

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

August 25, 2020

FROM

LARRY AINSWORTH, Chief Information Officer, Information Services Department

SUBJECT

Contract with SUSE LLC, for SUSE Linux Enterprise Server and SUSE Manager Software

RECOMMENDATION(S)

Approve Contract, including non-standard terms, with SUSE LLC, which includes an Addendum, the SUSE Volume License Agreement, and the SUSE Linux Enterprise Server End User License Agreements, applicable to SUSE license subscriptions for the period of October 1, 2020, to September 30, 2021.

(Presenter: Jake Cordova, Information Services Division Chief, 388-0503)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT

Approval of this Contract will not result in the use of Discretionary General Funding (Net County Cost). The cost for SUSE LLC's (SUSE) license subscriptions are included in the Information Services Department (ISD) Computer Operations 2020-21 budget and will be included in future recommended budgets. Operating costs are recovered via service rates approved annually by the Board of Supervisors (Board).

BACKGROUND INFORMATION

ISD manages multiple enterprise systems that serve many County departments and host countywide departmental applications. These systems utilize several different operating systems. The SUSE Linux Enterprise Server (SLES) operating system hosts different critical applications that run on those systems, such as FileNet, EMACS, InfoSphere, WordPress, GIS, and IBM Cognos. SUSE Manager is software used to automate both the deployment of patches and maintenance for the SLES.

SUSE Manager and SLES are software available as subscriptions only. The usage of SUSE Manager and SLES is governed by the terms listed in their respective End User License Agreements (EULA) and the SUSE Volume License Agreement (VLA). On September 24, 2019 (Item No. 24), the Board approved Contract No. 19-641, including non-standard terms, with SUSE LLC, which included an Addendum, the SUSE Volume License Agreement, and the SUSE Linux Enterprise Server End User License Agreements, applicable to SUSE license subscriptions for the period of October 1, 2019, to September 30, 2020.

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Approval of this Contract incorporates SUSE's latest product specific terms into a single document, referred to by SUSE as the Addendum to the VLA. In addition to compiling the various terms and conditions into a single Contract, the Addendum to the VLA also incorporates an annual term and will allow ISD to continue its existing SLES license subscription for the one-year period of October 1, 2020, through September 30, 2021.

SUSE's VLA and EULAs are its standard commercial terms, which contain terms that differ from the standard County contract. SUSE refuses to negotiate these terms. The non-standard terms include the following:

1. There is no termination for convenience.
 - The County standard contract gives the County the right to terminate the Contract, for any reason, with a thirty (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 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.
2. Disclaimer of any warranty of non-infringement and no indemnity for infringement claims.
 - There is no warranty requirement in the County standard contract. 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: The disclaimer of a warranty of non-infringement, coupled with the lack of indemnity for intellectual property infringement means that, should the County be sued for intellectual property infringement based on its use of SUSE software or services, the County will be liable for the costs of defense and damages. While infringement claims against end users are rare, they have been known to occur, and the County could be responsible for defense costs and damages, which could exceed the total contract amount. County Counsel cannot advise on whether and to what extent Utah law may allow the County to require SUSE to defend or indemnify it absent an express provision in the contract.
3. Limitations of liability to the County of a maximum of 1.25 times the actual amounts paid by the County for the software or service giving rise to the claim. Free software limitation of liability is \$50.
 - The County standard contract does not include any limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited. County Counsel cannot advise on whether, and to what extent, Utah law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
4. Governing law and venue in the State of Utah.

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- The County standard contract requires California governing law and venue for disputes in the Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: The contract will be interpreted under Utah law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advise on Utah law, and having a venue in Utah may result in additional expenses, both of which may result in fees that exceed the total contract amount.
5. In any legal proceeding related to the Contract, the prevailing party will be entitled to recover reasonable 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: If either party institutes any legal proceedings related to the Contract, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount.
6. The contract is silent on assignment.
- The County must approve any assignment of the contract.
 - Potential Impact: County Counsel cannot advise on whether, and to what extent, Utah law may limit or expand SUSE's ability to assign the contract.
7. The contract does not require SUSE to meet the County insurance standards.
- 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: The County has no assurance that SUSE 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 contract amount.

ISD recommends approval of this Contract, including the non-standard terms which are typical in the IT industry, due to the cost and complexity of implementing and migrating to a different operating system needed to run these critical County applications.

PROCUREMENT

The terms in the Contract will be used to accompany future purchase orders issued to authorized resellers, to be approved, as necessary, per County Policy 11-04.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on July 23, 2020; Purchasing (Jessica Barajas, Lead Buyer, 387-5546) on July 24, 2020; Finance (Joon Cho, Administrative Analyst, 387-5402) on July 31, 2020; and County Finance and Administration (Kelly Welty, Deputy Executive Officer, 387-5423) on July 31, 2020.

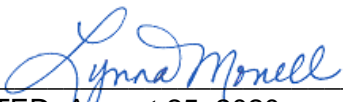
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ISD- Mancebo w/agree
Contractor- C/O ISD w/agree
File- w/agree

APPROVED (CONSENT CALENDAR)

Moved: Josie Gonzales Seconded: Robert A. Lovingood
Ayes: Robert A. Lovingood, Janice Rutherford, Dawn Rowe, Curt Hagman, Josie Gonzales

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: August 25, 2020



cc: ISD- Mancebo w/agree
 Contractor- C/O ISD w/agree
 File- w/agree
la 09/3/2020