

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

June 28, 2022

FROM

GEORGINA YOSHIOKA, Interim Director, Department of Behavioral Health

SUBJECT

Amendment to Contract with Netsmart Technologies, Inc. for the Behavioral Health Management Information System

RECOMMENDATION(S)

1. Approve **Amendment No. 2**, effective June 28, 2022, to **Contract No. 17-188** with Netsmart Technologies, Inc., which includes a Third Party Pass Through Agreement with Intelligent Medical Objects, Inc., including non-standard terms, for the Intelligent Medical Objects Problem IT terminology products service for the Behavioral Health Management Information System to move from a self-hosted environment to a vendor-hosted cloud service, add OrderConnect licenses for use by medical residents, add a Service Level Agreement for Hosting Account Services, increasing the total contract amount by \$5,814,925, from \$12,286,128 to \$18,101,053, and exercising both one-year extension options, for a total contract period of seven years from April 4, 2017 through June 30, 2024.
2. Authorize the Director of the Department of Behavioral Health to reallocate funds allocated to Contract No. 17-188 with Netsmart Technologies, Inc., for required and agreed upon changes to facilitate completion of the implementation of the Behavioral Health Management Information System, in the amount of \$12,638, from one deliverable to another as required to complete the work outlined in the contract, with no change to the total contract amount or the contract period of April 4, 2017 through June 30, 2024.

(Presenter: Georgina Yoshioka, Interim Director, 388-0801)

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

This item does not impact Discretionary General Funding (Net County Cost). The increase of \$5,814,925 is funded by the Mental Health Services Act. Adequate appropriation and revenue have been included in the Department of Behavioral Health's (DBH) 2021-22 budget, 2022-23 budget, and will be included in future recommended budgets.

BACKGROUND INFORMATION

DBH is responsible for providing mental health and substance use disorder services to San Bernardino County (County) residents experiencing major mental illness and/or substance use disorders. Netsmart Technologies, Inc. (Netsmart) is responsible for enhancement, customization, configuration and maintenance of all system components for the Behavioral Health Management Information System (BHMIS) and the Electronic Health Record (EHR). It is

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an integrated system that is replacing the DBH billing system and ancillary supplemental systems to continue providing efficient and secure Mental Health, Substance Use Disorder, and Managed Care services to clients throughout the County and contract provider networks.

Recommendation No. 1

As originally approved, the contract with Netsmart was to be in a self-hosted environment where DBH would acquire the necessary infrastructure, hosted by the County Innovation Technology Department (ITD) at the County's Data Center. Continuing changes to state and federal requirements require enhancements to the application and access rights, requiring extensive coordination between Netsmart, ITD, and DBH Information Technology teams to ensure the BHMIS continues to function as intended. The recommended amendment will move the system to a vendor-hosted environment to allow Netsmart to implement state and federal requirements, which continue to evolve, more quickly to all the vendor-hosted counties, rather than implementing these changes on an individual basis.

The Intelligent Medical Objects, Inc. (IMO) third party pass through terms (IMO agreement) are required to license IMO software used in association with, but separate from the Netsmart software application. The IMO agreement is IMO's standard commercial agreement, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The IMO Contract is non-negotiable. The non-standard and missing terms include the following:

1. The IMO agreement is silent on governing law.
 - The County standard contract requires California governing law.
 - Potential Impact: Having no specified governing law in the agreement results in uncertainty over which state's laws will govern the interpretation of the agreement, and leads to ambiguity in interpretation of the agreement terms. IMO is a privately-held corporation based in the State of Illinois. The agreement could be interpreted under any state law depending on where the claim is brought, including Illinois or California. Any questions, issues or claims arising under this agreement could require the County to hire outside counsel competent to advise on the applicable state law, which may result in fees that exceed the total agreement amount.
2. The IMO agreement is silent about assignment.
 - The County must approve any assignment of the contract.
 - Potential Impact: IMO 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. Should this occur, the County would 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 Illinois law may permit or restrict a party's right to assign without an express provision in the agreement.
3. There is no provision in the IMO agreement addressing each party's responsibility for paying attorneys' fees.

