

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

June 13, 2023

FROM

TOM BUNTON, County Counsel

SUBJECT

Agreement with MOXFIVE LLC and Cipriani & Werner, P.C. for Data Migration Services

RECOMMENDATION(S)

1. Ratify approval of **Agreement No. 23-516**, including non-standard terms, between the County, MOXFIVE LLC and Cipriani & Werner, P.C. in the total contract amount of \$8,250 to engage third-party data migration services from Total Data Migration LLC, for the contract period beginning April 27, 2023, until terminated by either party.
2. Ratify approval of **Amendment No. 1 to Agreement No. 23-516** between the County, MOXFIVE LLC and Cipriani & Werner, P.C. in the amount of \$14,750, from \$8,250 to a total contract amount of \$23,000, for additional third-party data migration services from Total Data Migration LLC., with no change to the contract period beginning April 27, 2023, until terminated by either party.
3. Ratify approval of **Amendment No. 2 to Agreement No. 23-516** between the County, MOXFIVE LLC and Cipriani & Werner, P.C. in the amount of \$11,500, from \$23,000 to a total contract amount of \$34,500, for additional third-party data migration services from Total Data Migration LLC., with no change to the contract period beginning April 27, 2023, until terminated by either party.
4. Authorize the Chief Executive Officer or the County Counsel to approve revisions to the scope of work in the Agreement with MOXFIVE LLC and Cipriani & Werner, P.C. in an amount not-to-exceed \$100,000.
5. Direct County Counsel to transmit any revisions to the scope of work in the Agreement with MOXFIVE LLC and Cipriani & Werner, P.C. to the Clerk of the Board of Supervisors within 30 days of execution.

(Presenter: Tom Bunton, County Counsel, 387-5455)

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 additional Discretionary General Fund (Net County Cost). Sufficient appropriation is included in County Counsel's 2022-23 budget and will be included in future recommended budgets, as necessary.

BACKGROUND INFORMATION

On April 7, 2023, a County department became aware of a network disruption that affected a sector of County systems. Upon discovering this incident, the County immediately secured the network and began working with the Innovation and Technology Department and third-party

Agreement with MOXFIVE LLC and Cipriani & Werner, P.C. for Data Migration Services
June 13, 2023

forensic specialists to investigate the incident. The County has referred the incident to partnering law enforcement agencies, including the Federal Bureau of Investigations and the Department of Homeland Security.

Cipriani & Werner, P.C. (Cipriani) has been engaged to assist in the investigation into this incident and on April 25, 2023 (Item No. 23), the Board of Supervisors (Board) ratified approval of the agreement with Cipriani for specialized legal services.

Through the Agreement, Cipriani has engaged MOXFIVE LLC (MOXFIVE), on the County's behalf, to provide services through a third-party provider, Total Data Migration LLC (TDM), to assist Cipriani in providing legal advice to the County.

The Agreement includes MOXFIVE Master Services Agreement (MSA), which are MOXFIVE's standard commercial terms, and 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. Governing law is the Commonwealth of Virginia.
 - The County standard contract requires California governing law.
 - Potential Impact: The MSA will be interpreted under Virginia law. Any questions, issues or claims arising under the MSA will require the County to hire outside counsel competent to advise on Virginia law, which may result in fees that exceed the total MSA amount.
2. MOXFIVE may assign the MSA without notice to the County and without the County's approval.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: MOXFIVE could assign the MSA 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. Should this occur, the County would be out of compliance with the law until it becomes aware of the assignment and terminates the MSA. County Counsel cannot advise on whether and to what extent Virginia law may permit or restrict a party's right to assign without an express provision in the MSA.
3. There is no provision in the MSA addressing each party's responsibility for paying attorneys' fees arising from any dispute.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party in a dispute.
 - Potential Impact: County Counsel cannot advise on, whether and to what extent, another state's 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 MSA.
4. The MSA does not require MOXFIVE to meet the County's insurance standards as required pursuant to County Policy 11-07.
 - The County Policy requires service providers 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 County has no assurance that MOXFIVE will be financially responsible for claims that may arise from the services provided, which could result in expenses to the County that exceed the total MSA amount.
5. MOXFIVE's maximum liability to the County is limited to the amount of fees paid or payable by the County to MOXFIVE under the addendum giving rise to the claim in the 12 months prior to the date of the claim without exclusions.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the MSA amount leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, Virginia law may limit or expand the exclusion of limits to the extent prohibited by applicable law.
 6. Neither party may bring a legal claim more than one year from the date that it arose.
 - 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 from the date that it arose 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 MSA. County Counsel cannot advise on, whether and to what extent, Virginia law may allow parties to contractually agree to override the Statute of Limitations on claims.
 7. Payment terms are Net 30 with late payment interest of 1.5% per month, and MOXFIVE may suspend performance of the services and terminate the MSA.
 - 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 of the MSA, which would allow MOXFIVE to terminate the MSA and seek other legal remedies, including charging the County interest at a rate of 1.5% per month, which would exceed the MSA amount.
 8. The County will not solicit MOXFIVE's personnel during the term of the MSA and for a period of one year thereafter.
 - The County standard contract does not include a non-solicitation/non-compete provision.
 - Potential Impact: Breach of this provision would permit MOXFIVE to pursue any applicable legal remedy including termination of the MSA and injunctive relief against the County.
 9. The term of the MSA is indefinite, beginning on April 27, 2023 until terminated by either party.
 - 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 MSA and the County is indefinitely bound to the terms and conditions of the MSA until terminated by either party for breach or completion of all addendums.
 10. There is no stated venue in the MSA.

