

**REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS
OF THE SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT
AND RECORD OF ACTION**

April 7, 2020

FROM

DAN MUNSEY, Fire Chief/Fire Warden, San Bernardino County Fire Protection District

SUBJECT

Information Technology Contracts

RECOMMENDATION(S)

Acting as the governing body of the San Bernardino County Fire Protection District (SBCFPD):

1. Authorize the Purchasing Agent to approve the following contracts/contract amendment, which include non-standard terms, and issue purchase orders to these Information Technology (IT) vendors in order to renew subscriptions for IT products that assist SBCFPD in providing professional and modern fire protection and advanced life support services:
 - a. Amendment No. 1 to End User License Agreement with ESi Acquisition Inc. that changes governing law and venue to California and San Bernardino County, respectively, associated with the use of WebEOC Enterprise Solution software in the amount of \$39,361 for the renewal period of February 1, 2020 to January 31, 2021.
 - b. Client Agreement, ~~including Schedule A,~~ with TargetSolutions Learning, LLC for the TargetSolutions Premier Membership Platform and TargetSolutions Web Event in the amount of ~~\$66,669~~66,699 for the period of January 1, 2020 through December 31, 2020 that includes automatic renewal with an annual 3% escalator in the contract amount for successive one-year periods, as well as an early termination clause of 60 days' notice prior to the automatic renewal date.
 - ~~c. Sales, Software License and Services Agreement with Kronos Incorporated for the following Telestaff services that includes automatic renewal with up to 4% annual escalator in the contract amount for successive one-year periods, as well as an early termination clause of 60 days' notice prior to the automatic renewal date:~~
 - ~~i. Software support services in the amount of \$28,741 for the renewal period of October 1, 2019 through September 30, 2020.~~
 - ~~ii. Hosting services in the amount of \$21,152 for the renewal period of January 21, 2020 through January 20, 2021.~~
2. Direct the Fire Chief/Fire Warden of the SBCFPD to return to the Board of Directors within three years with recommendations regarding whether to exercise SBCFPD's rights to terminate or continue with the agreements identified in Recommendation No. 1.
(Presenter: Dan Munsey, Fire Chief/Fire Warden, 387-5779)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

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). Sufficient appropriation for the cost of these IT contracts is included in SBCFPD's 2019-20 budget and will be included in future recommended budgets as appropriate.

BACKGROUND INFORMATION

To aid in the mission of protecting the public it serves, SBCFPD uses multiple IT products to provide professional and modern fire protection and advanced life support services. The contracts identified in Recommendation No. 1 all have a vital role in assisting SBCFPD with providing these services.

Due to the amount and term of each contract, SBCFPD anticipated having the Purchasing Agent approve purchase orders to renew all of the IT products described in this item. However, upon receipt of the proposed contracts/contract amendment from the vendors and review by County Counsel, it was determined that these agreements would require approval from the Board of Directors (Board). More specifically, per County Policy 11-05, contracts that contain non-standard contract language require approval by the Board.

The contracts/contract amendment are retroactive to the dates identified in Recommendation No. 1 as a result of continued negotiations between the vendors and SBCFPD to obtain as many of the standard terms as possible. To avoid further delays, SBCFPD will request terms and conditions at 120 days before expiration of any future IT agreement to ensure a timely review, negotiation period and if necessary, an agenda item approving any non-standard terms.

ESi Acquisition Inc.

On July 26, 2016 (Item No. 14), the Board authorized the issuance of a purchase order to Intermedix Corporation/ESi Acquisition Inc. in the amount not to exceed \$158,000 for the procurement and implementation of WebEOC Enterprise Solution software for the purpose of expanding administrative access and operation capabilities of the San Bernardino County Operational Area (OA). The OA was established as an intermediate level of the State's emergency services organization to manage and/or coordinate emergency preparedness efforts. In relation to this purchase order, an End User License Agreement was approved for use of the WebEOC Enterprise Solution software. In general, the End User License Agreement remains in effect during time that SBCFPD uses the software. The original purchase order was for the term of July 26, 2016 through May 31, 2018. A new purchase order was issued for SBCFPD's continued use of this software through January 31, 2020. The current legal entity is now ESi Acquisition Inc. (ESi).

Amendment No. 1 to the End User License Agreement changes governing law and venue to California and San Bernardino County, respectively, to match County standard contract terms. The recommended purchase order associated with this agreement will allow for continued use of the WebEOC Enterprise Solution software for a period of one year, retroactive to February 1, 2020 to January 31, 2021. The purchase order and Amendment No. 1 to the End User Agreement are retroactive due to SBCFPD and ESi revisiting and negotiating the non-standard terms in the End User Agreement. While ESi agrees in Amendment No. 1 to SBCFPD's standard contract terms on governing law and venue, the underlying End User License Agreement still includes non-standard contract terms.

