

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

June 22, 2021

FROM

ENSEN MASON, Auditor-Controller/Treasurer/Tax Collector

SUBJECT

Agreements with Wolters Kluwer Financial Services, Inc. for Support and Maintenance of TeamMate Audit Software

RECOMMENDATION(S)

1. Approve Terms and Conditions **County Contract No. 21-466** with Wolters Kluwer Financial Services, Inc., to be accepted electronically, for future purchases of licensing, support, and maintenance of TeamMate, an electronic audit management software system, for the period of March 1, 2021, through February 28, 2022, automatically renewing thereafter.
2. Approve Global Subscription and Services Agreement **County Contract No. 21-467** with Wolters Kluwer Financial Services, Inc., to be accepted electronically, for future purchases to access and use the TeamMate electronic audit management software suite, for the period of March 1, 2021, through February 28, 2022, automatically renewing thereafter.
3. Approve Global License, Support and Services Agreement **County Contract No. 21-468** with Wolters Kluwer Financial Services, Inc., to be accepted electronically, for future purchases for licensing, support, and maintenance of TeamMate, an electronic audit management software system, for the period of March 1, 2021, through February 28, 2022, automatically renewing thereafter.
4. Authorize the Purchasing Agent to electronically accept the Terms and Conditions, Global Subscription and Services Agreement, and Global License, Support and Services Agreement with Wolters Kluwer Financial Services, Inc. as approved.

(Presenter: Tori Roberts, Assistant Auditor-Controller/Treasurer/Tax Collector, 382-7005)

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 item will not result in the use of additional Discretionary General Funding (Net County Cost). Sufficient appropriation and revenue have been included in the Auditor-Controller/Treasurer/Tax Collector's (ATC) 2020-21 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

TeamMate's integrated software and support package is a complete audit management system used for entering working papers, engagement planning documents, risk assessments, and reports. It has also provided an integrated paperless strategy for managing audits, eliminated barriers associated with disconnected electronic files, and increased the efficiency and

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productivity of the entire internal audit process. ATC recommends the continued use of TeamMate software, as the Internal Audit Section has worked with the TeamMate provider, Wolters Kluwer Financial Services, Inc. (WKFS), since 2007.

The WKFS Terms and Conditions (TC); Global Subscription and Services Agreement (GSSA); and Global License, Support and Services Agreement (GLSSA) are its standard commercial contracts having substantially similar terms, which include terms that differ from the standard County contract and omit certain County standard contract terms. The non-standard and missing terms include the following:

1. The governing law for both the GSSA and GLSSA is the State of New York.
 - 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 outside of San Bernardino County may result in additional expenses that exceed the amount of the contract.
2. The GSSA and GLSSA court venue is in the state or federal courts in the Borough of Manhattan, New York City, New York.
 - The County standard contract requires California governing law.
 - Potential Impact: The contract will be interpreted under New York law. Any questions, issues or claims arising under this contract will require the County to hire outside counsel competent to advice on New York law, which may result in fees that exceed the total contract amount.
3. WKFS may revise the GSSA in its discretion without notice, and revised terms will take effect at the next renewal. WKFS may revise the GLSSA and gives the County an opportunity to review. The County's continued use after review constitutes acceptance of the revised GLSSA terms.
 - 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: WKFS may change the agreement terms without notice at any time. The County could be agreeing to new terms without review by anyone, including County Counsel, and without the approval of the new terms by the Board. County Counsel cannot advise on whether and to what extent New York law may affect the enforceability of unilateral changes to the terms.
4. The County will pay WKFS' attorneys' fees and costs incurred in the enforcement of any provision of the GSSA.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: Any legal proceeding related to the enforcement of the agreement, the County will pay all attorneys' fees, which could exceed the total contract amount.
5. The GLSSA is silent on 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, New York 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.
6. Under both the GSSA and the GLSSA, WKFS has the right to audit County's use of the software to ensure compliance with the terms of the agreement. If the audit reveals any underpayments of any fees payable under the Agreement, County will be invoiced for fees, plus 1.5% interest, and if the underpayment exceeds 5% of the total fees actually paid, the County will pay the reasonable costs of audit.
- The County standard contract does not permit Contractors to audit the County's compliance.
 - Potential Impact: If an audit determines that the County's use of the software exceeds the number of licenses purchased, WKFS may demand payments of additional fees plus interest, and reimbursement of audit costs, which will result in fees that exceed the total contract amount.
7. Under the GSSA, the County agrees to indemnify, and hold harmless WKFS, its employees, officers, directors, and Affiliates, for liability to third parties relating to County's breach of the agreement, or use of the software or any third party software, application or service. There is no such requirement in the GLSSA.
- The County standard contract does not include any indemnification or defense by the County of a Contractor.
 - Potential Impact: By agreeing to indemnify WKFS, 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 WKFS without such limitations and the County would be responsible to defend and reimburse WKFS for costs, expenses, and damages, which could exceed the total contract amount. County Counsel cannot advise on, whether and to what extent, New York law may limit or expand this contract term.
8. The GSSA does not require WKFS to indemnify the County, including for intellectual property infringement claims. The GLSSA provides indemnity 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: WKFS is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from WKFS' 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 WKFS' software or services, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount. County Counsel cannot advise

on whether and to what extent New York law may allow the County to require WKFS to defend or indemnify it absent an express provision in the contract.