- The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
- Potential Impact: MOXFIVE is located in Fairfax County, Virginia. Having no express venue in the MSA means that Fairfax County, Virginia venue could be applied to disputes arising under the MSA, which may result in additional expenses that exceed the amount of the MSA.

The Agreement also includes the standard commercial terms for TDM, which omits certain County standard contract terms. The missing terms include the following:

1. The Agreement is silent on governing law.
 - The County standard contract requires California governing law.
 - Potential Impact: Having no specified governing law in the Agreement results in uncertainty over which state's laws will govern the interpretation of the Agreement, and leads to ambiguity in interpretation of the Agreement. TDM is a Georgia limited liability corporation based in the State of Georgia. The Agreement could be interpreted under any state law depending on where the claim is brought, including Georgia or California. Any questions, issues or claims arising under the Agreement could require the County to hire outside counsel competent to advise on the applicable state law.
2. There is no provision in the Agreement addressing each party's responsibility for paying 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, any state's law other than California 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 Agreement. Under California law, the Agreement must state that fees are recoverable for Agreement disputes.
3. The Agreement does not require TDM to indemnify the County, as required by County Policy 11-07.
 - 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.
 - Potential Impact: TDM is not required to defend, indemnify or hold the County harmless from any claims, including indemnification for claims arising from TMD's negligent or intentional acts. If the County is sued for any claim arising from the services provided by TDM, the County may be solely liable for the costs of defense and damages. County Counsel cannot advise on whether and to what extent any state law may allow the County to require TDM to defend or indemnify it absent an express provision in the Agreement. There is no requirement under California law.
4. The Agreement does not require TDM to meet the County's insurance standards as required pursuant to County Policy 11-07.
 - The County Policy requires 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.

Agreement with MOXFIVE LLC and Cipriani & Werner, P.C. for Data Migration Services
June 13, 2023

- Potential Impact: The County has no assurance that TDM will be financially responsible for claims that may arise from the services it provides to the County.
5. There is no stated term in the Agreement.
- 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 Agreement and the County is indefinitely bound to the terms and conditions of the Agreement until TDM has completed its services.
6. There is no stated venue in the Agreement.
- The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: TDM is located in Cobb County, Georgia. Having no express venue in the Agreement means that Cobb County, Georgia venue could be applied to disputes arising under the Agreement, which may result in additional expenses to the County.

County Counsel signed the Agreement on April 28, 2023, as a consultant retained by outside legal counsel, and signed Amendment Nos. 1 and 2 on May 25, 2023. Due to the non-standard terms, County Counsel recommends ratification of approval of the Agreement and Amendment Nos. 1 and 2 with MOXFIVE and Cipriani to engage third-party data migration services from TDM, including the non-standard and missing terms, to provide the County with assistance in the Sheriff network disruption. The delegated authority request is to allow the County to quickly approve additional scopes of work for MOXFIVE as needed to assess the impact of the incident.

PROCUREMENT

County Code section 12.1908 authorizes County Counsel to select and retain specialized outside legal counsel. Due to the need to quickly retain specialized legal counsel and their consultant, there was insufficient time for a competitive procurement. The Purchasing Department agrees with the non-competitive procurement for these services given the immediate need for services.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Julie Surber, Principal Assistant County Counsel, 387-5455) on May 2, 2023; Purchasing (Leo Gomez, Purchasing Manager, 387-2063) on May 10, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on June 5, 2023; Finance (Carl Lofton, Administrative Analyst, 387-5404) on May 10, 2023; and County Finance and Administration (Paloma Hernandez-Barker, Deputy Executive Officer, 387-5423) on May 11, 2023.

**Agreement with MOXFIVE LLC and Cipriani & Werner, P.C. for Data
Migration Services
June 13, 2023**

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: June 13, 2023



cc: County Counsel - Bunton w/ agrees
Contractor c/o County Counsel w/ agrees
File w/ agree
JLL 06/20/2023