The non-standard terms of the End User License Agreement include, but are not limited to, the following:

- The End User Agreement has an indefinite term, though the renewal period is February 1, 2020 to January 31, 2021.
- Payment is due prior to the installation of any software versus 60 days from invoice.
- ESi may assign the agreement without the County's advance written approval.
- ESi disclaims all warranties, including any warranty of fitness in connection with the SBCFPD's use of the software for high risk activities.
- ESi's entire liability and SBCFPD's exclusive remedy, at ESi's option, is either (a) correction of the error or (b) return of the license fee. ESi's liability is further limited by

certain actions, including, but not limited to, errors attributable to accident and SBCFPD's failure to install updates.

- SBCFPD indemnifies, defends, and holds harmless ESI for liability, etc., arising out of or in connection with the SBCFPD's use of the software for high risk activities.
- SBCFPD indemnifies, defends, and hold harmless ESI for any liability etc. with respect to any of the County's export or re-export activities contrary to the agreement.
- Neither Amendment No. 1 nor the End User Agreement includes any indemnity or insurance requirements placed on ESI for the benefit of the County.

Potential impacts of these non-standard provisions include, but are not limited to, the following:

- SBCFPD will need to make payment per the terms of the agreement, versus 60 days from invoice.
- The disclaimer of warranties results in SBCFPD accepting the product "as is" and with all faults.
- The limitation of liability reduces the type and amount of claims the SBCFPD may pursue against ESI.
- The indemnity obligations, as well as the lack of indemnity and insurance obligations imposed on ESI could result in additional costs to SBCFPD; although, the likelihood of this occurring is low.

Notwithstanding the non-standard provisions, SBCFPD is recommending the Board's approval of Amendment No. 1 to End User License Agreement with ESI because the WebEOC Enterprise Solution has become the reporting software during incidents and has become a familiar tool to all stakeholders in the county.

TargetSolutions Learning, LLC

On May 5, 2015 (Item No. 55), the Board approved a purchase order with TargetSolutions Learning, LLC (TargetSolutions) for the use of the TargetSolutions Premier Membership Platform and TargetSolutions Web Event software that allows SBCFPD to provide online training, testing, credential tracking and other services. Based on the County of San Bernardino being a member of the CSAC Excess Insurance Authority, SBCFPD receives a discount on the licenses purchased from TargetSolutions. The recommended Client Agreement will renew the TargetSolutions Premier Membership Platform and TargetSolutions Web Event software license for the period of January 1, 2020 through December 31, 2020. This agreement is retroactive due to continued negotiations between SBCFPD and TargetSolutions. Ultimately, the two parties could not agree on all terms, thus resulting in the Client Agreement having non-standard terms.

The non-standard terms of the contract include, but are not limited to, the following:

- The agreement automatically renews for successive one-year periods unless notice is given by either party of its intent to terminate the agreement at least 60 days prior to the automatic renewal date. The fees increase by 3% for each year the agreement is renewed.
- Payment is 30 days from invoice date versus 60 days.
- TargetSolutions may assign the agreement without the County's advance written approval.
- The agreement is silent on governing law and court venue.
- The limitation of liability provision does not expressly exclude TargetSolutions' gross negligence, willful misconduct or violations of the law. Also, the liability is capped at the total fees due to, or already paid to TargetSolutions for the preceding 12 months.
- TargetSolutions' indemnity to SBCFPD for any claim that the services or any component infringes or violates any intellectual property right does not include a defense obligation.
- The lack of any insurance obligations imposed on TargetSolutions could result in additional costs to SBCFPD; although, the likelihood of this occurring is low.

Potential impacts of these non-standard provisions include, but are not limited to, the following:

- SBCFPD will need to evaluate whether it desires that the agreement automatically renew at least 60 days before January 31, 2021.
- The fees will increase 3% per year.
- SBCFPD will need to make payment within 30 days of invoice.
- While SBCFPD believes the governing law is California and, in the event of a dispute, venue is San Bernardino County Superior Court, TargetSolutions may take a different legal position.
- The limitation of liability reduces the type and amount of claims the SBCFPD may pursue against TargetSolutions and it could result in no viable claim against TargetSolutions in the event the claim arises 12 months after payment.
- While TargetSolutions' indemnity obligation to SBCFPD covers claims that the services or any component infringes or violates any intellectual property right, the indemnity does not require TargetSolutions to defend SBCFPD in this type of matter. This would result in a financial impact to SBCFPD (cost of defense), in the unlikely event SBCFPD were required to defend such a claim.

Notwithstanding the non-standard provisions, SBCFPD is recommending the Board's approval of Client Agreement with TargetSolutions for the TargetSolutions Premier Membership Platform and TargetSolutions Web Event because it provides SBCFPD with a one-stop shop that assures compatibility and consistency in application by requiring that personnel become familiar with only one program as opposed to several programs. .