9. Except for collection actions, both parties' right to bring legal claims under the GSSA is limited to one year from the date the cause of action first arose. The GLSSA limits the time to bring all claims to one year.
 - The County standard contract does not include a limit on the time to bring action.
 - Potential Impact: Limiting the County's ability to bring suit to one year amounts to a waiver of the Statute of Limitations for claims and shortens the period of time in which the County may file a lawsuit under the agreement.
10. Neither the GSSA nor the GLSSA requires WKFS to meet the County's 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 contract does not include County standard insurance requirements. This means that the County has no assurance that WKFS 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.
11. Both the GSSA and the GLSSA limit the total liability of WKFS and its affiliates, consultants, distributors, agents, subcontractors and licensors to the County to the total fees for the application or services paid by the County in the twelve months immediately preceding the event giving rise to the claim.
 - The County standard contract does not include a 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, New York law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
12. Payment terms are Net 30 days from date of invoice and, under the GSSA, WKFS may assess a late payment fee of 1½% monthly.
 - 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 make timely payments will result in a material breach of the contract, which would allow WKFS to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1.5% per month. WKFS may also suspend services if undisputed amounts are not paid within 30 days of giving notice to the County.
13. The initial term of the GSSA is for the period of time indicated on an order form. Thereafter, the subscription will automatically renew for successive one-year renewal terms until County fails to renew or WKFS terminates the agreement. The term of the GLSSA is indefinite until terminated upon 30 days' notice.
 - County Policy 11-06SP does not permit indefinite term or automatically renewing contracts unless approved by the Board.

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- Potential Impact: There is no end term to the contract and the County is indefinitely bound to the terms and conditions of the contract, unless the County fails to renew the subscription.
14. The GSSA provides no termination for convenience, and the County will not receive a refund for any prepaid but unused amounts upon termination by WKFS.
- 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: There is no termination for convenience without penalty. Upon any termination by either party regardless of cause, the County will not be entitled to a refund of any fees paid in advance and is required to pay the full order amount, plus additional expenses, if any, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
15. WKFS may assign the GSSA without notice to the County and without the County's approval, in whole or in part.
- The County must approve any assignment of the contract.
 - Potential Impact: WKFS may assign the contract 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.

PROCUREMENT

ATC selected PricewaterhouseCooper's TeamMate in 2005 to provide electronic audit management software. WKFS acquired PricewaterhouseCooper's TeamMate audit productivity software business in October 2007. TeamMate software is proprietary. The Purchasing Agent concurs with the non-competitive justification of sole-source license and service based on a letter received from WKFS, and has issued purchase orders annually for support and licensing of the TeamMate software.

The last Purchase Order No. 4100101512 was issued to WKFS on July 18, 2019, in the amount of \$13,804.01, for the annual license, support, and service renewal fee for the TeamMate software. Purchase Order No. 4100138354 was subsequently issued on March 26, 2020, in the amount of \$1,050 for an analytics maintenance add-on. Approval of the recommended agreements will allow the Purchasing Agent to issue new purchase orders to WKFS in a combined amount not to exceed \$15,000 for the continued use of the TeamMate software for the period of March 1, 2021, through February 28, 2022, and TeamMate analytics maintenance for the period of April 8, 2021, through April 7, 2022; as well as subsequent periods for the duration of the time that ATC is utilizing the software and analytics maintenance.

County Policy 11-05, effective March 10, 2020, requires Board of Supervisors (Board) approval on contracts containing non-standard contract language. Due to an inadvertent oversight regarding this policy, new purchase orders with WKFS cannot be issued until Board approval is received on the related TC, GSSA, and GLSSA. The Agreements with WKFS are retroactive since this is the earliest Board meeting date available to present the item for the Board's consideration. As a result of continuous, punctual payments, WKFS has not suspended ATC's services for TeamMate software and analytics maintenance. ATC will now review changes to

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County Policy and anticipate their effects on recurring purchase orders in the future to avoid such delays.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Deputy County Counsel, 387-5455) on May 26, 2021; Risk Management (LeAnna Williams, Director, 386-8621) on May 24, 2021; Purchasing (Leo Gomez, Purchasing Manager, 387-2063) on May 27, 2021; Finance (Carl Lofton, Administrative Analyst, 387-5404) on June 3, 2021; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-5423) on June 3, 2021.

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Record of Action of the Board of Supervisors
County of San Bernardino

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: June 22, 2021



cc: ATC - Mejico w/agrees
Contractor- C/O ATC w/agree
File - w/agree
CCM 06/28/2021