

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

March 29, 2022

FROM

LEONARD X. HERNANDEZ, Chief Executive Officer, County Administrative Office

SUBJECT

Service Order and Terms of Service Agreement with Sprout Social, Inc. for Social Media Management

RECOMMENDATION(S)

Approve Service Order and Terms of Service **Agreement No. 22-215** with Sprout Social, Inc., including non-standard terms, to license a social media management tool in the amount of \$90,000 for a total contract period of two years from March 29, 2022, through March 28, 2024, automatically renewing for two-years periods until notice of non-renewal is provided. (Presenter: Martha Guzman-Hurtado, Chief Communications Officer, 387-4193)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Promote the Countywide Vision.

Operate in a Fiscally-Responsible and Business-Like Manner

FINANCIAL IMPACT

Approval of this item will not result in the use of additional Discretionary General Funding (Net County Cost). The cost associated with this Sprout Social, Inc. (Sprout Social) Service Order and Terms of Service Agreement (Agreement) is included in the County Administrative Office's 2021-22 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

The San Bernardino County communications team uses social media to communicate and interact with the public. This communication is critical to providing services and information, particularly during emergencies. The County maintains more than 150 social media accounts across County departments on platforms such as Facebook, Instagram, YouTube, and Twitter. More than half a million people follow the County's social media accounts.

The Sprout Social social media management tool will allow the County to monitor and approve all social media content for all County departments in one location, study analytics to measure the effectiveness of outreach to the public, and to ensure social media is being used properly to communicate. Sprout Social has superior historical data on the County's media posts that allow for more detailed analytics of social media use. The platform also offers a robust workflow that allows for approvals, which provides a structured review of content before posted.

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

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Social is unwilling to negotiate these terms. The non-standard and missing terms include the following:

1. Governing law is the State of Illinois.
 - The County standard contract requires California governing law.
 - Potential Impact: The Agreement will be interpreted under Illinois law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Illinois law, which may result in fees that exceed the total contract amount.
2. Sprout Social may revise and update the Agreement from time to time, in its sole discretion, effective immediately upon posting.
 - The County standard contract requires that any changes to the contract to be reduced to writing, executed and attached to the original Contract and approved by the person(s) authorized to do so on behalf of Contractor and County.
 - Potential Impact: The County could be agreeing to new terms without review by anyone, including County Counsel, and without approval of the new terms by the Board of Supervisors (Board). County Counsel cannot advise on whether and to what extent Illinois law may affect the enforceability of unilateral changes to the terms.
3. All disputes arising under the Agreement must be settled by final and binding arbitration, except for breach of confidentiality and intellectual property infringement.
 - The County standard contract does not require arbitration.
 - Potential Impact: Arbitration decisions are not appealable. In addition, disputes that might otherwise be settled in small claims court would incur arbitration costs that would exceed the costs of a small claims action, and the contract amount. County Counsel cannot advise on whether and to what extent such arbitration provisions may be enforceable against a government entity under Illinois law.
4. Sprout Social may assign the Agreement without notice and without the County's consent to a successor by way of merger, acquisition, sale of assets, or operation of law.
 - The County must approve any assignment of the contract.
 - Potential Impact: Sprout Social 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 Illinois law may permit or restrict a party's right to assign without an express provision in the contract.
5. 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, 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 contract.

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6. The County is required to defend, indemnify, and hold harmless Sprout Social and its affiliates from all third party claims arising from the County's breach of the Agreement, use of third-party services, or for any action arising from: (a) any use of the products in combination with other products or services, (b) use of the products outside of the scope of the rights granted under these terms, or (c) any modification of the products not authorized in writing by Sprout Social.
 - The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify Sprout Social, 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 Sprout Social without such limitations and the County would be responsible to defend and reimburse Sprout Social 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 term.
7. The Agreement does not require Sprout Social 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 Sprout Social will be financially responsible for claims that may arise from the County's use of the products or services, which could result in expenses to the County that exceed the total contract amount.
8. Sprout Social's maximum aggregate liability to the County is limited to the total amount paid by the County under the applicable plan during the 12 months prior to the event that gives rise to the claim.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: The total contract amount for the full two-year term is \$90,000, payable in full in advance. Based on this term Sprout Social's maximum liability to the County during the first year will be \$90,000, and during the second year of the term it will be \$0. Claims would exceed the liability cap and the contract amount, leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, Illinois law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
9. Payment is due upon receipt of invoice. If payment is not received within 30 days, Sprout Social may suspend the County's account and block access to the product and assess finance charge of 1.5% of the unpaid balance per month determined and compounded daily from the date due until the date paid. The County will also be required to reimburse Sprout Social for any costs or expenses (including any reasonable attorneys' fees) incurred to collect past due amounts.
 - 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 contract, which would allow Sprout Social to terminate the contract and seek other legal remedies,

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including charging the County interest at a rate of 1.5% monthly, compounded daily, which would exceed the contract amount.

10. The Agreement automatically renews for additional two-year terms unless either party provides written notice to the other party at least 30 days prior to current expiration date.
 - 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 until the County emails notice of non-renewal to the County's account manager no less than 30 days prior to expiration of the current Agreement term.
11. The County may not terminate the Agreement for convenience. In addition, the County agrees to a non-cancelable payment obligation and non-refundable fees for the entire term of the Agreement and each renewal term thereafter.
 - The County standard contract gives the County 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: The County can only terminate the Agreement during the term of an uncured breach by Sprout Social. Any attempted termination by County without cause would result in payment liability for the full contract amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
12. Venue is in Cook County, Illinois.
 - 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 Cook County, Illinois may result in additional expenses that exceed the amount of the contract.
13. Sprout Social 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 product and services are solely at its own risk. County Counsel cannot advise on, whether and to what extent, Illinois law may limit or expand the disclaimers of warranty to the extent prohibited by applicable law.

The County Administrative Office recommends approval of the Sprout Social Service Order and Terms of Service Agreement, including non-standard terms, as this social media management tool will allow the County to monitor and approve all social media content for all County departments in one location, and enable the County to measure the effectiveness of public outreach efforts.

PROCUREMENT

Purchasing supports the non-competitive purchase of Sprout Social. Sprout Social offers far superior features than other social management tools on the market. This vendor offers detailed

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analytics for the County social media sites, and better control over content posting in multiple platforms.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on March 22, 2022; Purchasing (Michelle Churchill, Supervising Buyer, 387-2092) on March 23, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on March 23, 2022; Finance (Sofia Almeida, Administrative Analyst, 387-4378) on March 23, 2022; and County Finance and Administration (Matthew Erickson, County Chief Financial Officer, 387-5423) on March 23, 2022.

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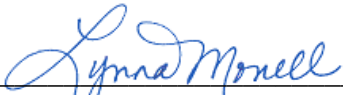
Record of Action of the Board of Supervisors
San Bernardino County

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: CAO - Almeida w/agree
Contractor - C/O CAO w/agree
File - w/agree

CCM 03/30/2022