

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

June 28, 2022

**FROM**

**BRENDON BIGGS, Director, Department of Public Works – Solid Waste Management**

**SUBJECT**

Software Agreements with SVA Consulting, LLC and Microsoft Inc., for Test and Live Upgrade to Microsoft Dynamics SL 2018 Windows with SQL Server

**RECOMMENDATION(S)**

1. Approve Master Services Agreement and Statement of Work (**County Contract No. 22-552**), including non-standard terms, with SVA Consulting, LLC, for a purchase amount estimated at \$7,200 to \$9,800 and estimated contract term of one month for testing and live upgrade to Microsoft Dynamics SL 2018 Windows with SQL server.
2. Approve Microsoft Inc., Software License Terms (**County Contract No. 22-553**) for Microsoft Dynamics SL 2018, including non-standard terms, in connection with testing and live upgrade to Microsoft Dynamics SL 2018 Windows with SQL server.
3. Authorize the Director of the Department of Public Works to accept the terms and any non-substantive amendments to the SVA Consulting Master Agreement, Statement of Work, and Microsoft Software License Terms, subject to review by County Counsel.
4. Direct the Director of the Department of Public Works to transmit copies of all documents in relation to these agreements to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Brendon Biggs, Director, 387-7906)

**COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES**

**Operate in a Fiscally-Responsible and Business-Like Manner.  
Improve County Government Operations.**

**FINANCIAL IMPACT**

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost) as the Department of Public Works – Solid Waste Management Division (SWMD) is financed by fee revenue. SWMD establishes fees that are charged to the public and other agencies for utilization for the County's Waste Disposal System. The SVA Consulting Master Services Agreement and Microsoft Software License Terms for Microsoft Dynamics SL 2018 do not commit San Bernardino County to make any purchases. The Live Upgrade to Microsoft Dynamics SL 2018 under the Statement of Work is estimated to be between \$7,200 and \$9,800. This one-time expense is to ensure that Microsoft Dynamics SL 2018 is compatible with SQL server. Sufficient appropriation and revenue have been included in the SWMD's 2022-23 budget and will be included in future recommended budgets.

**BACKGROUND INFORMATION**

**Software Agreements with SVA Consulting, LLC and Microsoft Inc., for  
Test and Live Upgrade to Microsoft Dynamics SL 2018 Windows with  
SQL Server  
June 28, 2022**

Microsoft Dynamics is an accounting/fiscal module that extracts data from the CW6 database, which assists the accounting department to bill clients and monitor fiscal transactions. Microsoft Dynamics and CW6 are MS SQL databases that interconnect and reside on the same SQL server. The MS SQL databases need to be moved to a newer SQL version to prevent the compromise of data security and integrity after the lifecycle ends.

SWMD is seeking an upgrade of the current SQL server whose end of lifecycle is July 2022. SVA Consulting is the authorized Microsoft Dynamics provider that currently maintains SWMD's Microsoft Dynamics SQL environment. No competitive solicitation was completed, as Dynamics is a Microsoft-based platform, and SVA Consulting is the authorized reseller. SVA submitted a Statement of Work, estimated to be between \$7,200 and \$9,800, which incorporates SVA's Master Services Agreement, Statement of Work, Microsoft Software License Terms for Microsoft Dynamics SL 2018, and the material terms of the quote and proposed contract. The Master Services Agreement, Statement of Work, and Change Order is SVA Consulting's standard agreement and the Microsoft Software License Terms for Microsoft Dynamics SL 2018 is Microsoft's standard commercial agreement, setting forth general terms applicable with SVA Consulting and the Microsoft Dynamics software, license, and services, which include terms that differ from the standard County contract and omit certain County standard language. The non-standard language and missing terms include the following:

1. **Governing Law.** The Master Services Agreement and the Microsoft Dynamics SL 2018 Software License require Wisconsin and Washington, respectively, as the applicable governing law.
  - The County standard contract requires California governing law.
  - Potential Impact: The Contracts will be interpreted under Wisconsin and Washington law, respectively. Any questions, issues, or claims arising under this contract will require the County to hire outside counsel competent to advise on Wisconsin and Washington state law, which may result in fees that exceed the total contract amount.
2. **Venue.** The Master Services Agreement's venue for disputes are the federal or state courts in Wisconsin and the Microsoft Dynamics SL 2018 Software License is silent on venue.
  - The County standard contract requires venue for disputes in Superior Court of California, San Bernardino County, San Bernardino District.
  - Potential Impact: A venue in Wisconsin for the Master Services Agreement may result in additional expenses that exceed the amount of the contract. No stated venue in the Microsoft Dynamics SL 2018 Software License means that the federal and state courts of Washington could be applied to this contract, which may result in additional expenses that exceed the amount of the contract.
3. **Assignment.** The Master Services Agreement may be assigned without notice to and without the consent of the County as part of a reorganization, merger, sale of assets or other transaction that involves all or a portion of its related business.
  - The County standard contract indicates the County must approve any assignment of the contract.
  - Potential Impact: The Master Services Agreement may be assigned to a third party without notice to the County and without the County's approval. This could allow the contract to be assigned to a business with which the County is legally prohibited from doing business with due to the issues of Federal debarment or suspension and conflict of interest, without the County's knowledge.

