

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

August 10, 2021

FROM

BOB DUTTON, Assessor-Recorder-County Clerk

SUBJECT

Technical Support and Subscription and VMware Success 360 Services Terms and Conditions (For On-Premises Software Products) with VMware, Inc.

RECOMMENDATION(S)

Approve Technical Support and Subscription and VMware Success 360 Services Terms and Conditions (**County Contract No. 21-611**), for on-premises software products, with VMware, Inc., including non-standard terms, for future purchases of production support and subscription services for a period retroactive to July 1, 2020, through June 30, 2025.
(Presenter: Bob Dutton, Assessor-Recorder-County Clerk, 382-3254)

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). These Technical Support and Subscription and VMware Success 360 Services Terms and Conditions (Terms and Conditions) are non-financial in nature and do not commit the County to make any purchases. When future purchases are made under these Terms and Conditions, the Assessor-Recorder-County Clerk Department (ARC) will adhere to County purchasing policies and return to the Board of Supervisors (Board) for approval, if necessary.

BACKGROUND INFORMATION

ARC utilizes production support and subscription services provided by VMware to maintain on-premises software products, which include infrastructure equipment such as servers, switches, etc. These services are necessary to ensure that ARC's on-premises software products remain fast, flexible, and secure to keep ARC's network running at peak performance. These services include rapid problem resolution for issues that result from unexpected complications related to on-premises software products and allow for access to recent patches and security updates among other related services.

This item is being presented to the Board at this time, as this is the first available date for presentation after ARC finished negotiations with VMware over non-standard County terms. ARC currently needs to purchase production support and subscription services for two network servers where the service period has lapsed. Service on one of the servers unknowingly lapsed on June 30, 2020, and service on the other server lapsed while negotiations over non-standard terms were occurring. To prevent future oversights, ARC has added the services that lapsed to its inventory management system, which is monitored by two staff members and has oversight

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by management. Approval of these Terms and Conditions will allow ARC to procure manufacturer direct support and production services that are needed for these two servers and other on-premises software products for the period of July 1, 2020 through June 30, 2025. The County's standard contract term is five years, so while these Terms and Conditions contain a clause indicating that the terms are indefinite, ARC will only use the Terms and Conditions during the period previously identified, and will return to the Board at the conclusion of the proposed period if necessary or sooner, if VMware should make any substantial revisions to the Terms and Conditions during the period.

VMware's Terms and Conditions is its standard commercial contract applicable to use for its technical support and subscription and VMware Success 360 Services ("SnS"), which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. Venue: Venue is in Santa Clara, California.
 - Standard Term: 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 Santa Clara, California may result in additional expenses in the event a contract dispute arises.
2. Indemnity (Contractor): VMware disclaims the warranty of non-infringement and provides no indemnification for claims made against the County based on VMware's performance.
 - Standard Term: County Policy 11-05 requires contractors to provide a full warranty for their goods and services. 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 the VMware 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.
3. Limitation of liability: VMware limits its liability to the service fees paid by the County to VMware for services during the 12 months immediately preceding the date of the event most directly giving rise to the claim.
 - Standard Term: County Policy 11-05 provides the standard contract term is no limitation of liability for contractors.
 - Potential Impact: Based upon the limitation of liability to amounts paid during the immediately preceding 12 months, claims could exceed the liability cap leaving the County financially liable for the excess. In addition, the County's liability under the Terms and Conditions is not similarly limited; however, the County is not expressly agreeing to indemnify VMware.

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4. Payment terms: Payments are due 30 days from the date of the invoice with late payment interest of 1.5% per month. If payment is delinquent, VMware may also suspend performance of all services until the delinquency is corrected.
 - Standard Term: 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, which would allow VMware to terminate the services and seek other legal remedies, including charging the County interest at a rate of 1.5% per month. ARC will endeavor to ensure that payments are issued within 30 days of receiving invoices to avoid penalties.
5. Insurance: The Terms and Conditions do not require VMware to meet the County's insurance standards as required pursuant to County Policies 11-05 and 11-07.
 - Standard Term: County Policies 11-05 and 11-07 require 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 Terms and Conditions do not include County standard insurance requirements. This means that the County has no assurance that VMware will be financially responsible for claims that may arise from the County's use of the software and services, which could result in expenses to the County.
6. Assignment: The County may not assign or delegate the services to any third party without VMware's prior written consent, but VMware may assign the services without notice and without the County's approval.
 - Standard Term: The County must approve any assignment of a contract.
 - Potential Impact: VMware may assign the services to a third party or business without the County's knowledge, which could include an entity the County is legally prohibited from doing business with due to issues of Federal debarment or suspension and conflict of interest.
7. Termination for convenience: There is no termination for convenience.
 - Standard Term: 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: County can only terminate the services during the term of an uncured breach by VMware. Any attempted termination by County without cause would result in payment liability for the full amount of the individual purchases made utilizing these Terms and Conditions.
8. The term of the contract is indefinite.
 - Standard Term: 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 Terms and Conditions, however individual purchases made utilizing the Terms and Conditions will have defined terms within the requirements of 11-06SP.

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PROCUREMENT

VMware Technical Support and Subscription and VMware Success 360 Services Terms and Conditions, for on-premises software products, including non-standards terms, will be used to accompany future purchase orders to be approved, as necessary, per County Policy 11-04, Procurement of Goods, Supplies, Equipment, and Services.

County Policy 11-05 requires departments to obtain Board approval for procurement of services with non-standard terms and conditions.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Kristina M. Robb, Principal Assistant County Counsel, 387-5455) on July 16, 2021; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on July 16, 2021; Finance (Carl Lofton, Finance Analyst, 387-5404) on July 27, 2021; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-4342) on July 27, 2021.

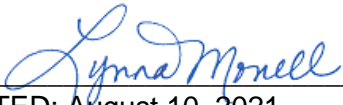
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Record of Action of the Board of Supervisors
San Bernardino County

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: August 10, 2021



cc: ARC - Gaeta w/agree
Contractor - C/O ARC w/agree
File - agree

CCM 08/12/2021