

**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 Warranty Maintenance and Support Terms with Hitachi Vantara LLC for Maintenance and Support Services of Storage Platforms

**RECOMMENDATION(S)**

1. Approve non-financial Warranty Maintenance and Support Terms (**Agreement No. 24-250**) with Hitachi Vantara LLC, for maintenance and support services for the Hitachi storage platforms as specified in quotes accepted by Purchasing within limits set by County Policy.
2. Authorize the Chief Information Officer or Assistant Chief Information Officer to electronically accept updates to the Hitachi Vantara LLC Warranty Maintenance and Support Terms, subject to review by County Counsel, provided that such updated terms do not substantively modify the terms of the original agreement.
3. Direct the Chief Information Officer or Assistant Chief Information Officer to transmit any non-substantive updated terms that are electronically accepted to the Clerk of the Board of Supervisors within 30 days of acceptance.

(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). Hitachi Vantara LLC's (Hitachi) Warranty Maintenance and Support Terms (Terms) are non-financial in nature and do not commit the County to make any purchases. If future purchases are made under these Terms, 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 manages and maintains the County's Hitachi storage platforms, which provides data storage for critical County applications, such as FileNet, Sheriff's Jail Information Management System, and other various database systems on the enterprise server. Support and maintenance for this infrastructure is critical to the continuous operations of these County systems, as well as the County's disaster recovery and business continuity efforts.

On March 24, 2020 (Item No. 29), the Board approved Contract No. 20-146 with Hitachi for the period of April 1, 2020 through March 31, 2021, for Hitachi storage platforms maintenance and support services. The item also authorized the Purchasing Agent to issue a Purchase Order to

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Consiliant Technologies, LLC (Consiliant), an authorized reseller of Hitachi equipment and services, in the amount of \$251,332, for the same period.

On March 9, 2021 (Item No. 22), the Board approved the Terms, Contract No. 21-174, with Hitachi for the period of April 1, 2021 through March 31, 2022, for Hitachi storage platforms maintenance and support services and authorized the Purchasing Agent to issue a Purchase Order to Consiliant in the amount of \$281,620, for the same period.

On March 29, 2022 (Item No. 31), the Board approved the Terms with Hitachi, Contract No. 22-245, including non-standard terms, for the period effective April 1, 2022 and continuing until terminated by Hitachi or the County does not renew a service period, for Hitachi storage platforms maintenance and support services. The item also authorized the Purchasing Agent to issue a Purchase Order to Consiliant in the amount of \$304,190, for the period of April 1, 2022 through March 31, 2023.

On March 14, 2023 (Item No. 21), the Board authorized the Purchasing Agent to issue Purchase Orders to Consiliant subject to the Terms, Contract No. 22-245, for Hitachi storage platform maintenance and support services in an aggregate amount not-to-exceed \$800,000, for the period of April 1, 2023 through March 31, 2025.

The Hitachi Terms remain valid until replaced by an updated version, terminated by Hitachi, or the County decides not to renew a service period. Since the approval of Hitachi's Terms on March 29, 2002 (Item No. 31), Hitachi updated their Terms for maintenance and support services of the Hitachi storage platforms. ITD is requesting Board approval of Hitachi's updated Terms to continue to utilize the maintenance and support services for the County's Hitachi storage platform.

The Hitachi Terms are their standard commercial agreement, which include terms that differ from the standard County contract and omit certain County standard contract terms. Hitachi is unwilling to negotiate these terms. The non-standard and missing terms include the following:

1. Governing law is based on the laws of the location of the state, province or country of the Hitachi entity that sold County the product (Local Service Jurisdiction).
  - The County standard contract requires California governing law.
  - Potential Impact: The County is not purchasing the product directly from Hitachi, so it is impossible to identify the location of the state, province or country of the Hitachi entity "selling" the product to the County. This results in uncertainty over which state's, province's, or country's laws will govern the interpretation of the contract, and leads to ambiguity in interpretation of the contract terms. Any questions, issues or claims arising under this contract would require the County to first determine from Hitachi which law it intends to govern the contract, then, if other than California, to hire outside counsel competent to advise on the applicable law, which may result in fees that exceed the total contract amount.
2. There is no restriction on Hitachi's assignment of the Agreement.
  - The County standard contract requires that the County must approve any assignment of the contract.
  - Potential Impact: Hitachi 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

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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. County Counsel cannot advise on whether and to what extent another jurisdiction's law may permit or restrict a party's right to assign without an express provision in the contract.

