

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

October 22, 2024

FROM

JASON ANDERSON, District Attorney

SUBJECT

End User License Agreement with Berla Corporation for Vehicle Forensic iVe Ecosystem

RECOMMENDATION(S)

1. Approve End User License **Agreement No. 24-1020** with Berla Corporation, including non-standard terms, for the vehicle forensic iVe Ecosystem, including system training and certification of department personnel, for a not-to-exceed amount of \$62,387, and renewing annually, for a period of five years, retroactively effective October 7, 2024, through October 6, 2029.
2. Authorize the Chief of Bureau of Investigation, or his designee, to electronically execute the agreement on behalf of the County, and any non-substantive amendments to the agreement, subject to review by County Counsel.
3. Direct the District Attorney to transmit copies of non-substantive amendments to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Michael Fermin, Chief Assistant District Attorney, 382-3662)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

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 item will not result in the use of additional Discretionary General Funding (Net County Cost). Berla Corporation (Berla) would not provide fixed pricing for the End User License Agreement (Agreement) due to changes in manufacturing processes and changing technology. However, they did provide a not-to-exceed annual license costs and a fixed cost for training. The not-to-exceed amount of \$62,387 will be funded within the District Attorney's existing 2024-25 budget allocation. Sufficient appropriation will be included in future recommended budgets.

Annual Period	Item	Not to Exceed
October 2024	iVe Renewal Plan	\$4,300
October 2025	iVe Renewal Plan	\$5,000
October 2026	iVe Renewal Plan	\$5,750
October 2027	iVe Renewal Plan	\$6,612
October 2028	iVe Renewal Plan	\$7,605
	Training and Certification for Staff	\$33,120

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Annual Period	Item	Not to Exceed
	TOTAL:	\$62,387

BACKGROUND INFORMATION

The District Attorney Office (Department) has the mandated responsibility to prosecute crimes committed within the County, pursuant to Government Code Section 26500. The Department bears the responsibility to provide the burden of proof, beyond a reasonable doubt, for crimes committed. During prosecution, the Department must provide evidence, motive, and the means, or ability, to commit crimes.

In 2015, the Department purchased a vehicle forensic iVe Ecosystem toolkit, from Berla, for the Bureau of Investigation to retrieve data from vehicles connected with crimes. Berla sets the industry standard for vehicle forensics and retrieves and interprets data from most vehicles. The tools and software retrieve information from numerous vehicle components such as global positioning system (GPS) data, navigation history, call logs, contact lists, short messaging service (SMS) messages, and emails. The software can identify devices that have been paired with the vehicle before, during, and after the vehicle's involvement in a crime. The data retrieved can provide additional proof, beyond a reasonable doubt, that the defendant was involved with the crime under investigation.

The types of cases that require vehicle forensic information include auto theft, auto insurance fraud, arson investigations, homicides, vehicular homicides, and human trafficking. When requested, the Department assists other County departments and law enforcement agencies to retrieve vehicle forensic information. The vehicle forensic information is retrieved on-premises, meaning information is not transmitted to or accessible by Berla, unless the investigator provides permission and access, when technical support is required.

Berla's Agreement includes terms and conditions that differ from the standard County contract and omits certain County standard contract terms. Berla has taken the position that its Agreement's terms and conditions are not negotiable. The non-standard and missing terms include the following:

1. Governing law is the State of Maryland.
 - a. The County standard contract requires California governing law.
 - b. Potential Impact: The Agreement will be interpreted under Maryland law. Any questions or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Maryland law, which may result in fees that exceed the total Agreement amount.
2. All late payments are subject to a late fee equal to 1.5% per month on the outstanding balance, or a lesser amount that may equal the maximum amount allowed by law.
 - County policy does not permit late payment interest or penalties.
 - Potential Impact: Failing to pay invoices on time may result in a material breach of the Agreement, which could allow Berla to seek legal remedies, including charging the County interest at a rate of 1.5% per month, which could exceed the Agreement amount.
3. Berla shall be entitled to recover all costs incurred in connection with a claim or action to enforce the terms of the Agreement, including attorney's fees.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.