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- 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, Illinois 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 agreement.
4. The IMO agreement does not require IMO to indemnify the County, 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: IMO is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from IMO'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 IMO's software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total agreement amount.
5. The IMO agreement does not require IMO to meet the County's insurance standards as required pursuant to County Policy 11-07.
- The County Policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and set forth in the County standard contract.
 - Potential Impact: The County has no assurance that IMO will be financially responsible for claims that may arise from the County's use of the software, which could result in expenses to the County that exceed the total agreement amount.
6. The County is required to indemnify and hold harmless IMO from any claims and costs arising out of County's use of the service or content, any data or information input by the County, tort, personal injury, medical malpractice, and product liability.
- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify IMO, 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 IMO without such limitations and the County would be responsible to defend and reimburse IMO for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, Illinois law may limit or expand this agreement term.

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7. IMO disclaims all liability to the County whatsoever, and where such liability cannot be disclaimed, limits its maximum liability to the County to the fees received by IMO specifically relating to the County's service or product, which is the subject of the claim.
 - 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.

8. There is no stated venue in the IMO agreement.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: IMO is located in Cook County, Illinois. Having no express venue in the contract means that Cook County, Illinois venue could be applied to this agreement, which may result in additional expenses that exceed the amount of the agreement.

9. IMO provides the software "AS IS" and disclaims all warranties of any kind.
 - There is no warranty requirement in the County standard contract. The County expects its vendors and service providers to fully warrant the products and services they provide to the County.
 - Potential Impact: The County's use of the software is solely at its own risk.

Recommendation No. 2

The recommended authorization will reallocate \$12,638 from one part of the project to another to add an additional lab interface to be used for bi-directional integration for electronically submitting and receiving laboratory requests/results. These funds were originally allocated to the Syndromic Surveillance and Incident Tracking license which DBH and Netsmart have determined is no longer necessary as the workflow it was designed for is more effectively captured in a different part of the system.

PROCUREMENT

On April 4, 2017 (Item No. 15), as a result of a formal procurement, the Board of Supervisors (Board) approved a contract with Netsmart for BHMIS, in the amount of \$11,255,574, for the period of April 4, 2017 through June 30, 2022. In addition, this item authorized the DBH Director to sign and execute any necessary Change Orders not to exceed \$25,000 provided the terms of Contract No. 17-188 do not change or exceed five percent of the total contract amount, for the development, installation, and maintenance of the BHMIS.

On February 13, 2018 (Item No. 18), the Board approved Amendment No. 1 to the contract, to accelerate the implementation schedule of the electronic health record system, increasing the total contract amount by \$1,030,554, from \$11,255,574 to \$12,286,128, with no change to the contract period of April 4, 2017 through June 30, 2022.

On December 14, 2021 (Item No. 20), the Board approved the reallocation of funds to facilitate the completion of the implementation of the BHMIS, in the amount of \$106,600 from one deliverable to another as required to complete the work outlines in the contract, with no change to the total contract amount of \$12,286,128 or the contract period of April 4, 2017 through June 30, 2022.

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DBH will continue to monitor contractor performance on a regular basis to ensure the performance and compliance standards of the contract are met.

REVIEW BY OTHERS

This item has been reviewed by Behavioral Health Contracts (Natalie Kessee, Contracts Manager, 388-0869) on May 31, 2022; County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on May 31, 2022; Finance (Christopher Lange, Administrative Analyst, 386-8393) on June 3, 2022; and County Finance and Administration (Cheryl Adams, Deputy Executive Officer, 388-0238) on June 14, 2022.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

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

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: June 28, 2022



cc: DBH - Hoatson w/agree
 Contractor - C/O DBH w/agree
 File - w/agree
CCM 07/19/2022