3. There is no provision in the Agreement addressing each party's responsibility for paying attorneys' fees.
  - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
  - Potential Impact: County Counsel cannot advise on, whether and to what extent, another jurisdiction's 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 Agreement does not require Hitachi to indemnify the County, as required by County Policies 11-05 and 11-07, 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: Hitachi is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Hitachi's 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 Hitachi's 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 any other jurisdiction's law may allow the County to require Hitachi to defend or indemnify it absent an express provision in the contract.
5. The Agreement requires the County to defend and indemnify Hitachi against claims made based on the County's failure to remove County data from any product or Hitachi property when returning the product or property to Hitachi.
  - The County standard contract does not include any indemnification or defense by the County of a contractor.
  - Potential Impact: By agreeing to indemnify Hitachi, 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 Hitachi without such limitations and the County could be responsible to defend and reimburse Hitachi for costs, expenses, and damages, which could exceed the total Agreement amount.
6. The Agreement does not require Hitachi to meet the County's insurance standards as required pursuant to County Policies, 11-05, 11-07 and 11-07SP.

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- 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 Hitachi 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.
7. Hitachi's maximum liability to the County is limited to \$50,000 or the monetary equivalent in the currency of the Local Service Jurisdiction, excluding claims for death, bodily injury, property damage caused by negligent acts, and willful misconduct.
- 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. County Counsel cannot advise on whether, and to what extent, another jurisdiction's laws may limit or expand this contract term.
8. Venue for disputes arising under the Agreement is within the Local Service Jurisdiction.
- County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
  - Potential Impact: The County is not purchasing the product directly from Hitachi, so it is impossible to identify the location of the state, province or country of the Hitachi entity "selling" the product to the County. This results in uncertainty over the location where legal disputes would be required to be resolved. Having a venue outside of the County may result in additional expenses that exceed the amount of the Agreement.

ITD recommends approval of the Terms, including non-standard terms, to continue to receive the necessary maintenance and support from Hitachi to ensure continuous operations of critical County systems and applications stored on the County's Hitachi storage platforms. The authorization for the Chief Information Officer (CIO) or Assistant Chief Information Officer (ACIO) to electronically accept non-substantive updates to the Terms in Recommendation No. 1, subject to review by County Counsel, is necessary as Hitachi does not provide notice when the Terms are updated. The ability to accept the non-substantive updated Terms by the CIO or ACIO will expedite approval of updates to the Terms to mitigate potential delays with maintenance and support of the County's Hitachi storage platforms.

**PROCUREMENT**

The Terms, 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, provided that Hitachi does not substantively modify the Terms.

On January 21, 2020, ITD released Request for Proposals (RFP) No. ISD120-ADM-3666 via the County's Electronic Procurement Network for Hitachi storage platforms maintenance and support services from authorized resellers. Consiliant, an authorized reseller, was selected based solely on the lowest cost proposal. The RFP included a one-year term with an option to renew for four additional one-year terms. ITD has exercised those options, and the current purchase will be effective through March 31, 2025.

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**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on February 22, 2024; Purchasing (Ariel Gill, Supervising Buyer, 387-2070) on February 9, 2024; Risk Management (Greg Ustaszewski, Staff Analyst II, 386-9008) on February 8, 2024; Finance (Iliana Rodriguez, Administrative Analyst, 387-4205) on March 6, 2024; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on March 11, 2024.

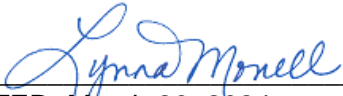
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Record of Action of the Board of Supervisors  
San Bernardino County

**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 - McClane w/agree  
Contractor - c/o IT w/agree  
File - w/agree  
CCM 03/26/2024