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- Potential Impact: If Berla institutes a legal proceeding related to enforcing the terms of the Agreement, it could be entitled to recover reasonable attorneys' fees, which could exceed the total Agreement amount.
4. The County shall indemnify, defend, and save Berla harmless from and against any and all claims, loss, damages, liabilities, costs and expense (including attorney's fees) to the extent arising out of Customer's breach of the Agreement.
 - c. The County standard contract does not include any indemnification or defense by the County of a contractor.
 - d. Potential Impact: By agreeing to indemnify Berla, 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 Berla without such limitations and the County could be responsible to defend and reimburse Berla for costs, expenses, and damages, which could exceed the total Agreement amount. County Counsel cannot advise on, whether and to what extent, Maryland law may limit or expand this Agreement term.
 5. The Agreement imposes cancellation fees on the County for cancelling training within 8 weeks of the event.
 - County Policy 11-05 requires that the County have 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: Any attempted termination by the County of the training within 8 weeks of the event could result in payment liability where no funds are available due to lack of allocation or loss of funding.
 6. The products licensed or purchased from Berla carry a limited warranty.
 - 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, Maryland law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.
 7. Berla's maximum liability to the County is limited to the total amount of fees paid to Berla under the Agreement.
 - 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, Maryland law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
 8. The Agreement does not require Berla to meet the County's insurance standards as required pursuant to 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 Berla 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.

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9. The Agreement does not require Berla 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 the 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 that the contractor will indemnify, defend and hold harmless the 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: Berla is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from Berla'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 Berla's software 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 Maryland law may allow the County or require Berla to defend or indemnify it absent an express provision in the Agreement.

The Department recommends approval of Berla's Agreement, including non-standard terms, to ensure continued access to vehicle forensic tools to retrieve information that is critical to the investigation and prosecution of cases.

As a result of an oversight, the Department did not address this agreement prior to its expiration date. Administrative processes have been established to address contract monitoring prior to expiration date. This item is being submitted to the Board for approval at the first available meeting upon completion of the required financial and legal review process. County Counsel and Risk Management have reviewed and provided input on the item.

PROCUREMENT

On October 22, 2015, the Purchasing Department (Purchasing) approved non-competitive purchase order No. 165929 to Berla for the purchase of the vehicle forensic iVe Ecosystem Toolkit. Berla is the creator and sole provider of the iVe Ecosystem Toolkit, associated services, maintenance, support plans, as well as training.

The iVe Ecosystem End User License Agreement No. 19-638 was approved by the Board on September 24, 2019 (Item No. 20), for a not to exceed amount of \$25,850.

Amendment No. 1 was approved on August 24, 2021 (Item No. 23), to increase the agreement amount by \$19,200, from \$25,850 to an amount not to exceed \$45,050.

Other vendors may provide the service of retrieving forensic information, but their focus is usually on reconstructing vehicle collisions for insurance purposes. Due to the need to demonstrate the chain of custody for case evidence, the Department prefers that its staff retrieve and interpret the data. Other vendors require that their personnel retrieve the data before making it accessible to the Department.

Purchasing concurs with the non-competitive justification of specialized credentials for the service and support of the iVe Ecosystem.

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REVIEW BY OTHERS

This item has been reviewed by County Counsel (Daniella Hernandez, Deputy County Counsel, 387-3121) on October 16, 2024; Risk Management (Gregory Ustaszewski, Staff Analyst II, 386-9008) on October 10, 2024; Purchasing (Jessica Barajas, Supervising Buyer, 387-2065) on September 30, 2024; Finance (Kathleen Gonzalez, Administrative Analyst, 387-5412) on October 4, 2024; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-5423) on October 4, 2024.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: October 22, 2024



cc: DA - Walker w/agree
Contractor - c/o DA w/agree
File - w/agree
CCM 10/25/2024