

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

June 23, 2020

FROM

DIANE RUNDLES, Director of Human Resources

SUBJECT

End User License Agreement with LexisNexis, a division of RELX Inc.

RECOMMENDATION(S)

1. Approve Subscription **Agreement No. 20-485** and related documents including Agreement Addendum, General Terms and Conditions, Supplemental Terms and Conditions and Price Schedule, including nonstandard contract terms, in the not to exceed amount of \$33,000, with LexisNexis, a division of RELX Inc., for a nontransferable license to access and use Lexis Advance and the materials available therein, for the period of June 23, 2020 to July 31, 2023.
2. Designate the Director of Human Resources as authorized to execute the online agreement(s) on behalf of the County of San Bernardino.
3. Direct the Director of Human Resources to transmit copies of all documents in relation to this agreement to the Clerk of the Board of Supervisors within 30 days of execution
(Presenter: Diane Rundles, Director of Human Resources, 387-5570)

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). The Subscription Agreement and related documents including Agreement Addendum, General Terms and Conditions, Supplemental Terms and Conditions and Price Schedule (Subscription Agreement) will be used to accompany future purchases not to exceed \$33,000 of LexisNexis, a division of RELX Inc., (LexisNexis) license subscriptions and additional online materials, pursuant to the included Price Schedule. Adequate appropriation and revenue have been included in the Human Resources Department (Department) 2020-21 budget, and will be included in future recommended budgets.

BACKGROUND INFORMATION

LexisNexis provides a proprietary program designed to provide researching capabilities for full federal, practice library and legislative bill history. This program, including nontransferable licenses for access and use of Lexis Advance and materials available therein, will be used by the Department as a tool in conducting internal employee relation investigations. This is a valuable tool that the Department will use to access the most current human resource law case decisions to ensure compliance with state and federal laws. The contract documents include the subscription Agreement, Agreement Addendum, General Terms and Conditions, Supplemental Terms and Conditions and Price Schedule (Agreement). The Agreement will be in place for the period of June 23, 2020 to July 31, 2023, for a total not to exceed amount of

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\$33,000. The number of licenses may increase or decrease based on the Department's need, and materials purchased outside of the basic subscription will be subject to the included Price Schedule.

The Subscription Agreement contains terms that differ from the standard County contract. The non-standard terms include the following:

1. The Agreement is silent regarding the location/venue of any claims or disputes.
2. The General Terms and Conditions Section 2.5 require the County to indemnify, defend and hold harmless LexisNexis for any and all claims which may occur as a result of the County's use of the Folders or any content uploaded to the Folders, excluding LexisNexis materials. Folders are workspaces where users can save copies of materials accessed.
3. In Section 3.1 of the General Terms and Conditions, LexisNexis provides a limited warranty that it has the right and authority to make the Online Services and Materials available to the County. In Section 4.5 LexisNexis agrees to indemnify and defend the County for any breach of this warranty, which results in a third party claim for violations of intellectual property rights. In Section 3.2, LexisNexis disclaims all other warranties including the warranties of merchantability and fitness for a particular purpose.
4. The General Terms and Conditions Sections 4.3 and 4.4 contain a limitation of liability equaling the lesser of actual direct damages or the amount paid for online services in the twelve-month period immediately preceding the date the claim arose.
5. The County may not assign its rights and obligations under the Agreement (Section 5.5 General Terms and Conditions). The Agreement is silent as to LexisNexis' ability to assign its rights and obligations under the Agreement.
6. The General Terms and Conditions Section 5.7 require the County to indemnify LexisNexis for any third party claims resulting from a "Security Event" or breach of confidential information, caused by the County.
7. The Price Schedule Section I.2 requires the County to indemnify LexisNexis for any taxes owed by the County.
8. The Price Schedule Section II.3 provides the County shall be liable for all costs of collection incurred by LexisNexis, including attorney's fees and court costs.
9. Additional terms and conditions may apply depending on materials selected.
10. The Agreement does not contain the standard County insurance requirements or indemnity provision.

The potential of these nonstandard terms and conditions is as follows:

1. The standard County provision requires venue to be in the Superior Court of California, County of San Bernardino, San Bernardino District. As set by the Addendum, governing law is that of the State of California. LexisNexis is headquartered in New York, but does business in California. Venue is likely to be in the State of California, however, this is not expressly stated, and there is no requirement for venue to be in the County of San Bernardino. Venue outside the County of San Bernardino or outside the State likely will result in additional expenses to the County.
2. By agreeing to indemnify LexisNexis against third party claims, the County could be contractually waiving the protection of sovereign immunity. Claims that would be barred against the county as a governmental entity, time limited or expense limited could be brought against LexisNexis, a private party, without such limitations, and the County would be responsible to defend and reimburse LexisNexis for costs, expenses, and damages.

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3. The limited warranty is industry standard for technology agreements. LexisNexis provides a defense and indemnity to the County for breach of the warranty, and resulting third party claims for violations of intellectual property rights.
4. The standard County contract does not include a limitation of liability. Under the Agreement, the County's liability is not limited. LexisNexis' liability to County is likely to be low or even nonexistent. It is limited to the lesser of the amount paid by County in the preceding twelve months or the County's actual direct damages. The amount paid will likely be the lower amount, and depending on when the claim arises, it is possible no amount could have been paid in the preceding twelve-month period. The Agreement also excludes both parties from recovering special damages. The limitation of liability excludes indemnification obligations, and the County's infringement of intellectual property. Gross negligence, willful misconduct, and violations of law are not excluded under the Agreement.
5. The standard County contract requires County approval for assignment of the Agreement. The Agreement places no restriction on LexisNexis' ability to assign its rights and obligations under the Agreement. California law provides the parties are free to assign an Agreement unless the Agreement provides otherwise.
6. Please see number two above.
7. Please see number two above.
8. As a matter of policy, the County generally does not agree to pay costs of collection, including attorney's fees and court costs. LexisNexis refuses to remove this provision. The likelihood of a County default and resulting collecting is minimal.
9. Any additional terms and conditions, which arise as a result of materials selected, will be reviewed by the Department and County Counsel. Additional Board approval will be sought if necessary, as dictated by law and County policy.
10. County Policy 11-07 requires the standard County insurance requirements and indemnity provision to be included in contracts unless otherwise approved by Risk Management and/or County Counsel. LexisNexis has refused to modify the language of its standard Subscription Agreement. The County therefore cannot include these requirements. This result is not uncommon for technology agreements. LexisNexis is not rendering any services on County property. The agreement is for an online subscription agreement, and risk to the County is fairly low.

PROCUREMENT

The Department solicited quotes to provide proprietary software from three vendors, two were received and evaluated by the Department based on services provided and cost of services. LexisNexis provided the lowest bid.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Katherine Hardy, Deputy County Counsel, 387-5437) on May 26, 2020; Purchasing (Bruce Cole, Purchasing Supervising Buyer, 387-2148) on May 26, 2020; Finance (Jessica Trillo, Administrative Analyst, 387-4020) on June 3, 2020; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-5423) on June 9, 2020.

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

APPROVED (CONSENT CALENDAR)

Moved: Josie Gonzales Seconded: Robert A. Lovingood
Ayes: Robert A. Lovingood, Janice Rutherford, Dawn Rowe, Curt Hagman, Josie Gonzales

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: June 23, 2020



cc: HR- Rundles w/agree
 Contractor- C/O HR w/agree
 File- w/agree w/attach
la 06/29/2020