**Software Agreements with SVA Consulting, LLC and Microsoft Inc., for  
Test and Live Upgrade to Microsoft Dynamics SL 2018 Windows with  
SQL Server  
June 28, 2022**

4. **Limitation of Liability.** The contract limits SVA Consulting's liability to the County to the amounts actually paid or payable for the materials or services. This includes an express limitation against all incidental, special, indirect, consequential, or punitive damages; loss of profits, use revenue, or data; and business interruption.
  - 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.
5. **Limited Warranty & Disclaimer of Warranties.** The Master Services Agreement warranty provided is limited to 60 days after the time of completion of the work and then disclaims all other warranties, express or implied, as to merchantability and fitness for a particular purpose.
  - 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 software is solely at its own risk. Under California law, sellers are not required to provide any warranty.
6. **Termination for Convenience.** The right to terminate for convenience requires 60 days' prior written notice.
  - 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: County can only terminate the contract upon 60 days' prior written notice and would have to pay for an additional month of service.
7. **Payment Terms.** The Master Services Agreement contains a late payment interest penalty of 1% per month.
  - The County standard payment terms are to be Net 60 days with no interest or late payment penalties.
  - Potential Impact: County can only terminate the contract during the term of an uncured breach. Failing to pay pursuant to the payment terms will result in a material breach of the contract, which would allow SVA Consulting to terminate the contract and seek other legal remedies, including charging the County interest at a rate of 1% per month, which could exceed the contract amount.
8. **Confidentiality.** County is obligated not to disclose the information claimed by SVA Consulting to be its confidential information, including not disclosing the terms of the Master Services Agreement and Statement of Work.
  - The County standard contract does not require the County to maintain the confidentiality of a contractor's information.
  - Potential Impact: The County is obligated to maintain the confidentiality of information that SVA Consulting deems confidential. The County will need to be aware of its obligation to notify SVA Consulting prior to any disclosure, including in response to a Public Records Act request. The County may incur liability from failing to disclose information pursuant to a California Public Records Act request or open public meetings

**Software Agreements with SVA Consulting, LLC and Microsoft Inc., for  
Test and Live Upgrade to Microsoft Dynamics SL 2018 Windows with  
SQL Server  
June 28, 2022**

requirements (Brown Act and County Sunshine Ordinance). In addition, the County could be deemed in breach of contract and incur liability to SVA Consulting for disclosure of SVA Consulting's information, regardless of whether the disclosure is intentional or inadvertent, which could exceed the contract amount.

9. Indemnification. The Master Services Agreement and the Microsoft Dynamics SL 2018 Software License does not require Microsoft to indemnify the County, including for intellectual property infringement claims.

- County standard contract indemnity provision requires the vendor/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 secrets (Intellectual Property Rights) by any goods or services.
- Potential Impact: SVA Consulting and Microsoft are not required to defend, indemnify, or hold the County harmless from any claims, including indemnification for claims arising from their negligent or intentional acts and intellectual property infringement based on its use of Microsoft's software, the County may be solely liable for the costs of defense and damages, which could exceed the total contract amount.

10. Insurance. The Master Services Agreement and the Microsoft Dynamics SL 2018 Software License does not require the vendors to meet the County's insurance standards as required pursuant to County Policy 11-07.

- The County Policy requires contractors/vendors 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 contracts do not include County standard insurance requirements. This means that the County has no assurance that SVA Consulting or Microsoft 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. Attorneys' Fees. The Microsoft Dynamics SL 2018 Software License provides that a prevailing party is entitled to recover attorneys' fees and costs.

- 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 agreement, the prevailing party will be entitled to recover reasonable attorneys' fees, which could exceed the total contract amount.

12. Prohibition on hiring of SVA Employees, Independent Contractors and Agents.

- The County standard contract does not contain a prohibition on hiring SVA Consulting's employees.
- Potential Impact: If the County hires an employee of SVA Consulting within one year from the termination date of the agreement, the County will be required to pay a sum equal to the departing employee's total annual compensation (including salary, bonuses and benefits) being paid by SVA at the time of departure.

**Software Agreements with SVA Consulting, LLC and Microsoft Inc., for  
Test and Live Upgrade to Microsoft Dynamics SL 2018 Windows with  
SQL Server  
June 28, 2022**

SWMD recommends the approval of the Master Services Agreement and Microsoft Dynamics SL 2018, including the non-standard terms, in order to upgrade the current SQL server whose end of lifecycle is July 2022.

**PROCUREMENT**

Not applicable.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Jolena Grider, Deputy County Counsel, 387-5455) on May 20, 2022; Risk Management (Victor Tordesillas, Director, 386-8623) on June 13, 2022; Finance (Carl Lofton, Administrative Analyst, 387-5404) on June 13, 2022; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on June 14, 2022.

**Software Agreements with SVA Consulting, LLC and Microsoft Inc., for  
Test and Live Upgrade to Microsoft Dynamics SL 2018 Windows with  
SQL Server  
June 28, 2022**

Record of Action of the Board of Supervisors  
San Bernardino County

**APPROVED (CONSENT CALENDAR)**

Moved: Janice Rutherford Seconded: Col. Paul Cook (Ret.)  
Ayes: Col. Paul Cook (Ret.), Janice Rutherford, Dawn Rowe, Joe Baca, Jr.  
Absent: Curt Hagman

Lynna Monell, CLERK OF THE BOARD

BY   
DATED: June 28, 2022



cc: PW/SWM- Ter-Keurst w/agree  
Contractor- C/O PW/SWM w/agree  
File- w/agree  
LA 07/13/2022