "AS IS" and disclaims all warranties of any kind as required by County Policy 11-05.
 - County Policy 11-05 requires a contractor to fully warrant its services and products.
 - Potential Impact: The County's use of the services and/or products is solely at its own risk. County Counsel cannot advise on, whether and to what extent, Pennsylvania law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

Recommendations Nos. 2 through 5 for the approval of the recommended Agreements, including non-standard terms, will enable the ARC to receive software licensing support, and allow the ARC to improve County government operations and operate in a fiscally-responsible and business-like manner.

**Non-Financial Agreements with Mescius Inc. for Software Licensing
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June 11, 2024**

On January 23, 2023, as a result of a non-competitive procurement, the Purchasing Department approved Agreement No. 4400021608 with The Software Revolution, Inc. (TSRI) for engineering support services in the total amount of \$1,000,000 for the five-year term of January 23, 2023, through January 22, 2028, to assist with the modernization of PIMS.

On September 12, 2023 (Item No.13), the Board of Supervisors (Board) approved Amendment No. 1 to Agreement No. 23-1006 (formerly Contract No. 4400021608) with TSRI, revising the scope of work to include additional engineering support services for the AIMS project, adding a milestone payment schedule, with no change to the contract amount of \$1,000,000, and shortening the term from five years to two years, for a total term of January 23, 2023, through January 22, 2025.

On May 7, 2024 (Item No.18), the Board approved Amendment No. 2 to Agreement No. 23-1006 with TSRI, revising the scope of work to include additional engineering support services for the PIMS Upgrade Project and increasing the contract amount by \$250,000, from \$1,000,000 to \$1,250,000, with no change to the term of January 23, 2023, through January 22, 2025.

TSRI's role in modernizing PIMS is to transform the existing legacy code into modern code. The existing legacy system uses an embedded grid view control that uses older technology and has performance issues when converted to modern code. Mescius developed a new upgraded grid view control that is compatible with the modern code. TSRI bought the Mescius Inc. Spread.NET developer license to streamline processes. At this time, the transfer of the license is being requested.

Recommendation No. 1 for the Amendment No.3 to Agreement No. 23-1006 with TSRI will allow for the transfer of a Mescius software license into the ARC's name and increase the amount from \$1,250,000 to \$1,251,652, to continue the modernization of PIMS, addressing existing performance issues, and the implementation of new technology where form changes can be made without custom code.

PROCUREMENT

The Agreements, including non-standard terms, will be used to make future purchases to be approved as necessary, in accordance with County Policy 11-04, Procurement of Goods, Supplies, Equipment, and Services.

County Policy 11-05 requires departments to obtain Board approval for procurement of goods and services with non-standard terms and conditions.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Kenneth Brown, Deputy County Counsel, 387-5455) on May 21, 2024; Purchasing (Ariel Gill, Supervising Buyer, 387-2070) on May 21, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on May 21, 2024; Innovation and Technology (Lynn Fyhrlund, Chief Information Officer, 388-5501) on May 28, 2024; Finance (Penelope Chang, Administrative Analyst, 387-4886) on May 22, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on May 24, 2024.

**Non-Financial Agreements with Mescius Inc. for Software Licensing
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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: June 11, 2024



cc: ARC - Willhite w/ agrees
Contractor c/o ARC w/ agree
File w/ agree

JLL 06/20/2024