

**REPORT/RECOMMENDATION TO THE BOARD OF DIRECTORS  
OF SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT  
AND RECORD OF ACTION**

September 12, 2023

**FROM**

**DAN MUNSEY, Fire Chief/Fire Warden, San Bernardino County Fire Protection District**

**SUBJECT**

Non-Financial Agreement with Equipment Simulations LLC for SimsUShare Training Software Licenses and Support

**RECOMMENDATION(S)**

Acting as the governing body of the San Bernardino County Fire Protection District:

1. Approve non-financial Terms of Use **Agreement No. 23-944**, including non-standard terms, with Equipment Simulations LLC for SimsUShare training software licenses and support, beginning upon download, installation, or use of the services and continuing for the subscription period, until terminated by either party.
2. Authorize the Fire Chief/Fire Warden as the County representative authorized to electronically accept the Terms of Use Agreement identified in Recommendation No. 1.  
(Presenter: Dan Munsey, Fire Chief/Fire Warden, 387-5779)

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

**Improve County Government Operations.**

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

**Provide for the Safety, Health and Social Service Needs of County Residents.**

**FINANCIAL IMPACT**

Approval of the recommended actions will not result in the use of Discretionary General Funding (Net County Cost). The Terms of Use Agreement (Agreement) is non-financial in nature and does not commit the San Bernardino County Fire Protection District (SBCFPD) to make any purchases. If future purchases are made in conjunction with the Agreement, SBCFPD will adhere to purchasing policies and return to the Board of Directors (Board) for approval, if necessary.

**BACKGROUND INFORMATION**

SBCFPD uses multiple information technology products to provide professional and modern fire protection and advanced life support services to the public. SimsUShare is a web-based simulation program that provides classes and training to prepare SBCFPD firefighters for incidents and promotional exams. This program will allow for unlimited simulations and users, allowing SBCFPD to create training simulations that all station staff could participate in virtually. By providing this training online, SBCFPD will ensure that all stations receive the same classes and training for promotional exams and incidents such as commercial fires, wildland fires, etc., without having the logistical issues of station coverage.

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The Agreement is Equipment Simulations LLC's (Equipment Simulations) standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The Agreement is a non-negotiable clickwrap agreement accepted upon downloading, installing, or using the services. The non-standard and missing terms include the following:

1. Governing law is the Commonwealth of Pennsylvania.
  - The County standard contract requires California governing law.
  - Potential Impact: The Agreement will be interpreted under Pennsylvania law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Pennsylvania law, which may result in fees that exceed the total Agreement amount.
2. Equipment Simulations may change the Agreement terms at any time by posting changes on the website of providing notice. SBCFPD's continued use of the services constitutes acceptance of the modified terms.
  - The County standard contract requires that any changes to the contract to be reduced to writing, executed and attached to the original contract and approved by the person(s) authorized to do so on behalf of the contractor and County.
  - Potential Impact: SBCFPD could be agreeing to new terms without review by anyone, including County Counsel, and without approval of the new terms by the Board. County Counsel cannot advise on whether and to what extent Pennsylvania law may affect the enforceability of unilateral changes to the terms.
3. Equipment Simulations may assign the Agreement without notice to SBCFPD and without SBCFPD's approval.
  - The County standard contract requires that the County must approve any assignment of the contract.
  - Potential Impact: Equipment Simulations could assign the Agreement to a third party or business with which SBCFPD is legally prohibited from doing business due to issues of Federal debarment or suspension and conflict of interest, without SBCFPD's knowledge. Should this occur, SBCFPD would be out of compliance with the law until it becomes aware of the assignment and terminates the Agreement. County Counsel cannot advise on whether and to what extent Pennsylvania law may permit or restrict a party's right to assign without an express provision in the Agreement.
4. 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, Pennsylvania 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 Agreement.
5. The Agreement does not contain the standard contract provisions regarding Government Code section 84308 (Senate Bill 1439) and the disclosure of campaign contributions to a member of the Board or other County elected officer.

