

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

March 28, 2023

FROM

JAKE CORDOVA, Interim Chief Information Officer, Innovation and Technology Department

SUBJECT

Enterprise License Agreement with VMware, Inc. for Software Subscription and Support Services

RECOMMENDATION(S)

1. Approve Enterprise License **Agreement No. 23-205**, including non-standard terms, with VMware, Inc., for the period of March 31, 2023, through March 30, 2026, for the provision of software subscription and support services.
2. Authorize the Purchasing Agent to issue purchase orders to Sidepath, Inc., an authorized VMware reseller, in an aggregate amount not-to-exceed \$1,542,364 to purchase VMware, Inc. software subscription and support services for the period of March 31, 2023, through March 30, 2026.
3. Authorize the Chief Information Officer or Assistant Chief Information Officer to execute amendments to the Enterprise License Agreement with VMware, Inc., to reflect non-substantive changes to the provision of software subscription and support services, subject to review by County Counsel, provided that such amendments do not increase the total not-to-exceed purchase order authorization of \$1,542,364, as set forth in Recommendation No. 2, nor modify the general terms and conditions, or change the duration of the Enterprise License Agreement.
4. Direct the Chief Information Officer or Assistant Chief Information Officer to transmit all non-substantive amendments to the Enterprise License Agreement with VMware, Inc. to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Jake Cordova, Interim Chief Information Officer, 388-5501)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

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

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The three-year Enterprise License Agreement (ELA) with VMware, Inc. (VMware) sets forth the terms and conditions for the provision of software subscription and support services. Pursuant to the VMware process, software and support will be purchased from Sidepath, Inc. (Sidepath), an authorized VMware reseller, in the total amount not to exceed \$1,542,364. Initially, a purchase of \$742,364 will be made and the remaining not-to-exceed amount of \$800,000 will provide the Innovation and Technology Department (ITD) the ability to purchase additional software subscription and support services necessary to meet the needs of County departments. Sufficient appropriation is included in ITD's Computer Operations 2022-23 budget and will be included in future recommended budgets. The cost of the purchases will be recovered via service rates approved annually by the Board of Supervisors (Board).

BACKGROUND INFORMATION

ITD maintains physical and virtual servers for departments for the purpose of hosting County applications and data. ITD's virtual environment consists of over 1,700 virtual servers and utilizes the VMware platform to provide these services. Without the virtual environment, ITD would need to add physical servers to replace the virtual servers, which would significantly increase costs.

On March 24, 2020 (Item No. 28), the Board of Supervisors approved an ELA with VMware (Original Contract) and a Standard Terms and Conditions of Purchase with Sidepath, each for the period of March 24, 2020, through March 23, 2023, for software subscription and support services.

On May 20, 2020, the Chief Information Officer (CIO) signed Amendment No. 1, which was a Statement of Work for consulting services under the Original Contract, with no change to the terms of the ELA.

On March 18, 2021, the CIO signed Amendment No. 2, which was a Change Request Form to cancel the consulting services under the Statement of Work, with no change to the terms of the ELA.

On October 5, 2021 (Item No. 28), the Board approved Amendment No. 3 to the Original Contract to add software, clarify the definition of Customer to include all County departments, and revise the expiration date of the term from March 23, 2023 to March 30, 2023, for a three-year term based on the County's original software purchase date of March 31, 2020.

ITD anticipates an increase in demand for virtual servers to host new applications from departments. Due to the potential increase, ITD will migrate virtual servers from other platforms to the VMware platform to standardize virtualization technologies and increase supportability. Approval of the new ELA with VMware and purchase order authorizations with Sidepath will allow ITD to continue to provide these cost-effective services for County departments. Sidepath no longer requires the County to sign its Standard Terms and Conditions of Purchase, allowing for future purchase orders with Sidepath to be governed by the County's standard purchase order terms.

The ELA is VMware's standard commercial contract and includes terms that differ from the standard County contract, which omits certain County standard contract terms. While the parties negotiated certain contract terms to County standards, VMware would not agree to all County standard terms. The non-standard and missing terms include the following:

1. Limitations of liability for either party is the greater of an amount equal to the total fees paid or payable to VMware for use of the particular service offering giving rise to the claim in the twelve months prior to the event or \$500,000, excluding VMware's indemnification obligations, infringement of each other's intellectual property rights, County's violation of software use terms, either party's breach of confidentiality obligations, either party's gross negligence, willful misconduct, violations of the law, fraudulent or criminal conduct, and any liability that may not be excluded by law.
 - The County standard contract does not include a limitation on a contractor's liability.
 - Potential Impact: Claims could exceed the liability cap and the ELA amount leaving the County financially liable for the excess.

**Enterprise License Agreement with VMware, Inc. for Software
Subscription and Support Services
March 28, 2023**

2. VMware may assign the ELA as part of a corporate transaction, provided that VMware provides the County with not less than 10 days written notice of the assignment and the County may terminate the ELA if required by applicable law.
 - The County standard contract provides that the County must approve any assignment of the contract.
 - Potential Impact: VMware may assign the ELA to a third party without the County's approval.
3. The ELA does not obligate VMware 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 standard policies required by the County's Risk Management Department are met based on VMware's current memorandum of insurance. However, VMware is not prohibited from making changes to its policies and the ELA does not require VMware to provide the County's standard requirements, such as for additional insured and waiver of subrogation protection. This means that the County may not be adequately protected in the event insurance claims arise against VMware from the County's use of the software, which could result in expenses to the County that exceed the total ELA amount.
4. The County may terminate the ELA at any time for convenience by providing written notice but under no circumstances will termination for convenience entitle the County to a refund of any fees paid.
 - The County standard contract gives the County the right to terminate the contract, for any reason, with a 30 day written notice of termination.
 - Potential Impact: If the County exercises its right to terminate for convenience, all pre-paid fees will not be refunded.

ITD recommends approval of the ELA with VMware, including the non-standard terms, to allow the County to continue to receive the necessary VMware software subscription and support services needed to maintain the virtual storage environment.

PROCUREMENT

On December 22, 2022, ITD released Invitation to Bid No. ISD123-ADM-4833 for VMware software subscription and support services from VMware authorized resellers. The following quotes were received and Sidepath was selected solely based on the lowest cost proposal. No protests were received.

Vendor	Location	Three-Year Cost
Sidepath, Inc.	Laguna Hills, CA	\$742,364
AKA Comp Solutions	Chicago, IL	\$753,371
Golden Star Technology	Cerritos, CA	\$757,403
Saitech, Inc.	Freemont, CA	\$759,010
Diltex, Inc.	West Covina, CA	\$759,012
Hypertech Direct USA	Tempe, AZ	\$766,820
vPrime Tech, Inc.	Houston, TX	\$786,381
Smart IT	Redding, CA	\$796,585

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REVIEW BY OTHERS

This item has been reviewed by County Counsel (Agnes Cheng, Deputy County Counsel, 387-5455) on February 28, 2023; Purchasing (Tevan Stremel, Buyer III, 387-2098) on March 2, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on March 3, 2023; Finance (Ivan Ramirez, Administrative Analyst, 387-4020) March 6, 2023; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on March 13, 2023.

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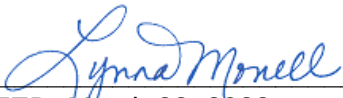
Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Curt Hagman

Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 28, 2023



cc: ITD- Lewis w/agree
Contractor- C/O ITD w/agree
File- w/agree
LA 03/29/2023