

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

March 29, 2022

FROM

LARRY AINSWORTH, Chief Information Officer, Innovation and Technology Department

SUBJECT

Maintenance Terms and Conditions Agreement with F5, Inc. for Direct Support Services

RECOMMENDATION(S)

Approve an F5 Maintenance Terms and Conditions **Agreement No. 22-216**, including non-standard terms, with F5, Inc. for direct support services that enable the Innovation and Technology Department to provide an uninterrupted, redundant and secure method of accessing County resources such as websites and computer applications, for purchase amounts as authorized by County Policy, effective as of March 29, 2022 and continuing until terminated by either party, provided that the Agreement remain in full force and effect with respect to maintenance and support services until the County gives notice of non-renewal of maintenance and support services, and the County ceases all use of the support services. (Presenter: Larry Ainsworth, 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 F5 Maintenance Terms and Conditions Agreement (Agreement) with F5, Inc. (F5) is non-financial in nature as F5 support and maintenance is not sold by F5 direct and is required to be purchased through a reseller. However, the Agreement automatically renews support and maintenance on an annual basis until the Agreement is terminated. For future purchases from F5 support and maintenance resellers made in conjunction with this 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 the F5 equipment as the network load balancing solution for providing County Departments and the public with secure and uninterrupted access to information technology services including websites, messaging, and computer application hosting. Support and maintenance for this equipment is critical to the 24/7 operations of ITD's datacenter, disaster recovery and business continuity efforts. Renewing the support and maintenance will allow ITD to continue to receive product updates including feature updates/enhancements and patches for security vulnerabilities.

The Agreement is F5's standard commercial agreement, which includes terms that differ from the standard County contract and omits certain County standard contract terms. While the

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parties negotiated certain contract terms to County standards, F5 would not agree to limit the contract term to five years or less. The non-standard and missing terms include the following:

1. Governing law is New York State.
 - The County standard contract requires California governing law.
 - Potential Impact: The Agreement will be interpreted under New York law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on New York law, which may result in fees that exceed the total Agreement amount.
2. F5 may assign the Agreement, without notice and without County's permission, in connection with any merger, consolidation, sale of all or substantially all of F5's assets, or any other similar transaction.
 - The County must approve any assignment of the Agreement.
 - 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. County Counsel cannot advise on whether and to what extent New York law may permit or restrict a party's right to assign without an express provision in the Agreement.
3. F5 provides no defense or indemnity for claims made against the County as required by County Policy 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: F5 is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from F5'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 F5'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 New York law may allow the County to require F5 to defend or indemnify it absent an express provision in the Agreement.
4. The Agreement does not include certain insurance terms as required by County Policy 11-07.
 - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: This means that the County cannot be certain that F5 will be financially responsible for claims that may arise from the County's use of the software or services, which could result in expenses to the County that exceed the total Agreement amount.

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5. F5's maximum liability to the County is \$300,000, without exceptions or exclusions.
 - 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. In addition, the County's liability under the Agreement is not similarly limited. County Counsel cannot advise on, whether and to what extent, New York law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
6. Payment terms are Net 30.
 - 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 will result in a material breach of the Agreement, which would allow F5 to terminate the Agreement and seek other legal remedies, which would exceed the Agreement amount.
7. The term of the Agreement commences on the date of last signature and continues until terminated by either party, provided, that the Agreement will continue with respect to any F5 maintenance and support services purchased by County prior to such termination. Coverage begins on the earlier of (i) (90) days after the date the Product is shipped from the manufacturing facilities of F5, or (ii) the date the covered Product is activated with F5, or (iii) if F5 has no record of license activation, service will begin on the ship date and no service extensions will apply. Support agreements will automatically renew for additional one-year terms upon submission of a purchase order for renewal, unless either the County or F5 provides written notice of termination at least 30 days prior to the end of any such term. In the event that the County accesses F5 support services in any way after the Agreement has expired or been terminated, the County will continue to be bound by the Agreement.
 - 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.
8. There is no termination for convenience.
 - The County standard contract gives the County the right to terminate the Agreement, 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: The County can terminate the Agreement by giving notice, but maintenance and support services continue to extend the Agreement until one of the parties provides notice of non-renewal. In addition, if the County accesses F5 support services after termination or non-renewal the Agreement will apply to such access, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
9. Venue for legal action is in New York, New York.
 - 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 in New York, New York may result in additional expenses that exceed the amount of the Agreement.

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ITD recommends approval of the Agreement with F5, including the non-standard terms, to provide County Departments and the public, high availability and redundancy for information technology services including websites, messaging, application hosting and the mechanism for publishing County resources for internet accessibility in support of the County's regular business operations and ITD's disaster recovery plan.

PROCUREMENT

The 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 (Bonnie Uphold, Deputy County Counsel, 387-5455) on February 18, 2022; Purchasing (Tevan Stremel, Buyer III, 387-2098) on February 3, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on February 4, 2022; Finance (Sofia Almeida, Administrative Analyst, 387-4378) on February 28, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5426) on February 28, 2022.


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Record of Action of the Board of Supervisors
San Bernardino County

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, CLERK OF THE BOARD

BY 
DATED: March 29, 2022



cc: IT - Mancebo w/agree
Contractor - C/O IT w/agree
File - w/agree
CCM 03/30/2022