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- Under the County standard contract the contractor states it has disclosed campaign contributions of more than \$250 to any member of the Board or other County elected officer and completed a form providing additional information.
  - Potential Impact: The County may have difficulty gathering information about campaign contributions made by Equipment Simulations.
6. The Agreement does not require Equipment Simulations to indemnify SBCFPD, as required by County Policy 11-07, including for intellectual property infringement claims.
- The County standard contract indemnity provision requires the contractor to indemnify, defend, and hold the 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 secret (Intellectual Property Rights) by any goods or services.
  - Potential Impact: Equipment Simulations is not required to defend, indemnify or hold SBCFPD harmless from any claims, including indemnification for claims arising from Equipment Simulations' negligent or intentional acts and intellectual property infringement. If SBCFPD is sued for any claim, including intellectual property infringement based on its use of Equipment Simulations' software or services, SBCFPD may be solely liable for the costs of defense and damages, which could exceed the total Agreement amount. County Counsel cannot advise on whether and to what extent Pennsylvania law may allow the County to require Equipment Simulations to defend or indemnify it absent an express provision in the Agreement.
7. SBCFPD is required to indemnify Equipment Simulations against all claims arising out of the SBCFPD content, SBCFPD's creation or use of a simulation, and breach of the Agreement, including any representation or warranty, by SBCFPD or any SBCFPD account user.
- The County standard contract does not include any indemnification or defense by the County of a contractor.
  - Potential Impact: By agreeing to indemnify Equipment Simulations, SBCFPD could be contractually waiving the protection of sovereign immunity or other statutory immunities. Claims that may otherwise be barred against SBCFPD, time limited, or expense limited could be brought against Equipment Simulations without such limitations and SBCFPD would be responsible to reimburse Equipment Simulations for costs, expenses, and damages, which could exceed the total Agreement amount. County Counsel cannot advise on, whether and to what extent, Pennsylvania law may limit or expand this Agreement term.
8. The Agreement does not require Equipment Simulations to meet SBCFPD's insurance standards as required pursuant to County Policy 11-07.
- 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.
  - Potential Impact: SBCFPD has no assurance that Equipment Simulations will be financially responsible for claims that may arise from SBCFPD's use of the service, which could result in expenses to SBCFPD that exceed the total Agreement amount.

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9. Equipment Simulations limits its aggregate maximum liability to the amount of fees paid for the services giving rise to the liability.
  - The County standard contract does not include a limitation of liability.
  - Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving SBCFPD financially liable for the excess.
  
10. Venue for disputes arising under the Agreement is in the federal and state courts in the City of Philadelphia, Pennsylvania.
  - 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 Philadelphia, Pennsylvania may result in additional expenses that exceed the amount of the Agreement.
  
11. Equipment Simulations provides the service “AS IS” without any warranty, places the sole risk of use on SBCFPD, and specifically states that the services are provided for educational and informational purposes only.
  - 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: SBCFPD’s use of the service is solely at its own risk.

Notwithstanding the non-standard provisions, SBCFPD is recommending that the Board approve the Agreement associated with SimsUShare service and software licenses as it will allow SBCFPD to receive access to increased training simulations.

**PROCUREMENT**

The recommended Agreement 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.

**REVIEW BY OTHERS**

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on August 15, 2023; Risk Management (Victor Tordesillas, Director, 386-8623) on August 16, 2023; Finance (Tom Forster, Administrative Analyst, 387-4635) on August 18, 2023; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on August 18, 2023.

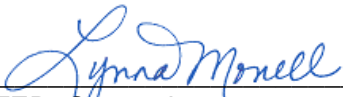
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Record of Action of the Board of Directors  
San Bernardino County Fire Protection District

**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, SECRETARY

BY  \_\_\_\_\_  
DATED: September 12, 2023



cc: SBCFPD - Munsey w/ agree  
Contractor c/o SBCFPD w/ agree  
File w/ agree  
JLL 09/13/2023