Kronos Incorporated

~~SBCFPD uses Telestaff software from Kronos Incorporated (Kronos) to track staffing and provide educational support services (e.g. online tutorial videos on the purchased product). The Sales, Software License and Services Agreement (Agreement) with Kronos and related purchase orders will renew the Telestaff software support and hosting services for use of the software. The software support services are from October 1, 2019 through September 30, 2020, while the software hosting services are from January 21, 2020 through January 20, 2021. Both services are retroactive due to continued negotiations between SBCFPD and Kronos. Ultimately, the two parties could not agree on all terms, thus resulting in the Agreement having non-standard terms.~~

~~The non-standard terms of the Agreement include, but are not limited to, the following:~~

- ~~• Software support automatically renews for additional one-year terms, unless either party notifies the other party 60 days' prior to the renewal date. The service charges are also subject to change by Kronos after the initial one-year term. For the initial two renewal years, the annual support fee, for the same products and service type, will not increase by more than 4% over the prior year's annual support fee.~~
- ~~• A late charge of 1% per month on any overdue amounts not the subject of a good faith dispute.~~
- ~~• The limitation of liability provision does not expressly exclude Kronos' gross negligence, willful misconduct or violations of the law. In addition, liability is capped at the order amount.~~
- ~~• SBCFPD indemnifies and holds harmless Kronos for all damages or liability caused by SBCFPD's failure to comply with the contractual restrictions imposed on SBCFPD in using object code form only and complying with all laws when exporting the product to other countries.~~
- ~~• Kronos' indemnity to SBCFPD for any claim that the services or any component infringes or violates any intellectual property right does not include a defense obligation.~~
- ~~• Kronos' insurance terms do not include the County's standard additional insured and waiver of subrogation provisions.~~
- ~~• Payment is 30 days from invoice date versus 60 days.~~

- ~~• The Agreement is silent on whether Kronos may assign it without SBCFPD's consent.~~

~~Potential impacts of these non-standard provisions include, but are not limited to, the following:~~

- ~~• The support fee may increase by 4% over the prior year's annual support fee.~~
- ~~• The limitation of liability reduces the type and amount of claims the SBCFPD may pursue against Kronos.~~
- ~~• SBCFPD will be responsible for all damages or liability caused by SBCFPD's failure to comply with the contractual restrictions imposed on SBCFPD in using object code form only and complying with all laws when exporting the product to other countries.~~
- ~~• While Kronos' indemnity obligation to SBCFPD covers claims associated with patent or copyright laws, the indemnity does not require Kronos to defend SBCFPD in this type of matter. This would result in a financial impact to SBCFPD (cost of defense), in the unlikely event SBCFPD were required to defend such a claim.~~
- ~~• SBCFPD will need to make payment within 30 days of invoice.~~
- ~~• Kronos could assign the agreement without SBCFPD's consent.~~

~~Notwithstanding the non-standard provisions, SBCFPD is recommending the Board's approval of the Agreement with Kronos, along with related purchase orders for Telestaff software support and hosting services, because the software is the standard program that CONFIRE uses to integrate with ICEMA's ImageTrend program and the capability for future integration with the Computer Aided Dispatch System.~~

~~The SBCFPD Fire Chief/Fire Warden will return to the Board within three years with recommendations regarding whether to exercise SBCFPD's rights to terminate or continue with the agreements identified in Recommendation No. 1.~~

PROCUREMENT

ESi

Since 2016, SBCFPD has contracted with ESi to provide and support the WebEOC Enterprise Solution software. The procurement continues to be considered non-competitive due to ESi being the proprietary sole source vendor for this software.

TargetSolutions

Since 2007, SBCFPD has contracted with TargetSolutions for the use of software that allows SBCFPD to provide online training, testing, credential tracking and other services. Over the years, other online education and training vendors have emerged, but none has offered the same level of service and customization to SBCFPD that TargetSolutions provides. In addition, based on the County of San Bernardino being a member of the CSAC Excess Insurance Authority, SBCFPD receives a discount on the licenses purchased from TargetSolutions.

Kronos

~~Telestaff software from Kronos was originally procured by CONFIRE. SBCFPD assumed management of the information technology systems from CONFIRE in 2018. SBCFPD desires for the continued use of this software. Therefore, SBCFPD must continue to purchase its own licenses and support from Kronos.~~

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Scott Runyan, Deputy County Counsel, 387-5455) on March 18, 2020; Purchasing (Leo Gomez, Purchasing Manager, 387-2076) on March 20, 2020; Finance (Tom Forster, Administrative Analyst, 387-4635) on March 20, 2020; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on March 23, 2020.